

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

OSSE
Office of Dispute Resolution
June 29, 2024

Confidential

<p>Parent on Behalf of Student, ¹</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p> <p>Case # 2024-0063</p> <p>Date Issued: June 29, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: June 3, 2024 June 14, 2024</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent in the District of Columbia. The District of Columbia Public Schools ("DCPS") is Student's local education agency ("LEA"). Student was last determined eligible for special education pursuant to IDEA with a disability classification of specific learning disability ("SLD"). Student attended a DCPS school ("School A") for the school year ("SY") 2023-2024. At a March 20, 2024, eligibility meeting, DCPS determined that the Student is no longer eligible for special education services.

On April 5, 2024, Student's parent ("Petitioner") filed a due process complaint ("DPC") alleging that DCPS ("Respondent") denied Student a free appropriate public education ("FAPE") by failing to implement Student's IEP during SY 2022-2023 and SY 2023-2024, failing to reevaluate Student at the time of Student's triennial evaluation due January 28, 2023, failing to find Student eligible for special education as a child with a disability pursuant to IDEA on March 20, 2024, and failing to provide Petitioner full access to Student's educational records.

Student's special education eligibility and services were continued by DCPS during the pendency of the proceedings pursuant to stay-put protections. Petitioner seeks as relief that DCPS be found to have denied Student a FAPE, a finding that Student is eligible for special education under other health impairment ("OHI") or SLD, restore Student's most recent special education placement, provide Student compensatory education, and an order directing DCPS to provide a comprehensive response to Petitioner's record request.

DCPS's Response to the Complaint:

DCPS filed a response to the complaint on April 15, 2024. In its response, DCPS stated, inter alia, the following:

The Student is currently enrolled at School A for SY 2023-2024. On or about March 20, 2024, School A determined Student was no longer eligible for specialized instruction and dismissed services. School A recommended that the Student be processed for the 504 plan, but Petitioner never met with the team to discuss eligibility.

There was no denial of a FAPE for failing to find Student eligible under the classification of OHI or SLD. During an eligibility determination meeting, conducted on March 20, 2024, the team reviewed all formal and informal assessments, data collected during the analysis of existing data ("AED"), and observations, considered state policy definitions, as well as eligibility criteria worksheets and exclusionary factors and determined that Student did not meet all required criteria under the categories of SLD or OHI. Most of the team from School A supported this determination

based on Student's strong performance in classes, namely, high report card grades (straight A's) and performance on classroom-based assessments (noted in an updated AED). Additionally, they also noted that even though Student was offered the supports listed in Student's IEP, Student often worked without using those supports.

DCPS denies the Student was denied a FAPE by allegedly failing to implement the Student's IEPs during SY 2022-2023 and SY 2023-2024. The IEP prescribed 6.66 hours per week of specialized instruction outside general education and 6 hours of specialized instruction inside general education. Pursuant to the progress reports and teacher reports, Student's IEP has been implemented to the extent the Student made himself/herself available.

DCPS denies that the Student was denied a FAPE by allegedly failing to comprehensively evaluate and/or reevaluate Student in connection with a triennial evaluation process in January 2023. There was an AED meeting scheduled, but the parent would not agree to meet. The school-based team did not move forward without the parent.

In April 2023, Petitioner obtained legal counsel (not her current counsel). In June, an IEP meeting was held, and Petitioner and her counsel agreed to hold an AED meeting at the beginning of SY 2023-2024 to determine if evaluation(s) were warranted. On August 31, 2023, an AED meeting was held, and the School A team determined that more information is needed to determine the Student's educational needs and present levels. However, on September 26, 2023, Petitioner stated via email that she did not give consent for DCPS to proceed with Student's psychological evaluation.

DCPS denies that the Student was denied a FAPE by allegedly failing to provide full access to educational records. Upon information and belief, Petitioner and her previous counsel were sent records sometime during SY 2022-23. An email from Petitioner's previous counsel acknowledged that Student's case manager during SY 2022-23 "sent two files, one labeled 21/22 and one labeled 22/23. These included relevant special education records, including IEPs, PWNs, progress reports, and tracking forms from those school years." Additionally, in September 2023, Petitioner's previous counsel renewed the record's request. DCPS sent records on October 17, 2023, and again on December 18, 2023.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on April 11, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint ("DPC") was filed on April 5, 2024. The 45-day period began on May 5, 2024, and ended [and the Hearing Officer's Determination ("HOD") was initially due] on June 19, 2024. Both parties were not available on the original hearing dates offered. Petitioner's counsel filed a motion to continue the hearing and extend the HOD due date for ten (10) calendar days. The HOD is now due June 29, 2024.

The undersigned impartial hearing officer ("IHO") conducted a pre-hearing conference on April 24, 2024, and issued a pre-hearing order ("PHO") on May 6, 2024, stating, inter alia, the issue to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny Student a free appropriate public education (“FAPE”) by failing to find Student eligible under the disability classification of other health impairment and/or specific learning disability at the March 20, 2024, eligibility meeting despite the record supporting those classifications and the school social worker dissenting from the decision in writing?
2. Did DCPS deny Student a FAPE by failing to implement the Student’s IEP during SY 2022-2023 and SY 2023-2024 and not providing consistent specialized instruction?
3. Did DCPS deny Student a FAPE by failing to evaluate and/or reevaluate Student at the time when Student’s triennial evaluation was due January 28, 2023?
4. Did DCPS deny Student a FAPE by failing to provide Petitioner full access to Student’s educational records following the December 5, 2023, and March 28, 2024, requests?

DUE PROCESS HEARING:

The Due Process Hearing was convened on June 3, 2024, and June 14, 2024. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 35 and Respondent’s Exhibits 1 through 45) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

² At the outset of the due process hearing, the IHO reviewed the single issue to be adjudicated the parties agreed to the issue as stated herein.

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

⁴ Petitioners presented four witnesses: (1) Student's mother (Petitioner), (2) Student, (3) an educational advocate who testified as an expert, (4) DCPS Social Worker who provided Student behavior support services, who testified and an expert and was also called by Respondent. Respondent presented four witnesses, all of whom testified as expert witnesses: (1) a DCPS school psychologist, (2) Student’s School A special education teacher, (3) School A social worker who provided Student behavior support services, (4) School A LEA representative and special educator who also provided Student instruction. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on all issues adjudicated. The IHO concluded that Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #1 but did not sustain the burden of persuasion on the other issues. The IHO ordered DCPS to reinstate Student's eligibility for special education under the SLD classification and to provide Petitioner authorization to obtain an independent evaluation to determine appropriate compensatory education for the Student being without special education services from the period Student was determined ineligible and the time that special education services were reinstated based upon stay-put protections.

FINDINGS OF FACT:⁵

1. Student resides with Student's parent, Petitioner, in the District of Columbia. DCPS is Student's LEA. Student was last determined eligible for special education pursuant to IDEA with a disability classification of SLD on January 28, 2020. Student attended School A, a DCPS school, during SY 2023-2024. (Parent's testimony, Respondent's Exhibit 1)
2. In July 2020, an independent evaluator conducted a comprehensive psychological evaluation of Student when Student was [REDACTED] 11 months. Student had just completed _____ grade at a DCPS middle school. The evaluator's report is dated September 23, 2020. By that date, Student was attending a DCPS high school for _____ grade during SY 2020-2021. (Petitioner's Exhibit 11)
3. The evaluator noted the following in her September 2020 evaluation report: "For the current testing, Student received an IQ score in the Average range on the WJ- Cognitive (SS = 95). [Student's] weakness was noted on a subtest that required Student to understand sequences among numbers and required some lower-level arithmetic applications. Student's scores were in the High Average range: Oral Vocabulary (SS = 119) and Verbal Attention (SS = 113). On the WJ Achievement, Form B, Student earned the following scores: Reading = 90 (Average); Math = 70 (Low); and Written Language = 91 (Average). While Student's Reading score is in the Average range, the Grade Equivalent is 5.9; and the Age Equivalent = 11- 4. While Student's Writing score is in the Average range, Student's Grade Equivalent is 6.3; and Student's Age Equivalent is 11-8. Mathematics is Student's weakest academic area; Grade Equivalent = 3.5; Age Equivalent = 9-0. Student's scores suggest a Specific Learning Disability in Reading, Math, and Writing. Using the Discrepancy Model, Student is functioning at least two years below Student's chronological age in all academic areas. Complicating Student's educational functioning is Student's traumatic school history. Student has been the victim of bullying, sexual assaults, and physical assaults, which began in _____ grade. Student's most recent incident occurred in 2019. Student was physically attacked and had a concussion. Also, a [REDACTED] peer reportedly tried to touch a Student sexually without the Student's permission in 2019.

⁵ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

Student's overwhelming perception is that adults do not keep Student safe, and they, themselves, are not safe." (Petitioner's Exhibit 11)

4. The evaluator also noted the following in her evaluation report: "...the IEP that this examiner reviewed states that Student would receive 20 hours of special education supports outside of the general education class, and BSS for 120 minutes per month inside the general education setting. [Student's parent] disagrees with this formulation and only approves that Student should receive co-taught general education classes, meaning that Student would be in a general education setting in all of Student's core classes, and Student would be a special education teacher in the room who can help Student, as needed. (Petitioner's Exhibit 11)
5. For SY 2021-2022, Student was enrolled at School A but participated in virtual learning for _____ grade and began attending School A in person for the [REDACTED] for SY 2022-2023. On May 10, 2022, School A conducted an annual review of Student's individualized educational program ("IEP"). Student's May 10, 2022, IEP included goals in the areas of math, reading, written expression, and emotional, social, and behavioral development. The IEP prescribed 16 hours of specialized instruction per week in general education and 30 minutes per month of consultative behavioral support services ("BSS") (Respondent's Exhibit 4, Petitioner's Exhibit 16)
6. On June 28, 2022, School A amended Student's IEP to reduce Student's specialized instruction to just over 13 hours per week, virtually evenly divided inside the general education setting and outside the general education setting. Student's BSS services were changed from consult to direct services of 120 minutes per month. In a prior written notice ("PWN"), School A noted the following regarding the IEP amendment: "An MDT meeting for [Student] was held on 9 June 2022. The team, including the agreement of the parent, determined to reduce [Student's] hours for specialized instruction inside general education to 6.66 hours and to add 6.5 hours of specialized instruction outside general education. Also, behavioral support services will change from 30 minutes of consultation to 120 minutes of direct services. The 120 minutes will consist of 5-minute daily check-ins, where [Student] will be responsible for checking in. In Other Classroom Aids and Services, access to a flash pass will be added so that [Student] can receive behavioral support services when [Student] needs them immediately and daily 5-minute check-ins with the social worker, as needed. Additionally, permission to use speech-to text software will be given for help with understanding assignments and also revising [Student's] own work." (Petitioner's Exhibits 17, 18)
7. Based upon Student's January 2020 eligibility determination Student's triennial evaluation was due in January 2023. School A provided Petitioner draft evaluation documents for an anticipated AED meeting, and Petitioner provided DCPS edits of the document along with a request for education Student's records. Student's special education case manager initially proposed that the AED be held in January 2023. In February 2023 Student's special education case manager contacted Petitioner regarding convening the AED meeting for Student. Although, there was email correspondence between Petitioner and School A and then later between Petitioner's attorney DCPS's attorney, there was no action on

Student's triennial evaluation until June 2023. (Witness 4's testimony, Respondent's Exhibit 38)

8. School A conducted an annual review of Student's IEP on June 1, 2023. Student's June 1, 2023, IEP included goals in areas of math, reading, written expression, and emotional, social, and behavioral development. Student's June 1, 2023, IEP prescribed the following services: 6.66 hours of specialized instruction inside general education, 6 hours of specialized instruction outside general education, and 120 minutes per month of direct BSS. (Respondent's Exhibit 1)
9. The June 1, 2023, IEP stated the following under the present levels of performance ("PLOP") for math "Student is a _____ at School A. "Student is currently enrolled in Algebra II and Trigonometry. Student has maintained a C average in the course throughout the year. [Student's] specialized instruction teacher during that class reported that Student has an average understanding of math concepts regarding his/her background knowledge, understanding, and application of average to difficult math concepts. However, [the teacher] noted that this is when Student comes to class and is engaged. He noted that Student has difficulty with math concepts when Student misses class. While in class, Student's teacher and the specialized instruction teacher reported that Student is often on her/his phone. Student participated in the beginning of the year assessment (MAP) and received a score of 206. He/she did not participate in the mid-year assessment. He/She participated in the end-of-the-year assessment, and his/her score was 206. The student has 38 absences and 38 tardies, of which 32 absences were excused, and 4 tardies were excused." (Respondent's Exhibit 1)
10. In all three academic areas, Student's June 1, 2023, IEP stated the following in describing how Student's disability affects Student's access to the general education curriculum the IEP states: There is no clear indication that Student's learning disability is having an impact on his/her ability to access the general education curriculum. However, his/her behavior and emotionality does seem to negatively impact his/her ability to access the general education curriculum. (Respondent's Exhibit 1)
11. In all three academic areas, Student's June 1, 2023, IEP stated the following in describing how Student's disability affects Student's progress in the general education curriculum the IEP states: When Student is in class and is engaged, his/her learning disability does not impact his/her ability to access the general Ed curriculum. However, Student has social-emotional deficits that greatly impact his/her ability to access the general education curriculum. (Respondent's Exhibit 1)
12. Student's June 1, 2023, IEP included 1 math goal: "When given a mathematical problem or equation, Student will independently recognize purposes of and differences among sample surveys, experiments, and observational studies; and explain how randomization relates to each with 75% confidence given 3 out of 4 opportunities quarterly. Baseline: Student was able to solve mathematical problems with 60% accuracy." The goal had an achievement date of May 31, 2024. (Respondent's Exhibit 1)

13. Student's June 1, 2023, IEP included stated the following for the PLOP in the area of reading: "Student is a _____ at School A. Student maintained an A during the first advisory, a B during the second advisory, and a B during the third advisory. There was no formal data for Student in the area of reading, but data taken from working directly with Student and informal assessments indicate that he/she is able to read at or above level grade text. He/She is also able to comprehend what he/she reads with at or above grade-level rationale. Currently, Student maintains an F average. However, he/she has earned a C for the year This average may be attributed to an excessive number of absences. Student currently has a 53 average, and 43 absences of which 32 of those absences are excused. (Respondent's Exhibit 1)
14. Student's June 1, 2023, IEP included one reading goal: By May 2024, given a grade-level literary or informational text, and (1) written inferential claim, Student will write (2) citations from the text that support the given claim, for (4 of 5) claims, on (3 out of 4) progress monitoring assessments. Baseline: While working with Student on writing assignments, it was not that Student was able to identify at least two citations from the text to back his/her claim with 50% accuracy. The goal had an achievement date of May 31, 2024. (Respondent's Exhibit 1)
15. Student's June 1, 2023, IEP included stated the following for the PLOP in the area of written expression: Student received an A during the first advisory, and a B+ during the second and third advisories. [Name] indicated that Student is able to work independently, and he/she prefers not to work in groups. Student is able to explain what he/she has read with average to above average understanding. He/She is also able to generate an appropriate grade level response with a clear topic explanation and conclusion. Currently, Student maintains an F average. However, he/she has earned a C for the year. This average may be attributed to an excessive number of absences. Student currently has a 53 average, and 43 absences of which 32 of those absences are excused. The IEP included on written expression goal: By May 2023, when given a narrative, informational, or argumentative writing prompt, and a writing checklist, Student will write a (2)-paragraph essay that is organized with an introductory topic sentence, (2) reasons or detail sentences, and a conclusion sentence, for (5 out of 6) rubric points, on (3 out of 4) progress monitoring assessments. Baseline: Student has an A in ELA. The goal had an achievement date of May 31, 2024. (Respondent's Exhibit 1)
16. Student's June 1, 2023, IEP included stated the following for the PLOP in the area of emotional, social, and behavioral development ("ESB"): Student is an _____-grade student in the [Name] department at School A. Student receives special education services as a student with a specific learning disability. He/She has 120 minutes of behavioral services monthly on his/her IEP. This is the first school year that Student attended [REDACTED] His/Her first year of ___ school he/she was at [previous school] and for his/her second year, while he/she transferred to School A, he/she did not take classes at the school because he/she attended the DCPS virtual academy. Student received the following diagnoses in his/her comprehensive psychological assessment completed in September 2020 by [Name]: post-traumatic stress disorder; attention-deficit/hyperactivity disorder; specific learning disorder with impairment in reading; specific learning disorder with impairment

in written expression; specific learning disorder with impairment in mathematics. Student rarely engages with his/her peers at school. In the classroom he/she usually keeps to him/herself and sits quietly when working. Student eats lunch alone in the student support center. When there are opportunities to engage with peers or when school staff attempt to facilitate his/her socializing with peers. Student prefers not to do so. When Student is in distress or needs additional specialized instruction supports, he/she has difficulty communicating his/her needs directly with staff members, although he/she will occasionally do so. Student feels very comfortable sharing these concerns with his/her mother throughout the school day via cell and at home. (Respondent's Exhibit 1)

17. Student's June 1, 2023, IEP ESB PLOP went on to state: "Student's mother communicates Student's concerns directly with staff members via email and Student will send emails to teachers at times. Teachers report that there are times when Student is focused on assignments, works hard and does well, however, when he/she is overwhelmed or agitated, he/she is not able to engage in learning. Student internalizes his/her stressors-withdrawing, shutting down and avoiding- on a daily basis. Teachers report that he/she will be on his/her phone during class or will come down to the Student Support Center to use his/her breaks as needed accommodations. When Student is in the student support center, 90% of the time he/she does not want to talk to the social worker. During these times or during check-ins with the school social worker, Student's responses are mostly limited to one or a few words. Student will sometimes tell the social worker to talk to Student's mother rather than responding. Approximately 1-2 times a month Student meets with the social worker and shares what is upsetting him/her and how it is making him/her feel. Student's mother states that Student has a history of trauma that impacts him/her at the present time, especially at school. According to Student's mother, in middle school there were incidents of Title IX behaviors towards Student by multiple staff members. Since the beginning of the school year, Student's mother has consistently raised these previous Title IX concerns as significantly affecting Student at School A and reports that Student has been triggered on numerous occasions, although there have been no allegations of Title IX behaviors at School A. Student's mother reports that heightened anxiety has triggered asthma attacks for Student. For this school year, Student's mother has attributed many of Student's emotional and academic difficulties at school to staff members' perceived misconduct and/or the lack of IEP services being provided. For the third term, Student received the following grades: English III B+, Anatomy F, Algebra II: I (Incomplete), Go-Go Human Rights C+, Public Speaking D, General Explorations (Learning Lab) B+, Tech Production A, Theatre Operations III A, Audio Visual Technology A-, Lighting Tech A." (Respondent's Exhibit 1)
18. Student's June 1, 2023, IEP ESB PLOP went on to state: The EOY (End of Year) SDQ (Strengths and Difficulties Questionnaire) teacher rating scale was completed by [Name] Student's Anatomy teacher. Student's score for overall stress 22-VERY HIGH, Score for emotional distress 8- VERY HIGH), Score for behavioral difficulties 4-HIGH, Score for hyperactivity and concentration difficulties 4- close to average, Score for difficulties getting along with other children 6- VERY HIGH, Score for kind and helpful behavior- 4-LOW, Score for the impact of any difficulties on the child's life 5- VERY HIGH. In comparison, [Name] completed the MOY (Middle Of Year SDQ teacher rating scale was completed by [Name]. The results are as follows: Overall stress 20 (19 - 40 is VERY

HIGH) Emotional distress 9 (6 - 10 is VERY HIGH) Behavioral difficulties 1 (0 - 2 is close to average) Hyperactivity and concentration difficulties 4 (0 - 5 is close to average) Difficulties getting along with other children 6 (6 - 10 is VERY HIGH) Kind and helpful behavior 0 (0 - 3 is VERY LOW) Impact of any difficulties on the child's life 5 (3 - 6 is VERY HIGH) Student was asked to complete the student SDQs but he/she declined. (Respondent's Exhibit 1)

19. Regarding ESB, Student's June 1, 2023, IEP stated the following in describing how Student's disability affects his/her access to the general education curriculum: Student's mental health diagnoses significantly affect his/her ability to manage his/her emotions, cope with stressors and communicate with staff members which negatively impacts his/her ability to access the general education curriculum. (Respondent's Exhibit 1)
20. Regarding ESB, the IEP stated the following in describing how the Student's disability affects the student's progress in the general education curriculum: The student's mental health diagnoses significantly affect his/her ability to manage his/her emotions, cope with stressors and communicate with staff members, which often results in her withdrawing or shutting down. (Respondent's Exhibit 1)
21. In the area of ESB, Student's June 1, 2023, IEP had the following two goals: Goal 1: During counseling sessions, with support from the social worker, Student will use problem-solving skills to discuss challenges he/she is experiencing and will identify at least two things he/she can do to make the situation better with 80% accuracy in 4 of 5 trials. Baseline: Currently, when Student discusses challenges he/she is experiencing, he/she struggles to identify ways he/she can respond that will address his/her needs and instead expresses feelings of helplessness. Anticipated date of achievement: 05/31/2024. Evaluation procedures and schedule: observation / once a month verbal response / once a month. Goal 2: During Student's learning lab class, he/she will practice self-advocacy skills by communicating with his/her teacher about how he/she is doing in his/her classes and will identify what assignments he/she needs assistance with and what supports are helpful with 80% accuracy in 4 of 5 trials. Baseline: Student has challenges with self-advocacy skills and struggles to communicate his/her needs with his/her special education teachers during class daily. Anticipated date of achievement: 05/31/2024. Evaluation procedures and schedule: observation / once a month verbal response / once a month. (Respondent's Exhibit 1)
22. Student's June 1, 2023, IEP included the following under Other Classroom Aides and Services: "All 4 core content classes will be in the inclusion setting. The student requires the following classroom aids and services: 1. Small group support 2. Use of visual aids and manipulatives (such as cue cards outlining steps of a math calculation, use of acronyms, and other memory aids) 3. Preferential seating 6. Praise and encouragement for positive interactions with teachers and peers 7. Chunking of assignments 8. Follow low-interest activities w/high-interest activities 9. Repetition of instructions 10. Prompting to remain focused on task 11. Preferential seating 12. Structured breaks directed by an adult 13. supported access to a flash pass so that he/she can access behavioral support services immediately 14. Permission to use speech-to-text software for help with understanding assignments and revising his/her own work. Asthma Plan: Student was diagnosed with

asthma and receives daily treatment. The asthma plan has been provided to the school nurse and is being followed with fidelity. He/she currently takes Albuterol and Flovent for treatment. Also, he/she is allergic to peanuts, tree nuts, sesame seeds, seafood, and mustard. Mother will provide any new medical information if allergies change, or new allergies need to be added. If Student consumes any of these items, he/she will become ill, and medical attention has to be provided as soon as possible.” (Respondent’s Exhibit 1)

23. On August 31, 2023, School A convened an AED meeting as the beginning of Student’s triennial reevaluation. Petitioner and Student participated in the meeting along with Petitioner’s attorney at the time. The team discussed how the Student’s IEP would be implemented for SY 2023-2024, and the DCPS psychologist proposed that the Student’s reevaluation include academic achievement testing and rating scales with consideration of the Student’s eligibility for special education under the SLD classification. There was some discussion by the team that, based on Student’s performance Student might no longer need specialized instruction and that a Section 504 plan might be considered. Petitioner shared that an independent neuropsychological evaluation would be conducted. Student’s School A’s social worker offered to conduct a functional behavioral assessment (“FBA”) and develop and implement a behavior intervention plan (“BIP”). The team agreed that Student would be reevaluated for consideration of both SLD and OHI classification related to ADHD. (Respondent’s Exhibit 13)
24. Petitioner engaged Children's National Medical Center (“CNMC”) to conduct an independent neuropsychological evaluation (“IEE”) in September 2023. The purpose of the evaluation was to provide a comprehensive neurocognitive profile of Student to “assist in differential diagnosis and treatment planning.” The IEE included cognitive and academic achievement testing, a review of the Student’s prior evaluations, and interviews with Petitioner and Student. The student’s cognitive scores were significantly lower than Student’s prior testing, but the independent evaluator could not identify a reason for the drop in scores. Student’s reading and written language scores were average, but Student’s math scores were low average. The independent evaluator, by history, diagnosed Student with Attention Deficit Hyperactivity Disorder (“ADHD”), a specific learning disorder, generalized anxiety disorder, and major depressive disorder. Because of the possibility of duplicate testing, Petitioner informed School A that she was not giving DCPS permission to proceed with evaluating Student. (Respondent’s Exhibits 3, 36)
25. On September 29, 2023, School A issued a PWN that indicated that Student’s triennial evaluation, which was due in January 2023, was delayed due to Petitioner’s not agreeing to a meeting date. Petitioner disagreed with that she caused the delay. The PWN noted that although the team had discussed at the August 31, 2023, AED meeting that there was an agreement for the DCPS psychologist to proceed with a psychological evaluation, Petitioner did not grant DCPS consent to proceed with the evaluation. The PWN noted that School A would provide a review of Student’s school-based data to consider Student’s continued eligibility for special education. (Respondent’s Exhibits 10, 11)
26. Petitioner provided the IEE to DCPS, and a DCPS psychologist conducted a review of the IEE in a report dated November 20, 2023. In addition to reviewing the IEE, the DCPS psychologist reviewed Student’s 2021 in-school standardized assessment and conducted interviews with Petitioner, Student, and Student’s teacher. She also conducted a classroom

observation of Student. The DCPS psychologist, in her report, noted her consideration of the Student's eligibility under the SLD classification. (Respondent's Exhibits 4)

27. The DCPS psychologist noted the following regarding Student's school-based assessments: "Review of standardized assessments was limited to ANet scores that were obtained in 2021. Student earned a score of 67 (above district level) in the area of ELA. There are no records of any subsequent curriculum-based assessment(s). Student has a cumulative average of 3.48, which represents his/her performance from ____ through ____th grade thus far. It appears that Student has performed well in most academic areas. During 2022-2023, Student appeared to struggle with attendance, which may have negatively impacted her academic performance in various courses. He/She has consistently struggled with mathematics but has shown exceptional progress in his/her current math class (Probability/Statistics: A-). Prior psychological reports indicate that Student's performance fell within average/low average range. His/Her performance on Working Memory tasks has been in borderline range. It must be noted that the most current independent evaluation shows a significant decrease in all areas of cognitive functioning, which is atypical for most test takers." (Witness 3's testimony, Respondent's Exhibit 4)
28. The DCPS psychologist noted the following regarding interviews with Student's teacher, Petitioner, and Student from the IEE: "interviews and classroom observations were not conducted by this examiner due to Petitioner's assertion that she did not give permission for DCPS to proceed with the evaluation. According to the Children's National neuropsychological report, Student's school case manager, reported that Student relies heavily on teacher support and accommodations, and is reluctant to work independently. Student spends most of his/her time at school alone and does not interact much with other students. The other teacher also reported concerns with Student's social communication. When given a narrative, informational, or argumentative writing prompt and a writing checklist, Student will write a paragraph essay that is organized with an introductory topic sentence, reasons or detail sentences, and a conclusion sentence. Modified materials and objectives. Specialized Instruction Work samples, practice, and teacher assessment Given an independent-level text, a claim, and a counterclaim, Student will write an argument by citing pieces of evidence to support a given claim, and respond to a counterclaim by citing pieces of evidence and accurately choosing pieces of evidence modified materials and objectives specialized Instruction work samples, practice, and teacher assessment." (Respondent's Exhibit 4)
29. The DCPS psychologist considered each DCPS's factors for the SLD disability classification and concluded that Student did not meet any of the criteria for SLD. The DCPS psychologist noted in her review of the IEP the following: "Student's overall cumulative GPA is 3.48. He/She has performed above district standards in the ANet ELA (curriculum-based measurement). Although there is evidence that Student struggled with math during the 2022-2023 school year, it appears that his/her attendance may have negatively impacted his/her performance in that class. He/She has performed well in the year prior, and currently, he/she has earned an A in his/her Probability/Statistics course... Student has made exceptional progress and has an overall cumulative average of 3.48. Additionally, he/she has exceeded district expectations in the 2021 ELA curriculum-based measurement...There is no evident pattern of strength and weakness in performance that

is relevant to the identification of a specific learning disability. Although there was variability in cognitive and achievement scores, these current results do not appear to impact Student's current academic performance. He/she has earned straight A's on his/her current progress report... There is no evidence that any of these factors apply to Student's educational performance. Based on the results of the independent evaluation's current psychological test findings and record review Student does not meet the criteria as a student in need of specialized instruction due to specific learning disability under IDEA and the Office of Specialized Instruction guidelines. The multidisciplinary team (MDT) will make the final determination of Student's eligibility for services and whether his/her current academic setting is appropriate. The MDT should review this report along with other currently relevant data to determine whether Student continues to meet special education criteria for any disabilities." (Witness 3's testimony, Respondent's Exhibit 4)

30. On November 30, 2023, School A convened a meeting with Petitioner and her attorney at the time to review the IEE. On December 14, 2023, DCPS issued a PWN to Petitioner with a summary of the November 30, 2023, meeting and indicating DCPS's intent to proceed with evaluating Student for edibility for both SLD and OHI classifications. The PWN notes the following: "On November 30, 2023, the school team, parent, and her attorney conducted a meeting to review a recent neuropsychological evaluation from Children's National (dated October 23, 2023). The Children's evaluation maintains that Student should continue to qualify for special education with a Specific Learning Disability. DCPS completed a report (dated November 20, 2023) which was a review of the Children's evaluation. Based on the psychologist's review of the Children's evaluation and the criteria for specific learning disability (SLD), the psychologist noted that the student did not meet the first criterion of SLD due to a 3.48 GPA, an "above-district average" score on the ANet ELA (March 15, 2021), current math grade, an A, in Probability/Statistics. The parent's counsel disagreed and requested that OHI also be considered for Student's eligibility determination. The school psychologist stated that she would need more information to complete the triennial eligibility evaluation to consider this new eligibility category; specifically, she needed consent to conduct an observation and complete teacher interviews. The team primarily reviewed a neuropsychological evaluation from Children's National dated October 23, 2023. The team also reviewed data that included but were not limited to, report card and progress report information, informal observations, teacher input, related service provider input, and input from the family. The team utilized classroom and school-based assessment data." (Respondent's Exhibit 7, 14)
31. On December 18, 2023, Petitioner granted DCPS consent to evaluate Student. (Respondent's Exhibit 6)
32. Student's special education case manager worked with Student in his/her ELA class and in the learning lab. He would offer support and provide it when Student needed it. Most of the time, another special education teacher provided Student support for math. Academically, Student's social-emotional components impacted his/her academics. He/She would sometimes exhibit symptoms of anxiety, and teachers would get Student to calm down, and he/she would perform better academically. Student's case manager had concerns about the Student's engagement in class as Student spent a lot of time on his/her electronic device. Most of the time, if the special education teacher asked Student if he/she

needed help, he/she would say no. Student did well in most classes. Often when Student was redirected Student would leave class using his/her flash pass. The special education teacher created graphic organizers and read to his/her for clarification when he/she was anxious. In the learning lab, there were two special education teachers, and the academic coaches were there at times, and they worked with the students. There are usually four special teachers who touch base with all students with IEPs. They would not necessarily work with students one to one. Students benefitted from accommodations. Although Student was being provided the specialized instruction services, Student did not like the way the services were being provided and complained that the services were inadequate. (Witness 4's testimony, Witness 5's testimony)

33. The DCPS psychologist conducted classroom observations of Student in January 2024. The DCPS psychologist conducted classroom observations of Student on January 4, 2024, during Student's Probability & Statistics class, 2nd period, for forty minutes. The teacher taught a lesson about discreet and random variables. Student was seated by him/herself but near peers, near the back of the classroom. Student was on his/her phone for thirty out of the forty minutes. Student did not pay attention to the lesson, and when prompted to get off the phone by both the special education teacher and the subject matter teacher, Student continued to watch what appeared to be YouTube programming. The teacher walked over and asked that Student to work on the math assignment. Student looked up momentarily and went back to looking at his/her phone. Student was dismissive of the support that the teachers offered. Student is given extra time to complete assignments and does the work outside of class and turns it in and gets credit. (Witness 3's testimony, Respondent's Exhibit 5)
34. The DCPS psychologist observed Student on January 9, 2024, during Student's DC History & Government class, 5th period, for forty minutes. The teacher assigned a "political compass" activity on Nearpod. Student was on his/her phone when this examiner walked into the classroom and remained on the phone throughout this observation. The class was initially tasked with finding definitions for keywords that would be used throughout his lesson. The special education teacher asked the Student to define words, but the Student quietly continued to watch what appeared to be YouTube on his/her phone. After ten minutes and consistent encouragement from the special education teacher Student began working on his/her computer on his/her own. (Witness 3's testimony, Respondent's Exhibit 5)
35. The DCPS psychologist interviewed Student's math teacher and history teacher on January 4, 2024, and January 9, 2024. They both stated that it was difficult to determine what Student's academic ability is because Student is often on his/her phone and unresponsive when prompted. It does appear that when Student pays attention that Student is able to do the work assigned to him/her. (Witness 3's testimony, Respondent's Exhibit 5)
36. On March 20, 2024, DCPS found the Student ineligible for special education under the SLD and OHI classifications. The Student was in attendance and became visibly upset when the decision was announced. Student also insisted that he/she had not been consistently receiving his/her specialized instruction since he/she enrolled at School A. The School A social worker dissented from the decision and submitted a written objection

to the ineligibility determination. School A provided Petitioner a PWN following the meeting, acknowledging receipt of the IEE and the social worker's dissent. (Respondent's Exhibit 15, Petitioner's Exhibit 23)

37. On March 28, 2024, Petitioner's counsel sent DCPS a formal record request. (Petitioner's Exhibits 9, 10)
38. On April 5, 2024, Petitioner filed her DPC, and pursuant to stay-put protections, School A has continued to provide Student services based on the Student's IEP. (Petitioner's Exhibit 1)
39. DCPS provided Petitioner records on April 11, 2024. (Respondent's Exhibit 42)
40. During SY 2022-2023, Student passed all classes and earned the final grade of A or B for the majority of courses; however, Student earned a C in Anatomy and Physiology, D+ in Algebra II and Trigonometry, and F in Science and Technology and Go-Go Human Rights and C+ in Public Speaking. During SY 2023-2024, Student earned As in the first three reporting periods in all courses. Student is slated to graduate with a high school diploma at the end of SY [REDACTED]. (Petitioner's testimony, Respondent's Exhibit 18, 19, 20)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioner held the burden of persuasion on all issues adjudicated. ⁶ The burden of persuasion shall be met by a preponderance of the evidence.

⁶ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. §

The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student a FAPE by failing to find Student eligible under the disability classification of OHI and/or SLD at the March 20, 2024, eligibility meeting despite the record supporting those classifications and the school social worker dissenting from the decision in writing?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to find that Student continued to be eligible for special education under the SLD disability classification.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

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

1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

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

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

H., 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

IDEA requires that upon completion of an eligibility evaluation, the LEA eligibility team, including the parents, determines whether the child is a child with an IDEA disability who, by reason thereof, needs special education and related services. See 34 C.F.R. § 300.8. Regardless of the disability classification for special education eligibility relied upon by the LEA, the LEA must ensure that IEP special education and related services are tailored to the unique needs of each child. See *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017).

IDEA does not require school districts to classify a student with a disability in a particular category or categories. See, e.g. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *Lauren C. by & through Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 377 (5th Cir. 2018) (IDEA promises--a FAPE--regardless of child's diagnosis.)

As far as the identification of the student's disability classification is concerned, "the particular disability diagnosis affixed to a child in an IEP, will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs." *Fort Osage R-I School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011).

34 CFR § 300.306 provides: (a) General. Upon completion of the administration of assessments and other evaluation measures— (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. (b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part— (1) If the determinant factor for that determination is— (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA); (ii) Lack of appropriate instruction in math; or (iii) Limited English proficiency; and (2) If the child does not otherwise meet the eligibility criteria under § 300.8(a). (c) Procedures for determining eligibility and educational need. (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must— (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered. (2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.320 through 300.324.

34 CFR § 300.307 provides: (a) General. A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State— (1) Must not require the use of a severe discrepancy

between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10); (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10). (b) Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

Petitioner asserts that the data available at the March 20, 2024, eligibility meeting, based on the ADHD diagnosis from the IEE and the observations and written dissent of the School's A social worker, established continuing concerns, including an FSIQ of 74 and the Student's challenges with executive functioning and academic skills and the explicit diagnosis of SLD with impairments in math, reading, and written expression, maintained by history.

The evidence demonstrates that in the eligibility determination, the School A team members believed that Student no longer met the criteria for eligibility under the SLD. In addition, the School A team members, save the School A social worker, believed that Student also did not meet the criteria for the OHI disability classification, principally because Student has been able to earn above average grades, even though Student takes limited advantage of the specialized instruction support that Student is provided both in class and outside of class. The School A social worker expressed her dissent to the ineligibility determination during the meeting and in a letter submitted after the meeting.

The evidence demonstrates that the DCPS psychologist, in her review of the IEE and in the eligibility meeting, considered each criteria factor in DCPS's guidelines in determining Student's continued eligibility under the SLD classification, and she concluded that the Student did not meet any of any criteria for SLD.

The DCPS psychologist noted, inter alia, that "Student's overall cumulative GPA is 3.48. He/She has performed above district standards in the ANet ELA (curriculum-based measurement). Although there is evidence that Student struggled with math during the 2022-2023 school year, it appears that his/her attendance may have negatively impacted his/her performance in that class. He/She has performed well in the year prior, and currently, he/she has earned an A in his/her Probability/Statistics course... Student has made exceptional progress and has an overall cumulative average of 3.48. Additionally, he/she has exceeded district expectations in the 2021 ELA curriculum-based measurement... There is no evident pattern of strength and weakness in performance that is relevant to the identification of a specific learning disability... He/she has earned straight A's on his/her current progress report..."

Although in her IEE review report, the DCPS psychologist noted that MDT would make the final determination of Student's eligibility for services and whether Student's current academic setting is appropriate, the School A members of the team seemed to have followed the DCPS psychologist conclusions that Student grade performance did not support a finding that Student was continued to meet the criteria for SLD and was in need of specialized instruction.

However, the evidence demonstrated several factors that weighed against the conclusion that Student no longer needed specialized instruction and supported the conclusion that Student

remained eligible under the SLD classification.

The IEE noted that Student's reading and written language scores were average, but Student's math scores were low average. Student's cognitive scores were significantly lower than Student's prior testing, but the independent evaluator could not identify a reason for the drop in scores. The independent evaluator, by history, diagnosed Student with Attention Deficit Hyperactivity Disorder ("ADHD"), a specific learning disorder, generalized anxiety disorder, and major depressive disorder.

There was testimony from the School A social worker that Student does not interact with other peers and seems to have limited interaction with teachers and completes work for classes either during advisory periods at school with help of the special education teacher or with help from Student's mother at home. Student often missed classes and instead went to the School A wellness center and preferred to be alone. The DCPS witnesses credibly testified, which was confirmed by Petitioner's witnesses, that the Student is provided extended time to complete assignments. Student and Petitioner credibly testified that Student is required to complete less work than is required of most students in the general education classes, and that is principally the reason that Student has been able to earn the above-average grades that Student demonstrated.

Based upon the Student's IEP progress reports for both SY 2022-2023 Student made progress in the academic IEP goals, but the goals were never mastered. In addition, the progress report for SY 2023-2024 demonstrates that some of the IEP goals were never introduced.

The School A psychologist relied totally upon the Student's ability to earn above-average grades as the reason that the Student no longer qualified for the SLD classification. However, there was no explanation at the eligibility meeting or evidence presented at the hearing to explain why Student had never mastered IEP goals and to counter the testimony that the principal reason Student earned above-average grades despite his/her reluctance to take full advantage of the specialized instruction was available to him/her was that Student was not required to meet the same academic demands as Student's non-disabled peers. Absent a cogent explanation by DCPS of these factors, the IHO must conclude that there was insufficient evidence to support a conclusion that Student was no longer in need of specialized instruction and was no longer eligible under the SLD classification.

Although Petitioner asserted that Student could have also been found eligible under the OHI classification, there was no history of Student having been previously found eligible under that classification. Although there was testimony that Student had been diagnosed with ADHD by history and that Student often paid no pay attention in class, there was insufficient evidence to support and finding that Student should have been found eligible under the OHI classification. Despite the School A social worker's dissent at the eligibility meeting, her testimony principally supported the Student's continued need for behavior support services. There was no direct testimony that the Student's ADHD was impacting the Student in the general education setting. The IHO concludes that Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 2: Did DCPS deny Student a FAPE by failing to implement the Student's IEP during SY 2022-2023 and SY 2023-2024 and not providing consistent specialized instruction?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that School A did not provide Student consistent specialized instruction.

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

A school district "must ensure that ... special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts ... have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.'" *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)). *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 at 144 (D.D.C. 2018)

The evidence demonstrates that Student often missed classes and instead went to the School A wellness center and preferred to be alone. Student did not interact with other peers and seemed to have limited interaction with teachers and completed work for classes either during advisory periods at school with the help of the special education teacher or with help from the Student's mother at home.

The School A social worker testified that Student is sometimes provided support from the special education teacher during the advisory period. The DCPS witnesses credibly testified that Student's special education case manager worked with Student in his/her ELA class and in the learning lab. He would offer support and provide it when Students needed it. Most of the time, another special education teacher provided Student support for math.

The evidence demonstrates that Student's case manager had concerns about the Student's

engagement in class and that he/she spent a lot of time on his/her electronic device. Most of the time, if the special education teacher asked Student if he/she needed help, he/she would say no. Nonetheless, Student did well in most classes. The special education teacher created graphic organizers and read to Student for clarification when he/she was anxious.

The evidence also demonstrated that in the learning lab, there were two special education teachers, and there were usually four special teachers who touched base with all students with IEPs. The DCPS witnesses credibly testified that although Student was being provided with specialized instruction services, Student did not like the way the services were being provided and complained that the services were inadequate.

Although Petitioner and Student testified that Student was not provided any specialized instruction during SY 2022-2023 and SY 2023-2024, the IHO did not find that testimony credible. There was no indication that Petitioner had ever personally observed Student's instruction and how it was being delivered. Although Student testified that he/she received no specialized instruction, he/she acknowledged that he/she knew who his/her special education teachers were and that they were routinely in the classroom, but they did not provide him/her exclusive attention.

The DCPS witnesses, including the School A social worker, indicated that Student was provided assistance from a special education teacher in the learning lab and that the special education teachers were in and supporting the Student in Student's ELA and math classes. Student's IEP did not require that Student have one-to-one instruction from a special education teacher. Student's apparently was under the mistaken impression that if a special education teacher was in his/her classroom the teacher was there to support only him/her. In addition, the School special education teacher credibly testified that Student, when offered support in the classroom, would refuse it and sometimes would leave the class with a flash pass when redirected to attend class.

Based upon this testimony, the IHO concludes School A consistently made specialized instruction available to Student consistent with Student's IEP. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that School A failed to implement Student's IEP during SY 2022-2023, and SY 2023-2024, except for the duration following the finding of ineligibility and when the services resumed under stay put protections.

ISSUE 3: Did DCPS deny Student a FAPE by failing to evaluate and/or reevaluate Student at the time when Student's triennial evaluation was due January 28, 2023?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence of a denial of a FAPE by failing to evaluate or reevaluate Student at the time of Student's triennial evaluation.

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

general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5A § 3006.7(a).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5A § 3006.7(f).

34 C.F.R. § 300.303 provides:

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section--

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

Petitioner asserts that DCPS convened a meeting in February 2023 to discuss Student's triennial evaluation process, and she was inappropriately excluded from the meeting. Petitioner further asserts that in August 2023, after the triennial was due, DCPS held another meeting at which the team did not authorize a new psychological evaluation and that Petitioner was forced to obtain an independent evaluation. However, the evidence belies this assertion.

The evidence demonstrates that there was no AED meeting held in February 2023 from which Petitioner was excluded. Based upon Student's January 2020 eligibility determination Student's triennial evaluation was due in January 2023. School A provided Petitioner draft evaluation documents for an anticipated AED meeting, and Petitioner provided DCPS edits of the document along with a request for education Student's records. In February 2023 Student's special education case manager contacted Petitioner regarding convening an AED meeting for Student. Although there was email correspondence between Petitioner and School A and then later between Petitioner's attorney and DCPS's attorney, there was no action on Student's triennial evaluation until June 2023.

An AED meeting was ultimately held in August 2023, at which School A proposed to conduct a psychological evaluation to which Petitioner initially consented. However, Petitioner later withdrew her consent because she had already initiated an independent evaluation with CNMC and informed School A. The IEE was conducted in September 2023 and provided to DCPS. A DCPS psychologist reviewed the IEE, and a team, including Petitioner and her attorney, reviewed the IEE in a meeting in November 2023.

Although Petitioner presented an expert witness who testified that the delay in conducting a psychological evaluation was a denial of a FAPE, there is no legal requirement for a psychological evaluation at the time of a student's reevaluation. IDEA provides that a variety of assessment tools and strategies should be used in evaluating a student; however, IDEA does not mandate any particular assessment or evaluation.

IDEA mandates that must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. Although there was no formal agreement between Petitioner and School A to delay Student's triennial evaluation, the evidence demonstrates that School A provided Petitioner an AED document in early 2023 that included evaluative data regarding Student's academic performance, and there was communication between Petitioner and School A regarding the AED meeting and later between the parties' attorneys. Ultimately, that data was reviewed at Student's June 2023 IEP meeting and at the August 2023 AED meeting.

Petitioner's expert witnesses' testimony and that of Petitioner and Student were insufficient to demonstrate that there was any material harm to Student due to any delay in a team reviewing the AED or for DCPS not conducting a psychological evaluation prior to its offer to do so at the August 2023, meeting. Nor was there sufficient evidence that the delay impeded Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused Student a deprivation of educational benefits. Consequently, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 4: Did DCPS deny Student a FAPE by failing to provide Petitioner full access to Student's educational records following the December 5, 2023, and March 28, 2024, requests?

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

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

review the records"; and (3) the "right to have a representative of the parent inspect and review the records." Id. § 300.613 (b).

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

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

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

Petitioner's counsel acknowledged at the outset of the hearing that DCPS had provided Petitioner with all requested documents by the time of the hearing. However, Petitioner still maintained that there had been a denial of a FAPE because of the delay in DCPS providing the records.

Although Petitioner testified that School A's delay in providing all of Student's educational records caused her to not be adequately informed of Student's school performance, Petitioner offered no testimony about any particular educational record that she was provided late that resulted in her being unaware of Student's academic or social-emotional progress, or in her being inadequately prepared to engage in any meeting. Absent testimony to that effect, the IHO concludes that there was insufficient evidence that DCPS's delay in providing all Student's educational records impeded Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused Student a deprivation of educational benefits. Consequently, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. See 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The IHO has concluded that School A denied Student a FAPE in failing to timely evaluate Student and determine eligibility.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Petitioner requested the compensatory education included in her educational advocate's proposal. Petitioner's educational advocate asserted inappropriately that Student should be compensated for denials of FAPE that were not substantiated. Consequently, the IHO found the proposal to be grossly overstated. Absent a factual basis to substantiate a specific compensatory award, the IHO directs in the order below that DCPS fund an IEE and grants Petitioner authorization to pursue compensatory services.

ORDER:

1. DCPS shall, within ten (10) business days of the issuance of this order, reinstate Student's eligibility for special education under the SLD disability classification effective March 20, 2024, until Student's graduation with a high school diploma at the end of SY [REDACTED].
2. DCPS shall, within ten (10) business days of the issuance of this order, provide Petitioner authorization to obtain an independent evaluation (IEE) to determine appropriate compensatory education for the Student being without special education services from the period Student was determined ineligible on March 20, 2024, until the time that special education services were reinstated based upon stay-put protections.
3. DCPS shall, within ten (10) business days of receipt from Petitioner of the IEE report mentioned in provision # 2 above, engage with Petitioner to determine the appropriate compensatory services that Student will be provided.
4. Petitioner is hereby authorized to seek compensatory education based upon the IEE mentioned in provision #2 above for any services missed in a subsequent due process complaint if necessary.
5. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Impartial Hearing Officer
Date: June 29, 2024

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