

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

<i>Student</i> , ¹)	Case No.: 2024-0087
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 9/26/24
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	8/22/24, 9/11/24 & 9/12/24
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to DCPS’s failure to develop appropriate IEPs, implement IEPs, and provide education records, among other things. DCPS asserted there was no denial of FAPE on any issue.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter A30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 5/3/24, the case was assigned to the undersigned on 5/6/24. Respondent filed a response on 5/14/24 and did not challenge jurisdiction. A resolution meeting took place on 5/17/24, but the parties did not settle the case or shorten the 30-day resolution period, which ended on 6/2/24. A final decision in this

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics. Personal pronouns and other terms that would indicate Student’s gender are omitted.

Hearing Officer Determination

Case No. 2024-0087

matter must be reached no later than 45 days following the end of the resolution period, as extended by 50-day and 25-day continuances, which require a Hearing Officer Determination (“HOD”) by 9/30/24.

A prehearing conference was held on-the-record on 8/7/24 and a Prehearing Order was issued that same day, addressing among many other things the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 8/22/24, 9/11/24 and 9/12/24, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present by telephone throughout the hearing.

Documents and Witnesses

Petitioner’s Disclosure, submitted on 8/15/24, contained documents P1 through P40, all of which were admitted into evidence without objection. Petitioner submitted 3 additional documents, P41-P43, on 9/4/24, 5 business days prior to resumption of the hearing on 9/11/24 when Respondent began its case, which were admitted over objection. Respondent’s Disclosure, submitted on 8/15/24, contained documents R1 through R27, all of which were admitted into evidence over certain objections.²

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
2. *Speech Language Pathologist* (qualified without objection as an expert in Speech Language Pathology and Audiology)
3. *Educational Advocate* (qualified without objection as an expert in Special Education)
4. *Behavioral Expert* (qualified over objection as an expert in Social-Emotional Behavioral Functioning)

Respondent’s counsel presented 3 witnesses in Respondent’s case (*see* Appendix A):

1. *School-Based Occupational Therapist* (qualified over objection as an expert in Occupational Therapy)
2. *School-Based Social Worker* (qualified over objection as an expert in Social Work)

² Citations herein to the parties’ documents are identical except that Petitioner’s documents begin with a “P,” while Respondent’s documents begin with an “R,” followed by the exhibit number and then a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits), with any leading zeros omitted.

Hearing Officer Determination

Case No. 2024-0087

3. *LEA Representative* (qualified over objection as an expert in Special Education)

Petitioner's counsel did not offer any rebuttal evidence.

Issues and Relief Requested

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to provide Parent complete access to Student's education records from 3/15/22, despite numerous requests. *(Petitioner has the burden of persuasion on this issue.)*

Issue 2: Whether DCPS denied Student a FAPE by impeding Parent's opportunity to participate in decision-making regarding provision of a FAPE to Student in the annual IEPs on 5/4/22, 5/3/23, and 5/2/24, when DCPS completely failed to include Parent in the development of the IEPs. *(Petitioner has the burden of persuasion on this issue.)*

Issue 3: Whether DCPS denied Student a FAPE by failing to implement Student's IEPs when (a) from 5/4/22 to 5/2/23, Student did not receive 240 minutes of speech-language pathology services ("SLP"), 1,470 minutes of behavioral support services ("BSS"), and/or 720 minutes of occupational therapy services ("OT"), and/or (b) from 5/3/23 to 4/11/24, Student did not receive 510 minutes of SLP, 1,680 minutes of BSS, and/or 780 minutes of OT. *(Petitioner has the burden of persuasion on this issue.)*

Issue 4: Whether DCPS denied Student a FAPE by failing to review the 7/15/22 independent speech-language evaluation. *(Petitioner has the burden of persuasion on this issue.)*

Issue 5: Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs on 5/4/22, 5/3/23, and/or 5/2/24 when it did not provide appropriate/sufficient (a) goals, (b) specialized instruction, and/or (c) related services. *(Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Relief Requested by Petitioner:

1. A finding that Student has been denied a FAPE.
2. DCPS shall immediately provide all of Student's education records to Parent via her counsel.
3. DCPS shall schedule and convene an IEP team meeting through Parent's counsel within 10 days to review the independent speech-language evaluation and review and revise Student's IEP appropriately.
4. At the IEP team meeting ordered above, DCPS shall discuss and determine the appropriate compensatory education for any denials of FAPE or, alternatively, Petitioner may present evidence of appropriate compensatory education at the

Hearing Officer Determination

Case No. 2024-0087

due process hearing, or DCPS shall fund an independent evaluation at market rates to determine appropriate compensatory education, after which Parent may bring another due process complaint at her option to determine compensatory education.³

5. DCPS shall immediately provide copies of requested education records to Parent through her counsel, and the statute of limitations shall be tolled until Parent has full access to education records.
6. Any other just and reasonable relief.

At the beginning of Respondent's case, Respondent's counsel made an oral motion for a directed finding on Issue 2 and part of Issue 3, which the undersigned denied on the record.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁴ are as follows:

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age, Gender,* and was in *Grade* during 2023/24 at *Public School.*⁶ Student was below average in all academic areas as of early 2022.⁷ Student has difficulty accessing the general education curriculum without academic and behavioral

³ As for any compensatory education sought in this case, Petitioner's counsel was put on notice that, at the due process hearing, Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE.

Respondent was to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ P15.

⁶ P4p42; P6p63.

⁷ Educational Advocate; P9p142; P11.

Hearing Officer Determination

Case No. 2024-0087

supports, due to low cognitive abilities and anxiety, depression, impulsivity and other issues, so continues to meet the criteria for Multiple Disabilities.⁸

2. IEPs. Student's 5/5/21 IEP ("2021 IEP") was appropriate with suitable goals and services against which subsequent IEPs were measured.⁹ The 2021 IEP provided a total of 15 hours/week of specialized instruction (9 hours outside general education and 6 hours inside), along with 240 minutes/month of SLP outside general education, 180 minutes/month of BSS outside general education, and 120 minutes/month of OT outside general education and 30 minutes/month of OT inside general education.¹⁰

3. Student's 5/4/22 IEP ("2022 IEP") provided 15 hours/week of specialized instruction (9 hours outside and 6 hours inside general education), as well as 180 minutes/month of BSS outside general education, 120 minutes/month OT outside general education, 30 minutes/month OT inside general education, termination of all 240 minutes/month of direct SLP, but the addition of 60 minutes/month of SLP consultation.¹¹

4. Student's 5/3/23 IEP ("2023 IEP") provided only 5 hours/week of specialized instruction inside general education, along with 180 minutes/month of BSS outside general education, 60 minutes/month of OT outside general education and 30 minutes/month of OT inside general education, plus 30 minutes/month of SLP consultation.¹²

5. Student's 4/9/24 IEP ("2024 IEP," apparently finalized on 5/2/24) provided 8 hours/week of specialized instruction inside general education, along with 30 minutes/month of BSS outside general education and 30 minutes/month of OT outside general education, plus 30 minutes/month of consultation for both OT and SLP.¹³

6. The parties agreed in Student's 6/6/24 Amended IEP ("2024 Amended IEP") that specialized instruction would be outside general education and there would be summer testing for SLP and auditory processing.¹⁴ The 2024 Amended IEP provided 18 hours/week of specialized instruction (with 10 hours/week inside general education and 8 hours/week outside general education, along with 30 minutes/month outside general education in both BSS and OT, plus 30 minutes/month of consultation in both OT and SLP.¹⁵ School-Based Social Worker convincingly testified that the 30 minutes of BSS outside general education

⁸ P11p182,183,184.

⁹ P14; Educational Advocate.

¹⁰ P14p240.

¹¹ P15p273; Speech Language Pathologist.

¹² P16p302.

¹³ P17p331; R19p287.

¹⁴ P18p349.

¹⁵ P18p366.

Hearing Officer Determination

Case No. 2024-0087

was supposed to be per week rather than per month, although she had never noticed the error on the new IEP form until testifying in this hearing.¹⁶

7. Education Records. On 2/7/24, Petitioner received service trackers for OT and inquired about SLP and BSS; Petitioner was concerned about incomplete documentation/data.¹⁷ On 2/17/22, documents were provided by LEA Representative.¹⁸ Records were requested a few at a time.¹⁹ School-Based Occupational Therapist never gave OT works samples to Parent.²⁰

8. On 6/5/23, Public School sent records for 2022/23; on 6/12/23 Petitioner's counsel noted some records were provided but not all records since 3/15/22 that had been requested on 4/10/23; DCPS did not respond.²¹ Petitioner had not received any records in more than a year, since 3/15/22.²² As one example, Petitioner requested the final version of the draft 4/9/24 IEP, apparently finalized on 5/2/24, but DCPS didn't provide it when requested on 5/29/24.²³

9. Petitioner sought the following categories of documents on 8/9/24; DCPS responded on 8/14/24 as indicated in parentheses²⁴:

- a) The final eligibility documents from Spring 2022 (DCPS: see email with documents)
- b) All i-Ready, ANET, DIBELs, and/or PARCC testing (DCPS: this information was sent; specifically, DCPS provided what it had access to)
- c) The full/complete Panorama report (DCPS: this information was sent; specifically, DCPS provided what it had access to)
- d) All related service provider logs/notes (DCPS: this information was already provided; specifically; DCPS provided what it had access to)
- e) All Student Support Plans/behavior contracts (DCPS does not have this information)
- f) All in-school and out-of-school suspension paperwork (DCPS does not have documentation consistent with this request other than Petitioner's copies of the student incident history)
- g) All end of year data for 2023/24 documents (except the i-Ready math assessment) (DCPS: see email with documents)

¹⁶ P18p366; School-Based Social Worker (DCPS amended the IEP to make the correction on 9/13/24).

¹⁷ P21p415.

¹⁸ P21p414.

¹⁹ P21p408; P36.

²⁰ School-Based Occupational Therapist.

²¹ P27p466; P25p449; Educational Advocate.

²² P25p447.

²³ P33p544; Educational Advocate.

²⁴ P42p621; P43p625-26 (with correction of paragraph f).

Hearing Officer Determination

Case No. 2024-0087

- h) The Student History/Index from SEDS, and the Events page from PSSP (DCPS: Parent has been provided with all documents contained in those databases)

10. Parent Participation. On 4/15/23, Petitioner's counsel stated that the upcoming IEP meeting would need to be postponed until documents were provided.²⁵ On 4/9/24, Petitioner's counsel asked for all records and stated that Parent would not meet on the draft IEP until all records had been provided.²⁶ On 4/17/24 and 4/29/24, Petitioner's counsel again asked for all education records, specifying many.²⁷ Public School provided many documents as requested.²⁸

11. IEE SLP. On 5/4/22, DCPS's position was that the SLP assessment conducted was adequate, so an IEE was not granted.²⁹ DCPS then authorized an SLP IEE which was completed by Speech Language Pathologist on 6/18/22 and concluded that Student had significant deficits in all language areas, with the largest in receptive understanding of language; Student needs language therapy at least twice a week with new and appropriate IEP goals.³⁰ References to Speech Language Pathologist's Speech IEE in the IEP were not a sufficient review of the IEE.³¹ Petitioner asked for review of the SLP IEE, but DCPS refused.³² The Amended 2024 IEP agreed there would be summer testing for SLP and auditory processing.³³

12. Appropriateness of IEPs. On 5/1/23, Petitioner's counsel asked if Public School's IEP draft on 4/26/23 was "meant to be a joke" by making minimal changes in the IEP and claiming that it was a new one; Petitioner's counsel stated that Petitioner would not participate in any IEP meetings until obtaining a draft IEP and all education records in advance of the meeting.³⁴ Counsel on each side encouraged respect for their clients.³⁵

13. Goals. Student's IEP goals were generally consistent between the 2021 and 2022 IEPs.³⁶ The OT goals and service hours in the 2021 IEP were appropriate.³⁷ The 3 OT goals were the same in 2021, 2022 and 2023, which was not appropriate.³⁸

²⁵ P25p446.

²⁶ P33p551; P28p468.

²⁷ P30p508; Educational Advocate.

²⁸ *See, e.g.*, P33p549,550.

²⁹ P21p404.

³⁰ P13p203,209; Speech Language Pathologist.

³¹ P18p359-60; Educational Advocate.

³² Educational Advocate.

³³ P18p349.

³⁴ P25p443-44.

³⁵ P25p442.

³⁶ Educational Advocate.

³⁷ Occupational Therapist.

³⁸ School-Based Occupational Therapist; Occupational Therapist.

Hearing Officer Determination

Case No. 2024-0087

14. Speech Language Pathologist reviewed the SLP goals in the IEPs.³⁹ Student's 2022 IEP needed more than a single SLP goal.⁴⁰ It was not appropriate to eliminate all direct SLP services in the 2022 IEP; there was no evidence that Student met the SLP goals.⁴¹ The SLP goal did not change from the 2023 IEP to the 2024 IEP, which was not appropriate, as DCPS should have determined why Student was not making progress.⁴²

15. Behavioral Expert reviewed the BSS goals in the IEPs and found the 2021 IEP appropriate.⁴³ The 2022 IEP had the same BSS goals as in 2021.⁴⁴ Student's 2023 BSS goals were about the same as the 2021 and 2022 goals.⁴⁵ Student also needed more academic goals, which had been reduced.⁴⁶ The 2023 IEP was missing baselines even when there were academic goals.⁴⁷ The 2024 IEP had 2 goals in reading that were not appropriate based on Student's level of work.⁴⁸

16. Specialized Instruction. Student's 2023 IEP reduced specialized instruction to 5 hours/week inside general education, for which there was no justification, as Student needed more.⁴⁹ In 2024, Student's specialized instruction was increased from 5 to 18 hours/week; receiving more specialized instruction and receiving it outside general education was important for Student in 2024, but more could be done.⁵⁰ Student was not making appropriate progress in the 2022, 2023 and 2024 IEPs; they were not reasonably calculated to make progress, which deprived Student of educational benefit.⁵¹ Specifically, Student missed a great deal of specialized instruction from May 2022 to May 2024, along with ESY, which totaled about 1500 hours of specialized instruction needed, with 944 received, resulting in about 550 hours missed.⁵² Petitioner seeks 300 hours of tutoring over 2 years to make up the deficit, expecting the bulk of the hours to be provided during the summer.⁵³

17. OT. The 2/18/22 OT Reassessment found that Student presented with very low overall visual-motor integration and visual perceptual skills; areas of concern included auditory and visual processing.⁵⁴ Student's IEPs provided 150 minutes/month of OT in the 2022 IEP, 90 minutes/month in the 2023 IEP, and 30 minutes/month in the 2024 IEP; 38.5

³⁹ Speech Language Pathologist.

⁴⁰ Speech Language Pathologist; P15p264-66.

⁴¹ Speech Language Pathologist.

⁴² *Id.*

⁴³ P14p231-33; Behavioral Expert.

⁴⁴ Behavioral Expert; P15p266-69.

⁴⁵ School-Based Social Worker.

⁴⁶ Educational Advocate.

⁴⁷ P16p292-94.

⁴⁸ P17p322; R19.

⁴⁹ Educational Advocate.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ P12p200.

Hearing Officer Determination

Case No. 2024-0087

hours were needed to make up OT services that Student missed; the due process complaint alleged that 25 hours were needed to make up missed services.⁵⁵ Occupational Therapist did not calculate if Student was absent when services were offered.⁵⁶ Student often did not attend OT sessions pursuant to the 2022 and 2023 IEPs, but made some progress on work samples.⁵⁷ School-Based Occupational Therapist was not sure how much Student missed, but regularly made himself available to Student.⁵⁸ Service trackers indicate that Student was often absent.⁵⁹

18. SLP. Student's IEPs were not reasonably calculated to make progress in SLP in Student's unique situation, where Student's receptive language issues were poorer than expressive, which deprived Student of educational benefit; Student needed intensive language therapy.⁶⁰ Speech Language Pathologist asserted that Student needed 240 minutes/month of direct SLP, which would have totaled about 100 hours since May 2022, calculating months of school and ESY.⁶¹ Student missed services according to the Service Trackers, but it is not clear how many.⁶² Student received no SLP services in 2023 or 2024, only consultation.⁶³

19. BSS. Reducing Student's IEP from 180 minutes/month to 30 minutes/month in BSS in the 2024 IEP without data showing progress was not appropriate and deprived Student of educational benefit.⁶⁴ Petitioner's expert calculated that Student needed a total of 75 hours of BSS and received only 8.5 hours based on service trackers, missing 66.5 hours.⁶⁵ The due process complaint alleged that Student missed over 52.5 hours of BSS.⁶⁶ Student made some progress and continues to need BSS going forward.⁶⁷ Student didn't need as much BSS pursuant to the 2023 IEP; a reduction from 180 minutes/month to 120 minutes/month (which was intended apart from the error discussed above) was appropriate based on work avoidance and the importance of not removing Student from class too much.⁶⁸ Student missed BSS, but the specifics of how much was missed are not clear in the service trackers.⁶⁹

⁵⁵ Occupational Therapist.

⁵⁶ *Id.*

⁵⁷ School-Based Occupational Therapist.

⁵⁸ *Id.*

⁵⁹ P29; R24.

⁶⁰ Speech Language Pathologist.

⁶¹ *Id.*

⁶² P29.

⁶³ Speech Language Pathologist.

⁶⁴ Behavioral Expert.

⁶⁵ *Id.*

⁶⁶ P6.

⁶⁷ Behavioral Expert.

⁶⁸ School-Based Social Worker.

⁶⁹ P29; R23; School-Based Social Worker.

Hearing Officer Determination

Case No. 2024-0087

20. Compensatory Education. The missed specialized instruction and related services were all intended by Petitioner's experts to put Student in the position Student would have been in but for the denials of FAPE.⁷⁰

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely

⁷⁰ Educational Advocate.

Hearing Officer Determination

Case No. 2024-0087

more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

Importantly, the local education agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455 (CKK), 2018 WL 4623572, at *3 (D.D.C. 2018).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide Parent complete access to Student’s education records from 3/15/22, despite numerous requests. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of persuasion on the hard-fought issue of access to education records. As a general matter, parents of a child with a disability have the right to examine all education records that pertain to the identification, evaluation, and educational placement of the child, and provision of a FAPE. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a), 34 C.F.R. § 300.613(a) (parents must be permitted to inspect and review any education records relating to their child that are collected, maintained, or used by an agency). See also *Jalloh ex rel. R.H. v. Dist. of Columbia*, 535 F. Supp. 2d 13, 21 (D.D.C. 2008) (“parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records”).

An “education record” under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act (“FERPA”). 34 C.F.R. § 300.611(b). Under FERPA, an education record includes records, files, documents, and other materials which

Hearing Officer Determination

Case No. 2024-0087

“(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. Part 99. Some of the documents sought by Petitioner (like homework) are quite likely not “maintained” by DCPS as required by the statute. Here, however, the key issue is that DCPS was quite clear at the end of the process that it had provided all education records sought by Petitioner, and Petitioner’s counsel could not prove otherwise.

In short, if DCPS doesn’t have a record, it cannot make it available to Parent, regardless of how many times it is requested. An order by the undersigned to produce the record would not change that basic reality, but certainly going forward DCPS cannot rely on a document that it cannot or did not make available, as ordered below. Further, the record in this case is clear that Petitioner was often not provided documents in a timely fashion, which is addressed in Issue 2, discussed next.

Issue 2: *Whether DCPS denied Student a FAPE by impeding Parent’s opportunity to participate in decision-making regarding provision of a FAPE to Student in the annual IEPs on 5/4/22, 5/3/23, and 5/2/24, when DCPS completely failed to include Parent in the development of the IEPs. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on the issue of participation in IEP meetings in 2022 and 2023, but not 2024 when the evidence shows that Parent was present at the IEP meeting. The law does clearly require parental involvement in IEP development. *See Andrew F.*, 137 S. Ct. at 999 (crafting an appropriate program of education contemplates the input of the child’s parents or guardians); *Lofton v. Dist. of Columbia*, 7 F. Supp. 3d 117, 124 (D.D.C. 2013) (the IDEA mandates that parent be allowed to meaningfully participate in the development of child’s IEP); *Lague v. Dist. of Columbia*, 130 F. Supp. 3d 305 (D.D.C. 2015). Here, Parent did not participate in the 5/4/22 or 5/3/23 IEP meetings, but apparently did participate in the 2024 IEP meeting held on 4/9/24.

The key issue here is that Petitioner’s counsel took the principled position that Petitioner should not be required to participate in the annual IEP meetings without receiving the draft IEP and other education records in advance of the meeting. Indeed, the applicable regulations require that the LEA should respond to the request for records “without unnecessary delay” and before any meeting regarding an IEP or any hearing, among other things. 34 C.F.R. § 300.613(a). That was not done here, which resulted in IEPs being drafted that did not address the concerns they likely would have, if Petitioner and her advocates had been able to participate in Student’s IEP development as intended by the statute and regulations. *See* D.C. Code § 38-2571.03(3) (requires that DCPS provide parents a copy of the documents to be discussed at IEP meetings at least five business days prior to the meeting). This is clearly a substantive violation, as it significantly impeded Parent’s opportunity to participate in the decision-making process, 34 C.F.R. § 300.513(a)(ii), which contributes to the award of compensatory education below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to implement Student’s IEPs when (a) from 5/4/22 to 5/2/23, Student did not receive 240 minutes of SLP, 1,470 minutes of BSS, and/or 720 minutes of OT, and/or (b) from 5/3/23 to 4/11/24, Student did*

Hearing Officer Determination

Case No. 2024-0087

not receive 510 minutes of SLP, 1,680 minutes of BSS, and/or 780 minutes of OT. (Petitioner has the burden of persuasion on this issue.)

Petitioner met her burden of persuasion on IEP implementation. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

An issue at the due process hearing was how to address refusal by a student to receive related services. Recently, the Court in *White v. Dist. of Columbia*, 20-CV-3821 (APM), 2022 WL 971330, at *5 (D.D.C. 3/31/22), stated that a school must do more than merely “offer” the services in the IEP, and must ensure that a child actually receives them. However, the court went on to explain that in *White* the child was not absent and the school just “dropped the ball,” scheduling services when the child was taking a standardized test or was on a fieldtrip, and that the school missed services for “no reason at all,” which is quite different than the situation at hand. *Id.* See also *Robles v. Dist. of Columbia*, 1:21-CV-02568 (CJN), 2022 WL 3700947, at *12-13 (D.D.C. 8/26/22) (in an IEP implementation case, “[t]he school cannot be faulted for making good-faith efforts to provide the required services when [student] failed to attend on his own volition”). While schools may sometimes be responsible for not making efforts to get children to attend, *see, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009), that was not the situation here.

Turning first to OT, Petitioner's due process complaint sought 25 hours of OT to make up for services not provided in the two years at issue, when a total of some 44 hours of service should have been provided, although Petitioner's counsel asserted that there should be no reduction for times when Student was not available for services. During the due process hearing, Petitioner's expert sought 38.5 hours as make up for missed services, which the undersigned concludes would be appropriate if reduced to 20 hours to make up for the denial of FAPE on this issue.

As for SLP, direct services of 240 minutes/month on the 2021 IEP were entirely eliminated on the 2022 IEP, leaving only consultation. Speech Language Pathologist asserted that Student needed 240 minutes/month of direct SLP services in the past and on an ongoing basis, which would have totaled about 100 hours since May 2022, although the due process complaint sought only 750 minutes, or 12.5 hours. However, when including the

Hearing Officer Determination

Case No. 2024-0087

SLP hours found appropriate in Issue 4 and 5, below, the undersigned concludes that a total of 20 SLP hours for the denial of FAPE would be appropriate.

Finally, in considering BSS, Petitioner's expert calculated that Student needed a total of 75 hours of BSS over the relevant period and received only 8.5 hours based on service trackers, missing some 66.5 hours, while the due process complaint alleged that Student missed some 52.5 hours of BSS. In 2024, a reduction was made from 180 minutes/month to 120 minutes/month, although the reduction was erroneously stated as 30 minutes a month, rather than a week, as discussed above. While Student was quite certainly absent for some BSS, the specifics are not clear and the undersigned concludes that an award of 40 hours of BSS would be appropriate.

Issue 4: *Whether DCPS denied Student a FAPE by failing to review the 7/15/22 independent speech-language evaluation. (Petitioner has the burden of persuasion on this issue.)*

The importance of assessing children in all areas of suspected disability was emphasized in *Z.B.*, 888 F.3d at 518, *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); 34 C.F.R. § 300.304(c)(4).

An SLP IEE completed by Speech Language Pathologist concluded that Student had significant deficits in all language areas, with the largest in receptive understanding of language, and that Student needed extensive language therapy. The IDEA regulations expressly contemplate that parent-initiated evaluations “must be considered” by the public agency (DCPS) in any decision made with respect to the provision of FAPE (as long as the evaluations meet agency criteria). 34 C.F.R. § 300.502(c). The undersigned concludes that references to Speech Language Pathologist’s speech IEE in the IEP did not constitute sufficient review or consideration of the IEE. Accordingly, DCPS shall schedule and convene an IEP team meeting through Parent’s counsel within 30 days to consider the independent speech-language evaluation and review and revise Student’s IEP appropriately.

Issue 5: *Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs on 5/4/22, 5/3/23, and/or 5/2/24 when it did not provide appropriate/sufficient (a) goals, (b) specialized instruction, and/or (c) related services. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did establish a *prima facie* case concerning Student’s IEPs through testimony and documents, shifting the burden to DCPS, which failed to meet its burden of persuasion.

Hearing Officer Determination

Case No. 2024-0087

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the U.S. Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at *12 (D.D.C. 2021); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEPs is analyzed by focusing on the specific concerns raised by Petitioner, which are considered in turn.⁷¹ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Goals. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). Here, the IEPs did contain annual goals, but there was a great deal of repetition of goals from one year to the next, which the undersigned finds excessive when considering the totality of the circumstances. Repetition of goals does indicate a lack of progress by Student. *See Endrew F.*, 137 S. Ct. at 996 (largely carrying over the same goals from one year to the next indicated failure to “make meaningful progress”). Although not every student progresses as anticipated, if the goals must be repeated, the IEP team is to address the lack of progress in the revised IEP. *See* 34 C.F.R. § 300.324(b). For instance, the 3 OT goals were the same in 2021, 2022 and 2023, while the 2023 BSS goals were about the same as the 2021 and 2022 goals. The SLP goal did not change from the 2023 IEP to the 2024 IEP. DCPS should have determined why Student was not making progress. Student also needed more academic goals, which had been reduced. The 2024 IEP had 2 goals in reading that were not appropriate based on Student’s work level.

(b) Specialized Instruction. Student’s IEPs must provide sufficient personalized instruction so that the child can benefit educationally, which in the case at hand required additional specialized instruction for the 2023 IEP which reduced specialized instruction from 15 hours/week to only 5 hours/week, and marginally increased specialized instruction to 8 hours/week (all inside general education), before increasing Student’s specialized instruction to 18 hours/week. *See Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203; *cf. Endrew F.*, 137 S. Ct. at 1000.

(c) Related Services. It was not appropriate to eliminate all direct SLP services in the 2022 IEP, as there was no evidence that Student met the SLP goals. DCPS should instead have determined why Student was not making progress. Student’s IEPs were not reasonably calculated to make progress in SLP in Student’s unique situation, where

⁷¹ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Procedural concerns are discussed herein.

Hearing Officer Determination

Case No. 2024-0087

Student's receptive language issues were worse than expressive, depriving Student of educational benefit. Student missed a great deal of OT simply by failing to show up for services. Finally, reducing Student's IEP from 180 minutes/month to 30 minutes/month in BSS in the 2024 IEP without data showing progress was not appropriate and deprived Student of educational benefit. However, the undersigned was persuaded that DCPS intended to reduce the 180 minutes/month to 30 minutes/week, which was a more reasonable reduction.

FAPE. In carefully considering the concerns raised above individually and collectively, the undersigned is cognizant of the fact that the analysis is not about achieving perfection. Instead, IEPs simply need to be reasonably calculated to enable Student to make appropriate progress in the circumstances. *See Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA "stops short of requiring public schools to provide the best possible education"). *See also Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015); *S.M. v. Dist. of Columbia*, CV 19-2096 (RC), 2020 WL 7230266, at *5 (D.D.C. 2020). However, on balance, this Hearing Officer concludes that DCPS failed its burden of persuasion by a preponderance of the evidence on Issue 5. This denial of FAPE contributes significantly to the compensatory education awarded below.

Remedies

Having analyzed and resolved the issues in this case, what remains is to consider the remedies appropriate in these circumstances, which are discussed in the conclusions of law, above, and paragraphs 1 and 2 of the Order below. Compensatory education is also necessary to make up for the denial of FAPE found above. In determining the amount of compensatory education for denials of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, Parent's Educational Advocate and other experts testified that the compensatory education they found appropriate would put Student in the position Student would have been but for the denials of FAPE. Based on experience and careful analysis, in the Order below the undersigned awards 250 hours of 1:1 academic tutoring, 20 hours of OT, 20 hours of SLP and 40 hours of BSS. This determination by the undersigned has been specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 24 months to avoid administrative burdens on Respondent, although the undersigned

Hearing Officer Determination

Case No. 2024-0087

encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without delay.

ORDER

Petitioner has prevailed in large part as set forth above. Accordingly, **it is hereby ordered that:**

1. In any future disputes between the parties, DCPS shall not be permitted to rely on any education records for Student created prior to 8/9/24 that had not been provided to Petitioner as of that date.
2. DCPS shall schedule and convene an IEP team meeting through Parent's counsel within 30 days to review the independent speech-language evaluation and review and revise Student's IEP appropriately.
3. As compensatory education for the denials of FAPE found herein, within 10 business days after request by Petitioner, DCPS shall provide a letter(s) of authorization for (a) 250 hours of 1:1 academic tutoring, (b) 20 hours of OT, (c) 20 hours of SLP, and (d) 40 hours of BSS, all from independent providers chosen by Petitioner; all hours are to be used within 24 months and any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).

Copies to:

Counsel of Record (Appendix A, by email)
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