

**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
March 27, 2021

<i>Student</i> , ¹)	Case No.: 2020-0221
through <i>Parents</i> ,)	
<i>Petitioners</i> ,)	Date Issued: 3/27/21
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	3/10/21, 3/11/21 & 3/17/21
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, Student’s Parents, 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 lack of appropriate Individualized Education Programs (“IEPs”), failure to implement an IEP, and failure to include Parent in the IEP team. DCPS responded that Student’s IEPs were appropriate and implemented, and that Parent failed to participate when invited.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 12/31/20, the case was assigned to the undersigned on 1/4/21. Respondent filed a response on 1/12/21, and did not challenge jurisdiction. A resolution meeting was held on 1/22/21, which did not resolve the dispute or shorten the 30-day resolution period, which ended on 1/30/21. A final decision in this

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

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matter must be reached no later than 45 days following the end of the resolution period as extended by a 14-day continuance, which requires a Hearing Officer Determination (“HOD”) by 3/30/21.

The prehearing conference was held on 2/23/21 and the Prehearing Order was issued that same day addressing, among other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 3/10/21, 3/11/21 and 3/17/21 and was open to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. *Father*, who had been added as a Petitioner on 3/9/21 due to the expected unavailability of *Mother*, participated for a portion of the first day of the hearing; *Mother* did not participate. Neither testified, despite a Notice to Appear issued for *Mother* on behalf of *Respondent*.

Petitioners’ Disclosures, submitted on 3/3/21, contained documents P1 through P48, which were all admitted into evidence over certain objections. On 3/16/21, Petitioners submitted 10 additional documents as rebuttal evidence, numbered Preb1 to Preb10. Respondent objected to all of Petitioners’ rebuttal exhibits except for Preb3p33-34.² Preb3, Preb4, Preb5, and Preb10 were admitted into evidence over objection.

Respondent’s Disclosures, also submitted on 3/3/21, contained documents R1 through R44; R45 and R46 (the transcripts of the prior hearing) were submitted during the hearing without objection when they became available. Of Respondent’s documents, only R10, R11, R29, R30, R33, R35, R36, R40, R42, R43, R44, R45, and R 46 were offered by Respondent at the due process hearing; all of Respondent’s offered documents were admitted into evidence without objection.

Petitioners’ counsel presented 3 witnesses in Petitioners’ case-in-chief (*see Appendix A*):

1. *Educational Advocate A* (qualified without objection as an expert in Special Education and IEP Programming and Placement)
2. *Probation Officer*
3. *Educational Advocate B* (qualified without objection as an expert in Special Education and IEP Programming and Placement)

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

1. *OSSE Special Program Manager*

² All evidentiary documents herein are consecutively Bates numbered throughout, so are referenced by a “P” (for Petitioners), “R” (for Respondent), or “Preb” (for Petitioners rebuttal) followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number(s) with any leading zeros omitted.

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2. *Teacher at Public School*
3. *Special Education Coordinator at Public School (qualified without objection as an expert in LEA Administration and Special Education)*
4. *School Psychologist (qualified without objection as an expert in Programming and Placement)*

Petitioners' counsel recalled Educational Advocate B as the sole rebuttal witness.

At the end of Petitioners' case-in-chief, Respondent made an oral motion for a directed verdict on Issue 3, which the undersigned took under advisement and hereby denies based on testimony and documentary evidence and the legal analysis set forth below.

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

Issue 1: Whether DCPS denied Student a FAPE by failing to develop and/or provide an appropriate IEP and/or placement from 4/27/20 to the present due to (a) inappropriate baselines and present levels of performance ("PLOPs") with unattainable goals, (b) lack of a dedicated aide (until 10/29/20), (c) insufficient hours of specialized instruction, with an insufficiently restrictive placement, (d) lack of a transition plan, (e) no mention of an intellectual disability ("ID") diagnosis, (f) failure to address specific academic or cognitive deficits, and (g) other errors, such as the absence of any breaks in the IEP; Student has continued to fail classes and make no progress on IEP goals. (*Respondent has the burden of persuasion, if Petitioners establish a prima facie case.*)

Issue 2: Whether DCPS denied a FAPE by failing to implement Student's IEP and provide a dedicated aide from 10/29/20 forward, which Student needed to access education; the school promised a dedicated aide from day 1 of 2020/21,³ but Student has not worked with a dedicated aide since the school year began. (*Petitioners have the burden of persuasion on this issue.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to include Parent (Mother) as a necessary participant on the IEP team.⁴ (*Petitioners have the burden of persuasion.*)

The relief requested by Petitioners is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall amend the IEP with the assistance of an IEP specialist from Central Office in line with the 6/5/20 HOD to include (a) appropriate disability

³ All dates in the format "2020/21" refer to school years.

⁴ At the beginning of the due process hearing, Petitioners narrowed Issue 3 by withdrawing without prejudice the phrase, "not providing Parent the opportunity to participate in the 4/27/20 IEP meeting" and making the other minor changes shown above.

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classification, (b) behavioral considerations, (c) PLOPs, (d) baselines, (e) goals, (f) extended school year (“ESY”), (g) accommodations, and (h) a transition plan.

3. DCPS shall provide appropriate compensatory education for any denials of FAPE.⁵
4. Any other just and reasonable relief.

Counsel for the parties agreed on the following stipulations prior to testimony at the beginning of the due process hearing:

1. *Email-1@gmail.com*, *Email-2@gmail.com*, and *Email-3@gmail.com* are and/or have been Mother’s emails in 2019 to date.
2. Mother was the filing and claiming Petitioner for the complaint in this matter, filed and served on or about 12/31/20.
3. Mother has been the primary parent contact for Student’s IEP, meetings, and placement since at least January 2020.
4. Mother confirmed the April 2020 meeting with the DCPS LEA representative in April 2020.
5. Mother was unavailable for contact and decision-making for Student in July and August 2020, due to Mother’s incarceration.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁶ are as follows:

⁵ With regard to any request for compensatory education to be awarded in this HOD, Petitioners’ counsel was put on notice at the prehearing conference that Petitioners must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was invited to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁶ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

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1. Introduction. Student is a resident of the District of Columbia; Petitioners are Student's Parents.⁷ Student is *Age*, *Gender* and in *Grade* at Public School.⁸ Student has faced many challenges from the beginning: exposed to cannabis and PCP *in utero*; history of juvenile delinquency; both Parents incarcerated at various times, so "shuffled" between several family members and friends and to group homes; and family history of mental health issues, including Mother's bipolar disorder.⁹ Student struggles with self-regulation and impulse control; Student avoids attending class, is defiant and very noncompliant.¹⁰ Student "is in a hole; we're trying to figure out how to save [Student]."¹¹ A juvenile judge, wraparound coordinator, Community-Based Intervention ("CBI") workers, Parent's team, and others are seeking to bring more stability to Student's life.¹²

2. Student's most recent comprehensive psychological evaluation dated 7/1/19 showed that Student was 4 to 5 years below grade level academically at that time, with a percentile rank on almost all Woodcock-Johnson IV ("WJ-IV") clusters/tests of <0.1.¹³ Student is far below grade level in all academic areas, with the WJ-IV showing global deficits across all areas in the severely deficient range.¹⁴ Student's Full Scale IQ ("FSIQ") ranged from 67 to 70, in the very low range.¹⁵ Student is resistant to testing.¹⁶ Student was retained in the same grade in 2019/20, after failing the grade in 2018/19.¹⁷ Student continues to fail the majority of classes and made "no progress" on all IEP goals for the first half of 2020/21.¹⁸

3. IEPs. All of Student's IEPs have been based on the disability classification of emotional disturbance ("ED").¹⁹ Student was diagnosed with ID (intellectual disability) by the 7/1/19 comprehensive psychological evaluation; School Psychologist considered Student's adaptive functioning scores in the Adaptive Behavior Assessment System 3rd Edition ("ABAS-3") to be too high for a disability classification of ID.²⁰

4. Student's initial IEP was dated 9/17/19 and provided 5 hours per week of specialized instruction in reading and 5 hours per week of specialized instruction in math, and 240 minutes per week of behavioral support services ("BSS"), all outside general education.²¹

⁷ P10p124.

⁸ P11p139.

⁹ P15p195-96; P47p377; Probation Officer (3 shelters or group homes).

¹⁰ P16p193; P47p377.

¹¹ P24p257.

¹² P25p266; Probation Officer (even less stability during pandemic).

¹³ P16p202-03; P48p385.

¹⁴ P16p202-03,215; P48p385.

¹⁵ P16p201,215.

¹⁶ P47p378.

¹⁷ P17p225.

¹⁸ P48p385.

¹⁹ P8p93; P9p109; P10;124; P11p139; P47p378.

²⁰ P16p213,218; School Psychologist.

²¹ P8p100 (the BSS apparently was intended to be 240 minutes per month, but the error is repeated on each IEP, despite reference to minutes per month by school personnel involved;

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Student's initial IEP was amended on 12/9/19 to increase specialized instruction to 20 hours per week and change placement to a Behavior & Education Support ("BES") classroom, but did not review or modify other aspects of the initial IEP.²²

5. In a due process hearing held on 5/20/20 and 5/22/20, the prior Hearing Officer found the 9/17/19 IEP insufficient as it provided only 10 hours per week of specialized instruction outside general education and had other shortcomings, included PLOPs, goals and transition plan, which were not corrected in the 12/9/19 IEP amendment; both IEPs were held to be a denial of FAPE.²³

6. Student's next IEP was dated 4/27/20 and made few changes from the 9/17/19 IEP or 12/9/19 amended IEP.²⁴ DCPS asserted that the finalized 4/27/20 IEP was provided to Parent immediately following a 4/27/20 IEP meeting; Petitioners asserted that it was not provided until October.²⁵ The 4/27/20 IEP was not at issue in the prior due process hearing (held on 5/20/20 and 5/22/20); the prior Hearing Officer found that the parties "disputed the purpose" of the 4/27/20 meeting and it was terminated without reviewing the "proposed revised IEP."²⁶ Special Education Coordinator acknowledged that the 4/27/20 IEP was a minor revision of the prior IEP, asserting there was no new information due to Student not going to school.²⁷

7. Student's final IEP at issue was dated 10/29/20 (with a barcode creation date of 11/19/20) and increased specialized instruction outside general education to 27.5 hours per week, which the least restrictive environment ("LRE") section noted was because Student required a separate day school to receive support throughout the day.²⁸ The 10/29/20 IEP contained minimal changes from the 2019 IEPs which were found insufficient in the May 2020 due process hearing.²⁹

8. IEP Team Meetings. Interactions were often very hostile, even unprofessional, between the professionals (including school personnel) on both sides of the case; Special Education Coordinator refused to meet with Mother's counsel, respond to counsel's "email

see P47p378 (School Psychologist); P26p270 (PWN); P32p302 (Petitioners flagged issue on 4/30/20)).

²² P9p109,115.

²³ P3p33,34,37 (6/5/20 HOD; the 6/5/20 HOD at P3 was an "interim decision," as the parties submitted compensatory education proposals based on the interim decision prior to the "final" HOD on 7/10/20 at P4.).

²⁴ P10.

²⁵ P35p324-25 (4/27/20 IEP "created without any parental notification or participation"); P33p315; Educational Advocate A; Special Education Coordinator.

²⁶ P3p26, para. 33; P35p324.

²⁷ Special Education Coordinator.

²⁸ P11p139,145,146; P26p270 (PWN notes that the parties agreed in the 10/27/20 IEP review meeting that Student required a more restrictive setting in a separate nonpublic day school); Special Education Coordinator.

²⁹ P48p383-84.

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chains,” or communicate with anyone on Mother’s team.³⁰ Special Education Coordinator scheduled an 4/22/20 meeting without checking with Mother’s advocates, who were not available; the meeting date was eventually shifted to 4/27/20.³¹ Special Education Coordinator was willing to wait only 10 minutes for Mother at the 4/27/20 IEP team meeting; when she did not connect, the meeting was ended.³² The letters of invitation (“LOIs”) for the 4/22/20 and 4/27/20 meetings did not mention IEP review.³³ Petitioners’ counsel did not know the purpose of the 4/27/20 meeting and did not receive a copy of the draft IEP prior to the meeting.³⁴ When Mother’s advocate emailed that Parent did not participate and the IEP was not reviewed at the 4/27/20 meeting, Respondent’s counsel responded that “the meeting did not occur” and that “if the IEP was not reviewed/revised and discussed, you should ensure you bring your concerns...at any subsequent IEP meeting...to raise those concerns so they can be discussed by the team....”³⁵ On 4/29/20, Special Education Coordinator emailed Mother, Mother’s counsel and educational advocate an IEP that Special Education Coordinator later asserted was finalized on 4/27/20 and a prior written notice (“PWN”) completed on 4/27/20.³⁶

9. On 4/30/20 Mother’s advocate sent the school team a very detailed letter raising dozens of issues in the IEP that was sent by Special Education Coordinator on 4/29/20, and raised legitimate concerns that PLOPs were repetitive and insufficient as they did not include the information that they should have; academic annual goals were repetitive and may have been too difficult given Student’s PLOPs; baselines were repetitive and not measurable and needed to be updated after 6 months; the IEP should have included breaks, which Student was known to need; and Student’s transition assessments had not been attempted since 9/17/19.³⁷

10. Petitioners’ counsel did not know the purpose of the 10/29/20 meeting either; it was not clear the meeting was of the IEP team.³⁸ DCPS agreed to move forward and place Student in a nonpublic school; DCPS also stated that it was adding a dedicated aide to the IEP.³⁹ No draft IEP was provided before the 10/29/20 meeting and the 10/29/20 IEP was never reviewed by the IEP Team.⁴⁰

³⁰ P24p259; P27p273,275,277; P31p297; P31p298; P34p317-18 (only occasional mention was made of the importance of Student’s “educational welfare” and keeping “our eye on the ball”).

³¹ Educational Advocate A; P28p284-85; P33p307.

³² P22p249.

³³ Educational Advocate A (LOI documents disclosed in prior due process hearing).

³⁴ P22p249-50; P29p288.

³⁵ P33p308.

³⁶ P33p314-15; Special Education Coordinator.

³⁷ P32p300-02.

³⁸ Educational Advocate B.

³⁹ P23p252.

⁴⁰ Educational Advocate B; P35p321 (IEP was not provided to participants until 10 minutes after the meeting began).

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11. Nonpublic School. DCPS agreed to a nonpublic day school for Student during the previous due process hearing.⁴¹ Mother was unavailable during July and August 2020 due to incarceration, which Special Education Coordinator found out after the fact.⁴² DCPS sent a letter of referral to OSSE on 12/7/20 seeking a more restrictive school setting.⁴³ OSSE took ID into consideration along with Student's ED classification when seeking suitable nonpublic schools to permit all of Student's needs to be addressed.⁴⁴ Mother declined to consider certain nonpublic schools and geographic areas, slowing the process.⁴⁵ Concerns were raised about whether Student needs or will need a residential placement. P24p257, 258. On the final day of hearing, 3/17/21, counsel noted on the record that a nonpublic school had accepted Student, OSSE was issuing a location of services ("LOS") assignment letter, and Student was ready to engage and work hard at the new school.⁴⁶

12. Present Levels. The IEP PLOPs were largely mere statements of grade level equivalents, even though there was extensive information available in the 7/1/19 comprehensive psychological evaluation.⁴⁷ The math PLOP was the same in the 4/27/20 and 10/29/20 IEPs, and relied on a single Woodcock-Johnson score repeated from the 9/17/19 IEP.⁴⁸ The reading PLOP was the same in the 9/17/19, 4/27/20 and 10/29/20 IEPs with a single grade level score and erroneous inclusion of the written expression grade level, with the 4/27/20 and 10/29/20 IEPs both adding that Student "was not prest (sic) for the standardized reding (sic) test."⁴⁹ The written expression PLOP was the same in the 9/17/19, 4/27/20 and 10/29/20 IEPs with a single grade level score and erroneous inclusion of the reading grade level, with the 4/27/20 and 10/29/20 IEPs both adding that Student "refused to complete th (sic) wriiting (sic) assignments (sic)."⁵⁰

13. Goals. The academic annual goals in the 9/17/19 IEP were merely copied from the Common Core State Standards for typically developing students, so did not fit Student without modification that was not provided.⁵¹ The first math goal in the 9/17/19, 4/27/20 and 10/29/20 IEPs was identical and required using "ratio and rate reasoning to solve real world and mathematical problems"; the other math goal was identical except for the addition in the 10/29/20 IEP of the phrase, "with 800% (sic) accuracy in 8 out of 10 trials" and required Student to "[i]nterpret and compute quotients of fractions, and solve word problems involving division of fractions by fractions."⁵² Both reading goals in all 3 IEPs were identical and required citing "textual evidence of what the text says explicitly as well

⁴¹ Special Education Coordinator.

⁴² Special Education Coordinator; Stipulation 5.

⁴³ R33p197.

⁴⁴ OSSE Special Program Manager.

⁴⁵ R44p379; R33.

⁴⁶ Parties' counsel.

⁴⁷ P16; P3p35.

⁴⁸ P10p126; P11p141; P8p96.

⁴⁹ P8p97; P10p127; P11p142.

⁵⁰ *Id.*

⁵¹ P3p36.

⁵² P8p96; P10p126; P11p141.

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as inferences” and determining “a central idea of a text and how it is conveyed through particular details....”⁵³ The single written expression goal in all 3 IEPs was identical, and provided only for “clear and coherent writing.”⁵⁴

14. Baselines. The baseline for the first math goal in the 9/17/19, 4/27/20 and 10/29/20 IEPs was identical, apart from omitting an extraneous word from the 9/17/19 IEP, and stated that Student “understands what a rate is and is able to give a ratio”; the baseline for the other math goal stated that Student “is able to recognize fractions and use them in a word problem” which was identical in all 3 IEPs, except for the inclusion in the 4/27/20 and 10/29/20 IEPs of an identical sentence that Student had an “understanding (sic) of what division is.”⁵⁵ The baselines for both reading goals in all 3 IEPs were identical; the first baseline stated that Student “is able to read with comprehension with teacher support.”⁵⁶ The baseline for the single written expression goal in all 3 IEPs was identical, except the 4/27/20 and 10/29/20 IEPs added an additional phrase, which stated in full that Student “struggles with grammatical errors and connecting [Student’s] ideas.”⁵⁷

15. Dedicated Aide. Based on the testimony and evidence at the May 2020 due process hearing, the prior Hearing Officer ordered DCPS to provide Student a dedicated aide in the BES classroom, although the effective date was to depend on the reopening of DCPS classrooms.⁵⁸ To stay on task, Student needs a virtual dedicated aide 20 hours per week while in remote learning and an in-person dedicated aide 20 hours per week when in school.⁵⁹ Student has still not been provided a dedicated aide.⁶⁰

16. Transition Plan. DCPS asserted that the 9/17/19 IEP Post-Secondary Transition Plan could not be completed because Student would not cooperate, but the lack of a completed transition plan was found in the 6/5/20 HOD to violate the District’s transition services requirement.⁶¹ On 4/20/20, DCPS asserted that due to Covid Student did not have an opportunity to complete an updated Transition Plan.⁶² The transition plans in the 9/17/19, 4/27/20 and 10/29/20 IEPs were virtually identical.⁶³

17. Attendance. Student struggled to attend school/class regularly, in part due to bullying, but as of 2/5/21 engaged more openly in therapeutic sessions compared to

⁵³ P8p97; P10p127; P11p142.

⁵⁴ P8p97; P10p128; P11p143.

⁵⁵ P8p96; P10p126; P11p141.

⁵⁶ P8p97; P10p127; P11p142.

⁵⁷ P8p98; P10p128; P11p143.

⁵⁸ P3p41.

⁵⁹ Educational Advocate A.

⁶⁰ P48p386 (3/3/21); P43p367 (Student “desperately needs a dedicated aide” to help Student stay on task); P38p345 (11/20/20); P40p352 (12/1/20).

⁶¹ P3p36.

⁶² P30p294.

⁶³ P8p104-06; P10p134-36; P11p149-51.

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2019/20.⁶⁴ Student was recently ordered back to live with Mother, but after a week Student ran away.⁶⁵

18. Other Services/Compensatory Education. The 7/10/20 HOD awarded Student 720 hours of academic tutoring and 60 hours of counseling/therapy, none of which has yet been used.⁶⁶ Virtual tutoring has been hard for Student; Mother's team has not been able to start Student's tutoring, and believes no more tutoring is needed now as compensatory education.⁶⁷ The 6/5/20 HOD ordered DCPS within 21 calendar days, or within a reasonable period of time after DCPS school buildings are reopened, to convene Student's IEP team to review and revise, as appropriate, Student's IEP and educational placement.⁶⁸ To facilitate an appropriate IEP, the HOD ordered DCPS to assign a qualified specialist in IEP development and programming from DCPS's Central Office to work with the IEP team to provide guidance and support, noting that DCPS may only "provide input," as ultimately it is up to the IEP team, with Parent's participation, to develop Student's IEP.⁶⁹ The parties ultimately agreed to convene sooner than the buildings' reopening "as school building closures have continued on" due to the pandemic.⁷⁰

19. Student has been receiving significant services through CBI, with intensive community based mental health sessions 3-4 times per week; CSW 3-4 times per week; Probation Officer's office is in touch with Student 4 times per week; and there are other services throughout the week, including some that were at a "standstill" due to Covid, including substance abuse counseling.⁷¹ At the 12/16/20 OSSE placement meeting, the social worker stated that Student was responding better to virtual services than previously and that she had developed good rapport.⁷²

20. Petitioners' expert, Educational Advocate A, prepared a thorough compensatory education proposal and proposed 100 hours of music or related therapy to be completed within 3 years, 100 hours of tutoring/mentoring to be completed within 3 years, support by an IEP specialist from DCPS's Central Office, and certain steps once Student is placed at a nonpublic school.⁷³

⁶⁴ P13p178,179 ("Student does not go to class"); Probation Officer (poor attendance resulting in danger of failing SY).

⁶⁵ Probation Officer.

⁶⁶ School Psychologist (as of 3/17/21); P4p52.

⁶⁷ P25p267 (1/22/21).

⁶⁸ P3p44; P4p52 (final HOD).

⁶⁹ P3p44-45.

⁷⁰ P26p271.

⁷¹ P24p256.

⁷² P24p255; Educational Advocate A.

⁷³ P48p381-87.

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21. Student would likely benefit from a mentor who could provide additional support.⁷⁴ Traditional therapy has been hard for Student.⁷⁵ Educational Advocate A spoke with Student who is interested in additional supports; Student loves music and expressed interest in music therapy.⁷⁶ Student is calmed by listening to music, but may not be interested in working with a therapist.⁷⁷ School Psychologist expressed skepticism about music therapy.⁷⁸ Family therapy may be important in helping explore more effective ways of building healthy relationships.⁷⁹

22. School Psychologist believes that if compensatory education is required it would be desirable to provide parent counseling and training, as that could help provide more stability in Student's life, which is critical.⁸⁰ Counsel for both sides in the recent hearing supported the suggestion of parent counseling and training, which is an IDEA related service, although similar services are already being attempted.⁸¹

23. Educational Advocate A persuasively stated that, but for the denial of FAPE in the current case, Student would have demonstrated meaningful progress academically and behaviorally, instead of lack of progress or even regression shown since the prior case.⁸² Petitioners' compensatory education proposal would restore Student to where Student should be as best it can be determined.⁸³ School Psychologist criticized the 3-year timeframe for using any compensatory education awarded, noting that if Student will benefit from compensatory education the benefit is needed sooner than 3 years.⁸⁴

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*

⁷⁴ P16p223; P25p267 ("[m]entoring is critical"; "mentor would also be appropriate"); Educational Advocate A (mentoring is what is needed).

⁷⁵ P25p267; Probation Officer.

⁷⁶ Educational Advocate A.

⁷⁷ Probation Officer.

⁷⁸ School Psychologist.

⁷⁹ P16p216.

⁸⁰ School Psychologist.

⁸¹ Petitioners' counsel.

⁸² P48p387; Educational Advocate A.

⁸³ Educational Advocate A.

⁸⁴ School Psychologist.

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Columbia, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education”).

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

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

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

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

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an

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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).

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

Issue 1: *Whether DCPS denied Student a FAPE by failing to develop and/or provide an appropriate IEP and/or placement from 4/27/20 to the present due to (a) inappropriate baselines and PLOPs with unattainable goals, (b) lack of a dedicated aide (until 10/29/20), (c) insufficient hours of specialized instruction, with an insufficiently restrictive placement, (d) lack of a transition plan, (e) no mention of an ID diagnosis, (f) failure to address specific academic or cognitive deficits, and (g) other errors, such as the absence of any breaks in the IEP; Student has continued to fail classes and make no progress on IEP goals. (Respondent has the burden of persuasion, if Petitioners establish a prima facie case.)*

Petitioners established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which failed to meet its burden of persuasion on the issue, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z. B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of each IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z. B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

The appropriateness of Student’s IEPs is analyzed by considering the specific concerns raised by Petitioners, which are considered in turn.⁸⁵ *See* 34 C.F.R. § 300.320(a);

⁸⁵ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Procedural violations were raised and are discussed herein.

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Honig, 484 U.S. at 311. Notably, Petitioners allege that the same deficits continue in the 4/27/20 and 10/29/20 IEPs as previously were found by the 6/5/20 HOD in the 9/17/19 and 12/9/19 IEPs, in addition to other failures by DCPS.

(a) *Present Levels, Goals, Baselines*. Primary areas of concern with Student's initial IEP on 9/17/19 were inappropriate PLOPs, annual goals, and baselines. Inexplicably, despite the prior complaint raising issues and the HOD concluding that the 9/17/19 and 12/9/19 IEPs were not adequate in these areas, very little improvement was made and those concerns continue in the IEPs at issue here. Indeed, the 2019 IEPs were so lacking that the prior HOD ordered DCPS to bring in the resources of an expert from DCPS's Central Office to assist in developing an appropriate IEP. This was not done and Student's IEP remained deficient, so this Hearing Officer again orders that DCPS include an expert from DCPS's Central Office to correct Student's IEP and provide a FAPE. To be clear, this is not an action to enforce the prior HOD, but simply a repetition of the same measure that still needs to be taken to obtain an adequate IEP for Student.

Present Levels. The IDEA requires statements of present levels of academic achievement and functional performance ("PLOPs") in IEPs in 34 C.F.R. § 300.320(a)(1). The PLOPs here were largely statements of grade level equivalents, even though more extensive information was available in the 7/1/19 comprehensive psychological evaluation. The math PLOP was the same in the 4/27/20 and 10/29/20 IEPs, and relied on a single Woodcock-Johnson score repeated from the 9/17/19 IEP. The reading PLOP was the same in the 9/17/19, 4/27/20 and 10/29/20 IEPs with a single grade level score and erroneous inclusion of the written expression grade level, while the written expression PLOP was the same in the 9/17/19, 4/27/20 and 10/29/20 IEPs with a single grade level score and erroneous inclusion of the reading grade level. This is not sufficient and, as the prior HOD noted, the PLOP descriptions do not reflect "careful consideration of the child's present levels of achievement, disability and potential for growth." *Andrew F.*, 137 S. Ct. at 999.

Goals. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). While carrying over the same goals from year to year may indicate failure to make meaningful progress, *see Andrew F.*, 137 S. Ct. at 994, lack of progress is not necessarily the fault of IEPs. Here, however, the goals are not only repeated, but appear too difficult, when not meaningless. The math goals require using "ratio and rate reasoning to solve real world and mathematical problems" and to "[i]nterpret and compute quotients of fractions, and solve word problems involving division of fractions by fractions." Reading is similarly complex, while written expression merely has a single undefined goal of "clear and coherent writing." These goals are not adequate.

Baselines. While the IDEA does not expressly require "baselines" in IEPs, it does require a description of how progress toward meeting a student's IEP goals will be measured, in 34 C.F.R. § 300.320(a)(3). That measurement is typically in the form of baselines stating the level at which a student begins so one can determine whether the special education services provided were sufficient to bring about the desired improvement. Here, the baselines provided little value in providing a measurable way to determine Student's progress as they had little meaning and were generally not measurable. The math baselines stated that Student "understands what a rate is" and can "recognize fractions,"

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while the reading baselines stated that Student “is able to read with comprehension with teacher support,” and the other reading baseline asserted that Student “knows what the central idea is.” Student’s baseline in written expression was that Student struggles with grammatical errors and connecting ideas. These baselines, for a child who is at least 4-5 years below grade level, are not sufficient.

In short, the PLOPs, goals, and baselines were found inadequate by the prior HOD in Student’s 9/17/19 IEP and are largely repeated in the later IEPs; they fare no better here pursuant to a fresh review by the undersigned. These insufficient elements alone are sufficient to conclude below that Student’s 4/27/20 and 10/29/20 IEPs have denied Student a FAPE.

(b) *Dedicated Aide.* The prior HOD concluded that Student required a dedicated aide, with which this Hearing Officer concurs, given the many challenges faced by Student, particularly Student’s struggles with self-regulation and impulse control. *See, e.g., Rowley*, 458 U.S. at 203 (dedicated aide required if necessary “to permit the child to benefit educationally from [the IEP personalized] instruction”). Despite the 6/5/20 HOD clearly requiring a dedicated aide for Student, DCPS did not include the requirement in Student’s IEP until 10/29/20, a delay of months. DCPS argued in the current due process hearing that this Hearing Officer lacks authority to enforce the prior HOD and that in any case the prior HOD did not require implementation until a reasonable time after the reopening of DCPS school buildings. However, Petitioners did not bring the current case as an enforcement action seeking to implement the prior HOD’s provisions. Instead, considering freshly the dedicated aide issue, this Hearing Officer is persuaded that Student needed a dedicated aide and suffered from the lack of a dedicated aide for the period from the prior HOD until the 10/29/20 IEP, which contributes to the conclusion here that Student has been denied a FAPE due to a deficient IEP.

(c) *Specialized Instruction, Placement.* The amount of Student’s specialized instruction outside general education was increased from 10 to 20 hours per week in the 12/9/19 IEP amendment and Student was placed in the BES program. Student’s specialized instruction was further increased to 27.5 hours per week in the 10/29/20 IEP to accommodate placement in a separate nonpublic school, which the IEP team agreed to at that time. In addition, the parties agreed that Student needed to be placed in a nonpublic school in the compensatory education submissions in the prior hearing. However, despite agreeing that Student needed a nonpublic school, there was significant delay in referring the case to OSSE, which DCPS did not do until 12/7/20. This delay was explained in part by Mother’s unavailability in July and August 2020, but the delay from late October to early December was not adequately explained by DCPS and held Student back. DCPS must be held to account for its own actions and delays. *See, e.g., Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). Fortunately, at the beginning of the final day of hearing on 3/17/21, counsel noted on the record that a nonpublic school had accepted Student, OSSE was issuing an LOS assignment letter, and Student was ready to engage and work hard there.

(d) *Transition Plan.* The lack of a transition plan in Student’s 9/17/19 IEP was a clear problem in the prior proceeding, which has not been improved or even notably

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changed in the 4/27/20 or 10/29/20 IEPs. DCPS blames the pandemic, but there is no indication that any effort has been taken by DCPS on Student's transition plan and most of the dates were not even changed. While the IDEA transition provisions take effect after age 16, 34 C.F.R. § 300.322(b)(2), the D.C. regulations require that the first IEP in effect after a child with a disability reaches age 14 shall include specified transition assessments and services. *See* 5-E D.C.M.R. § 3009.6. A student's lack of cooperation does not relieve DCPS of its obligation to provide an appropriate IEP. *See Letter to Borucki*, 16 IDELR 884 (OSEP 4/11/90) (“[t]he obligation of States and school districts to provide appropriate educational services to eligible students with handicaps is equally applicable to cooperative and uncooperative students”); *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 27-28 (D.D.C. 2008) (Hearing Officer's conclusion that student could not be evaluated because the student was “not available for learning” due to skipping classes was “entirely without merit”). The lack of a completed transition plan continues to violate the transition services requirement.

(e) *ID Diagnosis*. Petitioners continue to raise concerns about Student not being classified as ID in addition to ED, despite the prior HOD holding that the IEP team's failure to classify Student as multiply disabled did not deny Student a FAPE. Pursuant to 20 U.S.C. § 1412(a)(3)(B), DCPS is not required to classify Student into a specific category, as the focus is on the adequacy of services. *See Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (child's identified needs, not disability category, determine the services to be provided); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (the IDEA “charges the school with developing an appropriate education, not with coming up with a proper label”). Here, OSSE Special Program Manager convincingly testified that OSSE was taking ID into consideration along with Student's ED classification when seeking suitable nonpublic schools for Student in order to permit all of Student's needs to be addressed. This meets the law's requirements, rather than a focus on labels.

(f) *Academic or Cognitive Deficits*. Petitioners next raise concerns about specific academic or cognitive deficits, which are similar to their concerns about ID not being included in the IEP. The undersigned recognizes Student's significant cognitive deficits with a FSIQ of only 67-70 and very serious academic deficits that make it difficult for Student to successfully engage at school and heighten the need for a nonpublic school and other elements of Student's IEP, as discussed herein.

(g) *Other Errors, such as Absence of Breaks*. Finally, Petitioners' advocate raised the lack of breaks in April 2020 as being a modification that was clearly needed on Student's IEPs, yet DCPS refused to make the change, which seems to the undersigned to illustrate the lack of needed cooperation and evidence of the ongoing battle between the professionals for the parties that has been detrimental to Student. The refusal to include breaks for Student as a classroom accommodation or other classroom aid/service contributes to this Hearing Officer's conclusion that Student's 4/27/20 and 10/29/20 IEPs were inadequate.

In sum, as the Court recently noted in *S.M. v. Dist. of Columbia*, CV 19-2096 (RC), 2020 WL 7230266, at *5 (D.D.C. 12/8/20), review of an IEP turns on whether it is reasonable, not whether it is ideal, *quoting Endrew F.*, 137 S. Ct. at 999. This Hearing Officer concludes that the 4/27/20 and 10/29/20 IEPs were not reasonable when developed

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due to the inappropriate PLOPs, goals, and baselines, lack of a dedicated aide prior to 10/29/20, lack of a transition plan, and lack of breaks. Taken together (or even considering some of the elements individually), the undersigned concludes that these shortcomings denied Student a FAPE as they did not enable Student to make reasonable progress in the circumstances, which contributes significantly to the award of compensatory education set forth below.

Issue 2: *Whether DCPS denied a FAPE by failing to implement Student's IEP and provide a dedicated aide from 10/29/20 forward, which Student needed to access education; the school promised a dedicated aide from day 1 of 2020/21, but Student has not worked with a dedicated aide since the school year began. (Petitioners have the burden of persuasion on this issue.)*

Petitioners met their burden on the lack of implementation of a dedicated aide for Student, which was required by the 10/29/20 IEP. 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*, 962 F. Supp. 2d at 268, quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Here, Student certainly faced challenges in school, and a dedicated aide might have been able to help Student surmount the challenges. Student's difficulties in distance learning were even more serious, which may also have made remote or virtual connection to a dedicated aide more difficult, as DCPS intimated. On the other hand, the dedicated aide might have been able to help Student surmount challenges with distance learning which might have made all the difference. *See Middleton*, 312 F. Supp. 3d at 144. With DCPS refusing to provide a dedicated aide at all for Student, there is no doubt that this is a substantive violation and a denial of FAPE, which contributes to the compensatory education award below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to include Parent (Mother) as a necessary participant on the IEP team. (Petitioners have the burden of persuasion.)*

Petitioners also met their burden of persuasion on this issue, as DCPS failed to include either Parent when creating IEPs without Parent's participation or input. The IDEA clearly requires parental involvement in IEP development. *See Andrew F.*, 137 S. Ct. at 999 (crafting an appropriate program of education contemplates the input of the child's parents or guardians); *Z.B. by & through Sanchez v. Dist. of Columbia*, 382 F. Supp. 3d 32,

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47 (D.D.C. 2019), and cases collected therein, *aff'd sub nom. Sanchez v. Dist. of Columbia*, 815 Fed. Appx. 559 (D.C. Cir. 2020), *cert. denied sub nom. Z.B. by & through Sanchez v. Dist. of Columbia*, 141 S. Ct. 375, 208 L. Ed. 2d 97 (2020) (the IDEA requires that a student's parents be part of the team that creates the student's IEP and determines the student's educational placement); *Lofton v. Dist. of Columbia*, 7 F. Supp. 3d 117, 123-24 n.6 (D.D.C. 2013) (the IDEA mandates that parents be allowed to meaningfully participate in the development of children's IEPs).

Due to the lack of cooperation and hard feelings between the professionals involved, Special Education Coordinator set an IEP meeting with Mother on 4/22/20 without communicating with Mother's team to ensure her advocates were available. Petitioners' counsel and Mother's educational advocate both had conflicts, so the meeting was rescheduled for 4/27/20. On that day, Special Education Coordinator only waited 10 minutes before terminating the meeting when Parent did not appear, even though both Parent's counsel and educational advocate were available by telephone. DCPS later claimed that it finalized the IEP on 4/27/20, although there was bitter disagreement between the parties over whether the 4/27/20 IEP was provided to Mother and her advocates in late April or not until October 2020. Nor was Parent included in the next meeting on 10/29/20, when that IEP was purportedly finalized without participation or input of Parent or her team.

The record is clear – and no one disputes – that Mother suffers from mental health issues, yet instead of that resulting in more cooperation among the professionals involved for the benefit of Student, Special Education Coordinator insisted repeatedly in communicating only with Mother and repeatedly refused to engage with her counsel. In such circumstances, the undersigned would expect DCPS to take greater efforts to include Parent's advocates. However, the professionals failed to rise above the personal animosities that are not serving anyone well. Beyond the legal requirements, the need for including input from Parent and her team is shown by the 4/30/20 dissent letter which pointed out significant problems in the IEP that could have been corrected by DCPS when finalizing the IEP. Instead, due to lack of correction, there is a denial of FAPE due to problems with the IEPs as well as denial of FAPE for not including Parent in the process.

Accordingly, this Hearing Officer concludes that under these circumstances, precluding Parent and counsel from participation was a procedural violation which amounts to a denial of FAPE pursuant to 34 C.F.R. § 300.513(a)(2) by significantly impeding Parent's ability to participate in decision-making relating to the provision of FAPE to Student, which contributes modestly to the compensatory education awarded below.

Remedies

Having analyzed the issues and found denials of FAPE by DCPS in this case, the analysis next turns to appropriate remedies, including compensatory education. As an initial matter, DCPS is again ordered to provide an appropriate IEP for Student. Specifically, within 30 days from the date of this HOD, DCPS shall convene Student's IEP team to review and revise Student's IEP, with the assistance of a qualified specialist in IEP development and programming assigned from DCPS's Central Office to work with the IEP team to provide guidance and support, although the specialist shall only provide input, as it

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is up to the IEP team, with Parent participation, to develop Student's IEP. As specified below, Student's IEP shall provide, among other things, appropriate PLOPs, goals, baselines, breaks, and a transition plan. One complicating factor is that Student has been accepted and is apparently in the process of being transferred to a nonpublic school, which may impact the process for correcting the flaws in Student's IEP. This is addressed below by providing that if Student is transferred to a nonpublic school within 20 days from the date of this HOD, the updated IEP may be prepared by the new school within 30 days from Student's start date there.

Finally, compensatory education is considered. In determining the amount of compensatory education for the denials of FAPE above, 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," but that does not permit the effort to be avoided. *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016). See also *Henry v. Dist. of 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).

This undertaking is made more complex here by unusual aspects of the case. First, the prior due process hearing found denials of FAPE and awarded compensatory education on 7/10/20, which provided a significant amount of compensatory education to put Student in the place Student should have been had there not been denials of FAPE. However, the 4/27/20 IEP was not addressed in the prior due process hearing and was not understood to be final at that time by the prior Hearing Officer or Parent. Thus, this HOD has considered the 4/27/20 IEP and found it flawed, but this Hearing Officer views compensatory education as due for the denials of FAPE based on the 4/27/20 IEP as covering only the period after the prior case, that is, from 7/10/20 to present.

The other unusual element is that the 7/10/20 HOD awarded Student 720 hours of academic tutoring and 60 hours of counseling/therapy, none of which had been used by the conclusion of the current hearing on 3/17/21. Parent's advocates understandably indicated that additional tutoring hours would not be helpful to Student, especially as Student is being stepped up to a nonpublic school. Instead, the compensatory education proposal from Educational Advocate A proposed 100 hours of music therapy and 100 hours of tutoring/mentoring. Mentoring may well be helpful for Student and the record contained notable support for mentoring. Engagement with a mentor is by no means a sure thing, but Student is in serious need of support and mentoring has a chance of making a substantial difference in this young person's educational life. Accordingly, the undersigned provides for 100 hours of tutoring.

Turning to therapy, conventional therapy has been difficult for Student, but there is little indication that Student would succeed any better with music therapy, as it seems to have been included in the proposal because Student likes music and listening to music is calming, which has little to do with the serious work of music therapy, as School Psychologist explained. Instead, if compensatory education is required, School

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Psychologist urged that parent counseling and training be provided in order to help bring more stability to Student's life, which is undeniably important to further education. Parent training and counseling is defined as a related service in 34 C.F.R. § 300.34(c)(8) to assist parents in understanding the special needs of their child, gaining information about child development, and acquiring the skills that will allow them to support implementation of their child's IEP. Counsel for both sides also concurred in parent counseling and training. Given the very challenging circumstances of this case and Student's significant needs, the undersigned provides below for 100 hours of parent training and counseling, with a maximum of 50 hours available for each Parent, with the intention that these services for Parents would help bring the stability and care for Student that would lead to educational progress and needed academic gains.

Educational Advocate A testified that to the greatest extent possible the hours sought in her compensatory education proposal would put Student in the position Student would have been in but for the denials of FAPE in this case. However, the proposal must be adjusted slightly as not every aspect of the IEP claim was found to be a violation, which offsets the lack of every aspect of the proposal being adopted. The compensatory education ordered below is close to that proposed by Educational Advocate A and should put Student in the position Student would have been in but for the denial of FAPE found herein.

These determinations by the undersigned have been carefully considered and 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 24 months to ensure that Student receives needed supports on a timely basis and to avoid administrative burdens on Respondent. Moreover, the undersigned encourages Parents to use the hours awarded as quickly as possible to ensure that the services needed are obtained without delay.

ORDER

Petitioners have prevailed on the issues in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- 1) Within 30 days from the date of this HOD, DCPS shall convene an IEP team meeting to review and revise, as appropriate, Student's IEP with the assistance of an IEP specialist from Central Office to provide, among other things, appropriate PLOPs, goals, baselines, breaks, and a transition plan; however, if Student transfers to a nonpublic school within 20 days from the date of this HOD, an updated IEP may instead be prepared by the new school within 30 days from Student's start date there.
- 2) As compensatory education for the denials of FAPE found herein, within 10 business days after requested by Petitioners, DCPS shall provide letters of authorization for (a) 100 hours of mentoring, and (b) 100 hours of parent

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counseling and/or training, with a maximum of 50 hours for each Parent; all hours to be provided by independent providers chosen by Petitioners with input from their counsel; all hours are to be used within 24 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

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:

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