

OSSE
Office of Dispute Resolution
March 10, 2023

Hearing Dates: March 7 and 8, 2023

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on January 9, 2023, named DCPS as respondent. The undersigned hearing officer was appointed on January 10, 2023. On January 20, 2023, the parties met for a resolution session and were unable to resolve the issues in dispute. On January 20, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. My final decision in this case is due by March 25, 2023.

With the parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on March 7 and 8, 2023. MOTHER appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Attorneys for the parties made an opening statements. Mother testified and called as additional witnesses EDUCATIONAL ADVOCATE and PARALEGAL. DCPS called as witnesses OCCUPATIONAL THERAPIST, CASE MANAGER and LEA Representative. Petitioner's Exhibits P-1 through P-30 and Exhibit R-12 (designated as Exhibit P-31) were admitted into evidence without objection. DCPS' Exhibits R-1 through R-38 were all admitted into evidence without objection. After the taking of the evidence, counsel for the respective parties made oral closing arguments. There was no request to provide written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as set out in the January 20, 2023 Prehearing Order are:

A. Whether DCPS denied the student a FAPE by failing to timely conduct assistive technology (AT); occupational therapy (OT) and speech-language evaluations since 2021-2022 school year;

B. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement and/or IEP since the 2021-2022 school year by 1) providing inappropriate goals and baselines, 2) failing to increase Student's specialized instruction hours outside of general education and 3) failing to provide speech-language services;

C. Whether DCPS has denied Student a FAPE by failing to implement the student's May 27, 2022 IEP provision for 4.5 hours of specialized instruction outside the general education specialized instruction services during the 2022-2023 school year.

For relief, Petitioner requests that the hearing officer order DCPS to fund or conduct Occupational Therapy, Speech-Language Pathology and Assistive Technology evaluations of Student and reconvene Student's IEP team to review the evaluations and make the appropriate revisions to his/her IEP, including updating of appropriate baselines and goals based on evaluative data, increase of specialized instruction for reading and math hours; addition of speech-language pathology services and addition of occupational therapy services. In addition, the parent requests an award of

compensatory education to compensate Student for the alleged denials of FAPE.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with the Mother in the District of Columbia. Testimony of Mother.
2. Student is eligible for special education as a student with a Specific Learning Disability (SLD) impairment. Exhibit P-11.
3. Student is currently enrolled in GRADE at CITY SCHOOL 2, a DCPS “application” school. Applications to DCPS application schools are initially made by the parent through the My School DC lottery system. If a student is successful in the lottery, the student must submit an essay and be interviewed for admission by the lottery-matched school. Testimony of LEA Representative, Testimony of Mother.
4. For the 2021-2022 school year, Student was enrolled in CITY SCHOOL 1, another DCPS application school. In the prior 2020-2021 school year, Student was enrolled in PUBLIC CHARTER SCHOOL 2 (PCS-2), which was an independent (non-DCPS) local education agency (LEA). Testimony of Mother.
5. In December 2017, when Student was enrolled in PUBLIC CHARTER SCHOOL 1 (PCS-1), PSYCHOLOGIST 1 completed a comprehensive Psychoeducational Evaluation of Student. Psychologist 1 reported, *inter alia*, that Student’s full scale IQ (FSIQ) score, a measure of overall intellectual ability, was in the Very Low range

compared to other children of his/her age. On the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH), Student's overall reading skills tested at below 1st percentile for his/her age, in the Very Low range. Student's overall written language performance ranked at the fifteenth percentile in the Low Average range. Exhibit P-4.

6. In January 2018, a speech-language pathologist conducted a Speech and Language Evaluation of Student. She reported that Student's scores reflected a Receptive and Expressive Language Impairment. Additionally, Student showed significant weaknesses with Language Content and significant weaknesses in Language Processing. The speech-language pathologist recommended, *inter alia*, that Student receive speech/language therapy services in order to target his/her expressive and receptive language. Exhibit P-4. On February 18, 2018, Student was identified as a child with a Speech-Language Impairment (SLI) disability. Student's January 24, 2019 PCS-1 IEP provided for Student to receive 10 hours per week of Specialized Instruction Services, 240 minutes per month of Speech-Language Pathology and 120 minutes per month of Behavioral Support Services. Exhibit P-6.

7. In October 2020, when Student was enrolled in PCS-2, PSYCHOLOGIST 2 conducted an Updated Comprehensive Psychological Evaluation of Student. Psychologist 2 reported, *inter alia*, that Student had a Low IQ (79). On educational testing, Student's Reading was Low; Student's Mathematics Word Problems achievement was Low Average and his/her Written Language was Very Low (65). Psychologist 2 reported that Student was then functioning at least two grade and age

levels below expectations in all academic areas. Psychologist 2 reported that Student had IDEA disabilities of Specific Learning Disorder with impairment in reading, reading comprehension, and accuracy; Specific Learning Disorder with impairment in written expression, spelling accuracy and in clarity or organization of written expression; Specific Learning Disability in math, with difficulty with understanding operational concepts and with memorization of math concepts. Teacher ratings on the Behavior Assessment Scale for Children (BASC) indicated that scores for Aggression and Anxiety fall in the clinically significant range. Student's score for Depression was also elevated. Exhibit P-5. Prior to the filing of the due process complaint in this case, no updated psychological evaluation of Student had been conducted since October 2020. Testimony of Mother.

8. On June 8, 2021, the PCS-2 IEP team changed Student's disability classification from SLI to SLD based on the fall 2020 psychological evaluation. Although the amended IEP continued to identify Communication/Speech and Language as an area of concern for Student, the IEP team cut out Speech-Language Pathology related services. For services, the amended June 8, 2021 IEP provided for Student to receive 7 hours per day of Special Education Services, for Reading, Mathematics and Written Expression, including 2 hours outside general education. The IEP also provided for 120 minutes per month of Behavioral Support Services. Exhibit P-5.

9. For the final reporting period of the 2020-2021 school year at PCS-2. Student was reported to be progressing on all IEP goals except for 1 or the 4

communications/speech and language goals which had not been introduced. Exhibit P-13.

10. Student aged out of PCS-2 at the end of the 2020-2021 school year. Mother entered the My School DC lottery system for Student and secured Student's admission to City School 1 for 2021-2022 school year. Testimony of Mother. City School 1 is an application Science, Technology, Engineering and Math (STEM) school. City School 1 was not made aware of Student's special education status until after Student enrolled. When Student transferred from PCS-2 to City School 1, Student's last IEP was the June 8, 2021 PCS-2 IEP. Mother testified that she was told by City School 1 staff that Student would be taken out of the classroom for small group instruction by IEP teachers. Case Manager testified that Mother was told that because of its STEM curriculum, City School 1 was unable to pull students out of classes for outside of general education Specialized Instruction services. Case Manager testified that this was explained to Mother at a 30-day review meeting following Student's enrollment and that Mother still wanted Student to remain at City School 1. Testimony of Mother. Testimony of Case Manager. Both witnesses were credible but neither witness' account was corroborated by other testimony or documentation.

11. On a Reading Inventory assessment completed in fall 2021, Student's score was 459, correlating to between a 2nd and 3rd grade level. Exhibit R-7. Case Manager was very concerned about Student's deficits in reading. Testimony of Case Manager.

12. At a 30-day IEP review meeting at City School 1 on September 29, 2021, the City School 1 IEP team adopted verbatim the Annual Goals and Baselines from the June 8, 2021 PCS-2 amended IEP. For Special Education and Related Services, the City School 1 IEP team increased the special education level of services from the PCS-2 IEP from 7 hours to 10 hours per week, including 2.5 hours outside of general education. The IEP team reduced Student's Behavioral Support Services from 180 minutes per month to 120 minutes per month. Exhibits P-9, P-10.

13. From about November 23, 2021 to February 1, 2022, Student transferred to DCPS' virtual academy mainly because of negative peer interactions during the first quarter of the year. Student completed his/her courses for the first semester virtually. Exhibits P-56, R-26, R-28.

14. City School 1 next revised Student's IEP on May 27, 2022. The May 27, 2022 IEP team revised Student's annual goals and increased Student's Specialized Instruction Services from 10 hours to 14.5 hours per week, including 4.5 hours outside the general education classroom. Exhibit R-8.

15. At the end of the 2021-2022 school year, City School 1 staff telephoned Mother and informed her that Student could not stay at City School 1 because he/she did not maintain his/her GPA at the required level. Mother again entered Student in the My School DC lottery and secured Student's admission to City School 2 for 2022-2023 school year. Testimony of Mother. LEA Representative met Student in July 2022 for an admissions interview. Mother brought Student's IEP to the meeting. LEA

Representative told Mother that Student's IEP provided for more hours of service than City School 2 could provide and that the school would have to hold a 30 day review.

Mother testified that LEA Representative told her that the school would have to test Student to assess his/her then present level and decide if City School 2 had the services Student needed. Mother denies that LEA Representative told her that City School 2 would not be able to implement Student's IEP. Testimony of LEA Representative,

Testimony of Mother. Because Mother concedes that LEA Representative told her that Student would have to be assessed to determine whether City School 2 had the services Student needed, I find it more likely that not that LEA Representative did, in fact, tell Mother that City School 2 could not implement Student's IEP as developed at City School 1.

16. City School 2 is unable to implement Student's May 27, 2022 IEP because the school does not have a pull-out resource room for Math or English and does not have special education teachers for other subjects. Testimony of LEA Representative.

17. Student was allowed to drop math and English classes in fall 2022 because Student was upset that he/she was not provided an inclusion special education teacher in those classes. Testimony of LEA Representative.

18. Following a 30 day review meeting in fall 2022, City School 1 collected data on Student and convened an Analysis of Existing Data (AED) meeting on November 21, 2022. Testimony of LEA Representative. At the AED meeting, the parent requested that Student be reevaluated and the team decided to have student reevaluated

in the areas of academics (math, reading and writing) , occupational/physical therapy; speech and language; and emotional, social and behavioral development. Testimony of LEA Representative, Exhibit R-91. Prior to the AED meeting, Occupational Therapist had conducted an OT screener and determined there were not OT concerns for Student. The school team did not decide that a formal OT evaluation was warranted. Testimony of Occupational Therapist.

19. DCPS has now completed most of the reevaluation assessments of Student and has scheduled a multidisciplinary team (MDT) meeting at City School 2 to review the assessments for March 17, 2023. Testimony of LEA Representative.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP 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 Student of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

A. Did DCPS deny the student a FAPE by failing to timely conduct assistive technology (AT); occupational therapy (OT) and speech-language evaluations since 2021-2022 school year?

Following a November 2022 Analysis of Existing Data (AED) meeting, upon request of the parent's representatives, DCPS agreed to evaluate Student for assistive technology (AT); occupational therapy (OT) and speech-language needs. Petitioner contends that DCPS denied Student a FAPE by not conducting these evaluations on its own initiative, beginning in the 2021-2022 school year when Student transferred to DCPS from PCS-2. DCPS maintains that there were not indicators that Student needed AT, OT or speech-language evaluations. The parent has the burden of persuasion on this claim.

I agree with DCPS that Petitioner did not meet her burden of persuasion that DCPS had cause to evaluate Student in these areas. The IDEA requires that a local education agency (LEA) must ensure that a child with a disability is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, communicative status and motor abilities. *See* 34 C.F.R. § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643

(2006). Prior to the November 2022 AED meeting, there was no request from the parent or Student's educators to evaluate Student in AT or OT. For speech and language, Student had been evaluated in 2018 and determined to have a speech-language impairment (SLI). However, in spring 2021, Student's former LEA, PCS-2, changed Student's disability classification from SLI to Specific Learning Disability and removed Speech-Language Pathology related services from Student's IEP. No competent evidence was offered at the hearing which suggested that the prior LEA's decision was inappropriate. Nor did Petitioner present evidence from a speech-language expert that Student continued to have a suspected speech-language disability or that Student needed a speech and language reevaluation after transferring to DCPS.

For OT, DCPS' expert, Occupational Therapist testified that she had screened Student and observed him/her in the classroom. She opined that Student did not appear to have OT related needs. Nor had the parent or Student's teachers reported to her any concerns for Student in the OT area. With regard to AT, Student's DCPS IEPs provide that Student would benefit from text-to-speech software, such as the Google Read & Write plug-in and audiobooks, as he/she develops basic reading skills, but there was no evidence at the hearing from a competent assistive technology expert that Student needed to be assessed for AT.

As noted, DCPS has now evaluated Student in the areas of speech-language, OT and AT upon the parent's request at the November 2022 AED meeting. As of the hearing date, the results of those assessments had not been communicated to Student's

IEP team. I find that Petitioner did not meet her burden of persuasion that in the last two school years, at least prior to the parent's request at the AED meeting, Student had suspected needs that would have required DCPS to evaluate Student in the areas of speech and language, OT or AT.

B. Did DCPS deny Student a FAPE by failing to provide the student with an appropriate placement and/or IEP since the 2021-2022 school year by 1) providing inappropriate goals and baselines, 2) failing to increase Student's specialized instruction hours outside of general education and 3) failing to provide speech-language services?

Prior to transferring into DCPS in fall 2021, Student's most recent IEP had been developed by PCS-2 on June 8, 2021. City School 1 conducted a 30-day review meeting on September 29, 2021, where the IEP team, substantially adopted the PCS-2 IEP, with small adjustments to services. The City School 1 IEP team did not review the PCS-2 IEP again until the May 27, 2022 annual review meeting. Student transferred to City School 2 for the 2022-2023 school year and, as of the due process hearing date, the May 27, 2022 IEP has not been reviewed or revised.

DCPS' Adoption of PCS-2 IEP

The IDEA does not set a time frame for revising a child's IEP, except that the IEP must be reviewed at least annually. *See* 34 CFR § 300.324(b)(1). In August 2021, Student transferred from one LEA (PCS-2) to another LEA (DCPS) both within the same "state" (District of Columbia). For children who make an intrastate transfer between LEAs over the summer, the U.S. Department of Education has provided the following guidance:

[I]f a child's IEP from the previous public agency was developed (or reviewed and revised) at or after the end of a school year for implementation during the next school year, the new public agency could decide to adopt and implement that IEP, unless the new public agency determines that an evaluation is needed. Otherwise, the newly designated IEP Team for the child in the new public agency could develop, adopt, and implement a new IEP for the child that meets the applicable requirements in [34 C.F.R.] §§ 300.320 through 300.324.

U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46539, 46682 (August 14, 2006).

Student's last IEP at PCS-2 was reviewed and revised on June 8, 2021 by the PCS-2 IEP team for implementation during the 2021-2022 school year. Student had been evaluated with a comprehensive psychological in November 2020. There was no evidence at the hearing that, following Student's transferred to DCPS over the summer of 2021, the parent had requested a new evaluation or for Student's PCS-2 IEP to be revised. DCPS therefore had the options (1) to adopt and implement the PCS-2 IEP or (2) develop a new IEP for Student. The City School 1 IEP team substantially adopted the PCS-2 IEP at the September 29, 2021 30-day review meeting, in effect going with the first option. Under these facts, I conclude that DCPS did not deny Student a FAPE by adopting and implementing the PCS-2 IEP after Student transferred to City School 1 and that DCPS was not obliged to review and revise that IEP prior to the annual review in May 2022.

May 27, 2022 IEP

City School 1 convened Student's IEP team for the annual review of Student's IEP

on May 27, 2022. The parent claims the May 27, 2022 IEP was inappropriate to provide a FAPE. The Supreme Court has established a two-part test to evaluate the sufficiency of an IEP in providing FAPE: (1) whether the State complied with procedures set forth in the Act, and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206–07; 102 S.Ct. 3034 (1982). A student’s IEP need not be perfect or optimized but must only be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Specialized Instruction outside general education was appropriate for Student. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). *See Kerkam v. Superintendent, D.C. Public Schs.*, 931 F.2d 84, 88 (D.C. Cir. 1991). *B.D. by & through Davis v. District of Columbia*, 548 F. Supp. 3d 222, 234 (D.D.C. 2020).

The parent’s expert, Educational Advocate, an employee of Law Firm, opined that the May 27, 2022 IEP was inappropriate for Student because, *inter alia*, the present levels of performance (PLOPs) were repeated from the PCS-2 IEP, goals were inappropriate and the IEP provided for only 2½ hours per week of Specialized Instruction outside general education. Educational Advocate’s analysis was not persuasive. First, the IEP team revised Student’s annual goals and increased Student’s Specialized Instruction Services from 10 hours to 14.5 hours per week, including 4.5 hours outside the general education classroom (not 2.5 hours as asserted by Educational Advocate). Moreover, for every area of concern, except Communication/Speech and

Language, the IEP included not only historical data from PCS-2, but also an updated PLOP narrative, based on Student's performance in the 2021-2022 school year at City School 2. It is correct that the IEP did not provide updated baselines. However, IDEA does not require that IEPs include baselines for students. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424-25 (8th Cir. 2010) (Plaintiff has not cited any case in which any court has read such an implied requirement for baseline data into the law.)

The May 27, 2022 IEP also continued to identify Communication/Speech and Language as an IEP area of concern, even though speech and language services had been removed from Student's IEP the year before. These missteps – failure to update the Student's baselines and not removing the communications area of concern – appear to have been procedural errors by the IEP team. Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the student's right to a FAPE;
- (ii) Significantly impeded the parent's (or adult student's) opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2). In this case, I find that neither the failure to update the baselines nor the failure to remove the outdated Communication/Speech and Language Area of Concern information from the IEP, impeded Student's right to a FAPE, caused a deprivation of educational benefit or impeded the parent's opportunity to participate in the decision making process. These procedural deficiencies do not rise to a denial of

FAPE.

Petitioner also faults DCPS for not increasing Student's specialized instruction hours outside of general education. As discussed above, the May 27, 2022 IEP team increased Student's Specialized Instruction Services from 10 hours to 14.5 hours per week, including 4.5 hours outside the general education classroom. Petitioner's expert, Educational Advocate, opined that Student should have been provided at least 17 hours per week of Specialized Instruction Services, including 8.5 hours outside of general education.² This opinion was not rebutted by DCPS' witnesses. I conclude, therefore, that DCPS did not meet its burden of persuasion that the IEP team's decision to provide only 4.5 hours of Specialized Instruction outside general education was appropriate for Student. *See Endrew F., supra*, 137 S. Ct. at 1002 (A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.) This was a denial of FAPE.

Petitioner contends that the May 27, 2022 IEP should have provided Speech-Language related services for Student. The PCS-2 IEP team removed speech and language related services for Student from the June 8, 2021 IEP. There was no evidence that Mother disagreed with that decision. No evidence was offered at the hearing from a speech-language expert that the PCS-2's decision to end Student's speech and language

² Whether Student needed 17 hours total per week of Specialized Instruction Services, as opposed to the 14.5 hours per week provided in the May 27, 2022 IEP, was not identified as an issue in this case. *See Prehearing Order*, January 20, 2023.

services was inappropriate or that Student required speech and language services at the time of the May 27, 2022 IEP team meeting. I find that the parent did not establish a *prima facie* case that the omission of speech and language services in the May 27, 2022 IEP was inappropriate.

In sum, I conclude that DCPS has met its burden of persuasion that its adoption of the June 8, 2021 PCS-2 IEP was appropriate and that its May 27, 2022 IEP was reasonably calculated to enable Student to make appropriate progress, except for the failure to increase pull-out Specialized Instruction services to 8.5 hours per week.

C. Did DCPS deny Student a FAPE by failing to implement the student's May 27, 2022 IEP provision for 4.5 hours of specialized instruction outside the general education specialized instruction services during the 2022-2023 school year?

The May 27, 2022 IEP provided that Student would receive 14.5 hours per week of Specialized Instruction Services, including 4.5 hours outside the general education classroom. Student transferred to City School 2 at the start of the 2022-2023 school year. LEA Representative testified that City School 2 has been unable to provide special education services to Student outside of the general education setting because the school does not have a resource room. Petitioner contends that City School 2's failure to provide pull-out special education services to Student this school year was a denial of FAPE. I agree.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

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 at 144.

The lack of outside-of-general education special education services was not offset by additional push-in services in the classroom. LEA Representative testified that City School 2 was not able to provide push-in special education services to Student in English and Mathematics classes in the first half of the 2022-2023 school year, because of lack of available special educators. I find, therefore, that Petitioner has established that City School 2's failure to provide pull-out special education services to Student in the 2022-2023 school year was a failure to implement substantial or significant provisions of Student’s May 27, 2022 IEP and constitutes a denial of FAPE.

Remedy

In this decision, I have found that DCPS denied Student a FAPE (1) by providing for insufficient hours of outside-of-general education specialized instruction in the May 27, 2022 IEP and by not ensuring that pull-out special education services were

implemented for Student at City School 2 in the current, 2022-2023, school year. I found persuasive Educational Advocate un rebutted opinion that for the May 27, 2022 IEP, Student needed 8.5 hours per week of Specialized Instruction outside the general education setting. This IEP provided for only 14.5 hours per week of Specialized Instruction Services, including 4.5 hours outside the general education classroom. DCPS' witness also acknowledged that City School 2 did not provide any of the 4.5 hours per week of pull-out special education services specified in the May 27, 2022 IEP.

For relief, Petitioner seeks a compensatory education award for Student. The D.C. Circuit Court of Appeals explained the compensatory education remedy in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016):

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has “broad discretion to fashion an appropriate remedy,” which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an 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.” 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial.

An appropriate compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child’s needs.” *Id.* In some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in others the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.

For purposes of the compensatory education analysis, I determine that the period of harm from the denials of FAPE in this case runs from the start of the 2022-2023 school year, through the date of this decision – a period of about 23 school weeks. For her compensatory education proposal, Educational Advocate recommended that Student be awarded 289 hours of individual tutoring services, assuming 72 weeks of harm over the 2021-2022 and 2022-2023 school years. Since I have found that Petitioner established only that Student was denied a FAPE for approximately 23 weeks in the current school year school year, I will award Student 100 hours of academic tutoring as compensatory education.³ I find that this award of compensatory education is reasonably calculated to provide the educational benefits that likely would have accrued from special education services which the District “should have supplied in the first place.” *See B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby
ORDERED:

1. As compensatory education for the denials of FAPE found in this decision, DCPS shall, within 21 business days, issue funding authorization for the parent to obtain 100 hours of independent academic tutoring for Student to be provided by

³ Paralegal testified that Law Firm has found it very difficult to find willing tutors to provide compensatory education services because of alleged delays in payment by DCPS. It is beyond my authority to address alleged systemic shortcomings on the part of DCPS. I will order DCPS to assist the parent to locate a tutor for Student if the parent and her representatives are not able to secure the services of a qualified individual.

a qualified special educator. If requested by the parent, DCPS shall assist her to locate a qualified tutor for Student. If transportation to the provider is needed for Student, DCPS shall fund or reimburse the parent for Student's transportation expenses;

2. Within 21 school days of the date of this decision, DCPS shall ensure that Student's IEP team is convened to review and revise as appropriate Student's IEP, including to provide for enhanced Specialized Instruction Services to include at least 8.5 hours per week of services outside of the general education setting;

3. Within 21 school days of the date of this decision, DCPS shall provide a suitable school location for Student that is capable of implementing the revised IEP. DCPS shall be held harmless if the parent elects for Student to remain at City School 2 instead of transferring to an offered school that is capable of fully implementing Student's IEP and

4. All other relief requested by the Petitioner herein is denied.

Date: March 10, 2023

s/ Peter B. Vaden
Peter B. Vaden, 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).

Case No. 2023-0004
Hearing Officer Determination
March 10, 2023

cc: Counsel of Record
Office of Dispute Resolution
DCPS - SPED
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