

OSSE
Office of Dispute Resolution
November 09, 2023

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) Date Issued: November 9, 2023
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) Hearing Officer: Peter B. Vaden
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) Case No: 2023-0131
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) Online Videoconference Hearing
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) Hearing Dates: October 26 and 27, 2023
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¹ Personal identification information is provided in Appendix A.

Petitioner's due process complaint, filed on July 12, 2023, named DCPS as respondent. The undersigned hearing officer was appointed on July 12, 2023. On July 24, 2023, the parties met for a resolution session and were unable to resolve the issues in dispute. On July 31, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On September 6, 2023, I granted DCPS' unopposed motion to extend the final decision due date in this case to November 10, 2023.

With the Parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on October 26 and 27, 2023. Parent appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by RESOLUTION SPECIALIST and by DCPS' COUNSEL.

Counsel for each party made an opening statement. Parent testified and called OCCUPATIONAL THERAPIST 1 (OT-1), SPECIAL EDUCATOR and SPEECH-LANGUAGE PATHOLOGIST 1 (SLP-1) as additional witnesses. DCPS called as witnesses Resolution Specialist, SPECIAL EDUCATION DIRECTOR, OCCUPATIONAL THERAPIST 2 (OT-2) and SPEECH-LANGUAGE PATHOLOGIST 2 (SLP-2). Petitioner's Exhibits P-1 through P-55 and DCPS' Exhibits R-1 through R-92 were all admitted into evidence without objection. On October 27, 2023, after the taking of the evidence was completed, counsel for the respective parties made oral

closing arguments. There was no request to submit written closings.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination, set out in the July 31, 2023 Prehearing Order, are:

Did DCPS deny the child a FAPE by failing to fully implement the child's IEP speech and language and occupational therapy services during the 2021-2022 and 2022-2023 school years?

Did DCPS deny the student a FAPE when the District failed to provide an appropriate IEP on July 23, 2021 because the IEP did not program for social/emotional/behavioral issues?

Did DCPS deny the student a FAPE when the District failed to provide an appropriate IEP on May 16, 2022 because the IEP (1) did not program for the student's social/emotional/behavioral issues, (2) provided insufficient speech hours and (3) was not based on sufficient evaluative data?

Did DCPS deny the student a FAPE when the District failed to provide an appropriate IEP on May 10, 2023 because the IEP (1) did not program for social/emotional/behavioral issues, (2) provided insufficient speech hours, (3) provided insufficient OT hours and (4) was not based on sufficient evaluative data?

Did DCPS deny the student a FAPE when the District failed to timely and comprehensively evaluate the student by July 23, 2021 by completing Comprehensive Psychological, Occupational Therapy, Speech/Language, Assistive Technology, and Functional Behavioral assessments?

For relief, the Parent requests that the hearing officer order that DCPS shall:

- i. Fund compensatory education for the denials of FAPE alleged in the complaint;

- ii. Revise the student's IEP to include social/emotional/behavioral interventions;
- iii. Timely order, conduct, and review a comprehensive Occupational Therapy, Comprehensive Psychological, Speech/Language and Assistive Technology assessments and a Functional Behavioral Assessment and
- iv. Within 15 days of completing the evaluations, reconvene the IEP team to review and revise the student's IEP as necessary based on the new evaluative data.

FINDINGS OF FACT

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

1. Student, an AGE child, resides with the Parent in the District of Columbia.
Testimony of Parent. Student is a child with a disability, as defined by the IDEA, as having Autism. Exhibit P-12.
2. In September 2020, Student was seen by the D.C. Office of the State Superintendent of Education's (OSSE) Strong Start DC Early Intervention Program, via video telehealth, for a virtual assessment in his/her home with the parents present. Student was determined eligible for the OSSE Strong Start program based on developmental delays. Exhibit P-42. For the virtual assessment, Strong Start staff conducted a caregiver interview with the parents and administered the Assessment, Evaluation, and Programming System for Infants and Children, 2nd Edition (AEPS-2). Student qualified for IDEA Part C (Early Intervention) services due to having a 25-49% delay in the areas of adaptive, cognitive, communication, fine motor and social emotional development. Exhibits P-42, P-4. Student's Initial and Transition

Individualized Family Service Plan (IFSP), dated October 7, 2020, provided for in-home speech-language therapy once a week for 60 minutes. Exhibit P-4.

3. Strong Start also referred Student to DCPS' Early Stages Center to see if he/she qualified for school-based services. In November 2020, Student was observed virtually at his/home by an Early Stages team, including a speech-language pathologist, a special educator and an educational psychologist. The Early Stages team administered a Caregiver Interview, the Developmental Assessment of Young Children – Second Edition (DAYC-2), Communication Domain (conducted via videoconference with the parents acting as the on-site testing facilitators and reporters) and a naturalistic observation of play, pragmatic language, and speech. The Early Stages assessors concluded that Student's stereotypical behaviors combined with verbal and nonverbal social-communication deficits appeared to be in keeping with the characteristics of Autism Spectrum Disorder (ASD). Exhibit P-4.

4. On December 18, 2020, the Early Stages educational psychologist issued a "Confidential Supplemental Psychological Assessment Report." Due to COVID-19 restrictions, the psychologist was only able to gather informal qualitative data through remote data collection, via parent interview and virtual observation/assessment of Student in his/her home. The psychologist reported that overall, Student did not appear to attend to what was happening in his/her environment. Student's visual and tactile exploration of objects was limited. He/she was not observed to engage in a variety of functional play and symbolic play was absent. He/she was generally

unresponsive to directions or commands, and was not observed to engage in reciprocal communication or interaction with his/her parents. Overall, Student exhibited developmental delays across development in social communication, social development and adaptive functioning related to social and leisure skills, as well as self-direction, communication and social difficulties typically seen in Autism Spectrum Disorder (ASD). Assessment of Student's social skill development was considered to fall within the Mildly Delayed range and was commensurate with his/her cognitive skills. Exhibit R-4.

5. The DCPS Early Stages IEP team met on December 28, 2020 to develop Student's initial DCPS IEP. The December 28, 2020 IEP identified Adaptive/Daily Living Skills, Cognitive and Communication/Speech and Language as areas of concern for the child. The IEP team agreed that Student required 20 hours per week of Specialized Instruction outside of the general education classroom setting and 4 hours per month of speech and language related services. The team determined that the student was eligible for special education transportation and did not qualify for extended school year (ESY) services. Exhibit P-7.

6. On January 1, 2021, the Early Stages special education eligibility team determined, based upon the findings of September 2020 Strong Start assessments and the November 2020 DCPS multidisciplinary team assessment, that Student was eligible for special education and related services as a child with Autism Spectrum Disorder (ASD), known as Autism. Student was reported to have delays in communication,

cognitive, social, and adaptive or functional skills which adversely affected the child's educational performance. Exhibits R-6, R-7.

7. On June 23, 2021, a Children's National Medical Center nurse-practitioner reported that Student met diagnostic criteria for Autism Spectrum Disorder and recommended that Applied Behavior Analysis (ABA) therapy, speech therapy and OT were medically necessary for Student. Exhibit R-9.

8. The DCPS Early Stages IEP team met on July 23, 2021. Mother reported at the meeting that Student had regressed in his/her verbal communication and had fewer words. The July 23, 2021 IEP identified Adaptive/Daily Living Skills, Cognitive, Communication/Speech and Language and Motor Skills/Physical Development as areas of concern for the child. The July 23, 2021 IEP team agreed that Student required 26 hours per week of Specialized Instruction outside of the general education classroom setting, 4 hours per month of Speech and Language services and 2 hours per month of OT services. The team determined that the student was eligible for special education transportation and did not qualify for extended school year (ESY) services. Exhibits R-10, R-11. On March 31, 2022, Student's IEP was amended to provide for ESY services. Exhibit R-13.

9. At the beginning of the 2021-2022 school year, Student began attending school in Grade Y at CITY SCHOOL 1, a DCPS Public School. Student was placed in the Communication and Education Supports (CES) program classroom. For the school year, Student was absent some 68 school days. Exhibit R-31. As of April 18, 2022, most

of Student's IEP goals were reported to be "just introduced" because Student had experienced periods of extended absences. Exhibit R-83.

10. Student's IEP team at City School 1 met for his/her annual IEP review on May 16, 2022. The May 16, 2022 IEP identified Adaptive/Daily Living Skills, Cognitive, Communication/Speech and Language and Motor Skills/Physical Development as areas of concern for the child. The May 16, 2022 IEP continued 26 hours per week of Specialized Instruction Services outside of the general education setting and 4 hours per month of Speech and Language services. The IEP team increased Student's OT services from 2 hours to 3 hours per month. The IEP team determined that the student was eligible for special education transportation and required extended school year (ESY) services. Exhibits R-10, R-11.

11. For school year 2022-2023, DCPS identified CITY SCHOOL 2 as a new location of services for Student. The child's school location was changed from City School 1 because City School 2 was the CES feeder school in the student's high school boundary. Exhibit P-38.

12. On January 18, 2023, following an Assistive Technology (AT) consultation, Student's IEP team agreed to amend Student's IEP to provide for Student to be supplied an electronic Augmentative and Alternative Communication (AAC) device. Previously, Student had made progress with low-tech, non-electronic AAC options, *e.g.*, picture boards. Testimony of Special Education Director. DCPS stated that an electronic AAC device would be appropriate for Student because he/she had difficulty with

communication as demonstrated by difficulties following classroom rules, expressing wants/needs and verbally asking and answering questions. It was proposed that Student would benefit from a high-tech, dynamic display, robust vocabulary system device. Exhibits R-20, R-21. Although the child's IEP was amended in January to provide for the electronic AAC device, the device was not delivered to the school for Student's use until April or May of 2022. Testimony of Mother, Testimony of Special Education Director.

13. In the 2022-2023 school year, Student accrued some 21 days of absences. Exhibit R-31. As of April 10, 2023, Student was reported to be Progressing on all IEP goals, except for two Speech and Language goals for which Student had made no progress. Exhibit R-87.

14. Student's IEP Team at City School 2 met for his/her annual IEP review on May 10, 2023. The May 10, 2023 IEP identified Adaptive/Daily Living Skills, Cognitive, Communication/Speech and Language and Motor Skills/Physical Development as areas of concern for the child. The May 10, 2023 IEP continued 26 hours per week of Specialized Instruction Services outside of the general education setting. For related services, the IEP provided 240 minutes per month of Speech and Language services and increased OT services from 3 hours to 240 minutes per month. The team specified that Student would have an Assistive Technology (AT) device for communication. The IEP team determined that the student was eligible for special education transportation and required extended school year (ESY) services. Exhibit P-12.

15. Student has wonderful receptive language skills, but for the last two school years, he/she has been nonspeaking. Student communicates with gestures, some sign language and with the electronic AAC device, when he/she brings it to school. (Student has been taking the AAC device home after school and does not always bring the device back to school with him/her.) Testimony of Special Education Director.

16. Student's triennial reevaluation is due in December 2023. At an Analysis of Existing Data (AED) meeting on September 20, 2023, Mother requested that the reevaluation be moved up. The school team agreed to conduct additional assessments in the areas of cognitive and adaptive skills (psychological) OT, speech/language and AT for the triennial reevaluation and to conduct a functional behavioral assessment (FBA) to identify the function of Student's behaviors. Exhibit P-27. As of the due process hearing date, these assessment were almost completed. Testimony of Special Education Director.

17. Mother testified that she had requested that student be evaluated in the fall of 2022 and May of 2023. Special Education Director testified that the school had not received a reevaluation request for Student until fall 2023. Both witnesses were credible and no written request for evaluation was offered in evidence. I conclude that Parent did not meet her burden of persuasion that she had requested, before fall 2023, that Student be reevaluated.

18. On June 23, 2013, DCPS issued written funding authorization to the Parent to obtain 8 hours of independent speech and language services for Student.

Exhibit R-26.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

ANALYSIS

I.

2020-2021 School Year Evaluation

Did DCPS deny the student a FAPE when the District failed to timely and comprehensively evaluate the student by July 23, 2021 by completing Comprehensive Psychological, Occupational Therapy, Speech/Language, Assistive Technology, and Functional Behavioral Assessments?

Student was assessed in September 2020 by Strong Start, the District's early intervention program administered through OSSE, the District of Columbia's State Education Agency (SEA). Because of COVID-19 limitations, the Strong Start team – an Early Intervention Therapist/Occupational Therapist and an Early Intervention Therapist/Speech Language Pathologist – relied entirely on online virtual assessments, including a caregiver interview and the Assessment, Evaluation, and Programming System for Infants and Children, 2nd Edition (AEPS-2) assessment. The Strong Start assessors concluded that the child had qualifying delays in Adaptive Development, Cognitive Development, Communication Development, Fine Motor Development and Social Emotional Development.

In November 2020, DCPS' Early Stages Center evaluation team conducted an initial evaluation of the child for special education eligibility. The Early Stages team, including a speech-language pathologist, a special educator and an educational psychologist, conducted a remote observation assessment of the child, including a caregiver interview, the Developmental Assessment of Young Children – Second Edition (DAYC-2), communication domain, and a “naturalistic” observation of play, pragmatic language, and speech. The Early Stages assessors concluded that the child's stereotypical behaviors, combined with verbal and nonverbal social-communication deficits, appeared to be in keeping with the characteristic of Autism Spectrum Disorder (ASD). On January 1, 2021, the DCPS eligibility team determined, based upon the

September 2020 OSSE Strong Start assessments and the November 2020 DCPS Early Stages evaluation, that Student was eligible for special education and related services as a child with Autism Spectrum Disorder (ASD).

Petitioner alleges that following Early Stages' initial evaluation of Student, DCPS denied the child a FAPE by not completing comprehensive psychological, OT, Speech/Language, Assistive Technology, and behavioral assessments by July 23, 2021, when the Early Stages IEP team met to review Student's initial IEP. DCPS responds that Early Stages' December 2020 initial evaluation of Student was sufficiently comprehensive in light of the child's age at the time, and the circumstance that due to the COVID-19 emergency, DCPS schools did not fully reopen for in-person learning until the fall of the 2021-2022 School Year. DCPS disputes that Student needed to be further evaluated prior to his/her triennial reevaluation due date. Petitioner must shoulder the burden of persuasion that Student needed to be more comprehensively evaluated by July 2021. For the reasons explained below, I find that Petitioner has not met that burden.

Generally, when a child has been evaluated for special education eligibility and the appropriateness of the local education agency's (LEA) evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B),

1414(b)(1-3); 34 C.F.R. § 300.304(b)(1-3), (c)(4, 6).

Petitioner offered scant evidence that the December 2020 eligibility evaluation of Student was not sufficiently comprehensive. The September 2020 Strong Start assessors evaluated Student's Adaptive, Cognitive, Communication, Fine and Gross Motor and Social-Emotional Development and needs. In November 2020, the DCPS Early Stages team supplemented the Strong Start assessment with a parent interview and a virtual observation of the child in his/her home. The Early Stages assessment included a caregiver interview, the DAYC-2 assessment and a "naturalistic" observation of play, pragmatic language, and speech. Based on these data, the Early Stages eligibility team determined that Student was eligible for special education and related services as a child with Autism Spectrum Disorder. Student's initial IEP provided for his/her full-time placement in a Communication and Education Supports (CES) classroom which serves, primarily, children with ASD. The initial IEP also provided for Speech-Language Pathology related services. There was no disagreement with either the ASD disability classification or Student's educational placement in the CES classroom.

Petitioner's expert witness, OT-1, was critical that the Strong Start evaluators did not collect standardized OT data. However, DCPS' expert, OT-2, opined that because Student was just starting GRADE Y in the 2021-2022 school year and becoming integrated into the CES setting, there was no clinical need to further evaluate Student for OT before the 2023-2024 school year. OT-1 also asserted that in the initial

evaluation, Student's fine motor skills had not been evaluated. However, the Strong Start team, which included an Occupational Therapist, assessed Student's gross motor and fine motor skills and reported that the child was functioning within range, or at the cut-off mark, for typically developing children. OT-2 provided OT services to Student at City School 2 and has observed him/her in multiple settings. OT-1 never observed Student in an educational environment and her only contact with the child was a one-hour virtual observation. I found OT-2's opinion about the sufficiency of Early Stages' initial evaluation more credible than that of OT-1 who was far less familiar with the child.

Another expert witness for the Petitioner, Special Educator, opined that DCPS should have conducted a Functional Behavior Assessment of Student. A Functional Behavior Assessment or "FBA" refers to a systematic set of strategies that are used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. *See Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017). DCPS' expert, Special Education Director, who has interacted daily with the child since the 2022-2023 school year, testified convincingly that she has seen no behavioral concerns for Student. Moreover, Special Educator believed, incorrectly, that Student was placed in a self-contained behavior support classroom and she was apparently unaware that at DCPS schools, Student had always been served in the CES classroom, which uses Applied Behavior Analysis (ABA) strategies, designed for children on the Autism spectrum. I did not find

Special Educator's opinion that Student required an FBA persuasive.

Petitioner's speech-language expert, SLP-1, opined that Student needs further evaluation of AT, speech-language and OT needs. It was not clear from her testimony whether SLP-1 thought that Student needed these assessments prior to the July 12, 2021 IEP review meeting. In any event, this expert witness, also, was not well-informed about Student. She never observed or met the child and she understood, erroneously, that Student's educational placement was the general education setting. Assuming that SLP-1's opinion was that Student should have been further evaluated between the January 1, 2021 initial eligibility determination and the July 23, 2021 annual IEP meeting, I did not find her testimony persuasive. In sum, I conclude that Petitioner did not meet her burden of persuasion that DCPS denied Student FAPE by failing to comprehensively evaluate the child by July 23, 2021.

II.

Appropriateness of IEPs

- Did DCPS deny the student a FAPE when the District failed to provide an appropriate IEP on July 23, 2021 because the IEP did not program for social/emotional/behavioral issues?
- Did DCPS deny the student a FAPE when the District failed to provide an appropriate IEP on May 16, 2022 IEP because the IEP (1) did not program for the student's social/emotional/behavioral issues, (2) provided insufficient speech hours, and (3) was not based on sufficient evaluative data?
- Did DCPS deny the student a FAPE when the District failed to provide an appropriate IEP on May 10, 2023 because the IEP (1) did not program for social/emotional/behavioral issues, (2) provided insufficient speech hours, (3) provided insufficient OT hours, and (4) was not based on sufficient evaluative

data?

Petitioner contends that beginning with Student's July 23, 2021 IEP, DCPS failed to offer the child appropriate IEPs. DCPS responds that its IEPs were appropriate and enabled the child to make appropriate educational progress in light of his/her disabilities.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a court or a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

Middleton at 128.

Procedural Compliance

In this case, the Parent alleges that DCPS' May 16, 2022 and May 10, 2023 IEPs were not based sufficient evaluative data. To comply the IDEA's procedural requirements, the local education agency (LEA) must ensure that each child with a disability is appropriately evaluated before developing his/her IEP. *See* 34 C.F.R. § 300.304(b) (Public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information that may assist in determining the content of the child's IEP); *Richardson v. District of Columbia*, 273 F.

Supp. 3d 94, 101 (D.D.C. 2017) (IEP team's failing to order new testing may be procedural error.)

Petitioner's experts opined in their respective testimonies that DCPS' 2020 initial evaluation of Student was inadequate for want of a standardized OT evaluation and for failure to conduct an FBA and an AT Augmentative and Alternative Communication (AAC) device evaluation. Above in this decision, I have concluded that Petitioner did not establish that DCPS' initial evaluation of Student was inadequate for want of a standardized OT evaluation or of an FBA.

As concerns the need for an AT evaluation, in the 2021-2022 school year, Student had been making progress with low tech communication picture boards. In January 2022, the City School 2 team wanted to expand Student's expressive communication options and obtained an AT assessment of the child. At that time, the child was only AT ASSESSMENT AGE. Assistive Technology had not previously been requested for Student and the school team did not think AT was needed before. Deferring to the school team's expertise, I find that Petitioner did not establish that Student should have had an AT assessment at a younger age. *See, e.g., T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.)

In connection with developing Student's May 16, 2022 and May 10, 2023 IEPs, I find that DCPS complied with the procedures set forth in the IDEA for ensuring that Student was appropriately evaluated. (In response to a request from Mother in

September 2023, DCPS is currently conducting additional assessments of Student in the areas of cognitive and adaptive skills (psychological) OT, speech/language and AT, as well as an FBA.)

Turning to the second, substantive, prong of the *Rowley* IEP inquiry, were the IEPs developed by DCPS, beginning in July 2021, appropriate for Student? I find that the Parent has made a *prima facie* showing, through her expert witnesses' testimonies, that DCPS' July 23, 2021, May 16, 2022 and May 10, 2023 IEPs for Student were not appropriate. Therefore, the burden of persuasion as to the appropriateness of these IEPs falls on DCPS.

In *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, (D.D.C. Mar. 8, 2022), U.S. District Judge Beryl Howell explained the IDEA's FAPE requirement:

A "free and appropriate public education," or "FAPE," is delivered by local education authorities through a uniquely tailored " 'individualized education program,' " or "IEP." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 993-994 (2017); *see also* 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). To be IDEA-compliant, an IEP must reflect "careful consideration of the child's individual circumstances" and be "reasonably calculated to enable the child to receive educational benefits," *Endrew F.*, 137 S. Ct. at 994, 996 (cleaned up), "even as it stops short of requiring public schools to provide the best possible education for the individual child," *Z.B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018). . . . An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP "denies the child an appropriate education." *Z.B.*, 888 F.3d at 519.

A.D., 2022 WL 683570 at *1. "[A]n IEP's adequacy thus 'turns on the unique circumstances of the child for whom it was created,' and a reviewing court should defer

to school authorities when they ‘offer a cogent and responsive explanation’ showing that an IEP ‘is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances.’” *A.D.* at *7, quoting *Endrew F.*, *supra*, 137 S. Ct. at 1001-02.

IEP Programing for Social/Emotional/Behavioral Issues

Petitioner claims that DCPS’ July 23, 2021 IEP, as well as the 2022 and 2023 IEPs, were inappropriate because none of the IEPs programed for social/emotional/behavioral issues. The Parent’s expert, Special Educator, opined that the July 23, 2021 IEP, as well as the May 16, 2022 and May 10, 2023 IEPs should have included Social-Emotional-Behavioral goals tailored to address the child’s social-emotional needs. Special Educator based her opinion on language in the 2022 and 2023 IEPs describing Student’s “maladaptive behaviors” in the present levels of performance (PLOPs) for Adaptive/Daily Living Skills. In the 2022 IEP, it was reported that when the child was asked to repeat what he/she said, he/she would not, and the child would express that he/she “was upset by engaging in maladaptive behaviors (*i.e.* crying, whining, throwing body on floor, trying to squeeze you).” In the 2023 IEP, it was reported that the child would express that he/she was upset by engaging in maladaptive behaviors (*i.e.*, crying, whining, or stomping his/her feet) and also that Student displayed “some mild elopement behavior.”

DCPS’ expert, Special Education Director, who has interacted daily with the child since the 2022-2023 school year, testified that she has seen no behavioral concerns for Student. Mother also testified that the child loves to go to school, is able to follow

directions and likes to interact, joining in with friends. Special Educator, who never observed the child in school, apparently discounted the IEP teams' statements in all three IEPs that Student's behavior does *not* impede the child's learning or that of other children. Moreover, Special Educator was unaware that Student is placed full-time in the CES program classroom, which uses Applied Behavior Analysis (ABA) strategies designed for children on the Autism spectrum. I did not find Special Educator's opinion persuasive that Student needed Social-Emotional-Behavioral programming in his/her IEPs and I conclude that DCPS has met its burden of persuasion that the IEP teams' decisions not to program specifically for social/emotional/behavioral issues in Student's IEPs were appropriate.

Speech-Language Hours

The May 16, 2022 IEP and the May 10, 2023 IEP provided for Student to receive Speech-Language Pathology related services for 4 hours per month and 240 minutes per month, respectively. In her complaint, Petitioner contended that these IEP speech hours were insufficient. At the due process hearing, Petitioner's speech-language expert witness, SLP-1, was critical of the speech and language annual goals in Student's IEPs, but the expert did not opine on the appropriateness of the hours of speech-language related services in the IEPs. DCPS' speech-language expert, SLP-2, who is Student's speech-language provider this school year, opined that 240 minutes per month is adequate for the child and that increasing speech-language services would be too much for Student. Moreover, as explained by Special Education Director in her testimony, a

function of the CES program (Communication and Education Supports), where Student has been placed since the 2021-2022 school year, is to support communication deficits. Assuming that Petitioner has made a *prima facie* showing that the speech hours in the May 16, 2022 IEP and the May 10, 2023 IEPs were insufficient, I find that DCPS has met its burden of persuasion that the hours of speech-language pathology services provided for Student in these IEPs were appropriate for Student.

Occupational Therapy Hours

Petitioner alleges that the May 10, 2023 IEP was inappropriate because it provided insufficient Occupational Therapy (OT) hours for Student. For the May 10, 2023 IEP, the IEP Team at City School 2 increased Student's OT related services from 3 hours to 240 minutes (4 hours) per month. Petitioner's OT expert witness, OT-1, did not opine about the appropriateness of the provision for 240 minutes per month of OT services in the May 10, 2023 IEP – although she was critical of the provision of only 2 hours per month of OT services in the July 23, 2021 IEP. OT-1 also testified that OT sessions usually run for 1 hour.

DCPS' expert, OT-2, is Student's current OT provider at City School 2. She sees Student twice a week for OT services. OT-2 opined that the provision of 4 hours per month of OT, in two 30-minute sessions per week, was appropriate and that Student was making progress toward his/her IEP OT goals. OT-2 did not think that more than 30 minutes per session would be beneficial for Student. OT-1 only saw Student in a virtual meeting for 1 hour or less. I found the opinions of OT-2, who regularly works

with the child more credible. I conclude that DCPS has established that the IEP team's decision to provide 240 minutes per month of SLP services in Student's May 10, 2023 IEP was appropriate.

In sum, I conclude that with respect to the Petitioner's inappropriate IEP claims, namely, the alleged insufficiency of evaluative data available to the IEP teams, the purported need to program for social/emotional/ behavioral issues, the alleged insufficiency of speech hours in the 2022 and 2023 IEPs and insufficiency of OT hours in the 2023 IEP, DCPS has met its burden of persuasion the July 23, 2021 IEP, the May 16, 2022 and the May 10, 2023 were appropriate, that is, reasonably calculated to enable the child to make progress appropriate in light of his/her circumstances.

III.

Alleged Failure to Implement IEP Related Services

Lastly, the Parent seeks relief for DCPS' alleged failure to fully implement her child's IEP speech and language and occupational therapy services during the 2021-2022 and 2022-2023 school years. U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A school district "must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden,

the moving party “must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). “Generally, in analyzing whether a student was deprived of an educational benefit, ‘courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.’ “ *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144.

The Parent’s expert, Special Educator, calculated that in the 2021-2022 and 2022-2023 school years, Student missed some 33.5 hours of Speech-Language Pathology services and 14.25 hours of OT services. In her testimony, Special Educator explained that her calculation includes service hours missed due to Student’s unavailability and also assumes that if she did not receive copies of Student’s Service Trackers, those related services were not provided to the child.

DCPS’ witness, Resolution Specialist, made a separate analysis of related services missed by Student. She testified that she reviewed the service providers’ records of services actually provided to Student, as well as services attempted but not provided due to the child’s unavailability. Resolution Specialist concluded that for the 2021-2022 school year, accounting for Student’s unavailability due to absences, DCPS’ OT provider actually attempted to implement more service hours for Student than required by Student’s IEPs. According to Resolution Specialist’s testimony, for the 2022-2023 school year, the OT provider failed to provide 1.5 hours of the 32 hours prescribed in

Student's IEPs.

For SLP services, Resolution Specialist calculated that for the 2021-2022 school year, again excluding service hours missed due to Student's unavailability, the DCPS Speech-Language Pathologist failed to provide 3.5 hours of the 41 hours of SLP services prescribed in Student's IEPs. For the 2022-2023 school year, the provider failed to provide approximately 1 hour of the 32 hours of prescribed SLP services. On June 23, 2023, DCPS issued funding authorization to the Parent to obtain 8 hours of make-up speech and language services for Student from an independent provider of the Parent's choice.

I have considered the respective data compilations and conclusions of both Special Educator and Resolution Specialist. I found Resolution Specialist's calculations more credible because Special Educator included, as missed hours, service sessions missed due to student absences and because Resolution Specialist evidently had reviewed more complete Service Tracker records.

Based on Resolution Specialist's analysis, during the 2022-2023 school year, DCPS failed to implement 1.5 of the 32 OT service hours prescribed in Student's IEPs. I find that this OT shortfall did not amount to failure to implement "substantial or significant provisions" of the child's IEP. *See Middleton, supra*. For the hours of missed SLP sessions during the 2021-2022 and 2022-2023 school years, DCPS has already made up the missed service hours by providing the Parent funding authorization to obtain independent speech and language services. I conclude that Petitioner has not

met her burden of persuasion that Student was denied a FAPE by DCPS' failing to fully implement the child's IEP speech-language or OT related services in the 2021-2022 or 2022-2023 school years.

In summary, I conclude that Petitioner has not met her burden of persuasion that DCPS denied the Student a FAPE by failing to comprehensively evaluate the child or by failing to fully implement the child's IEPs. DCPS has met its burden of persuasion that its July 23, 2021, May 16, 2022 and May 10, 2023 IEPs were appropriate for Student.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that all relief requested by the Petitioner herein is denied.

Date: November 9, 2023

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution.