

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

OSSE
Office of Dispute Resolution
September 30, 2022

PARENT,
on behalf of STUDENT,¹

Date Issued: September 30, 2022

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2022-0114

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Date of Hearing: September 12, 13 and 21,
2022

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner, 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.”). Petitioner’s Due Process Complaint, filed on June 10, 2022, named DCPS as Respondent. Petitioner seeks relief for DCPS’ allegedly not providing appropriate Individualized Education Programs (IEPs) for the 2020-2021 and 2021-2022 school years and for allegedly not fully implementing Student’s IEPs.

The undersigned hearing officer was appointed on June 13, 2022. On July 27, 2022, the parties met for a resolution session and were unable to resolve the issues in

Personal identification information is provided in Appendix A.

dispute. On June 29, 2022, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On July 13, 2022, to accommodate the September 2022 hearing dates, I granted the parent's unopposed request to extend the final decision due date from August 24, 2022 to September 30, 2022.

With consent of the parent, the due process hearing in this case was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on September 12 and 13, 2022. An additional session was held to receive closing arguments on September 21, 2022. Mother appeared online for most 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 made opening statements. Mother testified at the hearing and called EDUCATIONAL ADVOCATE as her only additional witness. DCPS called as witnesses LEA Representative, SPECIAL EDUCATION TEACHER and SOCIAL STUDIES TEACHER. Petitioner's Exhibits P-1 through P-63 were admitted into evidence, including Exhibits P-5 through P-10, P-14 through P-18, P-28 through P-35 and P-42 through P-52 admitted over DCPS' objections. DCPS' Exhibits R-1 through R-35 and R-37 through R-43 were admitted into evidence, including Exhibits R-27, R-29, R-31 and R-32 admitted over Petitioner's objection. Exhibit R-36 was not offered. On September 21, 2022, counsel for the respective parties made oral closing arguments.

There was no request to file post hearing briefs.

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 June 29, 2022 Prehearing Order, are:

- A. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement in the 2021-2022 school year in that multiple IEPs developed in the school year were inappropriate for the following reasons:
 - a. Not based on comprehensive evaluations;
 - b. Failed to provide measurable goals and baselines;
 - c. Failed to develop goals in the student's areas of need and
 - d. Failed to provide a sufficient amount of specialized instruction and/or an appropriately restrictive setting.
- B. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP or placement in the 2020-2021 school year in that multiple IEPs developed in the school year were inappropriate for the following reasons:
 - a. Failed to provide ESY for Summer 2021;
 - b. Failed to provide measurable goals and baselines;
 - c. Failed to develop goals in the student's areas of need and
 - d. Failed to provide an appropriately restrictive setting.
- C. Whether DCPS denied Student a FAPE by failing to implement Student's IEP for the 2021-2022 school year, in that DCPS failed to provide Student with the direct specialized instruction mandated on his/her IEP, including not enrolling Student in an ELA class for the spring semester of the 2021-2022 school year and not providing direct support in this area and upon information and belief, not providing OT under his/her current IEP;
- D. Whether DCPS denied Student a FAPE by failing to implement Student's

IEP for the 2020-2021 school year, in that DCPS did not provide direct specialized instruction outside the general education setting as required by IEPs and not providing IEP OT services and

E. Whether DCPS denied Student a FAPE by failing to implement Summer 2020 ESY as required by Student's IEP.

For relief, Petitioner requests that the hearing officer order as follows:

- Order DCPS to fund independent comprehensive evaluations of Student in the areas of a Vocational Assessment, Assistive Technology, and a Comprehensive Literacy Evaluation or other evaluation that assesses deficits in reading and writing;
- Order DCPS to convene an IEP meeting to update Student's IEP based on the independent evaluations within 15 days of their completion;
- Order DCPS to revise Student's IEP to include literacy intervention by a literacy specialist to address Student's deficits in the areas of reading and writing;
- Order DCPS to revise Student's IEP to include specialized instruction in English for the full school year;
- Order DCPS to increase Student's specialized instruction on his/her IEP to 20 hours per week outside the general education setting and provide placement in the Specific Learning Support (SLS) classroom.

Petitioner also seeks an award of compensatory education for Student, including transportation expenses, to compensate for the denials of FAPE alleged in the due process complaint.

FINDINGS OF FACT

After considering all of the evidence received at the September 2022 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, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education services under the IDEA disability classification Specific Learning Disability (SLD). Exhibit P-13.

3. Student is currently enrolled in GRADE at CITY SCHOOL 3. Testimony of Mother.

4. On March 19, 2020, Mother filed a prior due process complaint on behalf of Student (Case No. 2020-0074), in which she alleged that DCPS had denied Student a FAPE by failing to provide an appropriate IEP on January 23, 2020, with sufficient specialized instruction services and provision for Extended School Year (ESY) services. At the time the IEP was developed, Student was enrolled in CITY SCHOOL 1. The IEP at issue provided for Student to receive 6 hours per week of specialized instruction inside general education and 8 hours per week of specialized instruction outside general education, along with 60 minutes per month of behavioral support services (“BSS”) inside general education, 60 minutes per month of occupational therapy (“OT”) outside general education, and another 30 minutes per month of OT consultation. The January 23, 2020 IEP also provided a significant number of Other Classroom Aids and Services, including small group instruction, independent and instructional level texts, grade level material read aloud in the general education setting, math manipulatives, printed out PowerPoints/class notes, checklists, and more. The January 23, 2020 IEP also significantly expanded Classroom Accommodations for Student. In her March 20,

2020 due process complaint, Mother sought a change in placement for Student to a full-time specific learning disability program, an increase in Student's specialized instruction to 20 hours per week outside general education and the addition of ESY services to Student's IEP. Exhibit P-61.

5. Following a two-day due process hearing on May 18 and 19, 2020, Impartial Hearing Officer Keith Seat issued a hearing officer determination on June 1, 2020 (the June 1, 2020 HOD). Hearing Officer Seat concluded, *inter alia*, that DCPS had met its burden of persuasion that Student did not need a more restrictive environment or a full-time IEP. However, Hearing Officer Seat found that DCPS failed to meet its burden of persuasion that Student did not require ESY services. The hearing officer was persuaded that the January 23, 2020 IEP was reasonably calculated to permit Student to make progress appropriate in light of his/her circumstances except for the omission of ESY services. Exhibit P-61.

6. Student's IEP was amended on June 12, 2020, at CITY SCHOOL 2, to add ESY services and an ESY goal. Exhibit P-9.

7. On July 15, 2020, Student's IEP was amended at City School 2 to reduce Student's special education services to 5 hours per week in Mathematics and 5 hours per week in Reading, all inside the general education setting. Exhibit P-10. (The IEP states 5 "minutes" per week for each area. This was a typographical error. See Exhibit R-13.) The hearing evidence does not establish how the July 15, 2020 IEP amendment came about, but it is clear that Mother did not agree to this reduction in services. For the

2020-2021 school year, Student transferred to City School 3. At a 30-day review meeting on October 7, 2020 at City School 3, an attorney for Petitioner requested that the special education hours from the June 12, 2020 IEP – 6 hours per week inside general education and 8 hours per week outside general education – be restored.

Exhibit R-13. On October 19, 2020, the City School 3 multidisciplinary team (MDT) amended Student's IEP to change his/her specialized instruction hours back to 6 hours per week in general education setting and 8 hours per week outside general education setting. Exhibit R-14.

8. The City School 3 IEP team met for Student's annual IEP review on December 22, 2020. Mother and her advocates attended the virtual meeting. At the time, DCPS schools were closed for in-person classes because of the COVID-19 pandemic. Student was reported to be uncomfortable with virtual learning on camera and would put the camera on for just 5 minutes. The school was "taking baby steps" with getting Student to turn on his/her camera. Student was reported to be "Progressing" on all of his/her IEP academic goals, but not to have mastered any goals. The City School 3 IEP team repeated, verbatim, all of the January 23, 2020 annual academic goals, except for the addition of a new math goal. The parent's representatives requested increased specialized instruction services. However, the City School 3 representatives continued special education and related services for Student unchanged. The IEP team determined that Student did not meet criteria for ESY services. Exhibits P-19, P-24, P-25, R-2.

9. Student received all “B” or “B+” grades in academic classes for the 2020-2021 school year at City School 3. Exhibit P-37. These grades were earned by Student. Testimony of LEA Representative.

10. The City School 3 IEP team met for Student’s annual IEP review on December 20, 2021. Mother and her advocates attended the virtual meeting. Student had not “Mastered” any goals from his/her December 22, 2020 IEP. He/she was reported to be “Progressing” on all of his/her IEP academic goals. Petitioner’s attorney at the meeting asserted that their stance was that if Student “hasn’t mastered [his/her] goals they need to remain the same until [he/she] masters them.” The IEP team adopted new Math annual goals for Student. Student’s annual goals for Reading and Written Expression were carried over unchanged from the 2019 and 2020 IEPs, except that a new, second, Written Expression goal was added. Exhibits R-63, P-26. Parent’s counsel disagreed with the specialized instruction hours and wanted a full time IEP for Student. The school representatives decided that based on the data reviewed and Student’s progress, a full time IEP was not warranted. The IEP team continued special education and related services for Student unchanged from the 2020 IEP. The IEP team determined that Student met criteria for ESY services. Exhibits P-26, R-3, R-39.

11. On March 7, 2022, Student’s IEP was amended to change present levels of performance and annual goals in mathematics. One of the three math goals was replaced with a new geometry goal. Exhibit P-13.

12. City School 3 operates on a 4x4 block schedule for all students, in which

students take core subjects in a given area in a single semester which covers a full year's curriculum. Each class period lasts approximately 83 minutes. Student had his/her English (ELA) class in the first semester of the 2021-2022 school year. He/she had math in the second semester of the school year. Testimony of Special Education Teacher, Testimony of LEA Representative.

13. Student's final grades for the 2021-2022 school year were all "A's" and "B's" in core academic subjects, except for a "C" in ELA. Exhibit R-26. These grades were earned by Student. Testimony of Special Education Teacher, Testimony of LEA Representative.

14. Mother does not have any concerns about Student's behavior at City School 3. Testimony of Mother.

15. Student's scores on the Scholastic Reading Inventory (SRI) assessment were 587 in September 2021 (3rd Grade range) and 671 in January 2022 (4th Grade range). These scores were years below Student's actual class grade level. These SRI scores do not correlate at all to Student's actual performance in the classroom because he/she rushed to finish the computer tests. Testimony of Special Education Teacher.

16. In the 2021-2022 school year, Student was quite successful in class. Student was creative, participated well, engaged in work and was willing to try everything asked. Student did reading with more fidelity than any of the other students in the class and had great comprehension. Student was able to access grade level material with supports, scaffolding and the curriculum broken down into smaller pieces.

Student was always ready to read aloud in class. Student was able to retell the stories he/she read and identify character development. Student asked questions in class. Student was willing to work as part of a team. When needed, Student was easily redirected back to task. Student was organized and motivated to learn. Student was highly self-confident. Student was able to keep up with the pace of the classroom.

Testimony of Special Education Teacher.

17. Student's weaknesses were rushing through work and lacking stamina for longer reading pieces. Student liked to finish work quickly and resisted having to do re-writes. Student rushed through tests, including the standardized SRI reading tests, too quickly. Testimony of Special Education Teacher.

18. In Social Studies in the 2021-2022 school year, Student was able to read the class material presented at the actual grade level. Testimony of Social Studies Teacher.

19. Parent's expert, Educational Advocate, calculated that DCPS failed to implement some 360 minutes (6 hours) of Occupational Therapy (OT) services, including 120 minutes of consultative services, in the 2021-2022 school year. Testimony of Educational Advocate. On August 30, 2022, DCPS issued funding authorization to the Parent to obtain 100 hours of independent OT services for Student. Exhibit R-43.

20. DCPS schools were closed for most in-person classes from on or about March 20, 2020 through the end of the 2020-2021 school year due to the COVID-19

pandemic. Hearing Officer Notice.

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, 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

Appropriateness of IEPs

1. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP or placement in the 2020-2021 school year in that multiple IEPs developed in the school year were inappropriate for the following reasons:
 - a. Failed to provide ESY for Summer 2021;
 - b. Failed to provide measurable goals and baselines;
 - c. Failed to develop goals in the student's areas of need and
 - d. Failed to provide an appropriately restrictive setting.

Petitioner alleges that DCPS' IEPs for Student for the 2020-2021 school year were inappropriate because the IEPs lacked appropriate goals and baselines, did not offer an appropriately restrictive setting and did not provide Student Extended School Year (ESY) services. DCPS responds that the IEPs were appropriate for Student at the time they were developed.

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. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 998 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered

must be “*specially* designed” to meet a child’s “*unique* needs” through an “*individualized* education program.” An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] 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 circumstances.

Endrew F., 137 S.Ct. at 1002. *See, also, Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018).

In the June 1, 2020 HOD, Impartial Hearing Officer Seat determined that DCPS’ January 23, 2020 IEP was appropriate for Student except for the failure of the IEP team to provide ESY services. Pursuant to that HOD, on June 12, 2020, the City School 2 IEP team added ESY services to Student’s IEP. However, on July 15, 2020, the City School 2 IEP team amended Student’s IEP again to reduce Student’s specialized instruction services from 6 hours per week of special education inside general education and 8 hours per week outside general education to 10 hours, total, per week, all in the general education setting.

Student transferred to City School 3 for the 2020-2021 school year. For a period of about 7 weeks, Student was provided the reduced special education services per the July 15, 2020 IEP. On October 19, 2020, following a 30-day IEP review meeting, the City School 3 IEP team restored Student’s special education services back to 6 hours per week in the general education setting and 8 hours per week outside general education. I find that the Petitioner made a *prima facie* showing in her case-in-chief that the

reduction in services in the July 15, 2020 amended IEP was inappropriate. Therefore, the burden of persuasion as to the appropriateness of the IEP falls on DCPS.

How the July 15, 2020 IEP amendment, with the reduction in special education services, came about was not explained at the due process hearing, but Mother and her representatives did not attend the July 15, 2020 IEP team meeting. (Petitioner has not raised this possible procedural violation as an issue in this case.) Considering that at the prior due process hearing in April 2020, DCPS successfully defended its IEP team's January 23, 2020 decision that Student needed 14 hours per week of specialized instruction services – and that the District offered no justification at this due process hearing for the July 2020 reduction in Student's services – I conclude that DCPS has failed to offer "a cogent and responsive explanation" for the decision of its July 15, 2020 IEP team to cut back Student's special education services. *See Endrew F., supra*. I find that DCPS denied Student a FAPE by reducing his/her specialized instruction services from 14 hours to 10 hours per week from the start of the 2020-2021 school year until October 19, 2020.

Petitioner also claims that City School 3's December 22, 2020 annual IEP was inappropriate for Student. With regard to the IEP's annual goals and baselines, contrary to the allegations in the complaint, Petitioner's expert, Educational Advocate, agreed that the annual goals were measurable. However, Educational Advocate opined that the academic goals were not appropriate, primarily because they were copied – except for one new math goal – verbatim from the prior January 20, 2020 IEP. The IDEA

mandates that IEP teams must “revise the IEP as appropriate” to address lack of progress toward annual goals, results of re-evaluations, information about the child provided to or by the parents, the child’s anticipated needs, or “other matters.”

Achievement Preparatory Acad. Pub. Charter Sch. v. Williams, No. 19-CV-2596 (BAH), 2020 WL 5038763, at *9 (D.D.C. Aug. 25, 2020), *quoting* 20 U.S.C. § 1414(d)(4)(A)(ii).

DCPS’ expert, LEA Representative, who participated in the December 2020 IEP meeting, told the IEP team that Student was working hard, showing progress and responding to the program modifications in his/her IEP. She opined in her testimony that the academic goals in the December 22, 2020 IEP were appropriate because school staff was still working on those skills with Student.

“A failure to meet IEP goals may not be dispositive of a failure to provide a FAPE, but it can aid in determining whether the IEP was reasonably calculated to allow the student to make progress.” *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. CV 18-2430 CRC/DAR, 2020 WL 12654618, at *18 (D.D.C. Aug. 14, 2020). Here Student was reported to be progressing on all of his/her January 20, 2020 IEP academic goals, even if he/she had not mastered any of the annual goals. Moreover, in December 2020, DCPS students were only being offered online learning, because of the COVID-19 schools closing. I conclude that on this evidence, DCPS has established that the December 22, 2020 IEP team’s decision not to change Student’s IEP academic goals was appropriate.

Educational Advocate also opined that because Student had not mastered any

goals from the January 20, 2020 IEP, the December 22, 2020 IEP team should have changed Student's educational placement to a full-time special education program in a Specific Learning Support (SLS) classroom. LEA Representative explained that Student's teacher in the 2020-2021 school year recommended that Student not be placed in a more restrictive setting and that he/she remain in an inclusion setting with typically developing peers. Special Education Teacher, who worked with Student, in the following, 2021-2022, school year, testified that being in the general education setting affected Student positively and that, with accommodations, Student was able to keep up with typically developing peers. She opined that with Student's personality and willingness to work, he/she had more potential and could grow further in an inclusion classroom setting.

LEA Representative and Special Education Teacher observed Student at City School 3 in both the inclusion and self-contained settings. Educational Advocate did not have that opportunity. I found the District's experts' opinions about the appropriateness of continued special education services in both the general education and pull-out settings more persuasive than the opinion of Educational Advocate that Student required a full-time special education placement.

Petitioner also claims that the December 22, 2020 IEP should have provided for Student to receive ESY services. I agree. In the June 1, 2020 HOD, Hearing Officer Seat concluded that, that standardized testing scores in reading and math suggested that Student experienced regression over the summer break. *See Johnson v. District of*

Columbia, 873 F. Supp. 2d 382, 386 (D.D.C. 2012) (ESY Services are necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.) Hearing Officer Seat concluded that Student's January 23, 2020 IEP should have included ESY to ensure meaningful progress in math and reading. DCPS' expert, LEA Representative, testified at the due process hearing that data reviewed at the December 22, 2020 IEP meeting did not support the need for ESY services. However DCPS did not present that purported data at the due process hearing. I conclude that in light of the determination in the June 1, 2020 HOD that Student's IEP should have included ESY and the lack of data indicating that Student was no longer likely to experience regression over the summer months, DCPS did not meet its burden of persuasion that the IEP team's decision not to offer Student ESY for summer 2021 was appropriate.

In sum, with regard to the 2020-2021 school year IEPs, I conclude that DCPS did not meet its burden of persuasion as to the appropriateness of the July 15, 2020 decision to reduce Student's special education services or of the December 22, 2020 IEP team determination that ESY services were not required for Student. In all other respects, I find that DCPS met its burden of persuasion that its IEPs for the 2020-2021 school year were reasonably calculated to enable Student to make progress appropriate in light of his/her circumstance. *See Andrew F., supra*.

2. Whether DCPS denied Student a FAPE by failing to provide an appropriate

IEP and placement in the 2021-2022 school year in that multiple IEPs developed in the school year were inappropriate for the following reasons:

- a. Not based on comprehensive evaluations;
- b. Failed to provide measurable goals and baselines;
- c. Failed to develop goals in the student's areas of need and
- d. Failed to provide a sufficient amount of specialized instruction and/or an appropriately restrictive setting.

On December 20, 2021, the City School 3 IEP team met for Student's annual IEP review. Mother and her advocates attended the virtual meeting. The parent's representatives continued to seek a full-time IEP for Student in an SLS classroom. Notwithstanding, the school representatives on the IEP team continued Student's special education services and placement unchanged from the 2020 IEP – that is, 6 hours per week of specialized instruction inside the general education setting and 8 hours per week outside general education.

Petitioner's expert, Educational Advocate, opined in her hearing testimony that the December 20, 2021 IEP was not based on comprehensive special education evaluations because Student needed an Assistive Technology (AT) evaluation, a comprehensive literacy assessment and a vocational assessment. As to this inadequate evaluations allegation, the parent has the burden of persuasion. Educational Advocate, did not attend the December 20, 2021 IEP meeting and none of the IEP team members who attended the meeting, including Mother or her attorney, stated a need for additional assessments. With regard to AT, LEA Representative testified that Student was provided an iPad and a calculator, as well as low-tech AT services, and the school

team did not think Student needed additional AT. Special Education Teacher, who was Student's case manager for the 2021-2022 school year and taught Student's ELA class testified, credibly, at length, about Student's reading and comprehension levels. I found unpersuasive Educational Advocate's opinion that Student needed some type of additional literacy assessment. With regard to a vocational assessment, Student was administered the Casey Life Skills educational assessment on November 15, 2021. Petitioner offered no evidence that the Casey Life Skills assessment was not an appropriate tool to assess Student. I conclude that Petitioner did not meet her burden of persuasion that DCPS' evaluations of Student before the December 20, 2021 IEP meeting were not sufficiently comprehensive.

Educational Advocate also opined in her testimony that the annual goals in the December 20, 2021 IEP were inappropriate because most of the reading and written expression goals were repeated from Student's December 22, 2020 IEP. Educational Advocate did not attend the December 20, 2021 IEP review. However, at that meeting, the parent's education attorney insisted to the IEP Team that Student's academic goals *not* be changed because none of the annual goals had yet been mastered. The parent cannot reasonably complain now that the annual academic goals should have been further changed when her attorney insisted at the IEP meeting that the goals remain the same. Contrary to Petitioner's claim, the December 20, 2021 IEP provide baselines and the annual goals are measurable. *See, e.g.,* Exhibit P-12, Reading Annual Goal 1 (Student "will construct a response that cites (3) pieces of textual evidence and explain

how it supports the claim using a graphic organizer, scoring (80%) or higher as measured by a (teacher created rubric).”)

Petitioner claims that the December 20, 2021 IEP failed to provide a sufficient amount of specialized instruction and/or an appropriately restrictive setting. As with the December 22, 2020 IEP, the parent’s representatives had sought a full-time special education program for Student. Their request appears to have been premised on Student’s poor performance on the standardized math and reading tests. However, I found persuasive the testimony of Special Education Teacher that these standardized computer tests did not accurately reflect Student’s actual progress. Special Education Teacher’s testified credibly that Student was quite successful in class, was able (with IEP supports) to access grade level material and could keep up with the pace of the classroom. Social Studies Teacher also testified that Student was able to read the class material, presented at the actual grade level. These observations were not rebutted by Petitioner’s expert who did not get to observe the Student in class.

The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See, e.g., Gross-Lee on behalf of D.A.-G. v. District of Columbia*, No. 22-CV-1695 (CRC/GMH), 2022 WL 3572457, at *8 (D.D.C. July 20, 2022), *citing* 20 U.S.C. § 1412(a)(5)(A). I found persuasive Special Education Teacher’s opinions that placement in the general education setting affected Student positively; that Student was engaged and able to keep

up with typically developing peers and that Student could really grow in that space. I conclude that DCPS has met its burden of persuasion that the decisions of the December 20, 2021 IEP team not to increase Student's special education services and not to change his/her educational placement were reasonably calculated to enable Student to continue to make progress appropriate to his/her circumstances.

IEP Implementation

3. Did DCPS deny Student a FAPE by failing to implement Student's IEP for the 2020-2021 school year, in that DCPS did not provide direct specialized instruction outside the general education setting as required by IEPs and not provide IEP OT services?

4. Did DCPS deny Student a FAPE by failing to implement Student's IEP for the 2021-2022 school year, in that DCPS failed to provide Student with the direct specialized instruction mandated on [REDACTED] IEP, including not enrolling Student in an ELA class for the spring semester of the 2021-2022 school year and not providing direct support in this area and upon information and belief, not providing OT under her current IEP?

Petitioner alleges that DCPS denied Student a FAPE in the 2020-2021 and 2021-2022 school years by failing to implement all of the specialized instruction services and Occupational Therapy (OT) services specified in Student's IEPs. DCPS admits that it did not provide all of the IEP-required OT services in the 2021-2022 school year because of the unavailability of its Occupational Therapist, but the District asserts it has already compensated Student for the missed OT services. DCPS denies that it failed to implement Student's specialized instruction services.

A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or

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

Middleton v. District of Columbia, 312 F. Supp. 3d 113, 144 (D.D.C. 2018). The Petitioner has the burden of persuasion on the failure to implement claims.

The City School 3 IEPs for both school years provided for Student to receive 60 minutes per month of direct OT services and an additional 30 minutes per month of OT consultation services. Petitioner alleges that in the 2021-2022 school year, DCPS failed to provide some 240 minutes of direct OT services and 120 minutes of OT consult services required by Student’s IEPs. *See* Exhibit P-63, p. 9. Prior to the due process hearing, DCPS issued funding authorization for the parent to obtain 100 hours of independent OT services for Student. *See* Exhibit R-43. Compensatory education should provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016). The District’s authorization for 100 hours of independent OT services more than compensated Student for the 360 minutes (6 hours) of missed occupational therapy which DCPS allegedly failed to supply.

Petitioner requests that DCPS be ordered to provide special education transportation to allow Student to access the independent OT services. This request is

warranted because the IDEA requires the District to provide school transportation services as are required to assist a child with a disability to benefit from special education. *See* 34 C.F.R. §§ 300.34(a); (c)(16). However, no further compensatory award is warranted for missed OT services.

Petitioner offered no probative evidence that in the 2020-2021 or 2021-2022 school years, DCPS did not provide Student with the direct specialized instruction (14 hours per week) mandated on his/her IEPs. Petitioner contends that Student did not receive specialized instruction in reading in the second half of the 2021-2022 school year, because on City School 3's 4x4 block schedule, Student's ELA class ended after the first semester. However, Petitioner ignores that Student's IEPs did not specify that Student's special education services would be provided in any designated subjects, ELA or otherwise. Petitioner offered no probative evidence that in the second semester of the 2021-2022 school year, Student was not provided the 14 hours per week of specialized instruction services specified in Student's IEP.

5. Did DCPS deny Student a FAPE by failing to implement Summer 2020 ESY as required by Student's IEP?

Pursuant to the June 1, 2020 HOD, on June 12, 2020, the City School 2 IEP team added ESY services to Student's IEP. At that time, DCPS schools were closed for in-person classes due to the COVID-19 pandemic. Mother testified that she spoke to the City School 2 principal about getting access to online ESY services for Student, but DCPS never provided her information on how Student could access the virtual ESY

program. No one from City School 2 testified at the hearing and Mother's testimony was not rebutted. I find that Mother has met her burden of persuasion DCPS denied Student a FAPE by failing to provide him/her access to the summer 2020 virtual ESY program.

Remedy

Compensatory Education

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

In this decision, I have found that DCPS denied Student a FAPE by reducing special education services from 14 hours to 10 hours per week in the July 15, 2020 IEP amendment, by failing to provide Student access to the virtual ESY program in summer 2020 and by failing to include ESY services for summer 2021 in the December 22, 2020 IEP. Due to the services reduction in the July 15, 2020 IEP, Student missed, roughly, 4 hours per week of special education services for 7 weeks in fall 2020, before specialized instruction services were restored to 14 hours per week in Student's IEP. Student also missed some 100 hours of ESY services each year in the summers of 2020 and 2021.

Petitioner proposed a compensatory education services plan (Exhibit P-63) for Student. However, that plan was drafted by a former educational consultant for the parent who did not testify at the due process hearing. Petitioner's expert, Educational Advocate, who did testify at the hearing, recommended that Student be awarded at least 300 hours of academic tutoring, including 200 hours at a Lindamood Bell reading learning center. Petitioner did not prevail on many of her claims in this case, notably that DCPS should have provided Student a full-time special education placement beginning with the December 22, 2020 IEP. Moreover, I have found that despite Student's low scores on standardized tests, Student was making solid gains in Reading under the DCPS IEPs. Taking account of the denials of FAPE established in this case, I will award Student the 300 hours of academic tutoring recommended by Educational Advocate, but I will not award services at the Lindamood Bell reading program. I will also order DCPS to provide special education transportation as needed by Student to attend the compensatory academic tutoring and the make-up OT services previously funded by the District.

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 promptly issue funding authorization to the parent for Student to receive 300 hours of 1:1 academic tutoring a qualified independent educator. If these services are provided outside the home, DCPS shall provide transportation or fund reasonable transportation expenses for

Student to attend this programming;

2. For the make-up OT services previously authorized by DCPS, if these OT services are provided outside the home, DCPS shall provide transportation or fund reasonable transportation expenses for Student to attend this programming and
3. All other relief requested by the Petitioner herein is denied.

Date: September 30, 2022

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
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