

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

OSSE  
Office of Dispute Resolution  
April 05, 2024

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PARENT, on behalf of STUDENT, <sup>1</sup>	)	Date Issued: April 5, 2024
	)	
Petitioner,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No: 2024-0004
	)	
DISTRICT OF COLUMBIA	)	Online Videoconference Hearing
PUBLIC SCHOOLS,	)	
	)	Hearing Dates:
Respondent.	)	March 25 and 27, 2024
	)	
	)	

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner parent under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR). In this administrative due process proceeding, the parent seeks relief for Respondent District of Columbia Public Schools' (DCPS) alleged denials of a free appropriate public education (FAPE) to Student in the 2021-2022, 2022-2023 and 2023-2024 school years.

Petitioner's Due Process Complaint, filed on January 5, 2024, named DCPS as Respondent. The undersigned hearing officer was appointed on January 8, 2024. The

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<sup>1</sup> Personal identification information is provided in Appendix A.

parties met for a Resolution Session Meeting on January 19, 2024 and did not resolve the issues in dispute.

On February 22, 2024, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing dates and other matters. The hearing dates were set for March 25 and 27, 2024. On February 28, 2024, I granted DCPS' continuance request, opposed by Petitioner, to extend the final decision due date to April 8, 2024, to allow time to hold the due process hearing on the scheduled dates and for the hearing officer to review the evidence and issue a written decision.

With the parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on March 25 and 27, 2024. MOTHER appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by NONPUBLIC MONITOR and by DCPS' COUNSEL. Counsel for the respective parties made opening statements. Petitioner called as witnesses MOTHER, EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses RESOLUTION SPECIALIST AND Nonpublic Monitor.

Petitioner's Exhibits P-1 through P-4, P-7, P-8, P-10, P-13, P-16 through P-22, P-29 through P-42, P-49 through P-56, P-60 through P-78, and P-80 through P-90 were admitted into evidence, including Exhibits P-7, P-10, P-13, P-16 through P-19, P-60

through P-65 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits P-5, P-28, P-57 through P-59, and P-79. DCPS' Exhibits R-1, R-4 through R-8, R-11, R-12, R-18, R-19. R-26, R-29, R-32, R-36 and R-38 through R-41 were admitted into evidence, including Exhibits R-11, R-26, R-36 and R-41 over Petitioner's objections.

On March 27, 2024, after Petitioner rested her case in chief, I granted DCPS' oral motion for a directed finding against the Petitioner as to Issue E (alleged failure to provide educational records). After both parties had rested on March 27, 2024, Petitioner's Counsel requested leave to file a written closing memorandum. I denied that request and Petitioner's Counsel and DCPS' Counsel proceeded to made oral closing arguments.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and 5A DCMR § 3049.1.

### **ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as set out in the February 28, 2024 Prehearing Order, are:

- A. Whether DCPS denied the student a FAPE when it failed to properly progress monitor and/or evaluate the student in all areas of suspected disability, from at least January 2022 until the present time, by failing to conduct appropriate progress monitoring and by failing to do a comprehensive psychological evaluation or Functional Behavior Assessment and by failing to develop an appropriate Behavior Intervention Plan;
- B. Whether DCPS denied the student FAPE because it failed to provide an

appropriate Individualized Education Plan (IEP) from January 1, 2022 until the present time, because the IEPs that were developed during the 2021/2022 school year, the 2022/2023 school year, up until December 29, 2023, were not based on updated data regarding the student's academic and behavior needs;

C. Whether DCPS failed to implement the September 2021, October 2022, and October 2023 IEPs with fidelity during the 2021-2022 and 2023-2024 school years by failing to fully provide IEP related services for Behavior Support Services and Occupational Therapy (OT) services;

D. Whether DCPS denied the student a FAPE when it failed to implement the September 2021 and October 2022 IEPs with fidelity, during the 2022-2023 school year in that Student's requirement for a dedicated aide was not implemented with fidelity during the 2022-2023 school year including Extended School Year (ESY) 2023 and

E. Whether DCPS denied the student a FAPE by not providing the parent full access to Student's educational records from January 2022 to the present.

On March 27, 2024, I granted DCPS' oral motion for a directed finding against Petitioner as to Issue E for failure to make a *prima facie* showing that the parent was not provided access to Student's educational records.

For relief, Petitioner requested that the hearing officer:

- Order DCPS to timely conduct and review a comprehensive Functional Behavior Assessment (FBA) and, thereafter, develop the student's Behavior Intervention Plan as appropriate;
- Order DCPS to timely conduct a psychological evaluation of Student to consist of an assessment of: (1) cognitive functioning, (2) formal academic achievement testing, (3) social, emotional and behavior testing and (4) an autism spectrum disorder assessment, or in the alternative conduct and review an updated comprehensive psychological to include the aforementioned assessment areas;
- Order DCPS upon completion of the assessments to timely reconvene Student's IEP team to review and revise Student's IEP as appropriate based on the updated evaluative data;

- Order DCPS to provide compensatory education for the denials of FAPE alleged in the complaint, or if necessary, fund a compensatory education evaluation to determine the appropriate amount of compensatory education warranted. Petitioner asserts that additional compensatory education shall be reserved until such time as the requested evaluations are completed and all student records are received and
- Order such other relief the hearing officer determines appropriate.

### **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, resides with the parent in the District of Columbia.

#### Testimony of Mother.

2. Student is eligible for special education as a student with Multiple Disabilities (MD) based on concomitant Emotional Disturbance (ED) and Other Health Impairment (OHI) impairments. Exhibit P-30.

3. Per a record review, Student began attending school at age 3 and attended a DCPS elementary school. Next he/she attended PUBLIC CHARTER SCHOOL. Subsequently, the parent appears to have enrolled Student in DCPS, which placed Student at a series of nonpublic special education day schools. Since at least October 2020, Student's DCPS IEPs have provided for his/her educational placement, outside of general education, at a full-time nonpublic day school. Exhibits P-30, P-31, P-32 and P-35. Beginning in the 2019-2020 school year, DCPS placed Student at NONPUBLIC

SCHOOL 1 in suburban Maryland. Exhibit P-21. On December 5, 2023, DCPS moved Student to NONPUBLIC SCHOOL 2, also in suburban Maryland. Testimony of Mother.

4. In the winter of 2015, when Student was enrolled in Public Charter School, Student was referred for a psychological evaluation by Mothers, due to continued academic and behavioral concerns. The psychologist administered an extensive battery of cognitive and educational tests and behavior assessments and conducted in-school observations and parent and teacher interviews. In her March 27, 2015 comprehensive psychological evaluation report, the psychologist reported that Student had a history of behavioral concerns, including classroom disruption, fighting, impulsivity, off-task behaviors, difficulty following classroom/school rules and physical aggressive behaviors. Student's cognitive functioning, assessed with the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) scored within the Average range of intellectual ability (FSIQ = 92). Academically, on the Wechsler Individual Achievement Test, Third Edition (WIAT-III), Student's academic skills in reading, writing and spelling fell within the Average range. Student's social-emotional status and behavioral functioning were evaluated using a number of assessment methods, including the *Behavior Assessment System for Children, Second Edition (BASC-2)*, which yielded many scales that fell within the At-Risk and Clinically Significant range. Results from the Conners 3rd Edition (*Conners 3*) Attention-Deficit Hyperactivity Disorder rating scales, completed by Student's mother and teachers, indicated Student was having more concerns than

were typically reported on all scales and appeared to have a negative impact on his/her education due to behaviors that often included difficulty focusing, impulsivity, remaining off-task during classroom instruction, demonstrating physical aggressive behaviors and requiring multiple prompts to initiate a task. Other behaviors included difficulty remaining seated during classroom instruction, lack of motivation, and easily giving up on assignments perceived as difficult. The psychologist reported that Student appeared to be a very eager student who enjoyed attempting to complete challenging academic material. However, Student had a history of avoiding classroom settings where he/she viewed the teacher and peers as significant contributors to a stressful environment. Student's behavior in the school setting appeared to have a negative impact on his/her education due to behaviors often associated with Oppositional Defiant Disorder and Student was spending several hours of the school day outside the classroom due to his/her disruptive behaviors. The psychologist diagnosed Student's disability as Attention-Deficit/Hyperactivity Disorder (ADHD), Combined Presentation, Oppositional Defiant Disorder, Moderate and Sibling relational problem. Exhibit P-18.

5. Public Charter School conducted a Functional Behavior Assessment of Student in November 2013. The assessor reported, *inter alia*, that Student exhibited refusals and physically distracting behaviors in response to unwanted classroom occurrences, including redirect, consequences, denied object/activity/individual attention and transitions; that Student was more likely to display an unwanted behavior

in response to teacher demands, tone of voice change, termination of preferred activity, limit/consequence, denial of individual attention or peer interactions/proximity.

Exhibit P-16. Public Charter School developed a Behavior Intervention Plan (BIP) for Student in December 2013. Exhibit P-17.

6. An updated FBA and BIP were completed for Student in the 2018-2019 school year, probably in January 2019, before Student started at Nonpublic School 1.

Testimony of Nonpublic Monitor.

7. DCPS SCHOOL PSYCHOLOGIST 1 conducted a partial psychological reevaluation of Student in June 2018, including a records review, a parent interview and the BASC-3 rating scales completed by Mother, a teacher and the school therapist. At the time, Student was placed by DCPS in a nonpublic special education day school. DCPS School Psychologist 1 reported in his June 10, 2018 report that based on school data, Student presented with behavioral challenges, that ranged from hyperactivity to aggression in the school setting. Due to a recent incident which allegedly included Student's hitting a teacher with a bat, Student's then-current school had decided that Student's placement was no longer appropriate and that Student should be transferred to a setting better designed to assist Student with his/her behavioral and emotional needs. DCPS School Psychologist 1 concluded that it was evident that given Student's severe behavioral challenges, he/she would not only require special education services, but he/she would also require intense and specific interventions to help him/her deal



with his/her emotional dysregulation and that he/she would also require intense counseling to help address some of the emotional problems that he/she currently was presenting with. DCPS School Psychologist 1 wrote that Student's education was compromised by mental health issues that made accessing the curriculum in his/her current environment almost impossible and that it would be almost impossible to assume that Student would make progress until his/her behavior and emotional concerns were addressed. DCPS School Psychologist 1 predicted that there may be regression in Student's overall academic performance if his/her emotional issues were not addressed and that these problems would need to be addressed by trained professionals and not solely special education teachers. DCPS School Psychologist 1 reported that it appeared that Student continued to meet criteria for special education services under the categories of Emotion Disturbance and Other Health Impairment.

Exhibit P-20.

8. In spring 2021, Student was reevaluated by DCPS SCHOOL PSYCHOLOGIST 2 as part of his/her triennial reevaluation for continued eligibility for specialized instruction under the Multiple Disabilities category. At the time, Student was enrolled in Nonpublic School 1. DCPS School Psychologist 2 conducted a partial psychological reevaluation, including a records review, interviews with Mother and Student's special education teacher and she administered the Conners 3 and the Emotional Disturbance Decision Tree (EDDT) rating scales assessment for Emotional

Disturbance. DCPS School Psychologist 2 concluded in her June 14, 2021 report that Student continued to meet criteria for the MD disability. DCPS School Psychologist did not administer a cognitive or educational assessment of Student. She reported, based on information from Student's teachers, that Student could compare fractions and did well on patterning exercises; that on a recent Prodigy assessment, Student excelled in number and operations and could independently multiply four digits by 1 digit without the use of a calculator, but that Student struggled with word problems and converting measurements and data. A teacher reported that for reading, Student frequently volunteered to read aloud and he/she was able to read grade level text without frustration or hesitation. Exhibit P-22.

9. DCPS schools closed for in-person instruction in March 2020 due to the COVID-19 pandemic. Hearing Officer Notice. At the time of the spring 2021 triennial reevaluation, Student was still receiving virtual distance-learning instruction. The triennial assessments were conducted using a virtual platform. Exhibits P-21, P-22. Student returned to in-person classes beginning with extended school year (ESY) in the summer of 2021. Exhibit P-31.

10. Educational Advocate 1 has assisted Mother with Student's education "journey" for the past 10 years. She has met with Student multiple times since elementary school, including most recently at a Nonpublic School 2 meeting in 2024. Testimony of Educational Advocate.

11. DCPS convened Student's IEP team for his/her 2021 annual IEP review on September 21, 2021 when Student was attending Nonpublic School 1. The September 21, 2021 IEP team identified mathematics, reading, written expression, social-emotional-behavioral development and motor skills/physical development as areas of concern for Student. The September 21, 2021 IEP team provided for Student to receive 26 hours per week of Specialized Instruction, 240 minutes per month of Behavioral Support Services and 90 minutes per week of OT services. In addition to other classroom aids and services, the IEP team determined Student required the support of a dedicated aide for 7 hours per day and described Student's placement as outside of general education at a special education school. The IEP team received input from Educational Advocate 1. Exhibit P-31.

12. As of March 28, 2022, Student's special education and related services providers at Nonpublic School 1 reported that Student was progressing on all IEP annual goals for math, reading and written expression. Student was reported to be progressing on all social emotional goals and to have mastered all of the 3 motor skills goals. Exhibit R-6.

13. On October 13, 2022, DCPS convened Student's IEP team for his/her 2022 annual IEP review. That school year, Student was attending Nonpublic School 1. The October 13, 2022 IEP team identified mathematics, reading, written expression, social-emotional-behavioral development and motor skills/physical development as

areas of concern for Student. The October 13, 2022 IEP team provided for Student to receive 26 hours per week of Specialized Instruction, 240 minutes per month of Behavioral Support Services and 90 minutes per week of OT services. In addition to other classroom aids and services, the IEP team determined Student required the support of a dedicated aide for 7 hours per day and described Student's placement as outside of general education at a special education school. Exhibit P-33.

14. As of June 23, 2023, Student's providers at Nonpublic School 1 reported that Student was progressing on 2 IEP annual goals for math; had mastered 3 goals and was progressing on another goal for reading; was progressing on 2 written expression annual goals; was progressing on 5 social emotional goals and regressing on the 6<sup>th</sup> goal – managing impulsive behaviors; and was progressing on the single motor skills goal. Exhibit R-6.

15. On the Brigance Diagnostic Inventory administered on October 21, 2022, Student scored at the 5.6 grade equivalent for reading comprehension, 4<sup>th</sup> grade level for vocabulary comprehension and 3.5 grade level for math. Exhibit P-39.

16. On i-Ready online assessments taken on September 27, 2023, Student scored at the grade 3 equivalent for overall mathematics and grade 5 equivalent for overall reading. Exhibits P-41 and P-42.

17. On the District of Columbia PARCC assessment of mathematics and English given in spring 2022, Student did not meet grade-level expectations for math or

English Language Arts. Exhibit P-50.

18. Student's report card grades for the 1<sup>st</sup> and 3<sup>rd</sup> quarters of the 2022-2023 school year at Nonpublic School 1 were mostly A's in academic classes. For the 4<sup>th</sup> quarter, Student's grades were F's in Language Arts, Mathematics and Academic Resources. It was reported that Student had missed assignments due to an increase in "support visits" in response to classroom behavior issues. Exhibit P-66.

19. By email letter of July 13, 2023 to Nonpublic School 1, Petitioner's Counsel requested that Student be reevaluated for special education, to include a full comprehensive psychological (including a test for Autism Spectrum Disorder), an OT evaluation, a speech-language evaluation and an FBA. Petitioner's Counsel made the evaluation request to Nonpublic School 1 – not to DCPS – and copied a DCPS central office official on the email. Exhibits P-83, P-84.

20. On October 5, 2023. DCPS convened Student's IEP team for his/her 2023 annual IEP review. At the time, Student was still placed at Nonpublic School 1. The October 5, 2023 IEP team identified mathematics, reading, written expression, social-emotional-behavioral development and motor skills/physical development as areas of concern for Student. The October 5, 2022 IEP team provided for Student to receive 26 hours per week of Specialized Instruction, 240 minutes per month of Behavioral Support Services and 90 minutes per week of OT services. In addition to other classroom aids and services, the IEP team determined Student required the support of a

dedicated aide for 7 hours per day and described Student as attending a specialized program 100% of the time outside of general education. Exhibit P-35.

21. Nonpublic School 1 did not have an OT provider available in the fall of 2023 and Student did not receive IEP OT services in the 2023-2024 school year prior to starting at Nonpublic School 2 on December 5, 2023. Exhibit P-36.

22. At the October 5, 2023 IEP team meeting, the participants discussed applying to different nonpublic schools for Student. Student was admitted to Nonpublic School 2. On December 4, 2023 there was a multidisciplinary team meeting convened to discuss Student's transition to Nonpublic School 2. At that meeting, it was discussed that DCPS was starting Student's triennial reevaluation process. Student started at Nonpublic School 2 on December 5, 2023. Exhibits P-34, P-36.

23. In December 2023, DCPS completed a draft Functional Behavioral Assessment (FBA) for Student. This resulted in an updated Behavior Intervention Plan (BIP), which was finalized in January 2024 at a 30-day review meeting for Student at Nonpublic School 2. Testimony of Nonpublic Monitor.

24. Student is doing well at Nonpublic School 2. Student is "on level" behavior wise. Testimony of Mother.

### **CONCLUSIONS OF LAW**

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

Burden of Proof

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

ANALYSIS

A. Did DCPS deny Student a FAPE when it failed to properly progress monitor and/or evaluate the student in all areas of suspected disability, from at least January 2022 until the present time, by failing to conduct appropriate progress monitoring and by failing to do a comprehensive psychological evaluation or Functional Behavior Assessment and by failing to develop an appropriate Behavior Intervention Plan?

In spring 2015, when Student was enrolled in Public Charter School, the child was assessed with a comprehensive psychological evaluation. At the time, due to his/her behaviors associated with Oppositional Defiant Disorder (ODD), Student was spending several hours of the school day outside of the classroom, which was having a negative impact on his/her education. The psychologist diagnosed Student with ADHD

and ODD. Student was determined eligible for special education under the IDEA Multiple Disabilities (MD) classification, specifically for Emotional Disturbance (ED) and Other Health Impairment (OHI-ADHD). Student was later enrolled in DCPS and in subsequent school years, was placed by DCPS at a series of full-time special education day schools.

Beginning in the 2019-2020 school year until December 2023, DCPS placed Student at Nonpublic School 1, a special education day school in suburban Maryland serving children with behavioral health needs. Student had numerous behavior incidents at Nonpublic School 1, including physical aggression and property destruction, which resulted in Student's repeatedly being suspended from school or removed from the classroom. In October 2023, the DCPS IEP team met to consider a change in schools for Student. In December 2023, Student's school location was changed to Nonpublic School 2, where he/she is currently doing well.

When assessed in spring 2015 for the comprehensive psychological evaluation, Student's cognitive abilities and academic functioning tested in the average range. However, as of fall 2023, Student's academic progress in both math and reading, as measured by i-Ready assessments, was years behind grade expectations. In light of Student's disappointing academic progress, Petitioner alleges that DCPS denied Student a FAPE by failing to conduct appropriate progress monitoring when Student attended Nonpublic School 1, by failing to conduct a comprehensive psychological reevaluation



after 2015 and by failing to develop a revised Behavior Intervention Plan (BIP) based on an updated Functional Behavior Assessment (FBA). DCPS responds that it conducted all required evaluations and updated Student's BIP when warranted. The Petitioner's claim in this first issue is, essentially, a failure to comprehensively evaluate Student, for which the parent holds the burden of persuasion. For the reasons explained below, I find that Petitioner did not meet that burden.

First, as DCPS' Counsel argued in closing argument, the IDEA does not mandate "progress monitoring" for children placed by a public agency in a nonpublic school. As with all children with disabilities who reside in the District, DCPS must ensure that the child's IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved and revises the IEP, as appropriate, to address lack of expected progress, results of any reevaluation and information by the parents. *See* 34 C.F.R. § 300.324(b).

With regard to Petitioner's allegation that DCPS failed since December 2022 to conduct a comprehensive psychological reevaluation of Student, the IDEA requires that reevaluations of a child with a disability must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). Public Charter School conducted a psychological evaluation of Student in spring 2015, which included measures of Student's cognitive abilities, academic achievement and behavioral needs. DCPS timely conducted psychological reevaluations

of Student in 2018 and 2021. Student's next triennial reevaluation is due in June 2024.<sup>2</sup>

Petitioner's expert, Educational Advocate 1, opined in her hearing testimony that DCPS' June 14, 2021 psychological reevaluation of Student was not comprehensive because it did not include parental input, a formal measure of academic achievement such as the Woodcock-Johnson IV Tests of Achievement (WJ IV), or assessments for autism spectrum disorder (ASD) or executive functioning. DCPS contends that the parent's complaints about the June 14, 2021 reevaluation are time-barred. I agree.

The IDEA provides that a parent must request an impartial hearing on their due process complaint within two years of the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint. *See* 34 C.F.R. § 300.511(e).<sup>3</sup> In this case, Educational Advocate 1, who has worked with the parent for years, testified that she attended the June 2021 eligibility review meeting for Student and reviewed the June 14, 2021 psychological evaluation. The parent, therefore knew, or should have known, about any alleged concerns regarding the adequacy of the June 2021 triennial reevaluation more than two years before she filed her due process

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<sup>2</sup> By email letter of July 13, 2023 to Nonpublic School 1, Petitioner's Counsel requested that Student be reevaluated for special education. This request should have been made to DCPS, not to the private school. *See* 34 C.F.R. § 300.303(a)(2).

<sup>3</sup> *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law. 34 CFR § 300.511(e).

complaint on January 5, 2024.

With regard to Student's alleged need for an FBA and a revised BIP, Educational Advocate 1, testified that Student's most recent FBA was completed in 2013 or 2014. This was apparently an error. DCPS' witness, Nonpublic Monitor, testified that an FBA and BIP had been completed for Student in the 2018-2019 school year – he believed in January 2019. According to Nonpublic Monitor, when the parent requested an updated FBA in April 2021, DCPS denied the request because the then-current FBA included the behaviors which Mother had expressed concern about and the IEP team did not have evidence or data of new behaviors that would have warranted an updated FBA for Student. The parent did not rebut that evidence. More recently, DCPS did complete an updated FBA for Student and, in January 2024, developed a revised BIP. I conclude that Petitioner did not establish that DCPS denied Student a FAPE by failing to conduct an FBA or develop a revised BIP.

B. Did DCPS deny Student a FAPE because it failed to provide appropriate IEPs from January 1, 2022 until the present time, because the IEPs that were developed during the 2021-2022, 2022-2023 and 2023-2024 school years, up until December 29, 2023, were not based on updated data regarding the student's academic and behavior needs?

Petitioner alleges that DCPS' IEPs for Student from January 1, 2022 forward were inappropriate because the respective IEPs were not based on updated data on Student's academic and behavioral needs. The IEPs at issue were developed on September 21, 2021, October 13, 2022 and October 5, 2023. DCPS maintains that when

each of the IEPs was developed, the respective IEP teams had the data needed to program 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 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 this proceeding, Petitioner has not alleged that DCPS failed to comply with the IDEA’s procedural requirements. Therefore, I turn to the second prong of the *Rowley* inquiry. Were the September 21, 2021, October 13, 2022 and October 5, 2023 IEPs inappropriate because the IEPs were not based on updated data on Student’s academic and behavior needs?

In an annual IEP review, the IEP team must revise the IEP to address any lack of expected progress toward IEP annual goals and in the general education curriculum, if appropriate. *See* 34 C.F.R. § 300.324(b)(1)(ii)(A). Student has not made expected progress under the September 21, 2021, October 13, 2022 and October 5, 2023 IEPs. Despite having average cognitive abilities, Student tested years below grade-level expectations in math and reading in fall 2023. In this case, however, Petitioner has not

alleged that Student's IEP teams failed to make appropriate revisions to address Student's lack of expected progress.<sup>4</sup> Petitioner claims that Student was denied a FAPE because the IEPs were not based on updated data regarding Student's academic and behavior needs.

Petitioner's expert witnesses, Educational Advocate 1 and Educational Advocate 2 opined in their hearing testimony that the present levels of performance in the September 21, 2021, October 13, 2022 and October 5, 2023 IEPs were not appropriate because, according to Educational Advocate 1, the IEP annual goals and PLOPs were not based on then-current data for Student, including norm-referenced academic achievement data, such as current WJ IV achievement scores. Educational Advocate 2 similarly opined that the annual goals and PLOPs were inappropriately based on classroom observations, not test results.<sup>5</sup> I find that Petitioner made a *prima facie* showing through these witnesses' testimony that the IEPs were not based on adequate data on Student. Therefore, on this issue, the burden of persuasion falls on DCPS.

DCPS' expert, Nonpublic Monitor, opined that based on informal observations,

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<sup>4</sup> In fact, the parent does not appear to contest the appropriateness of the special education and related services and supplementary aids and services that were prescribed for Student in the three IEPs – namely full-time special education with a dedicated aide, 240 minutes per month of Behavioral Support Services and 90 minutes per week of OT services. Nor has the parent alleged that Student's placement at Nonpublic School 1, a full-time special education day school for children with behavioral health needs, was inappropriate.

<sup>5</sup> Petitioner's experts did not opine on the appropriateness of the annual goals or present levels of performance for the motor skills/physical development area of concern in the IEPs.

input from staff, and work samples, the DCPS IEP teams had the data needed to program for Student. I found his testimony more persuasive. First, Petitioner has not cited any requirement in federal or District of Columbia regulations for the IEP team to include norm-referenced data, such as updated WJ IV achievement scores in IEP statements of academic performance. The IDEA does mandate that every IEP contain, *inter alia*,

(1) A statement of the child’s present levels of academic achievement and functional performance, including—

(i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) . . . .

*See* 34 C.F.R. § 300.320(a). “Academic achievement” generally refers to a child’s performance in academic areas (*e.g.*, reading or language arts, math, science, and history). *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46662. (August 14, 2006). “Functional” is generally used to refer to activities and skills that are not considered academic or related to a child’s academic achievement. *Id.* at 46579.

In each of the September 21, 2021, October 13, 2022 and October 5, 2023 IEPs, the respective IEP teams included updated statements of Student’s achievement and performance in Mathematics, Reading and Written Expression as well as for behavioral skills. For example, the September 21, 2021 IEP, Exhibit P-31, stated that Student was

able to solve single step math problems and required teacher prompting for multi-step word problems. For Reading, Student was reported to be able to read grade level text, but required prompting to slow down to process what he/she had read. For Written Expression, Student was reported to use proper capitalization but required prompting for punctuation, and Student was continuing to build up the skills for writing multiple full paragraphs. For Emotional, Social and Behavioral Development, Student was reported to struggle, *inter alia*, with following classroom and school rules, and to break rules in an effort to seek attention from peers. The October 13, 2022 and October 5, 2023 IEPs, Exhibits P-32 and P-35, provided updated statements of Student's then-current performance in Mathematics, Reading and Written Expression as well as Social-Emotional-Behavioral functional performance. I conclude that DCPS has met its burden of persuasion that the September 21, 2021, October 13, 2022 and October 5, 2023 IEPs all included appropriate statements of Student's present levels of academic achievement and functional performance and were not inappropriate for want of updated data regarding Student's academic and behavior needs.

C. Did DCPS fail to implement the September 2021, October 2022, and October 2023 IEPs with fidelity during the 2021-2022 and 2023-2024 school years by failing to fully provide IEP related services for Behavior Support Services and Occupational Therapy (OT) services?

Petitioner alleges that Student was denied a FAPE by Nonpublic School 1's not fully implementing Student's IEP requirements for 240 minutes per month of Behavior

Support Services and 90 minutes per week of OT services. Petitioner holds the burden of persuasion on this claim.

Petitioner's failure to implement claim rests on Educational Advocate 2's review of Service Tracker reports. Upon review of the Service Trackers entered into evidence by DCPS at the due process hearing, Exhibits R-7, R-8 and R-32, I find that the Service Trackers reviewed by Educational Advocate 2, Exhibits P-60, P-62, P-63 and P-65, were incomplete. For that reason, I find that her calculation of missed services was not probative. I conclude that Petitioner failed to establish that in the 2021-2022 and 2023-2024 school years, Nonpublic School 1 failed to implement Student's related services, except for OT services and some Behavior Support Services missed in the fall of 2023.

Other hearing evidence established that Nonpublic School 1 did not have an OT provider available in the fall of 2023 and Student did not receive IEP OT services from the start of the 2023-2024 school year until Student left the school on December 5, 2023. In addition, Student missed at least 2 weeks of Behavioral Support Services in fall 2023, when the Nonpublic School 1 school counselor was absent from school. *See* Exhibit P-34.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia, supra*, that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A school district "must ensure that . . . special education and related



services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) ). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.' " *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

*Middleton*, 312 F. Supp. 3d at 144.

It appears that in the fall of 2023, when Nonpublic School 1 did not have an OT provider, Nonpublic School 1 failed to provide Student some 12 school weeks of OT services, totaling about 1,080 minutes (18 hours) of missed services. I find that this was a material failure to implement Student's IEP and constituted a denial of FAPE. For Behavior Support Services, the hearing evidence only established that Student missed two weeks of services. This was 120 minutes out of the over 1,000 minutes of behavior services mandated by Student's IEP for the first half of the 2023-2024 school year. I find that Petitioner did not establish that Nonpublic School 1's withholding some 120 minutes of Behavior Support Services resulted in Student's being deprived of an educational benefit.

D. Did DCPS deny Student a FAPE during the 2022-2023 school year by failing to fully implement Student's IEP requirement for a dedicated aide including

during Extended School Year (ESY) 2023?

Student's IEPs for the 2022-2023 school year provided that Student required the support of a dedicated aide for 7 hours per school day. In her due process complaint, Mother alleged that the dedicated aide requirement was not implemented with fidelity during the 2022-2023 school year and that "upon information and belief" there were days when student did not have a dedicated aide and other days where the dedicated aide was serving two or three students at a time. At the due process hearing, there was scant evidence offered to support this claim. Mother testified that the dedicated aide services were "up and down" and that for an unspecified school year, Student did not have a dedicated aide for Extended School Year. She stated that Student told her that at times, his/her dedicated aide would assist other children exhibiting behavior problems and also that at times, the aide would be using a mobile phone instead of paying attention to him/her. Otherwise there was no other evidence offered at the hearing as to if, or when, Nonpublic School "withheld" dedicated aide services in the 2022-2023 school year. I conclude that Mother did not offer sufficient evidence to establish the proportion of dedicated aide services mandated to those actually provided for Student in the 2022-2023 school year, or that Student was deprived of educational benefit by Nonpublic School 1's alleged failure to fully implement the dedicated aide requirement.

#### Remedy

In this decision, I have found that DCPS denied Student a FAPE by not ensuring

that Nonpublic School 1 provided Student OT services from the start of the 2023-2024 school year until Student moved to Nonpublic School 2 in early December 2023.

Student is entitled to an award of compensatory education for this denial of FAPE.

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

I have found that Nonpublic School 1 failed to provide Student some 18 hours of OT services in the fall of 2023. In her compensatory education proposal, Educational Advocate 2 recommended, *inter alia*, that Student be awarded 50 hours of compensatory OT services, but that total was based her analysis of incomplete service tracker records. In *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, (D.C.Cir.2005) the District of Columbia Court of Appeals rejected “mechanical hour-counting,” and emphasized that an award must be designed to meet the student’s unique needs. *Reid*, 401 F.3d at 524. However an award created with the aid of a formula is not *per se* invalid, so long as the evidence provides a “sufficient basis for an individually-tailored assessment.” *See Stanton ex rel. K.T. v. District of Columbia*, 680

F.Supp.2d 201, 206 -207 (D.D.C.2010). In this case, it was not contested that Student was not provided IEP OT services in fall 2023, and for want of other evidence as to Student's unique OT needs, I will award Student 18 hours of OT services as compensatory education for the denial of FAPE in this case.

**ORDER**

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

ORDERED:

1. As compensatory education for the denial of FAPE found in this decision, DCPS shall, within 21 business days of the date of this decision, issue funding authorization to the parent for Student to receive 18 hours of independent occupational therapy services and
2. All other relief requested by the Petitioner herein is denied.

Date:     Date in Caption    

    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