

**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 24, 2023

<i>Student</i> , ¹)	Case No.: 2023-0049
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 6/24/23
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	6/7/23 & 6/8/23
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 provide an appropriate Individualized Education Program ("IEP"), fully implement Student's IEPs, and evaluate Student as needed. DCPS responded that there were no IDEA violations or denials of FAPE.

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 A30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 3/22/23, the case was assigned to the undersigned on 3/23/23. Respondent filed a timely response on 3/31/23 and did not challenge jurisdiction. A resolution meeting took place on 4/6/23, but the parties did not

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics. Personal pronouns and other terms that would indicate Student's gender are omitted.

Hearing Officer Determination

Case No. 2023-0049

settle the case or shorten the 30-day resolution period, which ended on 4/21/23. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 20-day continuance, which requires a Hearing Officer Determination (“HOD”) by 6/25/23.

A prehearing conference was held on 5/19/23 and the Prehearing Order was issued that 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 6/7/23 and 6/8/23 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in the entire hearing.

Documents and Witnesses

Petitioner’s Disclosure, submitted on 5/31/23, contained documents P1 through P51, all of which were admitted into evidence over limited objections. Respondent’s Disclosure, also submitted on 5/31/23, contained documents R1 through R42, all of which were admitted into evidence.²

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Educational Advocate* (qualified without objection as an expert in Special Education)
2. Parent

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

1. *Psychologist* (qualified without objection as an expert in School-Based Psychology)
2. *Special Education Teacher* (qualified without objection as an expert in Special Education)
3. *Speech-Language Pathologist* (qualified without objection as an expert in School-Based Speech-Language Pathology)
4. *Occupational Therapist* (qualified without objection as an expert in School-Based Occupational Therapy)

² Citations herein to the parties’ documents are identical except that Petitioner’s documents begin with a “P,” while Respondent’s documents begin with an “R,” followed by the exhibit number and then a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits), with any leading zeros omitted.

Hearing Officer Determination

Case No. 2023-0049

Petitioner's counsel submitted no 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 provide all speech-language services required from 3/22/21 through 3/22/23, amounting to 2480 minutes of missed services. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 4/28/22 due to (a) goals repeated verbatim, (b) insufficient specialized instruction, and/or (c) not being based on sufficient evaluative data. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student as of 4/3/22 due to lack of an occupational therapy evaluation. (*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 timely conduct a comprehensive occupational therapy evaluation, including a sensory profile.
3. Within 15 days after completing the occupational therapy evaluation, DCPS shall reconvene the IEP team to review and revise Student's IEP as necessary based on the new evaluative data.
4. DCPS shall fund compensatory education for any denials of FAPE.³
5. Any other just and reasonable relief.

³ 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. It was further noted that Respondent should be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

Hearing Officer Determination

Case No. 2023-0049

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁴ are as follows:

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age, Gender, in Grade at Public School*. Student is a friendly child who is caring and wants to help others; Student loves school, is excited to learn, and sometimes has to be told not to have too much fun.⁶ Student is doing very well, follows directions and is responsive to supports.⁷

2. IEPs. Student's 5/7/20 IEP (the "2020 IEP") indicated that Student's disability classification was Developmental Delay, contained areas of concern for adaptive and speech-language, but no academic areas of concern, and provided 2 hours/week of specialized instruction inside general education and 2 hours/week of specialized instruction outside general education, along with 4 hours/month of speech-language pathology outside general education.⁸

3. Student's 4/9/21 IEP (the "2021 IEP") also contained adaptive and speech-language areas of concern, but no academic areas of concern, and provided 2 hours/week of specialized instruction inside general education and 2 hours/week of specialized instruction outside general education, along with 4 hours/month of speech-language pathology outside general education.⁹

4. Student's 4/28/22 IEP (the "2022 IEP") added math and reading as areas of concern, along with adaptive and speech-language areas of concern, but reduced specialized instruction to 90 minutes/week outside general education, as well as 2 hours/month of speech-language pathology outside general education and 2 hours/month of speech-language pathology inside general education.¹⁰

⁴ 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.

⁵ Parent.

⁶ P6p58.

⁷ P6p58; Psychologist.

⁸ P10p99-105.

⁹ P11p110-17.

¹⁰ P13p135-43.

Hearing Officer Determination

Case No. 2023-0049

5. Academics. Student struggles with reading, but does better in math.¹¹ Student needs many supports to be successful.¹² At the 4/28/22 IEP team meeting, Student's teachers wanted to see more progress.¹³ Student is an English Language Learner ("ELL") and received ELL supports due to English not being Student's first language; Student's proficiency in listening was much greater than in speaking, reading or writing.¹⁴ The Woodcock-Johnson IV ("WJ-IV") found that Student had overall average academic skills and was average in reading, math, and written language.¹⁵ Student's iReady in reading for 2021/22 (Beginning of Year ("BOY"), Middle of Year ("MOY"), and End of Year ("EOY")) indicated that Student was "well below" every expected level in composite, letter names, phonemic awareness, letter sounds, decoding, and reading comprehension.¹⁶ Student was only "below" in EOY 2021/22 word reading, but dropped to "well below" in the next test in BOY 2022/23.¹⁷ Student's reading deficiencies were confirmed by an informal assessment by Educational Advocate on 1/3/23.¹⁸ With the addition of math and reading as areas of concern in the 2022 IEP, Student needed at least the same amount of specialized instruction on the IEP, not a significant decrease.¹⁹

6. Repeated Goals. In the adaptive area of concern, apart from dates, the first 2 goals were identical in the 2020 IEP, the 2021 IEP and the 2022 IEP; a third adaptive goal was added in the 2021 IEP and repeated verbatim in the 2022 IEP.²⁰ Public School asserted that the team was unable to remove unneeded repetitive adaptive goals, so added writing elements within adaptive goals.²¹ The speech-language goals differed only slightly in the first 2 goals between the 2020 and 2021 IEPs, but reduced the repeated goals from 80% to 70% in the latter IEP.²² The third speech-language goal in the 2020 and 2021 IEPs reduced "words, word combinations or pictures" to only "3-4 word combinations or pictures."²³ The speech-language section of the 2021 IEP noted that the 4 annual goals are all newly developed.²⁴ Goals can be repeated if a student is still working towards mastery of them.²⁵

7. Speech-Language. Student's 3/31/22 Speech-Language Re-evaluation found that Student had average articulation, below average receptive and expressive language, and below average receptive and expressive vocabulary; Student's overall language concerns

¹¹ Parent.

¹² Special Education Teacher.

¹³ *Id.*

¹⁴ P6p55; Parent; P37p295.

¹⁵ P6p64,72.

¹⁶ P36p292-93.

¹⁷ P36p292.

¹⁸ P46p333-34; Educational Advocate.

¹⁹ Educational Advocate.

²⁰ P10p102; P11p113-14; P13p140-41.

²¹ Special Education Teacher; P13p141.

²² P10p103-04; P11p115.

²³ P10p104; P11p115.

²⁴ P13p142.

²⁵ Educational Advocate.

Hearing Officer Determination

Case No. 2023-0049

may have adversely impacted academic performance due to the severity of Student's speech language impairment.²⁶ Student was frequently absent and missed related services; DCPS does not require making up services missed due to school closures or holidays.²⁷ Student was due 240 minutes/month of speech-language services during all relevant periods.²⁸

8. Public School failed to provide 590 minutes of speech-language services out of 750 minutes due from 3/22/21 through 6/24/21 (with 90 minutes missed in March 2021 when only a week and a half of services were due; the parties agreed on 195 minutes of missed services in April 2021 and 185 missed minutes in May 2021; and there were 120 minutes of missed services in June 2021, which was a partial month).²⁹

9. Public School failed to provide 1115 minutes of speech-language services out of 2340 minutes due from 9/1/21 through 6/24/22 (the parties agreed on 15 missed minutes in September and 180 missed minutes in October; largely due to holidays, there were 70 missed minutes in November and 90 missed minutes in December; there were 90 missed minutes in January 2022, and 60 missed minutes in February; the parties agreed on 100 missed minutes in March; there were 150 missed minutes in April, 180 missed minutes in May, and 180 missed minutes in June 2022).³⁰

10. Public School failed to provide 360 minutes of speech-language services out of 1590 minutes due from September 2022 to 3/22/23 (Educational Advocate testified to an error in Petitioner's calculations and that there were only 30 minutes missed in September 2022; the parties agreed that 30 minutes were missed in October; there were 120 minutes missed in November; no minutes were missed in December 2022 or January 2023; 120 minutes were missed in February; and 60 minutes were missed through 3/22/22).³¹

11. Based on Respondent's calculation of speech-language minutes missed for Student, DCPS authorized 30 hours (1800 minutes) of independent speech-language services for Student, which was not taken into account in Petitioner's compensatory education proposal.³² Respondent's failed to provide a total of 2065 minutes of speech-language services out of a total of 4680 minutes due for the relevant timeframe; Respondent failed to account for any of speech-language services due in April, May and June 2022.³³

12. Occupational Therapy. An occupational therapy evaluation of Student including a sensory profile was not needed based on the comprehensive psychological evaluation conducted by Psychologist.³⁴ The Conners Third Edition ("Conners-3") and Behavior

²⁶ P5p46,52.

²⁷ Speech-Language Pathologist.

²⁸ P10p105; P11p117; P13p143.

²⁹ P16; P47p336; R35p183.

³⁰ P17; R28; P47p336; R35p183-84.

³¹ P18; R33; P47p336; R35p184.

³² Educational Advocate.

³³ R35p184.

³⁴ Psychologist.

Hearing Officer Determination

Case No. 2023-0049

Rating Inventory of Executive Functions Second Edition (“BRIEF-2”) rating scales in the comprehensive psychological evaluation yielded mixed results, suggesting that Student’s executive functioning skills and learning behaviors vary depending on the task at hand.³⁵ School occupational therapists rely on psychological evaluations to determine issues of executive functioning.³⁶ No teachers raised concerns about sensory issues of Student; the multi-disciplinary team had no concerns about occupational therapy.³⁷ Occupational Therapist noted that Student followed directions and did what Student was supposed to attend to.³⁸ An occupational therapy observation was reviewed with Parent at the Analysis of Existing Data (“AED”) meeting; Parent did not have any questions.³⁹ Student had no need for occupational therapy services at that time.⁴⁰

13. Compensatory Education. Educational Advocate provided a compensatory education proposal to remedy denials of FAPE, proposing 62 hours of tutoring based on the insufficient 2022 IEP and 48 hours of speech-language services to restore Student to the position Student would have been in but for the denials of FAPE.⁴¹

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

³⁵ P6p70,73; Psychologist.

³⁶ Psychologist.

³⁷ *Id.*

³⁸ Occupational Therapist.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ P48p347-48.

Hearing Officer Determination

Case No. 2023-0049

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(14); *Endrew 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." *Endrew 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 more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Endrew 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; *Endrew 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 (CKK), 2018 WL 4623572, at *3 (D.D.C. 2018).

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).

Hearing Officer Determination

Case No. 2023-0049

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide all speech-language services required from 3/22/21 through 3/22/23, amounting to 2480 minutes of missed services. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on IEP implementation. The undersigned concludes below that Public School failed to provide 2065 minutes of speech-language services out of a total of 4680 minutes. With a failure to implement claim, the 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 v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), 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).

However, the law is clear that a student missing services by being absent, holidays, and some hours of unavailability due to testing is not to be held against the school. In *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), the court held that related services sessions missed due to “snow days, holidays, [student's] absence from school, and the like” were not counted toward failure to implement the IEP, while *Joaquin v. Friendship Pub. Charter Sch.*, Civ. No. 14–01119, 2015 WL 5175885, at *8 (D.D.C. 2015), makes clear that services simply need to be offered to a student, even if the student “would not have been present to receive any” of them. *See also Letter to Balkman*, 23 IDELR 646 (OSEP, 4/10/95) (does not require missed services due to student absences to be made up, but does require provider or student unavailability for school functions to be made up).

Recently, the Court in *White v. Dist. of Columbia*, 20-CV-3821 (APM), 2022 WL 971330, at *5 (D.D.C. 3/31/22), stated that a school must do more than merely “offer” the services in the IEP, and must ensure that a child actually receives them. However, the court goes on to explain that in *White* the child was not absent and the school just “dropped the ball,” scheduling services when the child was taking a standardized test or was on a fieldtrip, and that the school missed services for “no reason at all,” which is quite different than the situation at hand. *Id.* *See also Robles v. Dist. of Columbia*, 1:21-CV-02568 (CJN), 2022 WL 3700947, at *12-13 (D.D.C. 8/26/22) (in an IEP implementation case, “[t]he school cannot be faulted for making good-faith efforts to provide the required services when [student] failed to attend on his own volition”). While schools may sometimes be responsible for not making efforts to get children to attend, *see, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009), here Student's absences were mostly excused.

Hearing Officer Determination

Case No. 2023-0049

Based on Student's service trackers and charts submitted by the parties and corrected by the undersigned, out of 4680 total minutes of speech-language services due to be provided or offered to Student during the 2-year period at issue, 2065 minutes (a little less than 35 hours) were missed. That amounts to provision of some 46% of the speech-language services that Student was supposed to receive during this period and failure to provide 44%, which clearly is a material deviation from Student's IEPs and a denial of FAPE based on *Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*), and *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material). This denial of FAPE is addressed with an award of compensatory education below, taking into account the 30 hours of independent speech-language services that DCPS has already authorized to make up for the missed services.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 4/28/22 due to (a) goals repeated verbatim, (b) insufficient specialized instruction, and/or (c) not being based on sufficient evaluative data. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a *prima facie* case concerning Student's IEP through testimony and documents, shifting the burden to DCPS, which met its burden of persuasion on goals and evaluative data, but not on specialized instruction, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was "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 U.S. 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 the IEP are 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. 2021); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEP is analyzed by focusing on the specific concerns raised by Petitioner, which are considered in turn.⁴² *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Repeated Goals. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). Here, there were some goals repeated verbatim in the adaptive area of concern, with an odd explanation that the team had been unable to remove unneeded repetitive adaptive goals, so added writing elements within adaptive goals, which Student did need. Student's speech-language goals differed only slightly between the 2020

⁴² 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. Certain procedural concerns are discussed herein.

Hearing Officer Determination

Case No. 2023-0049

and 2021 IEPs, but reduced the first 2 repeated goals from 80% to 70% to make it more achievable, an important change when a student cannot master the higher level. While not achieving goals and carrying over the same goals from year to year may indicate failure to make meaningful progress, *see Endrew F.*, 137 S. Ct. at 994, lack of progress is not necessarily the fault of the IEPs. Indeed, Educational Advocate acknowledged that goals can be repeated if a student is still working towards mastery of them. Thus, the undersigned finds no violation of the IDEA or denial of FAPE due to repeated goals.

(b) Specialized Instruction. Student's IEPs must provide sufficient personalized instruction so that the child can benefit educationally, which in the case at hand required additional specialized instruction for the 2022 IEP. *See Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203; *cf. Endrew F.*, 137 S. Ct. at 1000.

Here, both math and reading were added as areas of concern by Student's team in the 2022 IEP, as Student's teachers wanted to see more progress. Parent was clear that Student struggled more with reading, while Special Education Teacher testified that Student needed many supports to be successful, a need enhanced by English not being Student's first language. In particular, Student's iReady in reading for 2021/22 indicated that Student was "well below" expected levels in every category except word reading, which also dropped to well below on Student's next iReady. Student's reading deficiencies were further confirmed by Educational Advocate's informal assessment of Student. Educational Advocate reasonably concluded that with the addition of math and reading as areas of concern in the 2022 IEP, Student would need at least the same amount of specialized instruction on the IEP – 2 hours/week outside general education and 2 hours/week inside – not a notable decrease to only 90 minutes/week.

Thus, this Hearing Officer concludes that DCPS failed to meet its burden of persuasion by a preponderance of the evidence on this sub-issue, as the reduction of Student's level of specialized instruction in the 4/28/22 IEP was not 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), resulting in a denial of FAPE and an award of compensatory education, below.

(c) Evaluative Data. Petitioner's counsel confirmed at the due process hearing that Petitioner's assertion here is limited to the need for an occupational therapy evaluation, which is discussed in detail in Issue 3, next, where the undersigned determines that an occupational therapy evaluation is not required, so the 4/28/22 IEP does not suffer from lack of evaluative data.

Issue 3: *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student as of 4/3/22 due to lack of an occupational therapy evaluation. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this final issue. The importance of assessing students in all areas of suspected disability was emphasized in *Z.B.*,

Hearing Officer Determination

Case No. 2023-0049

888 F.3d at 518, *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). In considering a re-evaluation, 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).

Decisions on the areas to be assessed are to be made based on the suspected needs of the child. *Z.B.*, 888 F.3d at 518; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). Indeed, evaluations of children by experts are central to the determination of what special education and related services are needed for most eligible children. *See Z.B.*, 888 F.3d at 518; *Hill v. Dist. of Columbia*, No. 14-cv-1893, 2016 WL 4506972, at *18 (D.D.C. 2016) (“evaluation’s primary role is to contribute to the development of a sound IEP,” *quoting Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60 (D.D.C. 2011)).

Here, Petitioner’s argument was that an occupational therapy evaluation of Student was needed, along with a sensory profile, based on Psychologist’s comprehensive psychological evaluation and various symptoms, such as inattentiveness and executive functioning. However, Psychologist persuasively testified that an occupational therapy evaluation of Student including a sensory profile was not needed based on the comprehensive psychological she conducted. Specifically, the Conners-3 and BRIEF-2 rating scales in the comprehensive psychological evaluation yielded mixed results, suggesting that Student’s executive functioning skills and learning behaviors vary depending on the task at hand. Even if executive functioning was at issue, school occupational therapists rely on psychological evaluations to determine issues of executive functioning. Occupational Therapist testified that Student followed directions and did what Student was supposed to, so Student had no need for occupational therapy services at that time. Further, Student’s teachers did not raise concerns about sensory issues. Nor did Student’s team have any concerns about occupational therapy. In short, the undersigned found the weight of the testimony from DCPS more persuasive than Petitioner’s assertions and concludes that Petitioner failed to meet her burden of persuasion on the need for an occupational therapy evaluation.

Remedy

Having analyzed and resolved the issues in this case, what remains is to consider the compensatory education necessary to make up for the denial of FAPE found above. In determining the amount of compensatory education for denials of FAPE, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of*

Hearing Officer Determination

Case No. 2023-0049

Columbia, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Further, with a failure to implement claim, as here, Petitioner need not even show that there was educational harm to Student. *James*, 194 F. Supp. 3d at 139.

Here, Educational Advocate testified that the compensatory education sought in her detailed plan would put Student in the position Student would have been but for the denials of FAPE. But that plan must be adjusted significantly to match the denial of FAPE actually found herein, which was limited to insufficient specialized instruction in the 2022 IEP and failure to provide all speech-language services required by Student’s IEPs. Based on experience and careful analysis, the undersigned awards 50 hours of 1:1 academic tutoring and 10 hours of speech-language services (giving credit to the 30 speech-language hours already authorized by DCPS) in the Order below. This determination by the undersigned has been specifically tailored to address Student’s unique needs as a matter of equity, as “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 18 months to avoid administrative burdens on Respondent, although the undersigned encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without delay.

ORDER

Petitioner has prevailed on Issue 1 and part of Issue 2, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denials of FAPE found herein, within 10 business days after request by Petitioner, DCPS shall provide a letter of authorization for (a) 50 hours of 1:1 academic tutoring, and (b) 10 hours of speech-language services, both from independent providers chosen by Petitioner; all hours are to be used within 18 months and any unused hours shall be forfeited.

Any and all other 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

Hearing Officer Determination

Case No. 2023-0049

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).

Copies to:

Counsel of Record (Appendix A, by email)

ODR (hearing.office@dc.gov)