

**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

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2024-0006
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 4/18/24
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates (using Microsoft Teams):
("DCPS"),	)	4/8/24 & 4/9/24
Respondent.	)	
	)	

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**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 provide all services on Student’s Individualized Education Program (“IEP”) and proposed too much specialized instruction. DCPS responded that Student’s prior IEP was implemented, while the more recent IEP was appropriate.

**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 1/5/24, the case was assigned to the undersigned on 1/8/24. Respondent filed a response on 1/17/24 and did not challenge jurisdiction. A resolution meeting took place on 1/18/24, but the parties did not settle the

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<sup>1</sup> 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.

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case or shorten the 30-day resolution period, which ended on 2/4/24. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 30-day continuance, which requires a Hearing Officer Determination (“HOD”) by 4/19/24.

A prehearing conference was held on 3/8/24 and a Prehearing Order was issued on 3/12/24 addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 4/8/24 and 4/9/24, and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in the entire hearing.

### Documents and Witnesses

Petitioner’s Disclosure, submitted on 4/1/24, contained documents P1 through P21, all of which were admitted into evidence over certain objections. Respondent’s Disclosure, also submitted on 4/1/24, contained documents R1 through R47, all of which were admitted into evidence over certain objections, except for R1, R13, R45 and R46, which were withdrawn by Respondent.<sup>2</sup>

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Educational Advocate* (qualified over objection as an expert in Special Education and IEP Programming)
2. Parent

Respondent’s counsel presented 7 witnesses in Respondent’s case (*see* Appendix A):

1. *General Education Teacher* (qualified without objection as an expert in General Education)
2. *Special Education Teacher* (qualified without objection as an expert in Special Education and Placement)
3. *Occupational Therapist*
4. *Physical Therapist*
5. *Resolution Manager*
6. *LEA Representative* (qualified over objection as expert LEA Representative and School Administrator)

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<sup>2</sup> 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.

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### 7. School Psychologist

Petitioner's counsel offered no 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 implement Student's 5/3/23 IEP when it did not provide (a) consistent dedicated aide coverage, with a few weeks of absences, (b) physical therapy ("PT") without a therapist at school, and (c) occupational therapy ("OT") sessions for various reasons. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 2:** Whether DCPS denied Student a FAPE by proposing a hybrid placement which was not Student's least restrictive environment, and predetermined the proposed placement prior to the 12/6/23 IEP meeting, which was not disclosed before the meeting and did not include Parent's input. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall maintain Student's current placement consistent with the 5/3/23 IEP during these proceedings pursuant to stay-put and after determination that the placement proposed by DCPS is inappropriate.
3. DCPS shall fund compensatory education for any denials of FAPE, paying providers in a timely manner, and funding related transportation expenses.
4. Any other just and reasonable relief.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact<sup>3</sup> are as follows:

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<sup>3</sup> 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.

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1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>4</sup> Student is *Age*, *Gender*, and in *Grade* during 2023/24 at *Public School*.<sup>5</sup>

2. Student cannot sustain attention in class for more than a few minutes at a time, and does not fit in general education; Student is unsafe with materials and with own body, hitting adults, throwing objects, damaging or breaking things and absconding.<sup>6</sup> Student puts things in mouth, which is also a safety issue.<sup>7</sup> Student can be aggressive; the week prior to hearing, Student's classmates all had to be evacuated from the classroom to be safe from Student; evacuation of the class happened once before in 2023/24, as Student usually can be removed from the classroom when necessary.<sup>8</sup>

3. Based on Student's cognitive and social emotional functioning, Student has trouble accessing general education independently, and would benefit from specialized instruction, substantial supports and accommodations to address specific needs.<sup>9</sup> Student distracts the other children in general education when expected to engage in a non-preferred activity.<sup>10</sup> Student requires a lot to engage and pulls General Education Teacher from working with other students; Student needs more support than any other in the general education class; Student needs 1:1 all the time.<sup>11</sup>

4. IEP. Student's 5/3/23 IEP provided 10 hours/week of specialized instruction inside general education and 5 hours/week of specialized instruction outside general education, along with 60 minutes/month of PT outside general education, 180 minutes/month of OT outside general education, 60 minutes/month of OT inside general education, 240 minutes/month of speech-language pathology ("SL") outside general education, and 90 minutes/month of SL inside general education; Student is also provided 30 minutes/month of consultation for each OT and SL; in addition, a dedicated aide is to be provided 6.5 hours/day inside general education.<sup>12</sup> Student's special education classification is Developmental Delay.<sup>13</sup>

5. Student's communication device needs to be accessible at all times inside general education; Student cannot use the device without assistance by an adult.<sup>14</sup> Developmentally, Student is significantly below same age peers and can't participate with classmates due to Student's delayed expressive and language skills.<sup>15</sup> Student is not engaging with peers, but

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<sup>4</sup> Parent.

<sup>5</sup> Parent; P13p163.

<sup>6</sup> General Education Teacher.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> P11p140 (5/3/23 IEP); LEA Representative (still true now).

<sup>10</sup> Special Education Teacher.

<sup>11</sup> General Education Teacher.

<sup>12</sup> P11p136,149-50.

<sup>13</sup> P11p136; P9p121.

<sup>14</sup> General Education Teacher; P11p137,150.

<sup>15</sup> General Education Teacher; P11p137.

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participates in parallel play with adult facilitation.<sup>16</sup> Student can say some words, but speech is challenging to adults not familiar with Student; Student can participate in group activities for only 2 minutes at a time with significant support from an adult.<sup>17</sup> Student needs 100% of Special Education Teacher's attention to be able to participate.<sup>18</sup>

6. Psychological Evaluation. A psychological evaluation dated 9/2/22 noted in the Behavior Assessment System for Children, Third Edition ("BASC-3") teacher report that Student scored in the clinically significant range for scales assessing hyperactivity, attention problems, atypicality, and more, while Parent report indicated that Student did not score in the clinically significant range for any clinical scales or any adaptive scales.<sup>19</sup> The teacher reports for Adaptive Behavior Assessment System 3rd Edition ("ABAS-3") placed Student's overall adaptive ability at <0.1 percentile and the Gilliam Autism Rating Scale – Third Edition ("GARS-3") in the very likely category for autism spectrum disorder.<sup>20</sup> In the psychological evaluation's cognitive testing, the Kaufman Assessment Battery for Children – Second Edition ("KABC-II") was discontinued because Student could only attend to the test for minimal lengths of time.<sup>21</sup> Student did not attend to testing stimuli generally and was nonverbal during the evaluation.<sup>22</sup>

7. Formal assessments are not appropriate for Student.<sup>23</sup> Informal preschool assessment on 1/12/23 states that Student can identify most colors and numbers 0, 1, 3 and 5.<sup>24</sup> Student has had lots of support, but minimal growth.<sup>25</sup> Student's education has been negatively impacted by Covid-19; Student has not been able to consistently participate in interventions.<sup>26</sup>

8. 2022 Observations. DCPS Central Office observations in June 2022 and November 2022 to consider whether Student needed a dedicated aide recommended that Student be placed in a self-contained special education setting, which would be more suitable than a dedicated aide; the IEP team determined such a move would be appropriate.<sup>27</sup>

9. Draft IEP for 12/6/23 IEP Meeting. DCPS did not provide a draft IEP to Parent until 12/4/23 and offered to postpone the 12/6/23 IEP meeting to provide the full 5 days required

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<sup>16</sup> General Education Teacher.

<sup>17</sup> General Education Teacher; P11p138 (5/3/23 IEP asserts that Student can sustain group activities for 3-4 minutes).

<sup>18</sup> Special Education Teacher.

<sup>19</sup> P9p121.

<sup>20</sup> P9p115,121.

<sup>21</sup> P9p111,121.

<sup>22</sup> P9p110; School Psychologist (Student not able to verbally engage).

<sup>23</sup> General Education Teacher.

<sup>24</sup> P10p126.

<sup>25</sup> General Education Teacher; P9p121.

<sup>26</sup> P9p121.

<sup>27</sup> R19p370-73 (specific reference to "self-contained Communication and Education Support (CES) classrooms"); P2p30.

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prior to the IEP meeting; Parent’s counsel agreed to go forward on 12/6/23.<sup>28</sup> Unlike Student’s 5/3/23 IEP, the draft IEP noted that Student’s behavior impedes learning, with Student “yelling, crying, hitting staff, throwing objects, and disruptive behavior in the classroom.”<sup>29</sup> The draft IEP proposed the same number of specialized instruction hours/week with 10 push-in and 5 pull-out, along with 1 hours/week of related services.<sup>30</sup> Communication & Education Support (“CES”) was not included in the 12/4/23 draft IEP.<sup>31</sup> Parent had no concerns about the draft IEP, but didn’t want CES at Student’s young age; Parent felt Student had potential but was not being given support.<sup>32</sup>

10. Hybrid IEP/Placement. The school IEP team noted on 12/8/23 that Parent disagreed with placing Student in a full-time self-contained setting; the school team reviewed PLOPs, benchmark data, progress reports, formal evaluations, teacher reports/observations and parent input/reports; the school team decided on a compromise to more closely align services to what Student needed in order to promote academic growth.<sup>33</sup> Educational Advocate acknowledged that IEP team members can meet to plan outside the formal IEP meeting.<sup>34</sup> The hybrid CES program was not included in the 12/4/23 draft IEP, but raised late in the 12/6/23 IEP meeting, which Educational Advocate believed was after an internal DCPS meeting that did not include Parent’s team.<sup>35</sup> Student’s hybrid schedule continued general education push-in hours, while increasing pull-out from 5 to 10 hours/week in the CES program.<sup>36</sup> DCPS would have fully removed Student from general education but for Parent’s desire for general education for social-emotional reasons; CES is more appropriate for where Student is now.<sup>37</sup> CES is built for children like Student to be successful, with more 1:1 support; Student can shift to general education when ready.<sup>38</sup>

11. DCPS made no mention of changing Student’s IEP/placement before the 12/6/23 IEP meeting, nor was there any change proposed in the draft IEP.<sup>39</sup> Parent’s team first heard about a change to half-time CES during the 12/6/23 IEP meeting after DCPS reported that Student was doing very well.<sup>40</sup> Parent’s team felt like the outcome was predetermined and not Student’s least restrictive environment (“LRE”); DCPS said that they knew Parent would not be happy with the change, so waited to make the proposal at the end of the IEP meeting.<sup>41</sup> Student’s general education class size was 15 students with 2 adults, a dedicated

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<sup>28</sup> P18p232; Parent.

<sup>29</sup> P11p137; P13p164.

<sup>30</sup> P13p181.

<sup>31</sup> Special Education Teacher.

<sup>32</sup> Parent.

<sup>33</sup> P14p192 (Prior Written Notice (“PWN”)).

<sup>34</sup> Educational Advocate.

<sup>35</sup> *Id.*

<sup>36</sup> P14p142.

<sup>37</sup> General Education Teacher.

<sup>38</sup> Special Education Teacher.

<sup>39</sup> Educational Advocate.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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aide for Student, and sometimes another service provider or 2.<sup>42</sup> CES is a smaller setting with more trained staff members and more scaffolding.<sup>43</sup> Public School has 2 CES classes for Student's grade, each with 4-6 students, a teacher and 2 paraprofessionals.<sup>44</sup>

12. Occupational Therapy. According to Petitioner, Student had missed less than 50 minutes of OT.<sup>45</sup> Occupational Therapist made up past OT minutes due, with extensions of some sessions that may not have been recorded in the OT notes; the OT services listed in the tracker ending on 11/27/23 were not the final services in 2023 (or 2023/24).<sup>46</sup> The only OT due Student was from a recent session Occupational Therapist missed when sick and will make up 10 minutes per session.<sup>47</sup> Student's schedule is "jam packed" with services, so Occupational Therapist will spread out the OT; service providers have until the end of the year to make up missed services.<sup>48</sup>

13. Physical Therapist. Student missed no more than 90 minutes of PT.<sup>49</sup> A majority of missed PT services were due to the illness of Student; other missed PT services were to be made up when a provider was available.<sup>50</sup> Physical Therapist began work for DCPS on 1/8/24 (at Public School and numerous other DCPS schools) and understood from his supervisor that Student was owed 60 minutes of direct PT services.<sup>51</sup> Physical Therapist made up 15 minutes so far and intended to make up remaining services in February and March, but now intends to make up the missed services in May, understanding that he has until the end of 2023/24 to do so.<sup>52</sup> Student's 11/3/23 IEP Progress Report noted that in PT (Motor Skills/Physical Development) Student was progressing in 4 of 5 goals, and the 5<sup>th</sup> had just been introduced.<sup>53</sup>

14. Dedicated Aides. DCPS emphasized that dedicated aides do not maintain service trackers; dedicated aides do log their attendance in and out at schools, but the logs are not available to parents (based on confidentiality); at the resolution meeting, LEA Representative stated that the school can text when there is a substitute, but there was no indication that such information was conveyed to Parent.<sup>54</sup> If a dedicated aide is absent, substitutes are provided whenever possible, with long-term substitutes used as appropriate.<sup>55</sup>

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<sup>42</sup> General Education Teacher.

<sup>43</sup> *Id.*

<sup>44</sup> Special Education Teacher.

<sup>45</sup> Educational Advocate.

<sup>46</sup> Occupational Therapist; P16; P16p216; P14p192 (PWN asserted that missed services had been made up by 12/8/23).

<sup>47</sup> Occupational Therapist.

<sup>48</sup> Occupational Therapist; LEA Representative.

<sup>49</sup> Educational Advocate.

<sup>50</sup> P14p192 (PWN asserted that missed services had been made up by 12/8/23).

<sup>51</sup> Physical Therapist.

<sup>52</sup> *Id.*

<sup>53</sup> P12p159-61.

<sup>54</sup> Resolution Manager; R5p69; Parent.

<sup>55</sup> R5p69; Resolution Manager.

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Student had multiple aides since August 2023 with a “few weeks of absences,” but Resolution Manager was uncertain whether the few weeks of absences were covered by other staff; Student has had a consistent aide as of 12/8/23; when Student’s dedicated aide was absent, the school team would “make every effort” to provide coverage with school-based staff.<sup>56</sup> Since 5/3/23 Student has had 5 dedicated aides, in addition to substitutes; it is hard for a student with rotating dedicated aides to make progress when rapport must be developed repeatedly.<sup>57</sup> Student’s 5/3/23 IEP provided a dedicated aide 6.5 hours/day, but only inside general education, not “everywhere”; with all the time Student spent outside general education and with push-in inside general education, Student was entitled to only 3.5 hours/day or less of support by a dedicated aide.<sup>58</sup>

15. Prior HOD. Petitioner filed a prior due process complaint alleging a failure to implement Student’s earlier IEPs by providing dedicated aides.<sup>59</sup> The 6/22/23 HOD noted that Student’s IEPs required a dedicated aide only inside general education and reduced the 6.5 dedicated aide hours on the IEP to the hours that Student was inside general education, awarding 216 hours of independent tutoring and 24 classes of recreational therapy.<sup>60</sup>

### 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

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<sup>56</sup> P14p192 (PWN); LEA Representative.

<sup>57</sup> Educational Advocate; R5p69.

<sup>58</sup> P11p136,150; Educational Advocate; LEA Representative; P2.

<sup>59</sup> P2.

<sup>60</sup> P2p30,32.



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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 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.

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 implement Student’s 5/3/23 IEP when it did not provide (a) consistent dedicated aide coverage, with a few weeks*

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*of absences, (b) physical therapy (“PT”) without a therapist at school, and (c) occupational therapy (“OT”) sessions for various reasons. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on her IEP implementation claim. 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*, 962 F. Supp. 2d at 268, *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). Here, Petitioner asserts failure in 3 areas, which are considered in turn, but does not show a material deviation from Student’s IEP in any area.

Dedicated Aide. Parent places great importance on the services of a dedicated aide for Student, in hopes that an aide would help address Student’s lack of attention and problems in general education. While many caring parents seek to resolve their children’s academic and behavioral problems by relying on dedicated aides, it is by no means a panacea. *See, e.g., Rowley*, 458 U.S. at 203 (dedicated aide required if necessary “to permit the child to benefit educationally from [the IEP personalized] instruction”). Here, in a dispute over the amount of dedicated aide services provided, DCPS emphasized that dedicated aides do not maintain service trackers and the arrival and departure logs that are kept are not available to parents, making it difficult to determine when services were provided and when missed. DCPS’s witnesses did testify convincingly that when a dedicated aide was absent, substitutes were provided for Student whenever possible, with long-term substitutes used to cover long absences, as appropriate.

Student has had multiple aides since August 2023 with a “few weeks” of absences, but no clarity about whether those absences were covered. When Student’s dedicated aide was absent, the school team would attempt to provide coverage with school-based staff. Importantly, Student’s 5/3/23 IEP provided dedicated aide coverage for 6.5 hours/day, but only inside general education and not “everywhere.” Student’s IEP provides a great deal of time outside general education and with push-in inside general education, so DCPS convincingly asserted that Student was entitled to only 3.5 hours/day or less of support by a dedicated aide. Accordingly, the undersigned concludes that Petitioner has not met her burden of persuasion by showing a material violation relating to Student’s dedicated aide.

Occupational Therapy. According to Petitioner, Student missed less than 50 minutes of OT in total, out of 240 minutes/month through the first half of 2023/24. Occupational Therapist made up past OT minutes due, with extended time in some sessions that may not

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have been captured and other trackers that were not included past 11/27/23. The undersigned is clear that any OT missed is *de minimis*. i

Physical Therapy. According to Petitioner, Student missed a total of no more than 90 minutes of PT in total out of 60 minutes/month in 2023/24. A majority of the missed PT services were reportedly due to the illness of Student, while other missed PT services were to be made up once a provider was available, which occurred very early in 2024, when 60 minutes of direct PT services were due. Physical Therapist made up 15 minutes so far and intends to make up the remaining services in May, understanding that he has until the end of 2023/24 to do so. Although harm need not be shown, it is notable that Student's 11/3/23 IEP Progress Report noted that in PT (Motor Skills/Physical Development) Student was progressing in 4 of 5 goals, while the 5<sup>th</sup> had just been introduced. The undersigned expects services to be made up as Physical Therapist committed, but in any case the 45 minutes of PT – or less – appears *de minimis*.

**Issue 2:** *Whether DCPS denied Student a FAPE by proposing a hybrid placement which was not Student's least restrictive environment, and predetermined the proposed placement prior to the 12/6/23 IEP meeting, which was not disclosed before the meeting and did not include Parent's input. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a *prima facie* case concerning Student's IEP and placement through testimony and documents, shifting the burden to DCPS, which met its burden of persuasion as discussed below. Here, Parent urges that Student be kept mostly in a general education setting as Student's LRE, while DCPS urges that Student receive the more restrictive benefits of a self-contained CES program. As noted above, the IDEA does expressly mandate that students with disabilities be educated in their LRE to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5); *see Leggett v. Dist. of Columbia*, 793 F.3d 59, 72 (D.C. Cir. 2015). However, the undersigned is clear that the CES classroom is Student's LRE at this time.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case is whether it was “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Andrew 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, *Andrew 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 IEP are determined as of the time it was 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). The appropriateness of Student's IEP is analyzed by focusing on the specific concerns raised by Petitioner.

The heart of this case is whether Student should continue in general education despite many challenges or whether it would be more appropriate for Student to be shifted to a self-contained CES program, at least for a significant portion of the day. As set forth in

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great detail above, Student cannot sustain attention in class for more than a few minutes at a time, is unsafe in the classroom and can be aggressive, requiring all classmates to be evacuated from the classroom recently to be safe from Student, although usually Student is removed from the classroom. Student can't participate with classmates and needs 100% of Special Education Teacher's attention to participate in class. Notably, DCPS observations in June and November 2022 analyzing whether Student needed a dedicated aide recommended instead that Student be placed in a self-contained special education setting – specifically mentioning CES – which would be more suitable than a dedicated aide. In this difficult situation, DCPS did attempt to take Parent's concerns into account, resulting in the proposal for a hybrid CES setting.

In short, as the Court noted in *S.M. v. Dist. of Columbia*, CV 19-2096 (RC), 2020 WL 7230266, at \*5 (D.D.C. 12/8/20), review of an IEP turns on whether it is reasonable, not whether it is ideal, quoting *Endrew F.*, 137 S. Ct. at 999. On balance, this Hearing Officer concludes that the proposed IEP at issue met the required standard and is appropriate for Student.

As for placement, the IDEA requires “school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student’s IEP.” *Middleton*, 312 F. Supp. 3d at 143, citing *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements). See also *A.T.*, 2021 WL 1978792, at \*12 (D.D.C. 5/18/21). Here, the proposed IEP requires a hybrid CES program, along with other services, which can be provided in CES classrooms at Public School, where the undersigned is persuaded Student will benefit.

Parental Input. The IDEA clearly requires parental involvement in “decisions on the educational placement of their child.” 34 C.F.R. § 300.327; 34 C.F.R. § 300.116(a)(1) (requiring public agency to ensure that the educational placement decision is made by a group that includes parents); 34 C.F.R. § 300.501(c) (same); *Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013). Here, however, Parent clearly had a great deal of involvement so that DCPS sought to compromise with Parent by offering a hybrid CES program, even though DCPS appeared to think that what really would be best for Student was a full-time CES program. Parent and her advocates were involved in discussions about whether a hybrid CES program was appropriate. The fact that DCPS did not change its position does not mean that Petitioners did not have adequate input or that its position was predetermined, which is discussed next. See, e.g., *Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power over the IEP team’s decisions); *Schoenbach v. Dist. of Columbia*, 2006 WL 1663426, at \*5 (D.D.C. 2006)

Predetermination. DCPS persuasively asserted that DC law requires DCPS to provide a draft IEP to Parent in advance of the IEP meeting, which necessarily requires DCPS to consider in advance what positions DCPS will include in its draft. See D.C. Code § 38-2571.03(3), which requires that DCPS provide parent a copy of the documents to be discussed at IEP meetings at least 5 business days prior to the meeting. The predetermination issue here is simply whether the school district came to the IEP meeting

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with an “open mind” or had already decided the outcome of the IEP. *See Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004); *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff’d*, 39 F.3d 1176 (4th Cir. 1994) (“if the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input,” but the school need not “come to the IEP table with a blank mind”). Here, in fact, Petitioner objects to the fact that DCPS’s position on a hybrid CES program was *not* included in the 12/4/23 draft, but only raised late in the 12/6/23 IEP meeting, allegedly following an internal DCPS meeting that did not include Parent’s team. However, Educational Advocate acknowledged that IEP team members can meet to plan outside the formal IEP meeting. The undersigned concludes that Student’s IEP was not improperly predetermined before the 12/6/23 meeting or that Petitioner lacked adequate opportunity to provide input.

### **ORDER**

Petitioner has not prevailed on any of the issues in this case. Accordingly, **it is hereby ordered** that any and all 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)  
ODR (hearing.office@dc.gov)