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**Confidential**

<p>Parent on Behalf of Student, <sup>1</sup></p>  <p>Petitioner,</p>  <p>v.</p>  <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p>  <p>Case # 2024-0042</p> <p>Date Issued: May 20, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p>  <p>Hearing Date: May 13, 2024</p> <p>Counsel for Each Party listed in Appendix A</p>  <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> 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 (“DCMR”), 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 pursuant to IDEA with a disability classification of specific learning disability (“SLD”). Student attended a DCPS school (“School A”) for (“SY”) 2023-2024.

On March 7, 2024, Student's parent (“Petitioner”) filed a due process complaint (“DPC”) alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing fully implement Student’s individualized educational program (“IEP”) by not providing Student the full measure of speech language services prescribed by Student’s IEP. Petitioner seeks as relief a finding that Student has been denied a FAPE and that DCPS be ordered to fund compensatory education for Student for the alleged denial of FAPE.

### **DCPS’s Response to the Complaint:**

DCPS filed a response to the complaint on March 22, 2024. In its response, DCPS stated, inter alia, the following:

DCPS denies that Student was denied a FAPE when it allegedly failed DCPS denies the Student was denied a FAPE by allegedly failing to implement all of the Student’s speech and language services from February 9, 2023, through March 6, 2024. During this period the DCPS was required to deliver 3880 minutes/ 64.7 hours of speech language services. DCPS delivered or attempted to deliver 2894 minutes/ 48.2 hours of speech language services. There was a 25% gap between the required and delivered speech language services is not substantial and thus was not an denial of FAPE.

Although DCPS denies the FAPE allegation, after the March 19, 2024, resolution meeting, DCPS, at the Petitioner’s request authorized 27 hours of independent speech services. These services can be used immediately. As a result, the claim is now moot as there is no other relief the hearing officer can grant.

### **Resolution Meeting and Pre-Hearing Conference:**

Petitioner and DCPS participated in a resolution meeting on March 19, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint (“DPC”) was filed on March 7, 2024. The 45-day period began on April 7, 2023, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on May 21, 2024.

The undersigned impartial hearing officer (“IHO”) conducted a pre-hearing conference on April 8, 2024, and issued a pre-hearing order (“PHO”) on April 8, 2024, stating, inter alia, the issue to be adjudicated.

**ISSUE: 2**

The issue adjudicated is:

Did DCPS deny Student a free appropriate public education (“FAPE”) by failing to implement Student’s February 9, 2023, IEP by not providing Student speech language services.

**DCPS’s Motion to Dismiss:**

On April 19, 2024, DCPS counsel filed a motion to dismiss Petitioner’s DPC on grounds of mootness pursuant Fed. R. Civ. P. 12(b)(1), because DCPS had allegedly provided all relief requested by Petitioner. DCPS asserted that the requirements that render a claim moot were met on March 19, 2024, when DCPS issued Petitioner an authorization letter funding 27 hours of speech services, the exact amount requested for the specific period in which Petitioner alleged speech services were not implemented. DCPS asserted in its motion that Student is currently receiving monthly speech language services and there is a reasonable expectation that the Student will continue to receive those services. DCPS also asserts that during the pre-hearing conference Petitioner’s counsel stated that Petitioner is not seeking additional relief, therefore, it can only be concluded that Petitioner’s continuation of this litigation is driven by a quest for attorney fees.

On April 24, 2024, Petitioner’s counsel filed an opposition to the motion to dismiss. In her opposition to the motion, Petitioner asserts “[a] case is not moot so long as any single claim for relief remains viable, whether that claim was the primary or secondary relief originally sought,” citing *Ramer v. Saxbe*, 522 F.2d 695, 704 (D.C. Cir. 1975). “[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442, 104 S.Ct. 1883, 80 L.Ed. 2d 428 (1984).

As Petitioner aptly points out, in addition to the compensatory services, she has requested a finding that DCPS denied Student a FAPE by failing to implement Student’s IEP from SY 2022-2023 to present. The case is not currently moot, because that requested relief can still be ordered by the IHO. Since all aspects of Petitioner’s requests for relief remain unaddressed, this claim remains ripe and this IHO denied DCPS’s motion on the record at the outset of the hearing.

**DUE PROCESS HEARING:**

The Due Process Hearing was convened on May 13, 2024. The hearing was conducted via video teleconference on the Microsoft Teams platform.

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<sup>2</sup> At the outset of the due process hearing, the IHO reviewed the issues to be adjudicated the parties agreed to the issues as stated herein.

## **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 32 and Respondent's Exhibits 1 through 23 ) that were admitted into the record and are listed in Appendix 2.<sup>3</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>4</sup>

## **SUMMARY OF DECISION:**

Petitioner held the burden of persuasion on the issue adjudicated. Based on the evidence, the IHO concluded that Petitioner sustained the burden of persuasion by a preponderance that DCPS denied Student a FAPE by not providing Student a significant portion of prescribed speech-language services. The IHO granted Petitioner's request for compensatory education for the denial of FAPE.

## **FINDINGS OF FACT:<sup>5</sup>**

1. Student resides with Student's parent, Petitioner, in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education pursuant to IDEA with a disability classification of SLD. Student is currently in \_\_\_\_\_ grade and at the start of SY 2023-2024 was attending School A, a DCPS school.
2. As part of Student's individualized educational program ("IEP") during the 2022-2023 school year, dated February 9, 2023, Student received 2.5 hours per week of specialized instruction in the general education setting: 2.5 hours per week in written expression outside of the general education setting, 5 hours per week each of math and reading outside of the general education setting. In addition, it prescribed 240 minutes per month of speech-language pathology ("SLP") outside of the general education setting and 30 minutes per week of SLP inside the general education setting. DCPS related services providers are not required to make up services that were missed due to Student being absent when the service provider has scheduled or attempted to deliver the related service. (Witness 2's testimony, Respondent's Exhibit 1)

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

<sup>4</sup> Petitioners presented three witnesses: (1) Student's mother (Petitioner), (2) an educational advocate who testified as an expert witness. Respondent presented three witnesses: (1) Student's DCPS Speech-Language Pathologist for SY 2022-2023, (2) Student's DCPS Speech-Language Pathologist for SY 2022-2024, and (3) DCPS Resolution Specialist. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

<sup>5</sup> 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. During SY 2022-2023, Student's SLP service trackers indicate that from February 2023 to June 2023 Student was due a total of 1800 minutes of SLP services of which Student was absent 290 minutes of the time when services were attempted, which makes 1510 minutes that could have been delivered. Of the 1510 minutes that could have been delivered, Student was provided 832 minutes of SLP services. Thus, Student was not provided 45% of SLP services during this period. DCPS related services providers are not required to make up services that were missed due to Student being absent when the service provider has scheduled or attempted to deliver the related service. (Witness 3's testimony, Petitioner's Exhibit 22)
4. During SY 2023-2024, Student's SLP service trackers indicate that from September 2023 to January 2024, Student was due a total of 1800 minutes of SLP services of which Student was absent 310 minutes of the time when services were attempted, which makes 1490 minutes that could have been delivered. Of the 1490 minutes Student that could have been delivered, Student was provided 1235 minutes of SLP services. Student was not provided 17% of SLP services during this period. (Petitioner's Exhibit 22)
5. Of the 3600 minutes that Student was due according to Student's IEP from February 2023 through January 2024, minus the 600 minutes that Student was absent when SLP services were attempted, Student was provided 2067 minutes. This resulted in Student missing 933 minutes or 15.6 hours (31%) of the SLP services that Student should have been provided during this period. (Petitioner's Exhibit 22)
6. On January 22, 2024, Student's annual IEP meeting was held. During the meeting the team agreed that the student would continue to qualify as a student eligible for special education services under the disability classification of SLD. The IEP developed prescribed the following services: 7.5 hours per week of specialized instruction outside the general education setting with 2.5 of those hours in math, and 5 hours per week each in math and reading inside the general education setting, for a total of 17.5 hours of specialized instruction. In addition, it prescribes 2 hours and 20 minutes per month of SLP both inside and outside of the general education setting, totaling 4 hours and 40 minutes per month of SLP. (Respondent's Exhibit 2)

## **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. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioner held that the burden of persuasion on the issue adjudicated. 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:** Did DCPS deny Student a free appropriate public education (“FAPE”) by failing to implement Student’s February 9, 2023, IEP by not providing Student speech language services.

**Conclusion:** Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to implement Student’s February 9, 2023, IEP by failing to deliver all prescribed SLP services.

To ensure that a child receives a FAPE, special education and related services must be provided "in conformity with the [child's] individualized education program," or IEP. 20 U.S.C. § 1401(9)(D). An IEP is the "centerpiece of the statute's education delivery system[.]" *Honig v. Doe*, 484 U.S. 305, 311 (1988). "It is through the IEP that the free appropriate public education required by the Act is tailored to the unique needs of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 401 (2017) (cleaned up). The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 399. A team of interested individuals--including the child's parents and teachers--draft his IEP. See 20 U.S.C. § 1412(a)(4), 1414(d). Each IEP must describe the "special education and related services ... that will be provided" to help the child "advance appropriately." *Id.* § 1414(d)(1).

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)). U.S. District Judge Rudolph Contreras explained in *Middleton*

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

The evidence in the case demonstrates that from February 2023 to June 2023, Student was available for 1510 minutes of SLP services that Student's IEP prescribed. Student was provided 832 minutes of those SLP services. During SY 2023-2024, from September 2023 to January 2024 Student was available for 1490 minutes of SLP services that Student's IEP prescribed. Student was provided 1235 minutes of those SLP services. From February 2023 through January 2024, Student was available for 3000 minutes of SLP services that Student's IEP prescribed. Student was provided 2067 minutes of those SLP services. This resulted in Student missing 933 minutes or 15.6 hours or 31% of the SLP services that Student should have been provided during this period. The IHO concludes that missing nearly one-third of the SLP services that Student was due was a material failure to implement a substantial or significant portion of Student's IEP and constituted a denial of FAPE.

### **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 DCPS denied Student a FAPE by failing to return Student to Student's school placement following the February 27, 2027, incident, and the March 4, 2024, MDR determination.

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 the compensatory education included in her educational advocate's proposal. Petitioner's educational advocate asserted that the proposal was designed to compensate Student for the speech-language services missed. However, the number of independent services requested, exceeded the amount of services that evidence demonstrates DCPS failed to provide. The IHO found that the provision of independent services to Student in the amount that were not

provided was a reasonable means of placing Student in the stead Student's would have been had the services not been missed. In addition, given the testimony and representations made during that hearing that Petitioner has not been able to find providers in the past who will come to Petitioner's home to deliver independent services, the IHO also directed in the order below that DCPS provide Student transportation for the independent services awarded.

**ORDER:**

1. DCPS shall, within fifteen (15) business days of the date of this order, rescind the authorization that it provided Petitioner for independent SLP services and issue a new authorization for Petitioner to obtain the following in compensatory education: 16 hours of independent speech-language services at the OSSE prescribe rate and reasonable transportation for Student to obtain these 16 hours of independent services.
2. All other relief requested by Petitioner is denied.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Impartial Hearing Officer**  
**Date: May 20, 2024**

Copies to:     Counsel for Petitioner  
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