

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
June 08, 2021

<i>Student</i> , ¹)	Case No.: 2021-0027
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 6/8/21
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date (using Microsoft Teams):
("DCPS"),)	5/24/21, 5/25/21 & 6/2/21
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to DCPS’s failure to timely and comprehensively reevaluate, provide appropriate IEPs, and fully implement the IEPs. DCPS responded that it had reevaluated Student appropriately, provided suitable IEPs and fully implemented them.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 3/15/21, the case was assigned to the undersigned on 3/16/21. Respondent filed a timely response on 3/25/21, and did not challenge jurisdiction. A resolution meeting was held on 3/31/21, but did not resolve the case or shorten the 30-day resolution period, which ended on 4/14/21. A final decision in

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 14-day continuance, which requires a Hearing Officer Determination (“HOD”) by 6/12/21.

A prehearing conference was held on 4/29/21 and the Prehearing Order was issued the same day addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 5/24/21, 5/25/21 and 6/2/21 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated throughout the hearing.

Documents and Witnesses

Petitioner’s Disclosures, submitted on 5/17/21, contained documents P1 through P74, which were all admitted into evidence over objection to various documents. Respondent’s Disclosures, also submitted on 5/17/21, contained documents R1 through R35, of which R1-R2, R4-R17, R21, R24-R33 and R35 were offered and admitted into evidence without objection.² During the hearing R36 and R37 were offered as witness rebuttal and admitted into evidence over objection.

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Psychologist* (qualified over objection as an expert in Psychology as it Relates to Evaluating and Making Recommendations for Students with Special Needs)
2. *Study Skills Consultant* (qualified over objection as an expert in Special Education with Respect to Assistive Technology and Executive Functioning)
3. *Educational Consultant* (qualified over objection as an expert in Special Education as Related to IEP Development, Placement and Programming)
4. Parent

Respondent’s counsel presented 6 witnesses in Respondent’s case (*see* Appendix A):

1. *Special Education Teacher at Prior Public School* (qualified over objection as an expert in Special Education and IEP Development and Implementation)
2. *Case Manager at Public School* (qualified without objection as an expert in Special Education)

² Citations herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted, while Respondent’s documents are indicated in the same manner beginning with an “R.”

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3. *Science Teacher* at Public School
4. *Social Worker* at Public School (qualified without objection as an expert in Social Work in the Field of Special Education)
5. *Assistive Technology Specialist* (qualified without objection as an expert in Assistive Technology in the Field of Special Education)
6. *Special Education Coordinator* at Public School (qualified without objection as an expert in Special Education)

Petitioner's counsel did not submit any rebuttal evidence.

Issues and Relief Requested

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to conduct a comprehensive and timely triennial reevaluation during 2019/20³ or 2020/21, where a re-eligibility determination was due by May 2020 but not completed until December 2020, and assessments are still needed in (a) adaptive functioning, (b) executive functioning, (c) social-emotional functioning, and (d) assistive technology. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP: (a) on 2/24/20, which did not include extended school year ("ESY") services for the summer of 2020; and/or (b) on 12/16/20, which did not provide sufficient specialized instruction outside general education given Student's significant cognitive and academic deficits, and was not based on comprehensive evaluation data. (*Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to fully implement the 2/24/20 IEP and/or the 12/16/20 IEP and provide the required 8 hours/week of specialized instruction outside general education during distance learning, as the services were provided only sporadically. (*Petitioner has the burden of persuasion on this issue.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall amend Student's IEP to provide (a) an increase of specialized instruction to 20 hours/week, and (b) placement in a Specific Learning Support ("SLS") classroom.

³ All dates in the format "2019/20" refer to school years.

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3. DCPS shall conduct or fund (a) an adaptive assessment, (b) an assistive technology assessment, (c) further assessment of executive functioning, such as a BRIEF, and (d) clinical testing to address social-emotional concerns and anxiety.
4. DCPS shall provide or fund compensatory education for any denial of FAPE, with reservation of rights to seek additional compensatory education pending completion of the assessments in the prior paragraph.⁴
5. Any other relief that is just and reasonable.

Near the end of the hearing, Respondent's counsel made an oral motion for a finding that Petitioner's case was frivolous, which is hereby denied based on the substantive evidence and legal analysis set forth below, which may not prevail but is not entirely without merit.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁵ are as follows:

⁴ So far as Petitioner's request for compensatory education depends on the findings of assessments that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student's assessments and a determination of eligibility for additional special education and related services. At the due process hearing, counsel for DCPS expressly objected to reservation of compensatory education and not receiving details of Petitioner's compensatory education plan in advance of the 5-day disclosures.

With regard to any request for compensatory education to be awarded in the HOD, Petitioner's counsel was put on notice at the prehearing conference that, at the due process hearing, Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was invited at the prehearing conference to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

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1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and in *Grade* at Public School, where Student began at the beginning of 2020/21 with distance learning.⁷ Student is "a hard-working, social, and committed student who shows great care" for friends, classmates and work; Student has "great leadership skills and is always willing to help a classmate" with an assignment or a "friendly ear."⁸ Student does not exhibit behavioral issues beyond "social engagement at the wrong time," but is "typically immediately compliant with re-direction."⁹ Parent indicated that "family discord" between Parent and Student's father may have impacted Student in 2020/21.¹⁰ Parent also noted that Student "does not like to get special education supports."¹¹

2. Public School does not require students to have their devices' cameras turned on during distance learning; Student did not have the camera turned on and was not visible to teachers most of the time, including during multiple efforts to formally observe Student in October 2020; when called on in virtual classes Student did not respond verbally as requested, but sometimes would use the chat function.¹² During the virtual administration of the recent comprehensive psychological evaluation, there were many negative factors that impacted Student in the home environment, so the results must be interpreted with "extreme caution"; factors included background noise, background conversations, Student speaking to other people, other people speaking to Student, Student walking away from the computer/camera, and Student eating while testing, all factors that could be controlled at school by educators, but not at home.¹³

3. Student presented very differently in the virtual setting than when at school.¹⁴ Student didn't like learning on a computer and didn't like typing.¹⁵ It was very difficult to transition to virtual.¹⁶ With Student's camera off it was difficult to tell how Student was doing with classes and how Student was dealing with the traumatic grief of losing family members.¹⁷

4. Eligibility/IEPs. Student was found eligible for special education in 2016/17 as a student with a Specific Learning Disability ("SLD").¹⁸ Student was again found eligible

⁶ Parent.

⁷ Parent; P21p191.

⁸ P28p320; Special Education Teacher.

⁹ P28p321.

¹⁰ P28p322.

¹¹ *Id.*

¹² P28p323.

¹³ P28p323; Educational Consultant.

¹⁴ P18p176; Special Education Teacher.

¹⁵ P18p178.

¹⁶ Special Education Teacher.

¹⁷ Social Worker; Special Education Teacher; Educational Consultant.

¹⁸ P28p311.

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based on SLD in December 2020.¹⁹ Student's initial 5/16/17 IEP provided for 5 hours/week of specialized instruction outside general education and no ESY.²⁰ Student's 6/11/18 IEP provided for 6.75 hours/week of specialized instruction outside general education, 5 hours/week of specialized instruction inside general education, and included ESY.²¹ Student's 10/19/18 IEP provided the same amount of specialized instruction, but added Behavioral Support Services ("BSS") with 30 minutes/month outside general education and 60 minutes/month inside general education.²² Student's 3/7/19 IEP provided the same amount of specialized instruction and BSS and added 120 minutes/month of Occupational Therapy ("OT"), but concluded that ESY was not necessary for FAPE.²³ A 6/5/19 amended IEP increased Student's specialized instruction outside general education to 8 hours/week and specialized instruction inside general education to 5.5 hours/week.²⁴

5. Student's 2/24/20 IEP continued specialized instruction outside general education at 8 hours/week and specialized instruction inside general education at 5.5 hours/week, along with increasing BSS to 60 minutes/month outside general education and 60 minutes/month inside general education, reducing OT to only 45 minutes/month of consultation, and not providing ESY.²⁵ Student's 12/16/20 IEP continued specialized instruction outside general education at 8 hours/week and specialized instruction inside general education at 5.5 hours/week, along with increasing BSS to 180 minutes/month outside general education, maintaining OT at 45 minutes/month of consultation, and providing ESY.²⁶ A 3/17/21 amended IEP provided a new social-emotional goal.²⁷

6. Analysis of Existing Data ("AED")/Comprehensive Psychological Evaluation. The IEP team held an AED meeting in February 2020 to determine the assessments needed for Student's reevaluation, which was due in May 2020.²⁸ The team agreed on a comprehensive psychological evaluation for Student's reevaluation because of Parent's concern about attention and executive functioning.²⁹ DCPS began conducting the comprehensive psychological evaluation in March, once consent was received from Parent on 3/9/20, and a largely completed "due diligence report" was available on 4/23/20; the entire evaluation was completed on 12/3/20, after the school was cleared and equipped to conduct virtual assessments in the Fall; DCPS had closed in mid-March due to the Covid pandemic and then operated on a virtual, online basis for much of the next year.³⁰ DCPS offered to proceed with determining Student's eligibility for special education in May 2020, but when

¹⁹ P64p551.

²⁰ P4p45,50,53.

²¹ P6p59,66,69.

²² P7p74,84,87.

²³ P8p92,104,107.

²⁴ P9p109,121.

²⁵ P12p135,145,148.

²⁶ P21p191,204,207.

²⁷ P23p227.

²⁸ Special Education Teacher.

²⁹ R8p24.

³⁰ P26; P28p309; R1p2; Administrative Notice.

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Parent and her counsel did not decide to move forward in May, Prior Public School waited until the eligibility process could be conducted in a more orderly fashion in the Fall of 2020.³¹ Special Education Coordinator persuasively testified that the delay in finalizing the 12/3/20 comprehensive psychological evaluation (sometimes referred to as the “2020” evaluation herein) did not impact Student’s education or alter Student’s services.³²

7. Cognitive Ability. Student’s 2020 cognitive scores were consistent with Student’s cognitive scores in 2017.³³ The 4/20/17 comprehensive psychological evaluation (referred to as the “2017” evaluation) found Student’s Composite Intelligence Index (“CIX”) to be a scaled score of 68, which is Significantly Below Average (based on the Reynolds Intellectual Assessment Scales, 2nd Ed. (“RIAS-2”)), while the Test of Nonverbal Intelligence – Fourth Edition (“TONI-4”) found Student’s Nonverbal Intelligence to be at 112, which is Above Average.³⁴ The 2020 comprehensive psychological evaluation also used the RIAS-2 and found Student’s Full Scale IQ (“FSIQ”)/CIX to be a scaled score of 67, Significantly Below Average.³⁵ Using the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) in a 6/14/18 independent educational evaluation (“IEE”) comprehensive psychological evaluation (referred to as the “2018” evaluation), Psychologist found that Student’s FSIQ composite score was 96, while the sum of scaled scores was 66.³⁶

8. Academic Abilities. Student’s Woodcock-Johnson IV (“WJ-IV”) scores in the 2017 comprehensive psychological evaluation, WJ-III scores in the 2018 comprehensive psychological evaluation, and WJ-IV scores in the 2020 comprehensive psychological evaluation showed some variation between years but often remained within the confidence interval: Broad Reading – 73, 77, 71 (2017, 2018, 2020, respectively); Letter-Word Identification – 73, 89, 88; Sentence Reading Fluency – 68, 71, 69; Passage Comprehension – 86, 74, 70; Broad Math – 90, 81, 87; Math Facts Fluency – 87, 87, 79; Calculation – 93, 71, 90; Applied Problems – 91, 88, 103; Broad Written Language – (no 2017) 90, 86; Sentence Writing Fluency – (no 2017) 91, 87; Writing Samples – 104, 105, 98; Spelling – 80, 77, 82; and Broad Achievement – (2017 Brief Achievement 79) 79, 79.³⁷

9. Testing. Student tended not to perform well on timed tests or tasks; Student has some difficulties with reading comprehension and vocabulary on computerized tests.³⁸ Student’s test scores were sometimes not reliable: Student’s Reading Inventory at Beginning of Year (“BOY”) 2020/21 dropped from 595 to a 9; the test was re-administered and resulted in Beginning Reader (“BR”), with Student taking only 18 minutes, again calling into question the validity of the result; Case Manager worked with Student and found

³¹ R29p219-21.

³² Special Education Coordinator.

³³ P63p548.

³⁴ P28p316.

³⁵ P28p326.

³⁶ P25p272.

³⁷ P24p253; P25p277-78; P27p299.

³⁸ P28p321.

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that reading was strong, but answering comprehension questions brought the score down; by Middle of Year (“MOY”) 2020/21, Student scored a 352 (5 years below grade).³⁹

10. Reading. Student’s Text Reading Comprehension (“TRC”) results showed a positive trend from 2017/18 to 2018/19, and then to 2019/20, as there was steady progress at each data point, improving from G to K to M (in 2017/18), to N to Q to T (in 2018/19), to U to W (in 2019/20, prior to the pandemic, with all teaching in person); this was steady improvement from Far Below grade, to Below, to Proficient, to Above grade.⁴⁰ When Student read out loud in small group, it was difficult for the special education teacher to notice any significant fluency issues.⁴¹ Prior to the pandemic, with one anomaly Student’s Reading Inventory Lexile scores increased steadily from BR on 9/27/17 to 95 to 154 to 181 to 204 (to the anomaly of 110) to 204 to 294 to 414 to 474 to 595 on 1/15/20; the next score was BR on 10/28/20 (discussed above, showing the impact of the pandemic).⁴²

11. Math. In 2017/18, Student’s BOY math iReady overall score was 3 years behind grade, but by End of Year (“EOY”) only 1 year behind.⁴³ In 2018/19, Student’s BOY math iReady overall score was 3 years behind, but by EOY was less than 1 year behind.⁴⁴ In 2019/20, Student’s BOY math iReady overall score was 2 years behind, which continued in MOY testing.⁴⁵ In 2020/21, Student’s MOY math iReady overall score was 5 years below grade.⁴⁶

12. Grades. As of term 3 of 2020/21, Student’s grades were poor due to not completing assignments, with more than half “Ds,” but no “Fs” (an “F” in Science should have been a “D” and has been corrected).⁴⁷ By 3/17/21 Student had improved grades, despite still missing assignments; Student’s goal was to earn all “As” and “Bs” and be on honor roll.⁴⁸ Student has been doing well in Science recently and now has a “B.”⁴⁹

13. Executive Functioning. Psychologist’s 2018 comprehensive psychological evaluation found that overall Student did not present significant impairments with executive functioning, despite elevation in a few domains.⁵⁰ As part of the 2020 comprehensive psychological evaluation, a Conners 3rd Edition (“Conners 3”) was conducted to gauge behavioral functioning; 2 of Student’s teachers completed rating scales, but insufficient data was available for the Executive Functioning subscale; Student continued to exhibit issues

³⁹ P28p334; P32p355; P34p363; P18p175; P40p389; Case Manager.

⁴⁰ R14p59; Educational Consultant.

⁴¹ P59p525.

⁴² R16p62.

⁴³ P41p394; R17p64.

⁴⁴ R17p66; P44p416 (MOY 1 year behind).

⁴⁵ R17p68.

⁴⁶ P47p460.

⁴⁷ P62p543; Science Teacher.

⁴⁸ R25p193.

⁴⁹ Science Teacher.

⁵⁰ P25p271.

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with inattention.⁵¹ The 2020 comprehensive psychological evaluation indicated inconsistent data, which didn't consistently support ADHD from scores.⁵² Executive functioning is difficult to test in a virtual environment, especially without Student being visible on camera.⁵³ All students coming into Public School need support and help with organizing materials and schedule; Student was no different at the beginning of 2020/21.⁵⁴ Over the course of the year, some students were doing better than others; Student was about in the middle of the class and didn't need extra executive functioning assessment.⁵⁵

14. Social-Emotional Functioning. Petitioner's counsel reported to Public School on 11/11/20 that Student had been hearing voices and seeing relatives who had recently died; Special Education Coordinator promptly responded to connect Social Worker with the school psychologist.⁵⁶ The evaluator for the comprehensive psychological evaluation had finished testing before Student's mental health issue arose, but Social Worker referred Parent to a psychiatrist and Student was in a weekly small SPARCS group (Structured Psychotherapy for Adolescents Responding to Chronic Stress).⁵⁷ The IEP team in December 2020 addressed Parent's concerns about Student's mental health by modifying behavior support to respond to chronic stress.⁵⁸ Following the 12/9/20 IEP meeting, Parent was to reach out to a medical doctor about Student's psychiatric concerns.⁵⁹

15. Adaptive Functioning. In the 2017 comprehensive psychological evaluation an Adaptive Behavior Assessment System 2nd Edition ("ABAS-2") was administered, with some issues noted based on Parent's reports, but there were questions raised about the accuracy of the teacher report, so Petitioner sought an updated adaptive assessment.⁶⁰ The 2017 comprehensive psychological evaluation ruled out Intellectual Disability ("ID").⁶¹ An IEE comprehensive psychological evaluation was soon conducted (with the evaluation conducted on 9/8/17 and 10/26/17, and the report issued on 6/14/18), but did not include an adaptive assessment.⁶² Teacher and service provider observations in 2020 indicated there were no concerns with Student's adaptive living skills and Parent reported that Student had self-care skills.⁶³ The psychologist who conducted the 2020 comprehensive psychological evaluation concluded that further adaptive assessment need not be completed in Student's

⁵¹ Psychologist; P28p333.

⁵² P15p160.

⁵³ Psychologist.

⁵⁴ Case Manager.

⁵⁵ *Id.*

⁵⁶ P34p363-64.

⁵⁷ P35p368.

⁵⁸ P63p548.

⁵⁹ P15p162.

⁶⁰ P24p238,254-55; P40p390.

⁶¹ P24p259.

⁶² P25; Psychologist.

⁶³ P63p548.

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circumstances; others on the IEP team from the school agreed based on Student's age-appropriate coping skills.⁶⁴ Student navigates technology very well.⁶⁵

16. Assistive Technology. The IEP team requested an assistive technology consultation to determine potential assistive technology features and tools that could support Student's access to general education, particularly independent reading.⁶⁶ Assistive Technology Specialist credibly testified that the only difference between an assistive technology consultation and an assistive technology assessment or evaluation was that there is a comprehensive record review that goes back further for an assessment/evaluation, while a consultation reviews current data.⁶⁷ Based on both Student and teachers' input, Student does not require a comprehensive record review.⁶⁸ After completing a thorough process to assess Student's technology needs, the assistive technology process focused on text-to-speech, dictation, and proofing supports, with the technology largely available in the devices that Student was already using.⁶⁹ Assistive Technology Specialist sought to conduct a virtual assistive technology demonstration with Student one-to-one, but technical difficulties on Student's device prevented it from working.⁷⁰ A trial of the technology continues, although Student has been hesitant to use it; if it ultimately doesn't work for Student, the team may discuss an additional trial of specialized intensive supports for reading.⁷¹

17. Extended School Year (ESY). In 2016/17, instead of the IEP team recommending ESY for the summer of 2017, Student's teacher recommended summer school but Parent did not send Student.⁷² Student's IEPs included ESY in 2017/18 for 2018 but not in 2018/19 for 2019.⁷³ In 2018 when Student received ESY, Student improved from Reading Inventory Lexile 181 to 204 over the summer, although Student's percentile rank declined from 8 to 2.⁷⁴ Student's Reading Inventory increased from BOY 2019/20 Lexile of 474 to MOY of 595 and percentile rank increasing from 10% to 21% with in-person instruction.⁷⁵

18. Educational Consultant sent a letter of dissent on 3/7/19 complaining about the lack of ESY for 2019, as Student has "historically demonstrated regression over extended breaks," but that there was no regression in comprehension and fluency in DIBELS and Reading Inventory after receiving ESY in 2018.⁷⁶ Petitioner reached a settlement with DCPS concerning ESY for 2019 in which Student was provided 80 hours of tutoring

⁶⁴ P15p160-61.

⁶⁵ Social Worker.

⁶⁶ P29p342; Assistive Technology Specialist.

⁶⁷ Assistive Technology Specialist.

⁶⁸ *Id.*

⁶⁹ Assistive Technology Specialist; P29p344.

⁷⁰ Assistive Technology Specialist; P29p344.

⁷¹ P29p344; Assistive Technology Specialist.

⁷² P5p57.

⁷³ P6p69; P8p107.

⁷⁴ P49p484-85.

⁷⁵ Educational Consultant; P51p490-91.

⁷⁶ P30p349; Educational Consultant.

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services to use during the summer of 2019 (along with OT services that could not be delivered due to lack of Parent's response); DCPS records indicated that no tutoring was billed from the 80 hours, although Parent said she recalled a tutor coming to her home a few times.⁷⁷

19. On 2/24/20, Prior Public School completed the ESY eligibility worksheet and concluded that ESY was not needed in 2020 as Student's critical skills of reading fluency, reading comprehension, and socialization skills were not likely to have significant regression due to a break in service.⁷⁸ Petitioner sees a pattern of regression when ESY is not provided, with more than half a year to recoup.⁷⁹ Petitioner's advocates asserted on 2/24/20 that Student regressed every year that Student had not received ESY.⁸⁰ DCPS concurred on 12/10/20 that Student had regressed significantly over the summer of 2020 and needed ESY in 2021.⁸¹

20. Specialized Instruction Outside General Education. When distance learning began at the end of 2019/20, Student struggled to stay on task at home, as the home environment was very informal and Student was easily distracted by "anything else" going on; Student had difficulty keeping up with online learning as Student was "constantly" staying with different family members and Parent did not allow the school laptop to leave her home.⁸² Psychologist, testifying on behalf of Parent, noted that Student did not participate in virtual learning from March-June 2020.⁸³

21. At the beginning of 2020/21, in the first weeks at Public School, Student was "scheduled wrong" but was receiving specialized instruction and the scheduling was corrected in the first few weeks; Student was getting specialized instruction.⁸⁴ Parent's advocates asked when specialized instruction outside general education was being provided to Student and were told that there is a resource room, small groups and small classes; Case Manager met with Student on Wednesdays for an extended advisory; the school was using office hours for special education, although not always working on IEP goals.⁸⁵

22. Student was in inclusion classes for all core classes with both general education and special education teachers, with the co-teachers assisting the special education students; the special education teacher often pulled Student into small groups.⁸⁶ The IEP progress reports contain numerous and ongoing references to Student's presence in small groups, whether or not Student participated; in term 1 of 2020/21 math, Student attended small group; in

⁷⁷ Educational Consultant; R37p239; Parent.

⁷⁸ R9p26.

⁷⁹ P10p127-28; P11p132-33.

⁸⁰ P11p132.

⁸¹ P22p213-14; P29p345.

⁸² P59p529.

⁸³ Psychologist.

⁸⁴ R1p3; Case Manager.

⁸⁵ P13p151; P15p158; Case Manager.

⁸⁶ P60p531 (schedule); Case Manager.

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reading Student did not always want to unmute or read out loud when in small group; in written expression Student benefited from a small group; Social Worker observed Student in Science and ELA small groups.⁸⁷ Student continued in small group pull-outs during term 2 of 2020/21 and inconsistently responded to prompts verbally; Social Worker observed Student in Science and ELA small groups.⁸⁸

23. For 2020/21, Case Manager credibly testified that Student joined the check-ins with Case Manager 38% of the time, while Student joined class 65% of the time in term 1, 91% in term 2 and 70% in terms 3 and 4, although being in class did not mean Student was paying attention to class or responding.⁸⁹ Case Manager and other teachers routinely texted Parent if Student did not join, in order to improve attendance.⁹⁰

24. Student had one-to-one sessions in term 1 of 2020/21 in which Student was distracted, looking at something off-camera or falling asleep.⁹¹ During term 2 of 2020/21 Student worked one-to-one with teachers during office hours in reading and written expression, sometimes being pulled into one-to-one sessions by teachers.⁹² Student did better in one-to-one sessions with teachers, but teachers observed that Student fell asleep in the middle of individual sessions.⁹³

25. Need for More Restrictive Environment. Based on data and input from many sources, including Parent, service providers and teachers, in December 2020 the IEP team refused Parent's request to increase service hours and move Student to an SLS classroom.⁹⁴ The team considered recent WJ data and IEP progress reports; Student had not been consistently engaged in Student's services or during office hours; Student's data declines coincided with the Covid-19 pandemic causing schooling to shift to virtual and Student's family to suffer serious losses; and dramatic shift to a more restrictive setting in an SLS classroom would be harmful to Student socially.⁹⁵

26. Case Manager "strongly" believed that Student's current specialized instruction hours are appropriate and that it would be wrong to shift Student to an SLS class without ever seeing Student in person; SLS would be a shock due to Student's high level of social interaction with others, including many friends, and could cause regression.⁹⁶ Science Teacher taught SLS prior to 2020/21 and believes Student is now receiving appropriate supports to access the general education curriculum.⁹⁷ Learning on the computer is a barrier

⁸⁷ P59p525,527-28.

⁸⁸ P61p537,539.

⁸⁹ Case Manager.

⁹⁰ Case Manager; Parent; R24; R25.

⁹¹ P59p529.

⁹² P61p537-39.

⁹³ P61p541; R24; R25.

⁹⁴ P65p564; P18p178.

⁹⁵ P65p564; P18p178; Special Education Coordinator.

⁹⁶ Case Manager.

⁹⁷ Science Teacher.

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to success, as is not being held accountable.⁹⁸ When engaged, Student can complete assignments and takes less time than others in small group.⁹⁹

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

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

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely

⁹⁸ Case Manager.

⁹⁹ Science Teacher.

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more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, the local education agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to conduct a comprehensive and timely triennial reevaluation during 2019/20 or 2020/21, where a re-eligibility determination was due by May 2020 but not completed until December 2020, and assessments are still needed in (a) adaptive functioning, (b) executive functioning, (c) social-emotional functioning, and (d) assistive technology. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this issue for the reasons set forth below, including the fact that Parent and her counsel were given the option to proceed with the eligibility process in May 2020 despite the pandemic, but did not choose to do so.

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student’s parent or teacher requests a reevaluation, or if the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. §

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300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student's parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a).

The importance of assessing children in all areas of suspected disability was emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), quoting 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. See also *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); 34 C.F.R. § 300.304(c)(4).

Here, Student’s prior eligibility determination was on 5/16/17, following Student’s 2017 comprehensive psychological evaluation, so the new triennial was due by mid-May 2020, two months after DCPS closed due to the pandemic, which continued to worsen. The IEP team held an AED meeting early in 2020 to determine the assessments needed for Student’s reevaluation. The team agreed on a comprehensive psychological evaluation for Student’s reevaluation due to Parent’s concern about attention and executive functioning. DCPS began conducting the evaluation in March, once consent was received from Parent on 3/9/20, and a largely complete “due diligence report” was prepared by 4/23/20. The full comprehensive psychological evaluation was completed on 12/3/20, after the school was cleared and equipped to conduct virtual assessments in the Fall of 2020.

DCPS had offered to proceed with determining Student’s eligibility for special education in May 2020, but Parent and her counsel did not decide to move forward then, so the eligibility process was conducted in a more orderly fashion in the Fall of 2020 and completed in early December once the comprehensive psychological evaluation was finalized. There was no disagreement over Student’s ongoing eligibility for special education services and Special Education Coordinator convincingly testified that the delay in finalizing the 2020 comprehensive psychological evaluation did not impact Student’s education or alter Student’s services. Accordingly, this Hearing Officer concludes that there was no violation of the IDEA due to delay in reevaluating Student. However, even if there were a procedural violation from the delay in the reevaluation – which this Hearing Officer does not find – there would be no substantive FAPE violation due to the lack of impact in the circumstances.

Nor does Petitioner succeed in overturning the IEP team’s determination of the assessments needed in the reevaluation. The undersigned is persuaded by the credible testimony of DCPS’s witnesses and is also mindful of the need for appropriate deference in light of the Supreme Court’s guidance in *Andrew F.*, 137 S. Ct. at 1001, that courts should not “substitute their own notions of sound educational policy for those of the school authorities which they review,” quoting *Rowley*, 458 U.S. at 206.

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(a) Adaptive Functioning. An ABAS-2 assessment was administered in the 2017 comprehensive psychological evaluation, which had noted some issues based on Parent's report, but questions were raised about the teacher report, so Petitioner is now seeking an updated adaptive assessment, even though the 2017 comprehensive psychological evaluation ruled out ID. Moreover, an IEE comprehensive psychological evaluation was conducted for Parent by Psychologist in 2018, which could have – but did not – include an adaptive assessment, which undercuts Psychologist's call for an adaptive assessment now. Recent observations indicate there were no concerns with Student's adaptive living skills, and Parent reported that Student had self-care skills. Further, the psychologist who conducted the 2020 comprehensive psychological evaluation concluded that an adaptive assessment need not be done in Student's circumstances. Others on the IEP team from the school agreed that there was no need for further assessment now, based on Student's age-appropriate coping skills, and the fact that Student navigates technology very well. The undersigned concludes that Petitioner has not shown the need for an adaptive functioning assessment at this time.

(b) Executive Functioning. As part of the 2020 comprehensive psychological evaluation, a Conners 3 was conducted, but the evaluation indicated inconsistent data which didn't consistently support ADHD from the scores. However, Psychologist's 2018 comprehensive psychological evaluation found that overall Student did not present significant impairments with executive functioning, despite elevation in a few domains. As a practical matter, all students coming into Public School need executive functioning support and help organizing materials and schedules. Student was no different from other children at the beginning of 2020/21. Over the course of the year, students improved at different rates. School educators noted that Student was about in the middle of the class and didn't need extra assessment of executive functioning skills, which the undersigned finds persuasive.

(c) Social-Emotional Functioning. The IEP team in December 2020 addressed Parent's concerns about Student's mental health by modifying behavior support to respond to chronic stress. The school had taken very prompt action when Petitioner's counsel reported to Public School on 11/11/20 that Student had been hearing voices and seeing relatives who had recently died, and encouraged Parent to take necessary action and reach out to a medical doctor about Student's psychiatric concerns. Testing for the comprehensive psychological evaluation was completed before Student's mental health issue arose in late 2020, but Social Worker referred Parent to a psychiatrist and Student was in a weekly small SPARCS group (Structured Psychotherapy for Adolescents Responding to Chronic Stress). The undersigned does not find any error in the team's conclusion that no further social-emotional assessment was required.

(d) Assistive Technology. Finally, the IEP team did request an assistive technology consultation to determine potential assistive technology features and tools that could support Student's access to general education, focusing particularly on independent reading. Assistive Technology Specialist credibly testified that the only difference between a assistive technology consultation and the assistive technology assessment or evaluation sought by Petitioner was the comprehensive record review which goes back further for an assessment/evaluation, while an assistive technology consultation reviews current data.

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Assistive Technology Specialist was clear that Student did not require a comprehensive record review. After assessing Student's technology needs, the process focused on text-to-speech, dictation, and proofing supports. The technology was largely available in the devices that Student was already using, but Assistive Technology Specialist has been working on an ongoing trial of the technology with Student. Student has been hesitant to use text-to-speech, but if it doesn't work for Student other specialized intensive supports for reading can be used. Certainly, no additional assistive technology "evaluation" or "assessment" is required.

In short, this Hearing Officer is clear that DCPS did not fail to conduct an appropriate and reasonably timely triennial evaluation, and that further assessments were not required for the reasons discussed.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP: (a) on 2/24/20, which did not include ESY services for the summer of 2020; and/or (b) on 12/16/20, which did not provide sufficient specialized instruction outside general education given Student's significant cognitive and academic deficits, and was not based on comprehensive evaluation data. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which met its burden of persuasion on both IEPs.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z. B.*, 888 F.3d at 517, *Endrew F.* "raised the bar on what counts as an adequate education under the IDEA," requiring more than "merely some" educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be "reasonably calculated to produce meaningful educational benefit"). The measure and adequacy of each IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z. B.*, 888 F.3d at 524; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at *12 (D.D.C. 5/18/21); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEPs is analyzed by considering the specific concerns raised by Petitioner, which are considered in turn.¹⁰⁰ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Extended School Year (ESY). ESY is necessary to provide a FAPE under 34 C.F.R. § 300.106(a) when the benefits a disabled child gains during a regular school year

¹⁰⁰ A Hearing Officer must also determine whether "the State complied with the procedures" set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. Procedural violations were raised and are discussed herein.

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will be “significantly jeopardized” if the child is not provided with an educational program during the summer months. *Johnson v. Dist. of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012), quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002); see also *S.S. ex rel. Shank*, 585 F. Supp. 2d at 68-69 (adopting standard from *MM*). However, the “mere fact of likely regression” is not a sufficient basis for finding ESY eligibility, for all students may regress to some extent during lengthy breaks; ESY is required only when regression will substantially thwart the goal of “meaningful progress.” *Johnson*, 873 F. Supp. 2d at 386, quoting *MM*, 303 F.3d at 538. The point of ESY is not to provide additional resources or to maximize programming, but to provide a FAPE.

Here, Prior Public School completed an ESY eligibility worksheet on 2/24/20 and concluded that ESY was not needed in 2020 as Student’s critical skills were not likely to have significant regression due to a break in service. By contrast, Petitioner’s advocates asserted on 2/24/20 that Student regressed every year that Student had not received ESY. In fact, Student only had ESY one summer, for in 2017 Prior Public School proposed summer school instead of ESY, but Parent did not send Student. In 2018, Student did attend ESY, and Student’s Reading Inventory score did not drop, but Student’s percentile rating compared to peers did decline notably over the summer. The IEP team concluded that Student did not need ESY in 2019, but Petitioner challenged that determination and reached a settlement with DCPS in which Student was provided 80 hours of tutoring services to use over the summer. However, while Parent had some memory of a tutor showing up a few times, it appears that the bulk of the 80 hours were not used as DCPS was never billed for any tutoring.

In fact, the evidence suggests that Student was progressing quite steadily in both reading and math with in-person schooling through the middle of 2019/20, prior to the pandemic shutting down all in-person schooling. The pandemic was terribly hard on the education of Student, as so many other children. Specifically, prior to the pandemic, with one anomaly Student’s Reading Inventory Lexile scores increased steadily from BR on 9/27/17 to 95 to 154 to 181 to 204 (to the anomaly of 110) to 204 to 294 to 414 to 474 to 595 on 1/15/20, showing no regression even over summers and no clear indication that Student needed ESY in 2020. Similarly, Student’s TRC reading comprehension results showed a positive trend from 2017/18 to 2018/19 to 2019/20, with steady progress at each data point. Math was not listed as a critical skill for ESY in 2020, but also trended upward prior to the summer of 2020 and distance learning.

The only way for Petitioner to conclude that Student needed ESY in 2020 is by looking at the data after the fact to see how things turned out in 2020, when Student’s Reading Inventory Lexile dropped from a 595 to a 9 (and BR upon retesting), and math dropped sharply to 5 years below grade. Nor is the later decision to provide ESY for 2021 relevant. Looking at later decisions and data after the fact is contrary to how school decisions are to be judged. School educators must make decisions based on the information available to them, so it is only fair to review decisions based on what was known. See *A.T.*, 2021 WL 1978792, at *12 (D.D.C. 5/18/21) (“the relevant inquiry is on the IEP’s adequacy at the time it was developed, based on the information known then”); *Z. B.*, 888 F.3d at 524. Unfortunately, the pandemic severely impacted Student’s education. Student had great

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difficulty even showing up for distance learning late in 2019/20 and showed significant declines in testing early in 2020/21. Student suffered the jolt of suddenly being forced to learn by computer from the distraction of Student's home in the midst of the horror and unknowable risks of the pandemic.

For these reasons, this Hearing Officer concludes that DCPS met its burden of persuasion and acted reasonably in concluding that Student's 2/24/20 IEP need not include ESY for 2020 to ensure meaningful progress in Student's circumstances and provide a FAPE.

(b) Insufficient Specialized Instruction. In December 2020, the IEP team refused Parent's request to greatly increase specialized instruction (to 20 hours/week) and move Student to a self-contained SLS classroom. The team considered recent WJ data and IEP progress reports, along with input from many other sources, including Parent, service providers and teachers. The IEP team noted that Student's data declines coincided with the Covid-19 pandemic causing schooling to shift to distance learning and Student's family to suffer serious losses. The undersigned found Case Manager's testimony persuasive that Student's current specialized instruction hours were appropriate and that it would be wrong to shift Student to an SLS class without ever seeing Student in person – and for that matter seeing very little of Student on camera in class during 2020/21. Science Teacher also was convincing in her testimony that Student was currently receiving appropriate supports to access the general education curriculum. When engaged, Student can complete assignments and takes less time than others in Student's small group. The team further concluded that a dramatic shift to a more restrictive setting in an SLS classroom would be harmful to Student socially. SLS would be a shock due to Student's high level of social interaction with others, including numerous friends, which could cause academic regression.

The specialized instruction on Student's challenged 12/16/20 IEP was appropriate; a more restrictive, 20-hour/week IEP was not needed. Moreover, as set forth above, the law is clear that to the maximum extent appropriate children with disabilities must be educated with children who are nondisabled. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible). In sum, this Hearing Officer concludes that Student's current level of specialized instruction was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, and to access the curriculum to advance toward meeting Student's annual goals pursuant to 34 C.F.R. § 300.320(a)(4). See *Damarcus S.*, 190 F. Supp. 3d 35; *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013).

Issue 3: *Whether DCPS denied Student a FAPE by failing to fully implement the 2/24/20 IEP and/or the 12/16/20 IEP and provide the required 8 hours/week of specialized instruction outside general education during distance learning, as the services were provided only sporadically. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on the lack of full implementation of Student's 2/24/20 and 12/16/20 IEPs, both of which required 8 hours/week of specialized instruction outside general education (along with 5.5 hours/week of specialized instruction inside general education, which is not at issue). With a failure to implement claim, the

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IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson*, 962 F. Supp. 2d at 268, quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Here, the question is to what extent specialized instruction was being provided to Student outside general education. As distance learning began at the end of 2019/20, Student struggled to stay on task from home. Student's home environment was very informal and Student was easily distracted by “anything else” going on. Student had difficulty keeping up with online learning as Student was regularly staying with different family members, but Parent did not allow the school laptop to leave her home. Indeed, Psychologist, testifying on behalf of Parent, noted that Student did not participate in virtual learning from March to June 2020, which cannot be attributed to DCPS.

When Petitioner's advocates sought to find out the details of specialized instruction outside general education in 2020/21, they were informed that Public School had a resource room and used small groups and small classes. Public School was also using office hours for special education. Further, Case Manager met with Student on Wednesdays for an extended “advisory.” Student was in inclusion classes for all core content, with both general education and special education teachers, with the co-teachers assisting special education students. The special education teacher often pulled Student into small groups, although there were no records of how often this happened or the duration. Student's IEP progress reports did contain numerous references to Student's involvement in small groups, noting Student's presence whether or not Student participated.

It is also clear that there were significant opportunities for Student to receive specialized instruction outside general education of which Student did not take advantage. In 2020/21, Case Manager credibly testified that Student only joined the check-ins with Case Manager 38% of the time, while Student only joined class 65% of the time in term 1, 91% in term 2 and 70% in terms 3 and 4, although simply being in class did not mean Student was paying attention to the class or responding. Case Manager and other teachers routinely would text Parent if Student did not join with Student's device, to improve attendance (to the levels noted). Student did better in one-to-one sessions with teachers, but Student sometimes fell asleep in the middle of individual sessions. During one-to-one sessions in term 1 in 2020/21 Student was sometimes distracted, looking at something off-camera. During term 2 in 2020/21 Student worked one-to-one with teachers during office hours in reading and written expression, sometimes being pulled into sessions by teachers. While the specific numbers are not available, the undersigned is persuaded that Student

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received a great deal of specialized instruction outside general education and that Public School offered significantly more services than Student took advantage of.

In the Fall 2020 Covid-19 guidance, the U.S. Department of Education's Office of Special Education Programs (OSEP) wrote that in the current Covid-19 environment, LEAs may need to consider multiple options for delivering instruction. But OSEP emphasized that no matter what instructional delivery approach is chosen, LEAs and IEP teams remain responsible for ensuring that a FAPE is provided to all children with disabilities and that regardless of limitations on instruction LEAs are not relieved of their obligation to provide a FAPE to each child with a disability. *See* U.S. Department of Education: Questions and Answers on IDEA Part B Service Provision (9/28/20). While keeping this standard in mind, the burden remains on Petitioner to prove that there has been a material deviation from the 8 hours/week of specialized instruction outside general education that is required by Student's IEPs. However, Petitioner failed to demonstrate that there has been a material deviation from the required hours, so the undersigned concludes that there is no IDEA violation.

ORDER

Petitioner did not prevail on any issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

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