

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

PARENT,
on behalf of STUDENT,¹

Date Issued: October 18, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2021-0095

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Dates: September 15, 23 and 29, 2021
October 7, 2021

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (Petitioner or Mother) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failures to timely evaluate Student and to develop an appropriate initial Individualized Education Program (IEP) in the 2020-2021 school year.

Petitioner’s Due Process Complaint, filed on July 9, 2021, named DCPS as Respondent. The undersigned hearing officer was appointed on July 12, 2021. On July

¹ Personal identification information is provided in Appendix A.

27, 2021, the parties met for a resolution session and were unable to resolve the issues in dispute. On July 28, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

On July 28, 2021, Petitioner, by counsel, filed a motion for the hearing officer to recuse himself, which I denied by order issued August 5, 2021.

The due process hearing was originally scheduled for September 15 and 16, 2021. After starting the hearing on September 15, 2021, the second hearing day had to be rescheduled to September 23, 2021 to accommodate availability of counsel and witnesses. When the hearing was not completed in two days, additional hearing days were added for September 29, 2021 and October 7, 2021. To accommodate this extended hearing schedule, over Petitioner's objections, I granted DCPS' requests to extend the final decision due date, ultimately to October 21, 2021.

Due to the impact of the COVID-19 virus pandemic, the hearing officer hosted and recorded the due process hearing on line, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on September 15, 23 and 29 and October 7, 2021. Mother appeared on line for much of the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Counsel for the respective parties waived making opening statements. Petitioner called INDEPENDENT PSYCHOLOGIST, INDEPENDENT SPEECH-LANGUAGE

PATHOLOGIST (SLP), INDEPENDENT OCCUPATIONAL THERAPIST (OT) and EDUCATIONAL ADVOCATE as witnesses. DCPS called as witnesses DCPS OT, CASE MANAGER, DCPS SLP, SCHOOL PSYCHOLOGIST, SCHOOL SOCIAL WORKER and LEA Representative. Petitioner recalled Independent SLP as a rebuttal witness. Petitioner's Exhibits P-1 through P-37 were all admitted into evidence without objection. DCPS' Exhibits R-1 through R-73 were all admitted into evidence, except for Exhibits R-12, R-14, R-18, R-22 and R-30 which were withdrawn. Exhibits R-13, R-16, R-17, R-19, R-21 and R-23 through R-29 were admitted over Petitioner's objections.

On October 7, 2021, after the presentation of evidence was completed, counsel made oral closing arguments. Neither party requested leave to file written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the August 9, 2021 Corrected Prehearing Order, are:

Whether DCPS denied Student a FAPE by not timely conducting child-find and not timely determining Student eligible for special education after the summer 2020 due process hearing concerning this student;

Whether DCPS denied Student a FAPE by failing to determine Student eligible, beginning January 14, 2021, as a student with a Specific Learning Disability and eligible for speech-language services;

Whether DCPS denied Student a FAPE by failing to ensure that an initial IEP was

timely developed and implemented after the January 14, 2021 eligibility determination;

Whether DCPS denied Student a FAPE by proposing an inappropriate initial IEP, dated March 24, 2021, which included inappropriate/insufficient present levels of performance, goals and baselines in math, reading, writing, social/emotional/behavioral, motor skills/physical development and post-secondary transition and provided inappropriate/insufficient special education services and related services (behavioral support services, occupational therapy and speech-language pathology.)

For relief Petitioner requests that the hearing officer order DCPS to appropriately identify Student's special education eligibility categories, order DCPS to fund Independent Educational Evaluation (IEE) Functional Behavioral Assessment (FBA) and Vocational II evaluations, and, upon completion of the assessments, promptly convene Student's IEP team to review and revise Student's IEP as appropriate. Petitioner also requests an appropriate award of compensatory education for Student to be determined by the IEP team or that the hearing officer order an independent compensatory education assessment and then order appropriate compensatory education to compensate Student for the denials of FAPE alleged in the complaint. The Petitioner also requests that the Hearing Officer order DCPS to review and revise Student's Behavior Intervention Plan (BIP), based on the updated FBA, and order that DCPS schedule all meetings through counsel in order to ensure the parent's participation.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this

case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, is a resident of the District of Columbia. Student has been determined eligible for special education under the Emotional Disturbance (ED) disability classification. Exhibit P-29.

2. Mother filed a previous due process complaint on behalf of Student on April 23, 2020 (Case No. 2020-0093), in which she alleged that DCPS denied Student a FAPE by (1) failing to locate, evaluate, and identify Student as a child with a disability, and (2) failing to provide Petitioner access to Student's education records. Exhibit R-2.

3. The parent's April 23, 2020 due process complaint included a request for IEE speech and language, OT and FBA assessments. On May 1, 2020, DCPS convened a resolution meeting in Case No. 2020-0093 to discuss the due process complaint and proposed for DCPS to complete these initial evaluations, as this was the first referral DCPS had received to evaluate the student for a suspected disability. On May 11, 2020, DCPS sent the parent a funding authorization letter for the parent to obtain IEEs for Student, including comprehensive psychological, OT and speech and language evaluations, and an FBA. In a May 11, 2020 Prior Written Notice (PWN) to the parent, DCPS stated that following receipt of the IEE reports, the multidisciplinary team (MDT) would schedule a meeting to review the IEE reports and determine whether Student was eligible for special education services. Exhibit R-20.

4. On October 10, 2020, following a due process hearing in Case No. 2020-0093 on July 23, 2020, Impartial Hearing Officer Terry Michael Banks issued a

Hearing Officer Determination (the August 10, 2020 HOD), in which he found that Mother had failed to meet her burden of persuasion that DCPS was remiss in failing to locate, evaluate, and identify Student as a child with a disability on or before April 23, 2020 and that DCPS' failure to provide Mother copies of all student support plans did not constitute a denial of FAPE. Hearing Officer Banks dismissed Petitioner's complaint. Exhibit P-2.

5. In the August 10, 2020 HOD, Hearing Officer Banks noted that after Case No. 2020-0093 was filed, Independent Psychologist, Independent OT and Independent SLP had conducted IEE evaluations of Student. Because these evaluations were conducted after the prior due process complaint was filed, Hearing Officer Banks excluded the IEE evaluations from evidence and did not permit reference to the evaluations by the witnesses. Hearing Officer Banks observed in his decision that these IEE evaluations "[would] undoubtedly lead to an eligibility meeting at the earliest possible date" and that nothing in his decision should have any effect on the future eligibility deliberations. Exhibit P-2.

6. Student was enrolled in City School 1 for the 2018-2019 and 2019-2020 school years. Exhibit R.32. In the August 10, 2020 HOD, Hearing Officer Banks found that for the 2018-2019 school year, Student's final grades were F in Geometry (with 11 unexcused absences), F in English II (with 64 unexcused absences), F in Test Taking Strategy (with 46 unexcused absences), F in French II (with 65 unexcused absences), F in World History (with 43 unexcused absences), F in Geometry (with 11 unexcused

absences through the first two terms), F in Chemistry (with 12 unexcused absences through the first two terms), A- in Fitness & Lifetime Sports I (with 5 unexcused absences), and C in Fitness and Lifetime Sports II (with 6 unexcused absences).

Student's final grades for the 2019-2020 school year were all F's with 99 days absent.

Exhibit P-2.

7. On June 11, 2020, Independent OT conducted an IEE OT evaluation of Student to determine the status of Student's visual perceptual, visual motor and fine and gross motor skills. Independent OT reported that Student demonstrated significant deficits in the areas of visual motor integration, fine motor precision, manual dexterity and visual perception; that Student's difficulty with visual motor tasks would impact Student's accuracy when copying from the board, copying from a text, forming letters and forming and copying shapes involved in geometry and math. Independent OT recommended, *inter alia*, that Student would benefit from school OT services at a rate of 45 minutes per week, including 15 minutes inside the classroom and 30 minutes outside of the classroom. Exhibit P-10.

8. On June 17, 2020, Independent SLP conducted a Speech Language Independent Educational Evaluation of Student. Independent SLP reported that Student's language knowledge was so impaired that it was surprising that Student would understand what was presented in lessons and class discussions in any classes; that Student's higher level language processing was extremely poor, so that Student has problems comprehending linguistic material to understand the meaning of the

information and has problems expressing him/herself which likely would be seen both orally (verbal expressive language) and in writing; that Student was in need of intensive language therapy with a speech-language pathologist as well as classroom accommodations focused on Student's lower level of language knowledge and that Student should have use of graphic organizers. Exhibit P-90.

9. On June 18, 2020, Independent Psychologist conducted an IEE Comprehensive Psychological Evaluation of Student to assess Student's cognitive, academic, and social-emotional functioning. Due to COVID-19 social distancing restrictions, Independent Psychologist used an online testing platform. In her July 16, 2020 report, Independent Psychologist reported that Student attained a Low (75) score on the Woodcock-Johnson IV Tests of Cognitive Abilities (WJ IV COG). On the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH), Student's scores were Low in Reading (78), Math (72) and Written Language (77). Independent Psychologist reported that Student's reading, math and writing were all at a 4th grade equivalent – years below grade and age level expectations; that Student's school absences did not become a problem until after the 2017-2018 school year; that Student suffers from some features of depression, with symptoms of lethargic behavior, poor concentration, poor coping skills, isolation and withdrawal, and nervousness regarding future and current academic status. She reported that Student also has not properly grieved the death of ■ friend, who was killed the prior year. Independent Psychologist diagnosed Student with Specific Learning Disorders in Reading, Mathematics and Written Language,

Language Disorder and Unspecified Depressive Disorder. Independent Psychologist did not consider a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) for Student because there was no information from teachers to substantiate the diagnosis and because Student's symptomatology could be attributed to the diagnosed learning disabilities, language disorder, and emotional difficulties. Independent Psychologist concluded that Student was at grave risk, and that Student's prognosis for finishing high school was poor without appropriate supports and academic setting. Independent Psychologist recommended that Student be placed in a self-contained class for students with this magnitude of special education and social emotional deficits. She further recommended, *inter alia*, that Student should be classified under the special education category of Multiple Disabilities (MD) for Specific Learning Disability, Speech and Language Impairment, and Emotional Disturbance; that Student needed counseling in the school setting for at least one hour per week; that once Student returned to school in person, Student receive an FBA to uncover any triggers to Student's behavior in the classroom; that a BIP be developed, to include a plan for attendance, and that Student would benefit from a male mentor in the community. Exhibit P-12.

10. For the 2020-2021 school year, Student transferred to DCPS' CITY SCHOOL 2. At City School 2, Student was placed on Case Manager's caseload, even though Student had not yet been found eligible for special education. Case Manager reached out to Mother to set up the special education eligibility process. Case Manager attempted to contact Student weekly to offer support and to encourage Student to attend

virtual classes. She also contacted Mother to ask for her support. However, except for one virtual meeting in October or November 2020, Student would not respond to Case Manager's attempts to make contact. Testimony of Case Manager.

11. On October 9, 2021, Petitioner's Counsel wrote DCPS by email to state that Student was evaluated for special education services over the summer with the IEE evaluations and that no one had reached out to Mother since the start of the 2020-2021 school year. Petitioner's Counsel asked how DCPS would like to proceed. After receiving no response from DCPS, Petitioner's counsel sent a follow-up email on October 16, 2020. Exhibit P-14. On October 20, 2021, LEA Representative, the special education coordinator at CITY SCHOOL 2, wrote Petitioner's Counsel by email to request copies of the IEE evaluations of Student, which Petitioner's Counsel provided the same day. LEA Representative set an initial special education eligibility meeting for Student for November 12, 2021. Exhibit P-15.

12. The City School multidisciplinary team (MDT) met on November 12, 2021. Mother, Petitioner's Counsel and DCPS' Counsel attended the meeting. The DCPS members of the MDT determined that the team needed more information to make an eligibility determination for Student and meet DCPS standards. Regarding Student's need for speech and language services, DCPS SLP stated that there were significant gaps, errors, and missing data in Independent SLP's IEE speech and language assessment of Student and that she rejected the IEE. DCPS SLP stated that once Student's attendance was more consistent, she would be able to gain data from Student's

teachers, assess Student one-on-one and conduct a classroom observation. From that, she would be able to determine whether Student's academic gaps were due to chronic absenteeism – versus the primary area of concern being a speech and language delay or disability. Over the parent's opposition, the MDT team decided that it would conduct an FBA of Student and in the same time period, the team would monitor Student's progress and response to intervention. A follow-up meeting was scheduled for January 6, 2021. Exhibit R-25.

13. On January 6, 2021, School Social Worker completed an FBA of Student. She made multiple attempts to observe Student in on-line virtual classes, but Student did not attend the classes. School Social Worker stated in her testimony that another FBA of Student needed to be conducted once Student would engage in the learning process. Testimony of School Social Worker.

14. The City School MDT team reconvened to again consider Student's eligibility for special education on January 14, 2021. Mother and Petitioner's Counsel attended the meeting. DCPS SLP stated that her position regarding Student's need for speech and language services had not changed from the November 12, 2021 MDT meeting. The DCPS representatives stated that the IDEA disability category which the team was considering was Emotional Disturbance (ED). Petitioner's Counsel objected that Independent Psychologist had recommended Specific Learning Disability (SLD), Speech and Language Impairment (SLI), and ED as disabilities categories for Student. LEA Representative responded that based on Student's poor school attendance and lack

of instruction and intervention, Student would not meet eligibility criteria for SLD. LEA Representative stated that the team would move forward with finding Student eligible for special education under the ED classification and would send the parent a consent form for the provision of services when the initial IEP was created. Petitioner's Counsel noted Mother's objection regarding the decision to not provide speech services.

Petitioner's Counsel stated that the parent was not consenting to services for Student on the IEP, when the parent did not know what services were proposed for Student.

Exhibits R-27, P-20.

15. On January 14, 2021, DCPS sent a PWN to the parent proposing that Student was eligible for special education services under the classification of ED and would receive services for reading, writing, math, occupational therapy and behavioral support. The PWN stated that the MDT team reviewed Student's speech and language needs, as requested by Petitioner's attorney, and that the team did not have enough data to make the determination. It was noted in the PWN that DCPS SLP stated that she would not be opposed to testing Student for speech and language and reopening eligibility for speech-language services in the future. Exhibit R-14.

16. On February 12, 2021, Student's IEP team met to develop Student's initial IEP. Mother, Petitioner's Counsel and Educational Advocate attended the meeting. LEA Representative referred to Student's not attending school regularly for the past year and a half. The school social worker reported that in the 2020-2021 school year, Christopher had not attended virtual classes at City School consistently and had 78

unexcused absences. All of the DCPS presenters noted their inability to obtain comprehensive information on Student due to the attendance issue and they based their present levels of performance (PLOP) narratives on record reviews, teacher interviews, parent interview, and information from the summer 2020 IEE assessments of Student. DCPS' proposed IEP provided for 2 annual goals in each of the academic areas and 1 annual goal each in the areas of Social-Emotional-Behavioral and OT. Educational Advocate argued that more annual goals were needed in the IEP. For special education and related services, the DCPS members of the IEP team decided that Student would receive 16 hours per week of specialized instruction, outside of general education, for reading, writing and math; 60 minutes per month of Behavior Support Services (BSS); 30 minutes per month of OT services outside of general education and 30 minutes per month of OT consult services. Petitioner's Counsel objected and contended that Student should receive 20 hours per week of specialized instruction and 240 minutes per month of BSS. Exhibit R-28.

17. On February 16, 2021, DCPS sent a PWN to Mother stating that for the initial IEP, Student would receive 16 hours per week of specialized support, 60 minutes per month of OT services and 120 minutes per month of behavior support. Exhibit R-17.

18. By email of February 17, 2021, Petitioner's Counsel notified Case Manager that he would discuss DCPS' consent for services form with the parent after they received the finalized IEP. Exhibit R-53.

19. On February 26, 2021, LEA Representative informed Petitioner's Counsel,

by email, that DCPS' electronic Student Education Data System (SEDS) required parental consent, in writing, prior to finalizing the initial IEP. In the absence of parental consent, SEDS had automatically dropped Student from eligibility for special education services. LEA Representative advised that it was necessary at that point to redo the eligibility/IEP process, obtain parental consent electronically and finalize the IEP immediately thereafter. Exhibit R-54.

20. Student's City School 2 IEP team reconvened on March 24, 2021. The IEP team confirmed Student's eligibility for special education under the ED classification and made no substantial changes to the February 12, 2021 proposed IEP, as revised on February 16, 2021. The March 24, 2021 IEP provided for Student to receive specialized instruction services for 16 hours per week, outside general education. For related services, the IEP provided for 120 minutes per month of Behavioral Support Services. OT services were changed to 60 minutes per month, all consultation services. Petitioner's Counsel restated the parent's objection to the ED disability classification, instead of MD, and to the IEP's content for the reasons stated at the prior IEP team meeting. In the meeting, Mother, who was unable to sign consent documents because she was hospitalized, gave oral consent to implement the IEP. Exhibits R-29, R-10, R-11. The IEP was finalized on March 30, 2021. Testimony of Case Manager. (Because the initial IEP shows March 24, 2021 as the IEP meeting date, hereafter in this decision, I refer to the initial IEP as the "March 24, 2021 IEP".)

21. At the time of March 24, 2021 IEP team meeting, DCPS OT had agreed to

provide for 30 minutes per week of direct OT services to Student, but direct OT services were not provided in the final IEP. Testimony of Educational Advocate.

22. School absences for Student became a problem until after the 2017-2018 school year. Exhibit P-12.

23. At the time of the February 12, 2021 initial IEP meeting, Student had 71 reported unexcused absences for the 2020-2021 school year. Exhibit P-24. For the remainder of the school year after the March 24, 2021 IEP team meeting, Student never attended school at all. Testimony of LEA Representative. For the 2020-2021 school year, Student accrued 167 days unexcused absences and received “Incompletes” for all courses. Exhibit P-33.

24. For the 2021-2022 school year, Student is enrolled in PUBLIC CHARTER SCHOOL (PCS), which acts as its own local education agency (LEA). DCPS is no longer the LEA for Student. Representation of counsel by October 7, 2021 emails.

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 Petitioner 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 student’s IEP or placement, or of the program or placement

proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

I.

Did DCPS deny Student a FAPE by not timely conducting child-find and not timely determining Student eligible for special education after the summer 2020 due process hearing concerning Student?

The parent filed her due process complaint in the prior case, Case No. 2020-0093, on April 23, 2020. At a May 1, 2020 resolution session meeting, DCPS acknowledged that Mother's due process complaint provided the District notice of the parent's referral to evaluate Student for a suspected IDEA disability. DCPS did not complete Student's initial eligibility determination until January 14, 2021. The due process hearing in Case No. 2020-0093 was held on July 23, 2020. Petitioner contends that the lapse of nearly six months to complete Student's eligibility determination, after the July 20, 2020 due process hearing, violated the District of Columbia's child-find requirements.

As U.S. District Judge Boasberg explained in *Davis v. District of Columbia*, 244 F. Supp. 3d 27 (D.D.C. 2017),

A school district must “evaluate a student who may have a disability and who may require special education services.” D.C. Code § 38–2561.02(a)(2) (emphases added). This duty applies to any “child suspected of having a disability who may need special education.” 5–E D.C. Mun. Regs. § 3004.1(a) (emphases added); see 34 C.F.R. § 300.111(c)(1) (extending duty to “[c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade”). Courts in this Circuit have thus repeatedly held that school districts are required to complete an evaluation process “as soon as a student is identified as a potential candidate for special education services.”

Davis, supra, 244 F. Supp. 3d at 49, *citing N.G. v. District of Columbia*, 556 F.Supp.2d 11, 25 (D.D.C. 2008) (emphasis in original). Once a potential candidate for special education services is identified, the District must conduct an initial evaluation and make an eligibility determination within [60 days from receipt of parental consent].” *See DL v. District of Columbia*, 109 F. Supp. 3d 12, 16-17 (D.D.C. 2015); D.C. Code § 38–2561.02(a); 5E DCMR § 3005.2. Accepting the filing date for the prior due process complaint, April 23, 2020, as the starting point, DCPS did not complete its initial evaluation of Student and make an eligibility determination for over 8 months – far in excess of the 60-day period required by DC Code § 38–2561.02(a).

DCPS’ Counsel argued at the due process hearing that Petitioner’s child-find claim is barred by the August 10, 2020 HOD in which Hearing Officer Banks determined that Mother had failed to meet her burden of persuasion that DCPS was remiss in failing to locate, evaluate, and identify Student as a child with a disability “on or before April 23, 2020.” I disagree with DCPS.

The prior adjudication doctrine of *res judicata* bars a subsequent suit, when

there has been a prior litigation that (1) involved the same claims or cause of action, (2) was between the same parties or their privies, and (3) resulted in a final valid judgment on the merits. *Holman on Behalf of H.P. v. District of Columbia*, No. CV 19-2600 (RC), 2020 WL 7340155, at *5, n. 5 (D.D.C. Dec. 14, 2020) (citations omitted). Petitioner's present due process complaint does not involve the same claims as Case No. 2020-0093. In that prior litigation, Hearing Officer Banks addressed whether DCPS was remiss in not evaluating Student before April 23, 2020. In the present case, Petitioner alleges that DCPS denied Student a FAPE by not timely completing the initial eligibility determination for Student after the July 23, 2020 due process hearing. I find that *Res Judicata* does not apply here.

Failing to timely complete an initial eligibility determination for a student suspected of having a disability, as required by D.C. law, is a procedural violation of the statute. *See Simms v. District of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *12 (D.D.C. July 26, 2018), *report and recommendation adopted*, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018). Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

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

See 34 C.F.R. § 300.513(a)(2). In this case, when DCPS did complete its eligibility

evaluation of Student in January 2021, the MDT team determined that Student was, in fact, a student with a primary disability of Emotional Disturbance in need of services in reading, mathematic and written expression, as well as related services for behavior support and occupational therapy. This was based, primarily, on the information in Independent Psychologist's July 16, 2020 IEE psychological evaluation report.

Based on the record in this case, that is, *inter alia*, Student's low academic achievement, history of nonattendance and psychological diagnoses, I conclude that if DCPS had promptly conducted an initial evaluation after receiving the parent's due process request in April 2020 and made a timely eligibility determination for Student, the District should have determined Student eligible for special education at least by the start of the 2020-2021 school year. I find, therefore, that DCPS' procedural violation of not determining Student for eligible for special education until January 2021, some 6 months after the July 2020 due process hearing, impeded Student's educational rights under District law. This was a denial of FAPE.

II.

Did DCPS deny Student a FAPE by failing to determine Student eligible for special education as a student with a Specific Learning Disability and also eligible for speech-language services?

At the January 14, 2021 initial eligibility meeting, the school members of the City School 2 eligibility team determined that Student was a child with a disability, having an Emotional Disturbance (ED) who, by reason thereof, needed special education and related services. *See* 34 C.F.R. § 300.8(a)(1). The parent contends that this eligibility

decision was a denial of FAPE, because Student should have been determined to have Multiple Disabilities, including ED and a Specific Learning Disability (SLD). DCPS responds that the IDEA requires that before determining a student to have an SLD, the District must ensure that the student's underachievement was not due to lack of appropriate instruction in reading or math. *See* 34 C.F.R. § 300.9(b). DCPS maintains that because Student had not regularly attended school since the 2017-2018 school year, it could not determine that Student's underachievement was not due to lack of appropriate instruction.

The IDEA requires that upon completion of an eligibility evaluation, the LEA eligibility team, including the parents, determines whether the child is a child with an IDEA disability who, by reason thereof, needs special education and related services. *See* 34 C.F.R. § 300.8. Regardless of the disability classification for special education eligibility relied upon by the LEA, the LEA must ensure that IEP special education and related services are tailored to the unique needs of each child. *See Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017). However, the IDEA does not require school districts to classify a student with a disability in a particular category or categories. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *Lauren C. by & through Tracey K. v. Lewisville Indep.*

Sch. Dist., 904 F.3d 363, 377 (5th Cir. 2018) (IDEA promises—a FAPE—regardless of child’s diagnosis.)

In this case, DCPS correctly determined in January 2021 that Student was a child with an IDEA disability in need of special education and related services and it is not disputed that Student met criteria for the ED disability. Although Independent Psychologist also diagnosed Student with, *inter alia*, Specific Learning Disorders in Reading, Math and Writing, the eligibility team decided that Student did not meet D.C. Office of the State Superintendent of Education (OSSE) criteria for the SLD classification. However, DCPS did not ignore Student’s diagnosed learning disorders. To address Student’s academic underachievement, the DCPS eligibility team expressly determined that Student should receive specialized instruction services for reading, writing and math. I conclude, therefore, that the Petitioner has not met her burden of persuasion that Student was denied a FAPE by the eligibility team’s decision that Student did not meet criteria for the SLD disability. Whether DCPS ensured that the initial March 24, 2021 IEP was tailored to Student’s unique needs, including Student’s need for specialized instruction in reading, writing and math, goes to the appropriateness of the initial IEP, which I address later in this decision.

With regard to speech and language services, Petitioner alleges in her due process complaint that at the January 14, 2021 eligibility meeting, DCPS “refused to find [Student] eligible for speech and language services.” It is not clear from this allegation whether Petitioner contends that Student has a Speech and Language Impairment (SLI)

disability, or only that Student required speech and language related services as part of the initial IEP. If Petitioner claims that DCPS denied Student a FAPE by not identifying SLI as an additional disability classification, for the reasons explained above, *i.e.*, that the IDEA does not require school districts to classify a student in a particular category or categories, I find that this classification decision was not a denial of FAPE. If Petitioner's claim is that DCPS denied Student a FAPE by not providing for speech and language related services in the March 24, 2021 initial IEP, I address that allegation below in this decision.

III.

– Did DCPS deny Student a FAPE by failing to ensure that an initial IEP was timely developed and implemented after the January 14, 2021 eligibility determination?

– Did DCPS deny Student a FAPE by proposing an inappropriate initial IEP, dated March 24, 2021, which included inappropriate/insufficient present levels of performance, goals and baselines in math, reading, writing, social/emotional/behavioral, motor skills/physical development and post-secondary transition, and provided inappropriate/insufficient special education services and related services (behavioral support services, OT and speech-language pathology)?

Petitioner alleges that DCPS denied Student a FAPE with the initial March 24, 2021 IEP for both procedural and substantive reasons. DCPS, which has the burden of proof on this issue, maintains that the IEP was appropriate for Student. U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how 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.

A.

Petitioner asserts that DCPS did not comply with the IDEA’s procedures because DCPS’ initial IEP for Student was allegedly not timely developed following the January 14, 2021 eligibility determination. The D.C. Regs. provide that the District must ensure that -

The IEP team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.

5E DCMR § 3007.1. *See, also*, 34 C.F.R. § 300.323(c)(1). Following the January 14, 2021 eligibility determination for Student, DCPS convened a meeting to develop Student’s initial IEP on February 12, 2021, within the thirty day deadline.

DCPS did not finalize the proposed February 12, 2021 IEP because the parent had not provided written consent for provision of services. *See* 5E DCMR § 3026.1(b) (The LEA shall obtain informed written parental consent before initial provision of special education and related services to a child with a disability and any change in the child’s placement.)² Completion of Student’s initial IEP was further delayed due to the

² Providing consent to the initial provision of special education and related services does not mean that before the IEP is developed, the parent consents to the specific special

erroneous automatic cancellation of Student's special education eligibility by DCPS' electronic Special Education Data System (SEDS), for lack of written parental consent. To correct the SEDS foul-up, DCPS had to convene another meeting of Student's IEP team, including Mother and Petitioner's Counsel, to reinstate Student's eligibility and resume the IEP development process. This was not completed until March 24, 2021.

I conclude that by convening the meeting to develop an initial IEP for Student on February 12, 2021, DCPS complied with the requirement in 5E DCMR § 3007.1 to convene Student's IEP team to meet and develop an IEP within thirty days of the original January 14, 2021 eligibility determination, even though there were subsequent delays in completing the IEP resulting from the parent's withholding consent and the SEDS system error.

education and related services that their child would receive. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 at -634. (August 14, 2006):

Discussion: We understand the commenters' concern that a parent of a child with a disability who refuses to consent to the provision of special education and related services may not fully understand the extent of the special education and related services their child would receive without the development of an IEP for their child. However, we do not view the consent provisions of the Act as creating the right of parents to consent to each specific special education and related service that their child receives. Instead, we believe that parents have the right to consent to the initial provision of special education and related services. "Fully informed," in this context, means that a parent has been given an explanation of what special education and related services are and the types of services that might be found to be needed for their child, rather than the exact program of services that would be included in an IEP.

Id.

Even if DCPS were deemed not to have met to develop Student's initial IEP until March 24, 2021, this delay would be a procedural violation of the IDEA. As noted above, procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

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

See 34 C.F.R. § 300.513(a)(2).

Here, Student has not attended school regularly since the 2017-2018 school year. After the initial IEP was completed on March 24, 2021, Student still did not attend school, virtually or in-person, for the rest of the school year. Under these facts, I find that DCPS' not completing Student's initial IEP before March 24, 2021, did not impede Student's right to a FAPE, impede the parent's participation rights or cause a deprivation of educational benefit. As such, this alleged procedural violation would not rise to a denial of FAPE

B.

Turning to the substantive prong of the IEP inquiry, the parent alleges that DCPS' March 24, 2021 IEP for Student was inappropriate because it contained inappropriate Present Levels of Performance (PLOPs) and annual goals and provided for inadequate special education and related services. Through her expert witnesses,

Petitioner established a *prima facie* case that the March 24, 2021 IEP was not appropriate for Student. Therefore, DCPS holds the burden of persuasion on the appropriateness of the initial IEP.

Judge Contreras explained in *A.G. v. District of Columbia*, No. CV 19-2148 (RC), 2020 WL 6799139 (D.D.C. Nov. 19, 2020), how a hearing officer should evaluate the appropriateness of an IEP:

The Supreme Court has stated that to be appropriate and constitute a FAPE, a student's IEP must form the basis for an educational program that is 'reasonably calculated to enable the child to receive educational benefits.' *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 995–96 (2017) (citing *Rowley*, 458 U.S. at 207). When determining if a given IEP is appropriate, a court must undertake a "fact-intensive" inquiry into the "unique circumstances of the child for whom it was created," that ultimately asks not if the IEP is ideal, but rather if it is reasonable. *Id.* at 999, 1001 (internal quotations omitted). This reasonableness standard incorporates deference to school officials due to their subject matter expertise and judgment, though the court still "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his [or her] circumstances." *Id.* at 1002.

A.G. at *12. "The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials." *Wade v. District of Columbia*, No. 19-CV-2101-TJK-ZMF, 2021 WL 3507866, at *2 (D.D.C. Feb. 11, 2021), quoting *Endrew F.*, *supra*, 137 S. Ct. at 991–92.

1. Present Levels of Performance and Baselines

The parent alleges that the Present Levels of Performance (PLOP's) in the March 24, 2021 IEP were inappropriate or insufficient. In its *Endrew F.* decision, the Supreme

Court instructed that an IEP is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.*, 137 S.Ct. at 999.

The "focus on the particular child is at the core of the IDEA." *Id*

The PLOP's for the academic and Emotional, Social and Behavioral Development areas of concern in the March 24, 2021 IEP were derived principally from Independent Psychologist's July 16, 2020 comprehensive psychological evaluation report. Since Student rarely attended school in the 2020-2021 school year and was not responsive to outreach efforts by City School 2's staff, I find that it was appropriate for the City School IEP team to rely on Independent Psychologist's evaluation to complete the Student's PLOP's for the academic and behavioral areas of concern.

Petitioner's expert, Educational Advocate, opined that the baselines for academics in the March 24, 2021 IEP lacked sufficient information to enable the IEP team to assess Student's progress on IEP annual goals. However, the academic baselines also were derived from Independent Psychologist's comprehensive psychological report. Similarly, the PLOP's and baselines for Motor Skills/Physical Development in the initial IEP were derived, appropriately, from Independent OT's June 11, 2020 IEE Occupational Therapy evaluation report. I conclude that DCPS has met its burden of persuasion the PLOPs and baselines in the March 24, 2021 IEP were appropriate for Student.

2. IEP Annual Goals

The IDEA requires that each student's IEP must include a statement of

measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability

and a statement of the special education and other services to be provided to enable the student to advance toward attaining the goals. *See* 34 CFR § 300.320(a)(2)(i), (a)(4).

The March 24, 2021 IEP for Student included 2 annual goals each for Math and Reading and 3 goals for Written Expression. Educational Advocate opined in her hearing testimony that the IEP should have provided more academic goals for Student. However, Case Manager explained that when she drafted academic goals for the initial IEP, in consideration of Student's not attending school and Student's lack of academic motivation, she proposed limited annual goals for academics, with the intent to build on these goals as Student started responding to interventions. In light of Student's poor attendance in the 2019-2020 school year and nonattendance for most of the 2020-2021 school year, I find that DCPS offered a "cogent and responsive explanation" for the IEP team's decision to limit the number of academic annual goals in Student's initial IEP and that the school officials' decision is entitled to some deference. *See A.G. v. District of Columbia*, No. CV 19-2148 (RC), 2020 WL 6799139 (Supreme Court's reasonableness standard in *Andrew F.* incorporates deference to school officials due to their subject matter expertise and judgment. *A.G.* at 12.)

For the Emotional, Social and Behavioral Development area of concern, according to School Social Worker, the March 24, 2021 IEP provided three behavior goals which were intended to address Student's attendance and attention/focus challenges. Educational Advocate opined that the IEP team should have added 3 additional goals to address Student's anxiety/depression and short attention span and to increase Student's confidence. School Social Worker opined that the limited behavioral goals were appropriate for Student and stated that she did not want to "throw" 5-6 goals at Student in the initial IEP.

Here I found Educational Advocate's expert opinion more persuasive. In the July 16, 2020 IEE psychological evaluation, Independent Psychologist reported that Student suffered from features of depression, with symptoms affecting access to education, including lethargic behavior, poor concentration, poor coping skills, isolation and withdrawal and nervousness regarding Student's Academic status. DCPS did not dispute those findings. I find that DCPS has not shown, that without annual goals to meet Student's needs resulting from those depression symptoms, the Emotional, Social and Behavioral Development section of the IEP was reasonably calculated to enable Student to be involved in and make progress in the general education curriculum.

For the Motor Skills/Physical Development area of concern, the March 24, 2021 IEP provided a single annual goal – for Student to implement a compensatory strategy to execute multi-step school-related tasks. DCPS' expert, DCPS OT, testified that the single OT goal was an appropriate overarching goal intended to target Student's

executive functioning weakness. Petitioner's expert, Independent OT, who completed an OT evaluation on Student in June 2020, opined that the omission of annual goals to address Student's visual-motor challenges as well as Student's deficits in fine motor precision, manual dexterity and visual perception was not appropriate. Here I found Independent OT's opinion more persuasive. The IEP team recognized that Student's OT related challenges were not limited to executive functioning. The final IEP states that Student's difficulties with visual perception and visual motor skills, as well as executive functioning, may impact Student's ability to manage the school schedule and educational materials, and to produce age-appropriate graphomotor work. But the IEP only provides the "overarching" executive functioning goal for OT. I conclude that DCPS did not meet its burden of persuasion that the omission of additional OT goals to address Student's challenges with visual perception and visual motor skills was appropriate to meet Student's needs in the Motor Skills/Physical Development area of concern.

In sum, I conclude that DCPS met its burden of persuasion that the March 24, 2021 IEP academic goals were appropriate for Student. DCPS failed to show that the initial IEP annual goals for Emotional, Social and Behavioral Development and Motor Skills/Physical Development were adequate to meet Student's disability related needs.

3. Post-Secondary Transition Plan

The IDEA requires that for students who have reached their 16th birthday, the IEP include a transition plan which is based on the individual student's needs, taking

into account the student's strengths, preferences, and interests; and includes - (i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school adult living objectives; and (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. *See* 34 C.F.R. § 300.320(b). Despite making diligent efforts, Case Manager, who drafted the March 24, 2021 IEP transition services provisions, was not able to connect with Student to get input for the transition plan. Nor was she able to conduct a vocational screening or assessment. As a result, the initial IEP post-secondary transition section includes stock annual goals, including attending a 2 year college or a vocational program, working in a field/job of interest and living in a college dorm or apartment, as well as uninformative baselines, which were not "specially designed" to meet Student's "unique needs." *See Andrew F., supra*, 137 S. Ct. at 994. I find that DCPS failed to establish the appropriateness of the Post-Secondary Transition Plan in the March 24, 2022 IEP.

4. Special Education and Related Services

The March 24, 2021 IEP provides for Student to receive 16 hours per week of Specialized Instruction Services in an outside of general education setting, 120 minutes per month of Behavioral Support Services and 60 minutes per month of consultative OT services. Petitioner contends that the IEP special education and related services are not adequate and also that Student requires Speech-Language Pathology services which were omitted by the IEP team. DCPS holds the burden of proof as to the appropriateness of the IEP services.

(i) With regard to Specialized Instruction Services, LEA Representative explained in her testimony that the IEP team considered Student's need for support in Reading, Writing and Math and decided to focus on providing special education support in the content areas – English, Math, Social Studies and Science. She testified that the school representatives on the IEP team believed that Student's least restrictive environment for elective classes would be in the general education classroom. However, in the July 16, 2020 IEE psychological evaluation, Independent Psychologist had recommended that Student be placed in a full-time special education classroom, due to the magnitude of Student's disabilities and Educational Advocate urged at the IEP meeting that Student needed a full-time IEP for the best chance of making progress.

Substantively, the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F., supra*, 137 S.Ct. at 1001. At the time the March 24, 2021 IEP was developed, Student's education circumstances were calamitous. Student had not regularly attended school since the 2017-2018 school year. Student had recently transferred to City School 2, where Student was repeating GRADE for the fourth time. According to Independent Psychologist's testing, Student's achievement levels in Math, Reading and Writing were all some 6 years below grade level. I find that in light of those circumstance, DCPS has not "[offered] a cogent and responsive explanation" for how the provision of 16 hours per week of Specialized Instruction Services was reasonably calculated to enable Student to make appropriate progress. *Id.*, 137 S.Ct. at 1002.

(ii) The March 24, 2021 IEP offered Student 120 minutes per month of Behavioral Support Services. Independent Psychologist opined in her testimony that Student required at least 60 minutes per week of school counseling to address Student's depressive symptoms, including lethargic behavior, poor concentration, poor coping skills, isolation and withdrawal. However School Social Worker, who drafted this part of the IEP, explained that she did not want to overwhelm Student with too many hours and that 120 minutes per month was the usual amount of services for students new to Behavioral Support Services. I found School Social Worker to more credible on this issue. School Psychologist has not worked as a school counselor, at least since locating to the Washington, D.C. area in 2009. Nor did she explain how she would reasonably expect Student to accept an additional hour weekly of school counseling, when Student had not attended school at all since being determined eligible for special education. I find that DCPS' decision to offer Student 120 minutes per month of Behavioral Support Services in the March 24, 2021 IEP was reasonably calculated to assist Student to benefit from special education in the initial IEP. *See* 34 C.F.R. § 300.34(a) (Definition of Related Services).

(iii) In the March 24, 2021 initial IEP, the DCPS IEP team proposed to provide Student 60 minutes per month of OT services, all consultative. DCPS OT wrote the Motor Skills/Physical Development part of the IEP. Despite her best efforts, DCPS OT was never able to meet or evaluate Student. She recommended consultation services initially with the goal of getting Student into the classroom. DCPS OT testified that she

did not recommend direct services because it was important to first observe Student in the classroom to see if Student needed direct OT services. She opined that without being able to see how Student performed in the classroom, it was premature to plan to pull Student out of the classroom for services.

Petitioner's expert, Independent OT, had recommended in her June 11, 2020 OT evaluation report that Student needed 30 minutes per week of pull-out OT services to work on visual-motor skills and 15 minutes per week of OT services in the classroom. In her testimony, Independent OT opined that 60 minutes per month of IEP OT consultative services was not sufficient for Student.

Here, I found DCPS' expert persuasive that without observing Student in the classroom, there was not enough information to determine what direct OT services Student needed in the initial IEP to benefit from special education. This was especially true because Student had not attended school regularly since the 2017-2018 school year, and Student was not attending classes either before the March 24, 2021 IEP was developed or at any time later in the school year. I find that DCPS' decision to offer Student 60 minutes per month of consultative Behavioral Support Services in the initial IEP was reasonably calculated to benefit Student appropriately.

(iv) Speech-Language Pathology Services

On June 17, 2020, Independent SLP conducted an IEE speech-language evaluation of Student. Independent SLP reported that Student had problems comprehending linguistic material and problems expressing him/herself orally and in

writing, because Student's language knowledge was extremely impaired and Student's higher level language processing was extremely poor. Independent SLP recommended, *inter alia*, that Student needed intensive language therapy with a speech-language pathologist, as well as classroom accommodations.

DCPS SLP reviewed Independent SLP's IEE report and rejected it in its entirety, because the IEE evaluation was allegedly not comprehensive and did not enable her to make a determination about Student's speech and language needs. DCPS SLP recommended and the March 24, 2021 IEP team decided that before offering Student speech and language services, additional data were needed, including Response to Intervention (RTI) information. Mother disagreed with this decision.

Even if this hearing offer were to accept that Independent SLP's evaluation did not meet OSSE's evaluation requirements, DCPS had the right to conduct its own speech and language evaluation of Student in lieu of accepting the IEE report. *See, e.g., Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir.1996) (“[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation.”) The IEE findings were certainly sufficient to put DCPS on notice of a suspected language disability for Student. It was therefore required for DCPS to assess Student in all areas related to this alleged disability. *See* 34 C.F.R. § 300.304(c)(4).

The IDEA requires that the IEP team be provided sufficient information from the student's evaluation and other sources to determine the nature and extent of the special

education and related services that the child needs.” *See* 34 C.F.R. § 300.15. Here there was no evidence DCPS sought to conduct a formal speech-language evaluation of Student after it rejected Independent SLP’s evaluation report. This left the March 24, 2021 IEP team without sufficient information to decide whether to provide Speech-Language Pathology services as part of Student’s initial IEP. Hence, I conclude that DCPS has not met its burden of persuasion that the omission of speech and language services in the March 24, 2021 IEP was appropriate.

Remedy

In this decision, I have found that DCPS denied Student a FAPE (1) by not comprehensively evaluating Student for a suspected speech and language disability; (2) by not determining Student for eligible for special education by the start of the 2020-2021 school year and (3) by offering Student in inappropriate initial IEP in that the March 24, 2021 IEP (a) provided for insufficient Specialized Instruction Services; (b) lacked Emotional, Social, and Behavioral Development annual goals to address Student’s needs resulting from depression symptoms; (c) lacked Motor Skills/Physical Development annual goals to address Student’s challenges with visual perception and visual motor skills, (d) omitted Speech-Language Pathology related services without the IEP team’s having sufficient information on Student’s speech and language needs and (e) provided an inappropriate Post-Secondary Transition Plan.

For the 2021-2022 school year, Student is enrolled in Public Charter School, which acts as its own local education agency (LEA). Since DCPS is no longer Student’s

LEA, DCPS cannot be ordered to provide Student a FAPE or an IEP for the current school year. However the hearing officer may still order compensatory education relief. *Cf. Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F. Supp. 2d 169, 172, n. 3 (D.D.C. 2008), citing *Neshaminy Sch. Dist. v. Karla B.*, No. 96–3865, 1997 WL 137197 at *6 (E.D.Pa. Mar. 20, 1997) (rejecting plaintiff’s argument that the issue of compensatory education was moot on the basis that defendants had moved from the school district).

The D.C. Circuit Court of Appeals explained the compensatory education remedy in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016):

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

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

For purposes of the compensatory education analysis, I determine that the period

of harm from the denials of FAPE in this case runs from the start of the 2020-2021 school year, by which time DCPS should have determined Student eligible for special education, to March 30, 2021 when the initial March 24, 2021 IEP was finalized.

Compensatory education is an equitable remedy. After March 30, 2021, it became clear that even with an IEP in place, Student, who had not attended school regularly since the 2017-2018 school year, was not going to return to school. I conclude that it would not be equitable to require DCPS to compensate Student for lost progress after March 30, 2021, when Student failed to avail him/herself of the substantial services offered by DCPS in the March 24, 2021 IEP. *See, e.g., S.J. ex rel. S.H.J. v. Issaquah Sch. Dist. No. 411*, 2007 WL 2703056, at *7 (W.D. Wash. 2007) (“School District is not responsible for the Parents’ failure to ensure the student was at school in order to benefit from [the student’s] education”). I find, therefore, that the period of harm, from August 31, 2020 to March 30, 2021, was approximately 29 school weeks.

Several of Petitioner’s experts opined as to appropriate compensatory education relief for Student. Educational Advocate recommended that Student be awarded 300 hours of academic tutoring based on her assumption that DCPS should have had a “full-time” IEP in place for Student by the start of the 2020-2021 school year and that Student missed 40 weeks (1 school year) of IEP services. Independent Psychologist assumed 44 weeks of harm from the time her evaluation of Student was completed in July 2020 through the hearing date. She recommended 44 hours of compensatory counseling supports, 50 hours of mentoring support and 80 hours of tutoring outside of

school. For related services, Independent OT recommended that Student be awarded 30 hours of OT services to compensate for Student's not being provided direct OT services from the start of the 2020-2021 school year. Independent SLP recommended that Student be awarded 90 hours of speech and language services to make up for Student's not being found eligible for Speech-Language Pathology services from the beginning of the 2020-2021 school year.

With regard to compensatory special education services, I found Educational Advocate, who qualified as an expert both in special education and compensatory education, to be the more credible witness. Educational Advocate is certified in special education and was at one time the director of tutoring for a local nonpublic special education day school. However, I will reduce Educational Advocate's recommended award of 300 hours of academic tutoring to 218 hours, since I have found the period of harm to be only 29 weeks – not 40 weeks as assumed by Educational Advocate.

For the Emotional, Social, and Behavioral Development area of concern, I have concluded in this decision that DCPS showed that the provision of 120 minutes per month of Behavioral Support Services in the initial IEP, was appropriate. However since the IEP was not completed until March 30, 2021, DCPS did not offer Student Behavioral Support Services for some 7 months of the school year. I will award Student 15 hours of independent counseling to compensate for DCPS' not offering Student Behavioral Support Services between August 31, 2020 and March 30, 2021. I decline to award Student compensatory mentoring services, as was recommended by Independent

Psychologist, because it has not been shown that Student required mentoring as an IEP related service.

For compensatory Motor Skills/Physical Development services, I will reduce Independent OT's recommended award for compensatory OT services from 30 hours to 22 hours, based on my determination that the period of harm was 29 weeks, not a full school year as assumed by Independent OT.

Also, in this decision, I have found that after rejecting Independent SLP's evaluation of Student, DCPS failed to ensure that Student was appropriately assessed for a suspected language disability and that the March 24, 2021 IEP team's decision not to provide for Speech-Language Pathology services was not based on sufficient information. As compensatory education, I will order DCPS to arrange for Student to be evaluated for speech and language needs by a qualified DCPS or outside Speech-Language Pathologist. *Cf. Nesbitt, supra*, 583 F. Supp. 2d at 172 (Court not persuaded by former LEA's argument that a new evaluation should not be its responsibility because Student no longer enrolled there.) This is without prejudice to the parent's right to seek additional compensatory education for Student from DCPS, should it be determined hereafter that Student is in need of Speech-Language Pathology services.

Lastly, I have found in this decision that the Post-Secondary Transition Plan in the March 24, 2021 IEP is based upon insufficient information due to Student's lack or responsiveness to Case Manager's efforts to assess Student or obtain Student's input. While the transition plan needs to be done over with Student's input, I find that it would

not be equitable or efficacious to charge DCPS with that task. Student's current LEA, PCS, with Student's cooperation and input, should review and revise Student's IEP transition plan as appropriate.

ORDER

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

ORDERED:

1. As compensatory education for the denials of FAPE found in this decision, DCPS shall, within 21 business days, issue funding authorization for the parent to obtain 218 hours of independent academic tutoring for Student to be provided by a qualified special educator, 15 hours of independent counseling to be provided by a social worker or other qualified professional and 22 hours of independent OT services to be provided by a qualified occupational therapist;
2. Subject to obtaining consent from the parent, DCPS shall ensure that Student has the opportunity to be appropriately evaluated by a qualified Speech-Language Pathologist. At DCPS' discretion, the evaluation may be conducted by DCPS staff or another qualified professional at DCPS' expense. This is without prejudice to the right of DCPS to seek appropriate relief if the District documents that Student fails to cooperate with the evaluation process. *See Nesbitt, supra* (Court assures Student that if he fails to cooperate with the evaluation process the case would be dismissed);
3. Petitioner's request for compensatory Speech-Language Pathology services is denied without prejudice to the parent's right to file a new request for such relief, should Student be determined to need speech and language services, informed by the evaluation ordered above and
4. All other relief requested by the Petitioner herein is denied.

Date: October 18, 2021

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
OSSE - SPED
DCPS Resolution Team
[REDACTED]@k12.dc.gov
[REDACTED]@k12.dc.gov