

OSSE
Office of Dispute Resolution
March 06, 2025

Parent on Behalf of Student, ¹	HEARING OFFICER’S DETERMINATION
Petitioner,	Hearing Dates: February 14, 2025 February 24, 2025
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency “LEA”)	
Respondent.	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Case # 2024-0219	
Date Issued: March 6, 2025	

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

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

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("the Student") resides with the Student's parents in the District of Columbia. The District of Columbia Public Schools ("DCPS") serves as the Student's local education agency ("LEA"). The Student has been determined eligible for special education under IDEA, classified with autism. The Student attends a DCPS school ("School A") in its Communication and Educational Support ("CES") program.

On November 18, 2024, the Student's mother ("the Petitioner") filed a due process complaint ("DPC") alleging that DCPS ("the Respondent") denied the Student a free appropriate public education ("FAPE") by (a) failing to consider the Student for extended school year ("ESY") services for summer 2024, (b) failing to provide the Student with an appropriate individualized educational program ("IEP") and/or placement and location of services ("LOS") for the 2024-2025 school year ("SY") due to School A's CES program not having a speech-language pathologist, and (c) failing to fully implement the Student's IEPs from March 2024 to the present by not providing the Student with the complete range of his/her related speech and language services.

The Petitioner seeks the following, in addition to a finding of a denial of a FAPE: (a) that DCPS amend the Student's IEP to provide for at least four (4) hours of occupational therapy ("OT") per month, with goals focusing on sensory processing, self-regulation, fine motor skills, and visuomotor skills; (b) that if a speech and language provider to support School A's CES program has not been identified by the date of the hearing, DCPS be ordered to send packets to non-public programs and place and fund the Student in a suitable non-public program of the Petitioner's choice, including transportation; (c) that DCPS gather appropriate data and reconvene the Student's IEP team to consider the need for ESY prior to the end of the current school year; and (d) that DCPS provide the Student with compensatory education.

DCPS's Response to the Complaint:

DCPS filed a response to the complaint on December 3, 2024. In its response, DCPS stated, inter alia, the following:

The Student was determined eligible for special education after an initial evaluation on March 30, 2022, and received the initial IEP on March 28, 2022. On April 19, 2022, the Petitioner received a location of service "LOS" assignment. On December 19, 2023, the IEP team met and proposed an IEP with a placement of 26 hours per week of special education outside general education and four (4) hours per month of speech-language pathology ("SLP").

On December 20, 2023, the Petitioner filed a DPC against DCPS. The IEP was amended on January 3, 2024, to correct a document error related to the “services and frequency”. The IEP team determined the placement to be the least restrictive environment (“LRE”) for the Student. Finally, the team determined at the time the IEP was developed that the Student was not eligible for ESY. On January 25, 2024, the Petitioner received an LOS for School A. A hearing officer issued a decision on March 4, 2024, and issued compensatory education relief related to the DPC challenging the December 19, 2023, IEP.

The Petitioner is barred by res judicata from challenging the December 19, 2023, IEP again. Yet, the Petitioner now alleges the IEP it “was/is inappropriate due to their inability to provide the Student with the support of a speech-language pathologist in School A’s CES program. The Petitioner has made an implementation claim disguised as an IEP claim. The claim should be dismissed as that IEP cannot be appealed again and because the current DPC already contains a claim of failure to implement the IEP.

Furthermore, the bullets in the DPC regarding the statement that the IEP needs to be amended do not state that there was a request for an amendment or a date when DCPS knew or should have known that the IEP was inappropriate.

On October 30, 2024, the Parent signed the IEE device agreement for an iPad. An MDT meeting was held on November 17, 2024, to review an independent OT assessment. At the meeting, the team discussed the missed SLP services and provided eight (8) hours of missed services. On November 18, 2024, DCPS issued a prior written notice (“PWN”) regarding the missed services due to the nationwide shortage of speech-language pathologists and noting authorization to obtain independent SLP services.

During the team meeting on November 7, 2024, the occupational therapist informed the Petitioner that she was accepting the independent occupational therapy (“OT”) evaluation with reservations and required additional class observations, interviews, and standardized data to ensure the testing was comprehensive. The team agreed to reconvene on November 21, 2024, after she had completed the necessary assessment data. However, before the team could reconvene, the Petitioner filed her second DPC against DCPS on November 18, 2024. Despite the filing of the DPC, DCPS proceeded with the previously agreed process and conducted an IEP meeting on November 21, 2024. Following the meeting, DCPS sent the Petitioner a copy of the IEP, which includes goals in all academic areas, as well as goals in OT, SLP, and adaptive daily living.

The IEP team proposed a placement of twenty-six (26) hours per week of special education outside of general education, three (3) hours per month of occupational therapy (OT), four (4) hours per month of SLP, 30 minutes per month of SLP consultation, and 15 minutes per month of OT consultation. The team recommended assistive technology (“AT”) in the form of the existing augmentative and alternative communication (“AAC”) device and determined that the program provided the Student with a placement in the least restrictive environment (LRE). Furthermore, the team concluded that, at the time of the meeting, the Student did not qualify for extended school year services (ESY) for the summer of 2025. DCPS denies all claims or allegations of denial of a FAPE.

Resolution Meeting and Pre-Hearing Conference:

The Petitioner and DCPS participated in a resolution meeting on December 3, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The DPC was filed on November 18, 2024. The 45-day period began on December 18, 2024, and ended [and the Hearing Officer's Determination ("HOD") was originally due on February 1, 2025. DCPS counsel was unavailable for the hearing dates offered and requested and agreed to later hearing dates. The parties filed a motion to continue and extend the HOD due date by thirty-three (33) calendar days to accommodate the requested hearing dates. With the granting of that motion, the HOD is now due on March 6, 2025.

The undersigned impartial hearing officer ("IHO") conducted a pre-hearing conference and issued a pre-hearing order ("PHO") on January 16, 2025, stating, among other things, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny the Student a FAPE by failing to consider the Student for ESY services for the summer 2024?
2. Did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate IEP /placement and/or location of services for SY 2024-2025 because School A's CES program lacked a speech-language pathologist?
3. Did DCPS deny the Student a FAPE by failing to fully implement the Student's IEPs between March 2024 and the present by failing to provide the Student with the full extent of his/her related speech-language services?

DUE PROCESS HEARING:

The Due Process Hearing was convened on February 14, 2025, and February 24, 2025. It was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses, and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 47 and Respondent's Exhibits 1 through 15) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each

² At the outset of the due process hearing, the IHO reviewed the issues to be adjudicated. Although Petitioner asserted that the Student's IEP needed to be amended to include additional goals and services, the IHO concluded and stated so in the PHO that the Petitioner's DPC did not allege that the Student's IEP was inappropriate because of a lack of those services. Petitioner's counsel did not object to the issues that were to be adjudicated as listed in the PHO within the required time frame following issuance of the PHO.

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

party are listed in Appendix B.⁴ The IHO incorporated some findings of fact and made reference to the conclusions of law from the prior HOD involving the Student that was disclosed as evidence.⁵

SUMMARY OF DECISION:

The Petitioner held the burden of persuasion on issues #1 and #3. DCPS held the burden of persuasion on issue #2 after the Petitioner presented a prima facie case regarding that issue. The Petitioner sustained the burden of persuasion by a preponderance of the evidence on issues #1 and #3. The Respondent did not sustain the burden of persuasion on issue #2. The IHO directs DCPS in the order below to place and fund the Student for the remainder of SY 2024-2025 in the non-public placement that the Petitioner requested and ordered DCPS to fund a compensatory education evaluation to determine the appropriate compensatory education for the denials of FAPE found.

FINDINGS OF FACT:⁶

1. The Student resides with the Student's parents in the District of Columbia. DCPS is the Student's LEA. The Student has been determined eligible for special education pursuant to IDEA with a disability classification of autism. The Student attends School A, where he/she began attending during SY 2023-2024, in School A's CES self-contained classroom. The Student attended a different DCPS school, School B, at the start of SY 2023-2024. (Mother's testimony, Respondent's Exhibit 12)
2. The Student has had an IEP since March 18, 2022. However, he/she did not begin attending school in October of 2023. Consequently, attending School B as a kindergarten student was the Student's first exposure to school. (Petitioner's Exhibit 13-3)

⁴ The Petitioner presented three witnesses: (1) Petitioner's educational advocate who testified as an expert witness in psychology, (2) an independent speech-language pathologist who testified as an expert witness, (3) a special education advocate who testified as expert witness in special education/psychology and prepared a compensatory education plan, and (3) the Student's mother (the Petitioner). The Respondent presented two witnesses, both of whom testified as expert witnesses: (1) the Student's School A general education teacher and (2) the Student's School A special education coordinator and LEA representative. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the witnesses' testimony that the IHO identified are addressed in the conclusions of law.

⁵ On December 20, 2023, the Petitioner filed a DPC against DCPS on behalf of the Student (Case # 2023-0253) for which an HOD was issued on March 4, 2024.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

3. In December 2023, DCPS started providing the Student SLP services which were a success for the Student, and s/he got excited when it is time to go to therapy sessions. The Student's SLP services included an assistive technology device, which the Student seemed to enjoy using. (Respondent's Exhibit 7-10)
4. DCPS conducted an annual review of the Student's IEP on December 19, 2023. The December 19, 2023, IEP noted that at that time, the Student could not complete the task independently or in a small group and required intense supervision and monitoring. The Student was neither potty trained nor able to orally communicate his/her needs. (Petitioner's Exhibit 13-3)
5. The Student's December 18, 2023, IEP meeting was held, in part to change the Student's IEP to reflect the Student's need to participate in a CES program. (Respondent's Exhibit 7-10)
6. When the December 18, 2023, IEP was developed, it was too early in the school year to consider adding ESY to the Student's programming. The IEP indicated that the timeframe for recoupment would be determined during the second semester of the 2023-2024 school year. However, the IEP also noted that the Student required a significant amount of time to recoup previously attained or emerging critical skills, but it stated that the Student was not eligible for ESY services. (Petitioner's Exhibit 13-16)
7. The Student's December 18, 2023, IEP included sections on speech-language as well as "cognitive" elements. It outlined three speech-language goals focused on following one- and two-step directions, identifying objects and actions, and making requests. The IEP specified three cognitive goals aimed at increasing vocabulary through picture cues, following directions, and sorting. The IEP noted that the Student would benefit from support in communicating and learning through various means (e.g., signing, pointing to pictures/objects, gesturing, nodding, and speaking), as his/her receptive and expressive spoken language skills were significantly delayed. The IEP indicated that the Student should have access to "repeated models of spoken language paired with visual support" and may require assistance to engage with classmates. (Petitioner's Exhibit 13-11)
8. The Student's December 18, 2023, IEP also noted that the Student continued to have difficulty with communication, as evidenced by difficulties completing written academic tasks, responding to teacher inquiries, and expressing wants and needs. The IEP indicated that the following interventions had been attempted unsuccessfully: visual organizational strategies, closed strategies, choice strategies, yes/no strategies, and alternative response strategies. Since these strategies were ineffective, the IEP team was "considering" assistive technology to help the Student with communication. The IEP stated that the Student required a "single switch type" device to communicate and demonstrate academic progress. The IEP prescribed twenty-six hours per week of specialized instruction outside general education and four hours per month of SLP services. This IEP also suggested an LOS with minimal distractions. (Petitioner's Exhibit 13-11, Respondent's Exhibit 5-10)

9. DCPS placed the Student in the CES program at School A in February 2024. On February 7, 2024, DCPS conducted a transition meeting to facilitate the Student's participation in the CES program. The Petitioner visited and approved the proposed CES program, indicating that the Student was promised an assistive technology device at the CES program site. DCPS agreed to provide the Student with a communication device and authorized an assistive technology evaluation, an occupational therapy evaluation, a psychological evaluation, and an authorization for compensatory education for missed SLP services. (Petitioner's Exhibit 13-12)
10. The Petitioner filed a DPC on December 20, 2023, for which a hearing was held on February 16, 2024, and February 26, 2024, resulting in an HOD issued on March 4, 2024. The hearing officer concluded that DCPS had denied the Student a FAPE but dismissed the Petitioner's related claims concerning the Student's December 19, 2023, IEP. The hearing officer granted the Student the following compensatory education for the denial(s) of FAPE found: 270 hours of tutoring, 200 hours of applied behavior analysis ("ABA") services, and ten hours of SLP services, for which DCPS provided the Petitioner authorization to obtain. (Respondent's Exhibit 7-25, Petitioner's Exhibit 40)
11. DCPS informed the Petitioner that School A did not have an assigned speech-language pathologist. The Student was provided some, but not all the SLP services he/she was due to be provided at School A during SY 2023-2024. (Petitioner's Exhibit 38)
12. DCPS did not reconvene an IEP team before the end of SY 2023-2024 to address the Student's need for ESY services for the summer of 2024. (Mother's testimony)
13. DCPS advised the Petitioner on August 27, 2024, that the Student was not receiving his/her SLP services due to the lack of a speech-language pathologist assigned to School A. As a result, DCPS provided the Petitioner's authorization on November 20, 2024, to obtain eight (8) hours of independent speech-language pathology. (Petitioner's Exhibits 41, 46)
14. School A has been unable to find a speech-language pathologist due to a nationwide shortage, and several other DCPS schools are facing the same issue. School A periodically reviews students' progress, and if there are negative impacts from the lack of SLP services, it provides compensatory education at the end of each school term. (Witness 4's testimony).
15. DCPS convened a meeting on or about October 25, 2024. At that time, School A confirmed that the Student's CES program was not supported by a speech-language pathologist and that the Student had not begun receiving SLP services during SY 2024-2025. The Student's psychological and assistive technology evaluations were reviewed at the meeting. A follow-up meeting was held on November 7, 2024, when the OT evaluation was reviewed. At the November 7, 2024, meeting, it was confirmed by DCPS that School A's CES program was still without the support of a speech-language pathologist. (Petitioner's Exhibits 15, 16)

16. School A updated the Student's IEP on November 21, 2024. The IEP prescribes, inter alia, four (4) hours per month of SLP services and 30 minutes per month of speech-language consultative services. (Petitioner's Exhibit 17-1, 17-19)
17. The Student has been accepted to a non-public day school ("School C"), which provides specialized instruction and related services, including SLP services and OT to students from kindergarten to eighth grade. The classes have eight to nine students with at least three staff members for each class, including an ABA therapist. The cost of the school is \$414.00 per day. School C has an OSSE Certificate of Approval ("COA"). (Witness 1's testimony, Mother's testimony, Petitioner's Exhibit 47)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--

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

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioner held the burden of persuasion on issues # 1 and #3. DCPS held the burden of persuasion on issue #2 once Petitioner presented a prima facie case on that issue. ⁷ The burden of persuasion shall be met by a preponderance of the

⁷ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

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

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided

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

ISSUE 1: Did DCPS deny the Student a FAPE by failing to consider the Student for ESY services for the summer 2024?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

34 CFR § 300.106 states that (a)(1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section. (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child. (3) In implementing the requirements of this section, a public agency may not— (i) Limit extended school year services to particular categories of disability; or (ii) Unilaterally limit the type, amount, or duration of those services. (b) Definition. As used in this section, the term extended school year services means special education and related services that— (1) Are provided to a child with a disability— (i) Beyond the normal school year of the public agency;(ii) In accordance with the child's IEP; and (iii) At no cost to the parents of the child; and (2) Meet the standards of the SEA.

The Petitioner contends that DCPS never gathered data over breaks or otherwise addressed the Student's need for ESY services before the summer of 2024, and given the extent of the Student's cognitive, communication, and adaptive deficits, ESY was a support that should have been extended to the Student.

In December 2023, DCPS noted in the Student's IEP that the Student was not in need of ESY services. However, the IEP also noted that the Student required a significant amount of time to recoup previously attained or emerging critical skills. The IEP also stated that the timeframe for recoupment would be determined during the second semester of SY 2023-2024.

The evidence demonstrates that DCPS never reconvened the Student's IEP meeting to discuss ESY for the Student and otherwise made an ESY determination. The Student did not have services during the summer of 2024. There was testimony by the Student's School A special education teacher that the Student usually did not show regression during breaks from school. However, it was unclear from her testimony the length of the breaks she was attesting to, and she did not specifically speak to the Student's regression or lack thereof after the summer of 2024. However, credible testimony from the Student's mother and educational advocate indicated the Student did show regression during the summer. In addition, the record is clear that Student has severe academic and communication deficits that require consistent interventions.

further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

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

*As the Court explained in Shipley v. District of Columbia, No. CV 18-2550 (CRC/RMM), 2020 WL 13669941 (D.D.C. Mar. 6, 2020), report and recommendation adopted in part, No. 18CV2550CRCRMM, 2020 WL13669870 (D.D.C. Mar. 24, 2020), ESY is not a remedial “catch-up” program for students who are behind grade level. ESY is limited to students at risk of significant regression, or loss of ability. Id at *17. See, also, S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56 (D.D.C. 2008) (“ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” Id. at 68-69, adopting standard from MM v. Sch. Dist. of Greenville County, 303 F.3d 523, 537–38 (4th Cir.2002)).*

Based on the evidence presented, the IHO concludes that there was substantial evidence that the Student was in danger of regression during the summer months, as his/her IEP noted: the Student required a significant amount of time to recoup previously attained or emerging critical skills. DCPS failed to reconvene the IEP team to address the Student’s need for ESY before the end of SY 2023-2024. As a result, the Student’s needs were never considered. The IHO concludes that this failure by DCPS impeded the Student’s right to FAPE, significantly impeded the Petitioner’s opportunity to participate in the decision-making process regarding the provision of FAPE, and caused the Student a deprivation of educational benefits.

ISSUE 2: Did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate IEP/placement and/or location of services for SY 2024-2025 because School A’s CES program lacked a speech-language pathologist?

Conclusion: The Respondent did not sustain the burden of persuasion by a preponderance of the evidence that it provided the Student an appropriate placement/location of services for SY 2024-2025.

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

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

teacher, at least one special-education teacher, and other specified educational experts. Id. § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

The second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated into the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The key inquiry regarding an IEP's substantive adequacy is whether taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP offered was reasonably calculated to enable the specific student's progress...."Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

As stated above, pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

The key inquiry regarding an IEP's substantive adequacy is whether taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP offered was reasonably calculated to enable the specific student's progress...."Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the least restrictive environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements).

The heart of this case is the difficulty of staffing Student's CES classroom at School A in SY 2024-2025. The IDEA requires "school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton*, 312 F. Supp. 3d at 143, citing *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008).

Although the Petitioner stylized the issue for adjudication as an inappropriate IEP/placement or LOS, the evidence does not indicate that the Student's IEP is at issue; rather, it is the appropriateness of the LOS that is in question. The Petitioner alleges that the LOS identified for the Student for SY 2024-2025 is inappropriate because the selected school, School A, has acknowledged that it lacks the necessary staffing to implement the Student's IEP. The Petitioner asserts that SLP services are a crucial aspect of the Student's programming and that the current LOS is inadequate to meet his/her needs, as it does not have a speech-language pathologist to implement the Student's IEP and support the CES program overall.

DCPS, however, asserts that the absence of a speech-language pathologist at School A is due to a nationwide shortage of providers, and that other DCPS schools face similar challenges. DCPS argues that it has provided the Petitioner with authorization and funding to access independent services outside of school to compensate for the SLP services the Student lacks at School A. Consequently, DCPS maintains that there has been no denial of FAPE to the Student.

The Student's mother credibly testified that the authorized independent services cannot be used during school time, and the Student is often exhausted after school and unable to benefit effectively from the independent services that DCPS has provided or could offer to compensate for the missed services. The Petitioner's expert witness, the only speech-language pathologist to testify, also credibly testified that based on the Student's communication deficits, it is critical that the SLP services be delivered along with the instruction that the Student is receiving in school.

In addition, the Student's special education teacher testified that when there was a speech-language pathologist on staff at School A, she was able to collaborate with that provider in delivering the instruction more effectively to all her students. Although, DCPS counsel argued that this case was simply an implementation issue and not an inappropriate IEP or placement, the evidence demonstrates that the absence of consistent SLP services being delivered at School A alongside the specialized instruction in the school setting detrimentally affects the Student and impacts the effectiveness of the LOS.

School A has been without an SLP service provider for all SY 2024-2025, and there is no indication of when one will join the School's staff. Based upon the evidence presented, the IHO concludes that School A is an inappropriate placement for the Student because of its inability to fully implement the Student's IEP and that the Student's placement at School A during SY 2024-2025 is a denial of a FAPE.

As a remedy, the Petitioner has requested that DCPS be ordered to place and fund the Student at School C for the remainder of SY 2024-2025.

To evaluate prospective private school placement requests, "[c]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, ... and the extent to which the placement represents the least restrictive educational environment." *R.B. v. District of Columbia*, No. CV 18-662 (RMC), 2019 WL 4750410 (D.D.C. Sept. 30, 2019), *quoting Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005)

The evidence demonstrates that School C holds an OSSE COA and that it can implement the Student's IEP and represents the Student's LRE. Given the nature and severity of the Student's disability and his/her significant academic and communication deficits, the IHO concludes that School C is an appropriate prospective placement for the Student and in the order below directs DCPS to place and fund the Student at School C.

ISSUE 3: Did DCPS deny the Student a FAPE by failing to fully implement the Student's IEPs between March 2024 and the present by failing to provide the Student with the full extent of his/her related speech-language services?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to provide all of the Student's speech-language pathology during SY 2023-2024 and SY 2024-2025.

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

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

Supp. 2d 270, 275 (D.D.C. 2011)). *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 at 144 (D.D.C. 2018)

“It is not enough merely to “offer” the services provided by an IEP, the school district must “ensure” the child actually receives them.” *White v. District of Columbia*, 80 IDELR 284 (2022)

The Petitioner contends that the Student only received five (5) of the fifteen (15) hours of speech-language services that she/he should have received between March 2024 and the end of SY 2023-2024 and has been provided no in-school SLP services during SY 2024-2205 due to the absence of a provider at School A.

Based on the Student’s IEPs, he/she is entitled to four hours per month of SLP services. There was no dispute by DCPS to Petitioner’s claim that the Student missed ten hours of SLP services at School A during SY 2023-2024. The evidence demonstrates that the Student has missed all in-school SLP services during SY 2024-2025 and that DCPS has, to date, authorized eight hours of independent services to compensate, which are presumably for the missed services during September and October 2024. The evidence demonstrates that since that time, the Student has missed at least an additional four months of SLP services or 16 hours of direct services, in addition to the missed consultative services. The IHO concludes that this level of missed services is material and a denial of FAPE to the Student.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

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

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

The Petitioner requested the compensatory education outlined in her educational advocate's proposal.⁸ Because the Student has already been awarded compensatory services and has lacked consistent speech-language pathology services throughout SY 2024-2025, the IHO concludes that more current data is necessary once consistent in-school SLP services have resumed to accurately assess the appropriate compensatory services. Consequently, the IHO determined that the advocate's proposal was based on insufficient data. As a result, the IHO grants the Petitioner authorization in the order below to obtain an evaluation to determine the appropriate compensatory education.

ORDER: ⁹

1. DCPS shall, within ten (10) business days of the issuance of this order, place and fund the Student at School C or another appropriate non-public school with an OSSE COA that can implement the Student's IEP, for the remainder of SY 2024-2025.
2. DCPS shall, within ten (10) business days of the issuance of this order, provide the Petitioner with authorization to obtain an independent educational evaluation at the OSSE prescribed rate to determine the appropriate compensatory education for the denials of FAPE determined in this HOD. If necessary, the Petitioner is authorized to seek appropriate compensatory education for the Student from DCPS based on this evaluation in a subsequent due process hearing.
3. All other relief requested by the Petitioner is denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Impartial Hearing Officer
Date: March 6, 2025

Copies to: Counsel for Petitioner
 Counsel for LEA

⁸ The advocate proposed 60 hours of independent SLP services, 12 hours of OT, and 200 hours of independent tutoring and ABA therapy combined. (Witness 1's testimony, Petitioner's Exhibit P45)

⁹ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day-for-day basis.