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OSSE
Office of Dispute Resolution
May 31, 2023

Confidential

Parent on Behalf of Student, ¹	HEARING OFFICER'S DETERMINATION
Petitioner,	Hearing Dates: May 23, 2023 May 26, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency "LEA")	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Respondent.	
Case # 2023-0047	
Date Issued: May 31, 2023	

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

JURISDICTION:

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

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of intellectual disability ("ID"). Student attended Student's neighborhood DCPS school ("School A") during school year ("SY") 2021-2022 and most of SY 2022-2023. In early May 2023, Student began attending a different DCPS school ("School B") in a self-contained special education program.

On March 9, 2023, Student's parent ("Petitioner") filed a due process complaint ("DPC") alleging, inter alia, that DCPS failed to provide Student an appropriate individual education program ("IEP") and placement, thus denying Student a free appropriate public education ("FAPE").

Petitioner seeks an order directing DCPS to provide Student with an appropriate location of service ("LOS")/placement and/or place and Student in a suitable nonpublic program with transportation and provide the Student with compensatory education.

DCPS's Response to the Complaint:

DCPS filed a response to the DPC on March 22, 2023. In its response, DCPS stated, inter alia, the following:

DCPS asserts Student has not been denied a FAPE, therefore the request for relief is unwarranted and the DPC should be dismissed with prejudice. Student is currently enrolled and attending the School A SY 2022-2023 and is eligible to receive special education and related services as a student identified with an .

DCPS denies Student was denied a FAPE by allegedly failing to provide an appropriate IEP and placement on or about August 31, 2022. In developing the IEP the school team relied on various sources of information including, but not limited to, class performance, educational assessments, evaluations. At the time the IEP was developed it was reasonably calculated to enable the Student to make progress appropriate considering ■■■■ circumstances.

Special Instruction Hours: DCPS denies Student was denied a FAPE by allegedly failing to provide sufficient specialized instruction outside general education. The August 31, 2022, IEP was the Student's initial IEP. At that IEP meeting the Petitioner's attorney requested ten hours of specialized instruction inside general education and ten hours outside general education. The School A team agreed to provide six hours of specialized instruction inside general education setting and six hours outside general education. The team needed the opportunity to implement

the IEP and all accommodations outlined in the IEP to see how Student would respond to initial services.

Assistive Technology: The School A team explained that they did not believe Student would benefit from assistive technology (“AT”), occupational therapy (“OT”) and speech-language pathology (“SLP”) and discussed in previous meetings that currently they are not recommending the usage of AT. Further, the team explained that they wanted to have the opportunity to implement the IEP and all accommodations outlined. The School A team explained that they would be open to coming back to the table, if need be, if AT is found to be needed in the future.

Restrictive setting: DCPS denies Student was denied a FAPE by allegedly failing to provide the appropriate setting. This was the Student’s initial IEP. At the time the IEP was drafted, the School A Team had not had the opportunity to implement the IEP to determine if Student required a more restrictive setting than proposed.

DCPS denies the Student was denied a FAPE by allegedly failing to provide appropriate IEP and placement on or about October 27, 2022. In developing the IEP, the school team relied on various sources of information in developing the IEP including, but not limited to, class performance, educational assessments, evaluations. At the time the IEP was developed it was reasonably calculated to enable Student to make progress appropriate considering [REDACTED] circumstances.

DCPS amended the IEP on October 27, 2022, to increase the specialized instruction hours from 12 hours (6 hours in general education and 6 hours outside general education) to 15 hours outside general education. The School A team explained the hours and setting would increase because after six weeks of implementing the IEP, the Student made minimum gains.

On October 20, 2022, the team met and determined that more information was needed to determine if the Student needed AT. As a result, the team agreed to conduct an AT evaluation. The evaluation was completed on or about December 8, 2022. As a result of the evaluation, the team added text-to-speech and audiobooks to Student’s IEP.

DCPS denies the Student was denied a FAPE by allegedly failing to provide appropriate IEP and placement on or about December 2022. On December 19, 2022, the School A team agreed to begin the more restrictive environment (“MRE”) referral process. DCPS assigned Student to a full-time program on March 17, 2023. Respondent respectfully requests that the Hearing Officer deny Petitioner’s request for relief as DCPS did not fail to provide the Student a FAPE.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on March 23, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The DPC was filed on March 9, 2023. The 45-day period began on April 9, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was initially due] on May 23, 2023. One party was unavailable on the hearing dates offered by the undersigned independent hearing officer (“IHO”). DCPS filed a motion to continue the hearing and extend the HOD due. The HOD will then be due May 31, 2023.

The IHO conducted a pre-hearing conference on April 3, 2023, issued a pre-hearing order ("PHO") on April 5, 2023, and a revised PHO on April 6, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUE: ²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP and placement on August 31, 2022. ³
2. Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP and placement on October 27, 2022. ⁴
3. Did DCPS deny Student FAPE by failing to timely provide Student an appropriate location of services ("LOS") after the December 19, 2022, meeting that could implement the services that are now prescribed by Student's February 13, 2023, IEP.

DUE PROCESS HEARING:

The Due Process Hearing was convened on May 23, 2023, and May 26, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 58 and Respondent's Exhibits 1 through 42) that were admitted into the record and are listed in Appendix 2.⁵ The witnesses testifying on behalf of each party are listed in Appendix B.⁶

² At the outset of the due process hearing, the IHO reviewed the single issue to be adjudicated from the revised PHO. The IHO revised that issue into three separate issues. The parties agreed to the three issues as stated herein as the issues to be adjudicated.

³ Petitioner asserts that the IEP should have proposed at least 15 hours of specialized instruction with all core academics outside general education and AT services.

⁴ Petitioner asserts that this IEP should have prescribed at least a self-contained program and AT services. At the December 19, 2023, meeting Petitioner asked DCPS to consider a non-public placement because the DCPS team members said they could not implement a more restrictive program at School A.

⁵ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

⁶ Petitioners presented two witnesses: (1) Student's mother (Petitioner), (2) an educational advocate who testified as an expert witness. Respondent presented three witnesses, all designated as expert witnesses: (1) the DCPS School A LEA representative, (2) Student's School A Special Education teacher and Case Manager, and (3) the School B LEA Representative. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material

SUMMARY OF DECISION:

Respondent held the burden of persuasion on issues #1 and #2 after Petitioner presented a prima facie case on each of those issues.⁷ Petitioner held the burden of persuasion on issue #3. Based on the evidence adduced, the IHO concluded that DCPS sustained the burden of persuasion by a preponderance of the evidence on issues #1 and #2. Petitioner sustained the burden of persuasion on issue #3. The Hearing Officer granted Petitioner compensatory education, but did not grant Petitioner's requested relief of Student's placement in a non-public separate school.

FINDINGS OF FACT:⁸

1. Student resides with Student's mother in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with an ID disability classification. Student attended School A, Student's neighborhood DCPS school during SY 2021-2022 and most of SY 2022-2023. In early May 2023, Student began attending, School B, a different DCPS school in a self-contained special education program. (Parent's testimony, Petitioner's Exhibit 16-1)
2. Prior to attending School A, Student first attended a private day care center for a couple of years and then attended a public charter school located in the District of Columbia in SY 2020-2021. Because of the Covid-19 pandemic, Student missed significant amounts of instruction while at the public charter school. (Parent's testimony)

inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁷ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 USC § 1415(f) and 20 USC § 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 the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

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

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

⁸ 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. DCPS conducted Student's initial psychological evaluation in July 2022. The evaluation concluded that Student had deficient cognitive skills with a FSIQ of 57. Student was performing two grade levels below Student's current grade in all academic areas according to the Woodcock Johnson IV (WJ-IV), and Student scored well below the mean on adaptive testing. (Petitioner's Exhibit 25)
4. DCPS conducted Student's speech-language evaluation in June 2022. The evaluation revealed that Student's overall language abilities were severely delayed. (Petitioner's Exhibit 22)
5. DCPS conducted Student's Student's OT evaluation in July 2002. The evaluation indicated Student had significant delays. Student was struggling to recall letters or letter sequence and difficulty writing Student's name. (Petitioner's Exhibit 24)
6. On August 3, 2022, DCPS determined Student eligible for special education and related services and on August 31, 2022, developed Student's initial IEP. The IEP prescribed 6 hours per week of specialized instruction inside the general education (3 hours each in reading and math), and 6 hours per week of specialized instruction outside of the general education setting (2.5 hours each in reading and math and 1 hour in written expression. The IEP also prescribed the following related services outside general education: 180 minutes per month of OT and 4 hours per month of SLP. (Petitioner's Exhibit 7-13)
7. Petitioner participated in the Student's initial IEP meeting along with her attorney and educational advocate. Petitioner's advocate requested that Student be provided specialized instruction in all core academic subjects. Petitioner and her representatives requested that Student be provided 10 hours per week of specialized instruction inside general education and 10 hours per week outside general education. They also requested that Student be considered for assistive technology. The School A team stated they would first measure Student's progress with the initial level of specialized instruction and related services and would consider adding additional hours of specialized instruction and AT within four to six weeks. Student, like other Student's was provided a personal computer with speech to text and other capabilities. (Witness 1's testimony, Witness 2's testimony, Petitioner's Exhibit 8)
8. On September 21, 2023, Petitioner's advocate sent School A a dissent letter. In the letter, the advocate requested that School A reconsider providing Student's specialized instruction of at least 15 to 20 hours per week of specialized instruction outside the general education setting. She also requested that DCPS reconsider its decision regarding Petitioner's request regarding assistive technology and conduct an AT evaluation. She also requested that DCPS reconsider providing Student compensatory education for alleged delays in DCPS initiating Student's evaluations and determining Student's eligibility for special education. (Witness 1's testimony, Petitioner's Exhibit 42)
9. On October 21, 2022, Petitioner provided DCPS a proposal for the requested compensatory education. DCPS without admitting to the alleged delay, authorized Petitioner to obtain

150 hours of independent tutoring which Student has begun receiving. (Parent's testimony, Petitioner's Exhibit 50, DCPS' Exhibit 31)

10. On October 20, 2022, School A convened a meeting to review Student's progress and IEP. Petitioner and her representatives participated in the meeting. Petitioner's advocate again requested that all of Student's core academic classes be outside the general education setting. Petitioner's attorney requested that DCPS to provide Student with all core academic classes in a self-contained special education setting and provide Student non-academic classes and lunch with non-disabled peers. The attorney stated that if DCPS could not provide Student such a program, Petitioner was requesting that Student be placed in a non-public setting. (Petitioner's Exhibit 11)
11. The School A staff concluded that Student's was not progressing sufficiently with the level of services in the initial IEP and increased Student's hours of specialized instruction to 15 hours per week with all specialized instruction delivered outside general education. The amount and setting of the related services was unchanged. The School A staff stated that they would collect Student's performance data over the next four to six weeks to determine if Student was making progress with the increase in services; if Student did not show progress, School A would consider placing Student in a self-contained special education program. The School A team also agreed to conduct an AT evaluation. (Witness 2's testimony, Petitioner's Exhibit 11, Respondent's Exhibits 2, 8, 9 10)
12. DCPS conducted an AT evaluation on December 8, 2022. The evaluator recommended that Student have access to the following AT tools: text to speech technology, audio books and to assist with writing that Student have a pencil grip, dictation, and modified writing. (Respondent's Exhibit 42)
13. On or about December 19, 2022, School A convened a meeting to review the AT evaluation and Student's progress with the increased hours of specialized instruction. The team agreed that speech to text and audiobooks would be added to Student's IEP. The consensus of the team was that Student was not making sufficient progress with the level of services being provided. Student's special education teacher and other members of the School A team agreed that Student's would be better served in an environment outside the general education classroom. The team concluded that Student required a more restrictive environment ("MRE") such as the placement in School A's self-contained Education Learning Support ("ELS") classroom. At the time, School A staff noted that School A's ELS classroom had its maximum number of Students. In early January 2023, School A referred Student's need for an MRE to DCPS' central office. That central office review process typically takes four to six weeks to complete. (Witness 2's testimony, Witness 3's testimony, Respondent's Exhibits 13, 24)
14. A representative from DCPS central office conducted an observation of Student at School A for the referral for an MRE and on February 13, 2023, DCPS convened the IEP team meeting and amended Student's IEP to prescribe 22 hours of specialized instruction per week outside general education. Student's related services remained the same. The School A staff informed Petitioner that DCPS' notification would be forthcoming of a school

location where Student would be placed in an ELS program. DCPS issued a prior written notice ("PWN") that reflected the change in Student's IEP and placement. Student was placed in School A's ELS classroom following the February 13, 2023, meeting. (Witness 2's testimony, Witness 3's testimony, Respondent's Exhibits 4, 14, 15, 21)

15. On or about March 17, 2023, DCPS issued Petitioner a PWN for Student in the ELS program at School A. However, Petitioner did not want Student to remain in the ELS classroom at School A due to her concern that the classroom was initially considered to be at its maximum number of students, yet there had been no reduction in the number of students or an increase in teachers in that classroom. She asked that Student be provided another school location. (Parent's testimony, Witness 1's testimony, Petitioner's Exhibit 51)
16. On March 24, 2023, DCPS issued Petitioner notification that Student would be assigned to the ELS program at School B. On April 4, 2023, DCPS convened a transition meeting to discuss Student's transition to the ELS program at School B. Student began attending the ELS program at School B on May 4, 2023. (Parent's testimony, Respondent's Exhibit 17, Petitioner's Exhibit 21)
17. Petitioner's educational advocate proposed a compensatory education plan for the denials of FAPE alleged in Petitioner's DCP. The advocate asserted that had Student's initial IEP prescribed the self-contained special education program and AT devices, Student would have made six months of academic growth and mastered Student's IEP goals. She requested that as compensatory education Student be placed in a non-public special education school and that DCPS fund a soccer camp for Student during summer 2023 and provide transportation services to the camp. (Witness 1's testimony, Petitioner's Exhibit 51)

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 issue #3. The burden of persuasion fell to Respondent on issue #1 and #2 once Petitioner established a prima facie case on those issues.⁹ The burden of persuasion shall be met by a preponderance of the 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 Student a FAPE by failing to provide Student an appropriate IEP and placement on August 31, 2022.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that the IEP that DCPS developed for Student on August 31, 2023, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

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).

⁹ 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 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.

"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 *Andrew 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. *Andrew 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 *Andrew 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)

The evidence demonstrates that Student did not attend school until SY 2020-2021. Student attended a private day care for a couple of years before enrolling in a public charter school. During Student's year at the public charter school, Student missed significant amounts of instruction due to the Covid-19 pandemic. Consequently, Student began at School A in SY 2021-2022 significantly below grade level as reflected in the psychological evaluation that DCPS conducted. DCPS evaluated Student in the latter part of SY 2022-2022, and found Student eligible for special education on August 3, 2023. Although Petitioner and her representatives requested that Student's initial IEP prescribe 15 to 20 hours of specialized instruction per week, School A prescribed a total of 12 hours split between the general education setting and the special education setting.

Petitioner asserts that the IEP should have proposed at least 15 hours of specialized instruction with all core academics outside general education and AT services. Petitioner's expert witness testified she believed Student need an increased level of services in the initial IEP because Student was walking around the classroom socializing with peers rather than attending to classroom assignments. She did not believe the level on specialized instruction in Student's initial IEP was sufficient considering where Student was functioning relative to Student's peers.

On the other hand, DCPS' expert witness opined that because Student had not yet been provided any specialized instruction inside or outside the general education setting and had not yet been provided the related services prescribed in the initial IEP, the School A team members thought it more reasonable to prescribe Student 12 hours per week of specialized instruction both inside and outside general education. They believed that impact of those services could be measured over the next 4 to 6 weeks to determine if more services and more restriction in Student's educational placement were warranted. DCPS also agreed to review Petitioner's request for AT at that time.

The facts reveal that School A conducted such a review in October 2022, and determined that Student was not making sufficient progress. Consequently, School A increased the level of specialized instruction to the amount that Petitioner's advocate first requested, with all specialized instruction delivered outside general education. School A also agreed that time to conduct an AT evaluation. School A agreed to review Student's progress again in 4 to 6 weeks. DCPS conducted such a review on December 19, 2023. At that meeting, all team members, including the School A staff who had provided Student services concluded that Student was not making sufficient progress and needed a more restrictive setting in a self-contained special education program.

Petitioner asserts that DCPS should have prescribed this level of service and placement in a self-contained program in Student's initial IEP. Petitioner's support for that assertion rested on the

testimony of her educational advocate. Although the educational advocate has experience in delivering special education services in a school setting in the past and has participated in numerous IEP meetings, her testimony and opinion of the services that Student warranted in the initial IEP were not convincing when compared with the testimony of the School A staff member, Witness 2, who is currently working as a special educator in the school setting, observed Student in the classroom setting and communicated regularly with the educators who taught Student at School A.

This witnesses' testimony and rationale for providing the initial level of services and measuring Student's progress relative to those services over a 4-to-6-week time frame was in the IHO's view a reasonable and measured approach. Delivering services and measuring effectiveness within a reasonable time before further restricting Student's time with non-disabled peers is consistent with IDEA's mandate that students being educated in the least restrictive setting appropriate. As the evidence demonstrates, School A promptly reconvened the team within the time frame promised and determined that Student needed more specialized instruction delivered in a more restrictive setting.

The evidence also demonstrates that Student was provided a laptop computer with some of the technical capabilities that DCPS later placed in Student's IEP. Although there was no evidence that Student was able to use the technology in the first semester of school, there was likewise no evidence of any specific loss that Student incurred by not having AT services or devices specifically prescribed in the initial IEP. As with its review of Student's specialized instruction, School A agreed at the October 2022 meeting to conduct an AT evaluation.

Even though Student's did not make sufficient progress under the initial IEP, based upon the facts of this case and the cogent testimony of the DCPS expert witness, the IHO concludes that the initial IEP that DCPS developed for Student on August 31, 2022, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances at the time.

ISSUE 2: Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP and placement on October 27, 2022.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that the IEP that DCPS developed for Student on October 27, 2023, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Petitioner asserts that Student's October 27, 2023, IEP should have prescribed at least a self-contained program and AT services. As stated in the discussion of the issue above, in October 2022, DCPS convened a team meeting to review Student's progress under the initial IEP. At that meeting DCPS determined that Student was not making sufficient progress. School A increased the level of specialized instruction to the amount that Petitioner's advocate first requested, with all specialized instruction delivered outside general education. School A also agreed that time to conduct an AT evaluation. School A agreed to review Student's progress again in 4 to 6 weeks. DCPS conducted such a review on December 19, 2023. At that meeting, all team members, including the School A staff who had provided Student services concluded that Student was not

making sufficient progress and needed a more restrictive setting in a self-contained special education program.

Student's educational advocate testified that by the October 2022, meeting Student's lack of progress warranted more services than she had requested in the initial IEP and Student should have been placed in a self-contained program as of that October 2022 meeting. By contrast, the School A members of the team continued with a measured approach and increased Student's specialized instruction prescribed all the instruction outside general education. As previously stated, the IHO weighed the educational advocate's testimony against that of the DCPS expert witness and found the DCPS witness' testimony more credible based on her more recent experience in the classroom as a special educator and her proximity to the services being delivered to Student at School A.

As stated previously, this witnesses' testimony and rationale for providing the initial level of services and measuring Student's progress relative to those services over a 4-to-6-week time frame was in the IHO's view a reasonable and measured approach. Delivering services and measuring effectiveness within a reasonable time before further restricting Student's time with non-disabled peers is consistent with IDEA's mandate that students being educated in the least restrictive setting appropriate. As the evidence demonstrates, School A promptly reconvened the team within the time frame promised and determined that Student needed placement in a self-contained special education program.

DCPS also conducted the AT evaluation and in the December 19, 2022, meeting reviewed that evaluation and updated Student's IEP to include AT. As stated, the evidence also demonstrates that Student was provided a laptop computer with some of the technical capabilities that DCPS later placed in Student's IEP. Although there was no evidence that Student was able to use the technology in the first semester of school, there was likewise no evidence of any specific loss that Student incurred by not having AT services or devices specifically prescribed in the October 27, 2022, IEP.

Even though Student's did not make progress under October 27, 2022, amended IEP, based upon the facts of this case and the cogent testimony of the DCPS expert witness, the IHO concludes that the initial IEP that DCPS developed for Student on October 27, 2022, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances at the time.

ISSUE 3: Did DCPS deny Student FAPE by failing to timely provide Student an appropriate LOS after the December 19, 2022, meeting that could implement the services that are now prescribed by Student's February 13, 2023, IEP.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS failed to timely provide Student an appropriate location of services ("LOS") after the December 19, 2022, meeting that could implement the services that are now prescribed by Student's February 13, 2023, IEP.

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 evidence demonstrates that at the December 19, 2023, meeting the entire team, including School A staff, concluded that Student needed a more restrictive placement in a self-contained special education program. At the time School A's self-contained ELS classroom was not available. Although School A referred Student to DCPS central office for a MRE determination and DCPS subsequently conducted an observation of Student at School A, the determination of the MRE had already been made by the IEP team at the December 19, 2023, meeting.

Although it took DCPS until February 2023, to amend Student's IEP to reflect this placement, again, the DCPS team had already made the determination that Student required a more restrictive program. The facts demonstrate that Student was not placed in that more restrictive setting at School A until after the February 2023, IEP meeting. Thus, Student remained in an inappropriate placement for approximately two months. The evidence demonstrates that Student had already made little or no progress from the services delivered in the initial IEP and the October 2022 amended IEP. Although DCPS' decisions regarding those IEP were reasonable, it was totally unreasonable for DCPS to allow Student to remain in an inappropriate placement for two months, particularly when the program Student was eventually placed in was in the same school Student already attended. The IHO concludes that DCPS' failure in this regard was a denial of FAPE to 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.) The IHO has concluded that School A denied Student a FAPE in failing to promptly provide Student an appropriate placement following the December 19, 2022, meeting.

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

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

Petitioner has requested that as compensatory education that Student be placed in a non-public placement and awarded funding for and transportation to a summer soccer camp. This request was based on Petitioner's assertion that Student's had been denied a FAPE for inappropriate IEPs and placements beyond what was determined by the IHO to be a denial of FAPE. The IHO does not conclude that the denials determined warrant Student's placement in a non-public special education school. There was also scant evidence presented of the benefit of Student participating in a summer camp. Consequently, in the IHO directs DCPS to fund an independent evaluation to determine the appropriate compensatory education for Student being without an appropriate education placement for approximately two months.

ORDER:

1. DCPS shall, within 15 business days of the date of this order, provide Petitioner authorization to obtain an independent educational evaluation to determine the appropriate compensatory education that will reasonably compensate Student for being in an inappropriate placement for approximately two months and that will provide Student the educational benefits that likely would have accrued to Student had DCPS promptly provided Student an appropriate educational placement.
2. After having obtained the above referenced independent evaluation, Petitioner is hereby granted authorization to seek said compensatory services in a separate due process

complaint if need be to obtain appropriate compensatory services for the denial of FAPE the IHO has determined in this HOD.

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.
Hearing Officer
Date: May 31, 2023

Copies to: Counsel for Petitioners
 Counsel for LEA
 ODR [\[hearing.office@dc.gov\]](mailto:hearing.office@dc.gov)