

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution

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OSSE
Office of Dispute Resolution
April 09, 2025

Confidential

Parent on behalf of Student¹)	Case Nos. 2025-0009
)	
Petitioner)	Hearing Dates: March 19-20,
)	and April 2, 2025
)	
v.)	Conducted by Video Conference
)	Date Issued: April 6, 2025
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the parent of an X-year-old student (“Student”) attending School A. On January 21, 2025, Petitioner filed a due process complaint notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to provide appropriate Individualized Education Programs (“IEP”) and placements, failing to implement Student’s IEPs, and failing to conduct a functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”). On January 31, 2025, DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint* (“*Response*”), denying that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its regulations, 34 C.F.R. Section 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-A, Chapter 30.

¹ Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

PROCEDURAL HISTORY

On January 21, 2025, Petitioner filed her *Complaint* alleging that DCPS failed to provide Student a FAPE when it developed IEPs on March 17, 2023 and March 1, 2024. Petitioner asserted that Student was prescribed an insufficient amount of related services, additional supports, and training should have been included in the assistive technology (“A/T”) section of the IEP, a dedicated aide should have been considered, behavioral support services (“BSS”) and/or services from a board certified behavior analyst (“BCBA”) should have been added in light of behavior concerns, the IEP was not based on comprehensive evaluative data, Student required a more restrictive educational environment in light of his/her lack of progress and evidence of regression, and goals in Reading, Mathematics, and Written Expression should have been added to the IEP. Petitioner further asserted that DCPS denied Student a FAPE by failing to implement Student’s IEPs during the 2022-2023 and 2023-2024 school years. by failing to provide the student with speech and occupational therapy, and failed to provide tutoring services at home when Student was home-bound due to an injury. Petitioner also alleged that DCPS failed timely to provide Student with an appropriate FBA and/or provide a BIP from December 2022 to the present.

On January 31, 2025, DCPS filed its Response in which it denied having denied Student a FAPE in any way. DCPS pleaded, *inter alia*, that the IEP teams relied on various sources of information in developing the IEPs. The IEPs provided 25 hours per month of specialized instruction outside the general education and were reasonably calculated to enable Student to make appropriate progress considering his/her circumstances. As for the failure to implement the IEP, tutoring services were not prescribed on Student’s IEP, but there was a brief time during the 2023-2024 school year that speech services were not implemented due to the lack of a therapist. DCPS has acknowledged this and will issue an authorization for 13 hours missed of speech language services. DCPS is not aware of missed speech language service missed during the 2022-2023 school year or missed occupational therapy services during the 2022-2023 or 2023-2024 school years. DCPS denied that Student was denied a FAPE when it allegedly failed to develop an FBA and BIP since December 2022. Student’s behavior was addressed through his/her IEP which included a small class setting that utilized the principles of Applied Behavior Analysis (“ABA”). Furthermore, upon Petitioner’s request in December 2024, School A completed an FBA that month and developed BIP in January 2025.

The parties conducted a resolution meeting on February 4, 2025 that did not result in a settlement. Due to scheduling constraints, no prehearing conference was held. I issued a *Prehearing Order* on February 27, 2025 and, upon Petitioner’s counsel’s request for changes, an *Amended Prehearing Order* on February 28, 2025. The due process hearing was conducted on March 19-20 and April 2, 2025 by video conference facilities. The hearing was open to the public at Petitioner’s request.

Petitioner filed Five-day Disclosures on March 12, 2025, containing a witness list of nine witnesses, and 67 documents. On March 17, 2025, DCPS filed objections to Petitioner’s disclosures. DCPS objected to expert testimony from Witness A as being an expert in special education, special education programming and compensatory education development. DCPS also objected to Petitioner’s Exhibits P4-P6, P11, P14-P15, P41-P42, P51-P55 on grounds of relevance, P18-P21, P50, and P61 on grounds of lack of authentication, P60 because it needed redaction, and

P65² was not prepared by a qualified person. Petitioner filed Revised Disclosures on March 19, 2025 to provide the redaction required in Exhibit P60. Petitioner's Exhibits P1-P13, P16-P17, P19-P20, P22-P49, P56-P60, and P62-P65 were admitted into evidence.

Respondent filed Disclosures dated March 12, 2025, containing a witness list of 11 witnesses and 54 documents. Petitioner filed objections to DCPS' disclosures on February 13, 2025. Petitioner objected to Respondent's Exhibits R26, R28-R30 and R36 on grounds of foundation and authentication, R27 because it included documents relating to a student other than Student, and R52-R53 on grounds of grounds of foundation, authentication, and relevance. On March 18, 2025, Respondent filed Amended Disclosures to effectuate the redaction in R27. When a third day of hearings was added, April 2, 2025, Respondent file a Supplemental Disclosure on March 25, 2025 adding one additional exhibit, R55, as to which Petitioner did not file an objection. Respondent's Exhibits R1-R55 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Petitioner, Witness A, Father, and Witness B. Witness A was admitted as an expert in behavior analysis. Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness E, Witness F, Witness G, Witness H, and Witness J. Witness C was admitted as an expert in speech and language therapy, Witness E was admitted as an expert in occupational therapy, Witness F was admitted as an expert in behavior analysis, and Witness H and Witness J were admitted as experts in special education. At the conclusion of testimony, the parties' counsel gave closing arguments. The Hearing Officer authorized the parties to submit authorities on which they rely by April 4, 2025. On April 4, 2025, DCPS filed citations of authorities on which it relies.

ISSUES

As identified in the *Complaint* and the *Amended Prehearing Order*, the issues to be determined in this case are as follow:

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on March 17, 2023, which was amended on April 11, 2023. Specifically, Petitioner asserts that the IEP was inappropriate because (a) occupational therapy ("OT") services should have been increased given his/her limited progress, (b) additional supports and training should have been included in the assistive technology ("A/T") section of the IEP, (c) a dedicated aide should have been considered, (d) behavioral support services ("BSS") and/or services from a board certified behavior analyst ("BCBA") should have been added in light of behavior concerns, (e) the IEP was not based on comprehensive evaluative data; (f) Student required a more restrictive educational environment in light of his/her lack of progress and evidence of regression, and (g) goals for academic areas like Reading; Mathematics; and Written Expression should have been added.

² DCPS' *Objections* listed P62, but DPCS' counsel clarified at the hearing that she intended P65.

2. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on March 1, 2024, which was amended in June 2024. Specifically, Petitioner asserts that the IEP was inappropriate because (a) speech and language (“S/L”) services were reduced despite a lack of progress, (b) occupational therapy (“OT”) services should have been increased given his/her limited progress, (c) additional supports and training should have been included in the assistive technology (“A/T”) section of the IEP, (d) a dedicated aide should have been considered, (e) behavioral support services (“BSS”) and/or services from a board certified behavior analyst (“BCBA”) should have been added in light of behavior concerns, (f) the IEP was not based on comprehensive evaluative data; (g) Student required a more restrictive educational environment in light of her/his lack of progress and evidence of regression, and (h) goals for academic areas like Reading; Mathematics; and Written Expression should have been added.
3. Whether School A is an appropriate placement for Student.
4. Whether DCPS denied Student a FAPE by failing to implement Student’s IEPs during the 2022-2023 and 2023-2024 school years. by failing to provide the student with speech and occupational therapy, and tutoring services. Specifically, Petitioner asserts that DCPS failed to provide approximately 38 hours of S/L services SLP and 10 hours of OT services during the 2023-2024 school year and 23 hours of S/L and 5 hours of OT during the 2022- 2023 school year based on the service trackers provided by the school. Services were missed primarily due to the absence of a provider as noted in this student’s November 9, 2023, IEP Progress Report. In addition, DCPS did not implement home-based instruction for the student with fidelity in that during the almost two months that the student was home due to an injury, the OT provider and tutor only appeared once, and the speech provider only appeared up twice.
5. Whether DCPS denied Student a FAPE by failing timely to provide Student with an appropriate FBA and/or provide a BIP from December 2022 to the present.

FINDINGS OF FACT³

1. Student is an X-year-old student in grade C at School A. S/he was retained twice in grade H.⁴

2. On May 16, 2022, when Student was in grade H at School A, DCPS conducted an IEP Annual Review meeting. Student was classified with a disorder on the autism spectrum

³ The Findings of Fact includes all of the oral and written evidence that I considered material in rendering the decision in this matter. The quotations of oral testimony are from my notes during the hearing, not the transcript.

⁴ Testimony of Petitioner.

(“ASD”).⁵ In Consideration of Special Factors, the IEP team reported that Student does not utter “true words;” s/he expressed her/himself using body language, facial expressions, and gestures. In the Assistive Technology section, the team reported that “[Student] used a PECS [picture exchange communications system] book and an AAC device (recent addition) to communicate her/his wants and needs at that time. Visual supports such as core vocabulary and communication boards were used in conjunction with spoken word during teaching and natural communicative exchanges to increase comprehension of spoken language. [Student] had been evaluated by the Assistive Technology team and was in the trial process of determining which device best supports [her/his] needs.”⁶

The IEP’s Areas of Concern included Adaptive/Daily Living Skills (“Adaptive”), Communication/Speech and Language (“Communication”), Emotional, Social, and Behavioral Development (“Behavior”), and Motor Skills/Physical Development (“Physical”). In Adaptive, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) reported that Student was a calm student who followed the routines and flow of the classroom. On the Verbal Behavior Milestones Assessment and Placement Program (“VB-MAPP”) her/his overall score improved from 23.5 in September 2021 to 31 in May 2022. In May,

On the Level 1 Mand subtest, [Student] scored 5 out of 5 points. [S/he] is able to use [her/his] PECS book to mand (request) for chicken nuggets, Doritos, Oreos, muffins, drink, mom, Disney+, apple, banana, yogurt, and go. With full- to partial-physical prompting, [Student] is able to mand for help as well. [Student] scored 0 out of 5 points on the Level 1 Tact (labeling) subtest, 2 out of 5 on the Listener Responding subtest, and 5 out of 5 on the Visual Perceptual Skills and Matching-to-Sample (VP/MTS) subtest. [S/he] scored 2 out of 5 points on the Level 2 VP/MTS subtest. [Student] is able to attend to a speaker’s voice and respond to hearing [her/his] own name in approximately 50% of opportunities. [Student] is able to track and grasp objects, attend to a toy or book for 30+ seconds, and stack blocks or put items into a container independently. [S/he] can match identical objects in an array of eight with minimal prompting to attend to the task. [S/he] is working on sorting objects between two colors. On the Motor Imitation subtest, [Student] scored 1.5 out of 5 points. [S/he] is able to imitate standing up and stacking blocks. When toileting, [Student] is dry in an average of approximately 52% of opportunities per week. With minimal verbal prompting, [Student] is able to pull up and down [her/his] pants ...

The goals addressed (a) toileting (remaining dry 75% of the time), (b) hand washing, (c) requesting desired items using vocalizations, PECS/picture symbols, a communication device, or sign language for 20 items, (d) matching pictures or items in arrays of 10, and (e) responding to verbal prompts.⁷

In Communication, the PLOP reported that with hand-over-hand assistance during structured tasks or activities with aided communication, Student was able to use a total

⁵ P11:1 (114).

⁶ *Id.* at 2-3 (115-16).

⁷ *Id.* at 4-5 (117-18).

communication approach (communication board, picture icons, single-message voice output device, alternative augmentative communication (“AAC”) device) to request an object or action given no more than 2 models and/or cues 40% of the time. Student had

...[l]ow tolerance for simple demands during activities. [S/he] requires routines in a highly structured and predictable way, structured and hands-on tasks, reduced to minimal demands, visual schedules and supports, immediate reinforcement and tangible reinforcers (cause and effect items) in order to engage in therapy sessions. [His/her] level of interest and external motivation greatly impact [his/her] communication skills and progress. [S/he] continues to present with decreased social awareness and joint attention with others. However, increased eye contact is seen with adults on occasion. [Student] has not yet produced true words or purposeful as observed by this clinician. In addition, [s/he] understands the concept of using picture communication symbols. [S/he] understands if [s/he] gives a picture to [her/his] teacher [s/he] will get something in return. Through the use of a total communication approach as needed, [Student] is able to request a desired item or action during 40% of opportunities independently by gesturing, giving a picture to [his/her] teacher or reaching to one of two items in five separate opportunities or using [his/.her] AAC device.

The goals addressed (a) using a total communication approach to request objects or actions, (b) following simple and routine one-step directives, and (c) using core vocabulary words meaningfully using total communication.⁸

In Behavior, the PLOP reiterated the results of the VB-MAPP tests. It also reported that in the classroom,

[S/he] is able to sit in a group for 5+ minutes without disruptive behavior or attempting to leave the group. [S/he] is able to sit at the meal table for 10+ minutes without negative behavior. [S/he] is working on following [her/his] independent schedule and is now able to grasp and remove an icon with gestural prompting. [S/he] is able to hold the icon and take it to the correct location in the classroom while a teacher walks with [her/him]... [S/he] is able to engage with and explore toys, but the variety of toys [s/he] enjoys is limited. Currently, [Student] enjoys the abacus, bead track, swing, and peanut ball. [S/he] has just started playing with blocks independently. On the Level 1 Social Behavior and Social Play subtest, [Student] scored 4 out of 5 points. [She] tracks and shows interest in other people’s movements and is able to play parallel to peers. [S/he] scored 0 out of 5 points on both of these subtests in Levels 2 and 3. [Student] does a nice job sitting at various activities throughout the school day. [She] has improved in [his/her] ability to participate in activities independently and no longer relies on as much prompting. [S/he] usually needs a partial-physical prompt to start an activity and will then continue on [her/his] own with either a gestural or verbal prompt.

⁸ *Id.* at 5-8 (118-21).

The goals addressed (a) sitting and participating for periods of at least 15 minutes, (b) taking an icon and moving to the appropriate area in the classroom independently, (c) responding correctly to one-step directions, and (d) during play time, showing variation in play by playing with eight various items.⁹

In Physical, the PLOP reported that in activities requiring fine motor skills, s/he required maximum assistance through verbal and tactile cueing to engage in tasks. S/he required hand-over-hand guidance to engage in pre-writing activities. Student used a palmar grasp when holding a writing utensil. Student was reported to be making progress in her/his ability to sustain engagement in structured tasks but continued to need moderate support during tasks involving bilateral coordination and crossing the midline of the body. S/he had not developed a hand preference. Student had also shown an increased tolerance in transitioning from the classroom to her/his OT sessions. S/he would respond to one-step verbal direction when it was coupled with visual demonstration 40% of the time. Student required individualized support to maintain attention in whole group instruction. The goals addressed (a) imitating simple prewriting strokes (vertical line, horizontal line, circle, cross stroke), (b) with sensory supports as needed, following along with ten minutes of teacher directed instruction.¹⁰

The IEP team prescribed 25 hours per week of specialized instruction, 4 hours per month of speech and language services, and two hours per month of occupational therapy services, all outside general education. Other Classroom Aids and Services included: Total communication approach, Multi-modality approach to teaching, Sensory Strategies to keep her/him regulated and alert, Visual cues such as a visual schedule, cue cards, visual work system, Behavioral strategies including positive reinforcement, teaching of expected behaviors, breaking down skills, Social skills teaching: adult scaffolding for social skills, fading prompt hierarchy, and hand over hand to verbal prompts.¹¹

3. On October 25, 2022, when Student remained in grade H at School A, DCPS completed a Psychological Triennial Reevaluation Form. Student had been previously found eligible for services with a classification of autism spectrum disorder (“ASD”) and was assigned to a Communication and Education Support (“CES”). Her/his current IEP provided twenty-five hours per week of specialized instruction outside of the general education setting as well as 240 minutes per month of speech-language pathology and 120 minutes per month of occupational therapy outside of the general education setting. It was reported to Examiner A that Student had shown improvements in his/her ability to follow classroom routines such as washing his/her hands with limited prompting, in his/her gross and fine motor skills, and had begun to gesture for his/her wants and needs. Areas in need of significant improvement included his/her ability to engage in non-preferred tasks, to engage in academic activities like identifying his/her name, following one-step directions, and following school routine/schedule with minimal adult support. When Student was frustrated, s/he would sometimes cry or fall to the floor.¹² “Due to [Student’s]

⁹ *Id.* at 9-10 (122-23).

¹⁰ *Id.* at 10-11 (123-24).

¹¹ *Id.* at 12 (125).

¹² Petitioner’s Exhibit (“P:”) 6 at page 1. The exhibit number is followed by the exhibit page number then the electronic page number in parentheses, e.g. P6:1 (54).

communications needs as well as [her/his] need for hand over hand support when engaging in academic tasks a formalized achievement assessment was not administered.”¹³

Student’s adaptive daily living skills are well below those of her/his same-age peers:

[S/he] is beginning to make progress during the day to transition in and out of the classroom; however, [s/he] continues require full adult physical support (hand-over-hand) to meet [his/her] basic wants and needs and initiate and complete tasks. [S/he] currently needs full adult support to complete the steps in the toileting routine (walking to the bathroom, pulling pants down/up, using the toilet, flushing, washing hands). [Student] can take off [her/his] shoes and clothes off at school, however it is done at inappropriate times (i.e., at the playground, classroom). [Student] is not toilet trained yet and uses diapers at home and at school... [Student] needs full physical adult support (hand-over-hand) to work on skills such as pasting, tracing, matching, and dot-marker activities. [Student’s] end of the year Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) score of 31/170 places [her/him] at a developmental level 1 (0-18 months) however, [s/he] has demonstrated beginning skills in the level 2 range (18-30 months).¹⁴

Student’s mother and Teacher A completed rating scales on the Gilliam Autism Rating Scale, (“GARS-3”). Their responses placed Student in the 86th percentile on the Autism Index, indicting that Student’s possibility of autism is very likely, and s/he required very substantial support in the educational setting. At school, Student was reported to have difficulty with social interaction and emotional responses such as regulating his/her emotions and recovering from upsetting events. S/he has temper tantrums when frustrated and exhibits extreme reactions to load or unexpected noises.¹⁵ Examiner A concluded that Student remains eligible as a student with a disability on the autism spectrum and requires support throughout the school day:

Based on the results of this evaluation, [Student] continues to be eligible for specialized services under the classification of autism. [Student] requires extensive support to engage in learning activities, regulate [her/his] behavior, and adequately communicate with [her/his] peers. Additionally, [s/he] needs hand over hand support and modeling to participate in activities requiring sustained attention. Presently, [Student] is making progress towards [her/his] adaptive and communication goals with the level of support and services [s/he] receives.¹⁶

4. The VB-MAPP assesses and tracks language and social skills in children with autism across 24 domains. During the 2022-23 school year, Student scored 6.5 in October on the Milestones, 11 in February, and 13 in May.¹⁷ S/he scored 90 on the Barriers in October and 73 in

¹³ Id. at 5 (58).

¹⁴ Id. at 3 (56).

¹⁵ Id. at 5-6 (58-59).

¹⁶ Id. at 7 (60).

¹⁷ P42:1 (426).

February.¹⁸ Increasing scores on Milestones indicates an increase in skill development, decreasing scores on Barriers indicates a reduction in barriers to development.¹⁹

5. On January 31, 2023, DCPS issued Student's IEP Progress Report for the second reporting period. Witness J, his/her special education teacher reported that Student was Progressing on three Adaptive goals and had made No Progress on the goal addressing requesting things. In Communication, her/his therapist reported that Student was Progressing on all three goals. In Behavior, Witness J reported that Student was Progressing on two goals but had made No Progress on the goal of following one-step directions independently and No Progress on the goal of playing with various items. Witness J reported that s/he continued to prefer playing with her/his toys from home. In Physical, Witness E, her/his OT provider, reported that Student was Progressing on both goals.²⁰

6. On March 17, 2023, DCPS completed an IEP Annual Review meeting.²¹ The Consideration of Special Factors described Student's classroom behavior that impeded his/her learning or that of others:

[Student] demonstrates the following impeding behaviors: stereotyped behaviors (stimming), flopping to the ground, climbing on furniture, disrobing, and walking away from adults. [Student's] behaviors often take [her/his] attention away from teacher directed activities and tasks. [Student] has to be re-directed each time to classroom areas, activities, and teacher-led instruction when [s/he] engages in behaviors. [Student's] stereotyped behaviors (stimming) include flapping [her/his] hands when [s/he] is excited, or covering [her/his] ears when [s/he] is overwhelmed or not feeling well. [Student] also climbs on furniture (i.e., tables) to lay on, or goes behind shelves. [Student] also often disrobes at inappropriate times (i.e., class, playground). [Student] also engages in attempts to walk away from adults to access preferred areas (i.e., away from the playground) and sometimes makes attempts to exit the classroom by grabbing a staff's hands to let [her/him] out or by grabbing [her/his] items. Though these behaviors have decreased over the past few months. [Student] needs multiple intervention strategies and adult proximity to transition inside the classroom and within to engage in teacher-led activities and for [his/her] safety. [Student] is highly dependent from staff to remain safe, follow daily routines, transition in/out of the class, and safely access [her/his] toileting/hygiene needs. [Student] is dependent on full adult supports (partial physical supports and/or hand-over-hand) to complete tasks and engage in instruction throughout the day. [Student's] behaviors are of concern as [s/he] does not yet demonstrate safety awareness for [her/himself] or others, and they impede [her/his] learning and that of other children...

[Student] benefits from a total communication approach by using all forms of verbal and non-verbal communication (verbal language, pointing, picture exchange

¹⁸ P41:1 (424).

¹⁹ Testimony of Witness A.

²⁰ P23:1-7 (287-93).

²¹ P12:1 (132).

communication system, sign language, eye gaze, facial expression, gestures) to promote functional communication skills at school and at home. [Student] presents with significantly delayed receptive, expressive, and pragmatic language skills. This impacts [his/her] ability to effectively communicate [her/his] basic wants and needs with adults and peers. [Student] requires visual supports in order to assist with [her/his] ability to participate in the learning environment. A total communication is being implemented to improve [his/her] ability to functionally use communication. [Student's] use of picture icons to request items is dependent on [her/his] motivation and highly preferred edible/tangible items. [Student] benefits from being in a highly structured language-rich environment that focuses on enhancing [her/his] functional communication skills throughout the day in a multi-modal, predictable and structured way.

The A/T section of Consideration of Special Factors reiterated Student's use of PECS and an AAC device to communicate his/her wants and needs.²²

In Adaptive, the PLOP reported that Student has a difficult time responding to simple one-step directions, structure, and following his/her daily visual schedule. During teacher-led activities, Student often needed adult support to start, end, and remain on task. In whole group activities, s/he often needed adult support to follow class expectations (i.e., sitting down, eyes on teacher, etc.) and participate. Student was not yet toilet trained and continued to wear diapers at school. S/he removed his/her clothing at inappropriate times. The three goals from the previous IEP were virtually unchanged, but two were added: (d) tracing within ¼ inch of the lines for five different geometrical shapes (circle, square, triangle, rectangle, and star), and (e) matching upper case letters with the lower-case letters.²³ In Communication, the PLOP indicated that Student's

... [m]ain way of communicating is by guiding an adult to [her/his] preferred item and vocalizing excitement/sadness. While working on using signs and AAC, s/he requires maximal hand over hand assistance to engage. S/he requires less assistance if the task is highly preferred. [Student] has made improvements in [her/his] joint attention skills, which are needed in order to achieve [her/his] speech and language goals. Joint attention is the sharing of a common focus, such as i.e., looking at an adult/peer while playing, watching someone walk by, turning for a loud noise, etc. [Student] has shown improvements in this by demonstrating intent to communicate. [Student] shows intent by guiding an adult... [Student] typically requires hand over hand assistance to follow 1-step directive with embedded concepts during structured play tasks. For example, when asked to "put it in" or "take it out" during play, [Student] typically needs maximal support. In the classroom [Student] requires less support to follow classroom directions.

The goals were unchanged from the previous IEP.²⁴ In Behavior, the PLOP reported Student's year-end ("EOY") VB-MAPP scores during the previous school year (June 2022). The second and third goals from the previous IEP were repeated ((b) taking an icon

²² *Id.* to 2-3 (133-34).

²³ *Id.* at 4-6 (135-37).

²⁴ *Id.* at 6-9 (137-140).

and moving to the appropriate area in the classroom independently, (c) responding correctly to one-step directions), the two other goals were deleted.²⁵ In Physical, the PLOP and goals were virtually unchanged from the previous IEP.²⁶ The IEP team increased Student's OT services from the previous IEP from 120 to 150 minutes per month; the specialized instruction and S/L services were unchanged.²⁷

7. For the 2022-23 school year, Student received grades of "1" (Does Not Meet the Standard) in every subject except Art, where s/he earned a "2" (Approaches the Standard) and Health and Physical Education, where s/he earned a 4 (Exceeds the Standard). Student was absent 31 days.²⁸

8. Beginning January 21, 2023, two years prior to the filing of the *Complaint*, when Student was entitled to two hours of OT services, Service Trackers indicate that for OT services, Student was absent on February 2 and 8, 2023 and received one hour of services on February 13 and 15, 2023. On March 17, 2023, Student's OT services were increased to 2.5 hours per month. In March, Student received 2.5 hours of services. In April, School A was closed on April 10 and April 21 (Spring Break), and Student received one hour of services on April 26, 2023. In May, Student was absent on May 19th, Student received 50 minutes of services on May 24th, and May 29th was a holiday. In June, June 19th was a holiday and Student was absent on June 22, 2023.²⁹

9. Beginning January 21, 2023, two years prior to the filing of the *Complaint*, when Student was entitled to four hours of speech and language services, Service Trackers indicate that for speech and languages services, Student received one hour of services in January 2023, s/he received 2.5 hours in February, was absent on February 8, 2023 and school was closed on February 25th. In March, Student received 2.5 hours of services, s/he was absent on two attempts, and school was closed on another day scheduled for services. In April, Student received one hour of services, s/he was absent once, and school was closed once for spring break and once for teachers' professional development. In May, Student received one hour of services and was absent once. No Service Tracker for June 2023 was provided.³⁰

10. On February 26, 2024, while descending stairs, Student missed the last step and suffered a fractured tibia.³¹ Student's doctor indicated that Student could not participate in physical education or bear weight on his/her leg while recuperating and could return to school on March 4, 2024.³²

²⁵ *Id.* at 9-10 (140-41).

²⁶ *Id.* at 11-12 (142-43).

²⁷ *Id.* at 13 (144).

²⁸ P37:1-4 (400-403).

²⁹ P30:9-15 (341-47).

³⁰ P32:6-13 (357-64).

³¹ R52 (402); Testimony of Father.

³² R53 (407). Student's Attendance History indicates that s/he returned to school on March 5, 2024.

11. During the 2023-24 school year, Student scored 6.5 in September on the VB-MAPP Milestones, 17 in January, and 24 in May.³³ S/he scored 88 on the Barriers in September, 76 in January, and 77 in May.³⁴

12. On February 1, 2024, DCPS issued Student's IEP Progress Report for the second reporting period. In Adaptive, Student made No Progress in matching upper and lower case letters because it was not a preferred activity, was Progressing on the goal related to requesting items, made No Progress in hand washing, No Progress in tracing within ¼ inch of the lines, another non-preferred activity, and No Progress in toileting. In each of the areas of no progress, it was indicated that Student was unable to accomplish the goals without adult support. In Communication, Witness D, her/his provider, reported that Student was Progressing on her/his four goals. In Behavior, Student was reported to be Progressing on both goals. In Physical, s/he was reported to be Progressing on all three goals.³⁵

13. On March 1, 2024, when Student was in grade E at School A, DCPS completed an IEP Annual Review meeting.³⁶ In the Special Considerations section, Student's behavior was characterized similarly to that in the Consideration of Special Factors in the 2023 IEP. The disrobing was reported to have decreased over the past several months, Student but continued to pull his/her pants and diaper down and removed his/her socks and shoes on a daily basis. S/he needed multiple intervention strategies and adult proximity to transition in the class and within the school to engage in teacher-led activities, and for her/his safety. Student was highly dependent on staff to remain safe, follow daily routines, transition in/out of the class, and safely access her/his toileting/hygiene needs. S/he was dependent on full adult supports (partial physical supports and/or hand-over-hand) to complete tasks and engage in instruction throughout the day. In terms of communication, Student continued to use her/his AAC device to express her/his wants and needs.³⁷

In Adaptive, the PLOP reported that Student was not yet following classroom rules, routines, and activities independently, but s/he could do so with adult proximity and supports. Student was beginning to demonstrate progress with his/her visual schedule and was beginning to remain at centers for short periods of time but had difficulty following one-step directions. S/he was beginning to participate in activities such as arts and crafts and teacher-led activities with adult proximity and supports. Student had shown no improvement in toilet training. The goals continued to include (a) hand washing, and (b) responding to verbal prompts.³⁸ In Behavior, the PLOP reported that his/her 2023/24 VB-MAPP scores remained low and reflected a great deal of difficulty adjusting to new environments, limited skills to follow one-step directions, functional communication, and the use of his/her AT device was dependent on adult prompts. Student exhibited difficulties with self-regulation, identifying his/her emotions appropriately and demonstrated impeding behaviors that took his/her attention from instruction. The lone goal addressed responding to verbal prompts.³⁹

³³ P44:1 (430).

³⁴ P43:1 (428).

³⁵ P27:1-5 (317-21).

³⁶ P13:1 (151).

³⁷ *Id.* at 2 (152).

³⁸ *Id.* at 3-5 (153-55).

³⁹ *Id.* at 6 (156).

In Physical, the PLOP reported that Student resisted pre-writing activities; s/he required hand-over-hand guidance to imitate prewriting strokes and continued to use a palmar grasp when holding a writing utensil. Student was reported to make progress towards in sustaining engagement in structured tasks. S/he continued to require moderate support during tasks involving bilateral coordination and crossing the midline of the body. Student demonstrated improved tolerance transitioning from the classroom to her/his occupational therapy sessions. S/he demonstrated the ability to respond to one-step verbal directions when coupled with visual demonstration in approximately 50% of opportunities in a 1:1 environment but required individualized support to maintain attention to whole group instruction. S/he demonstrated self-directed tendencies and will protest (i.e., whining, crying, etc.) when presented with an activity that was not preferred. The goals addressed (a) tracing the letters of his/her first name independently, (b) following along with ten minutes of teacher directed instruction, and (c) independently threading his/her arms through the sleeves of an upper body garment.⁴⁰ In Communication, Student was improving in his/her use of signing to request things, but often needed a verbal prompt or model beforehand. S/he required less assistance if the task was highly preferred and had shown improvement in demonstrating his/her intent to communicate by guiding an adult. S/he typically required hand-over-hand assistance to follow one-step directives, typically needing maximal support. In the classroom Student required less support to follow classroom directions. The goals were largely unchanged from the previous IEP: (a) using a total communication approach to request objects or actions, (b) following simple and routine one and two-step directives (up from one-step in the previous IEP), and (c) using core vocabulary words meaningfully using total communication.⁴¹

The IEP team reduced Student's speech and language services from four hours per month to three hours; the specialized instruction and OT services were unchanged.⁴² The meeting notes reflect that Petitioner agreed with the IEP.⁴³

14. During the 2023-24 school year, the Service Tracker for OT Services was incomplete as the dates for each session were not consistently provided.⁴⁴ For S/L services, data was available beginning on December 5, 2023. Student received one hour of services in December 2023, 1.5 hours in January 2024 (school was closed due to snow on January 16th), 40 minutes in February, and no recorded services in March while recuperating at home from a fractured leg.⁴⁵

⁴⁰ *Id.* at 7-9 (157-59).

⁴¹ *Id.* at 10-12 (160-62).

⁴² *Id.* at 13 (163). Other Classroom Aids and Services included adult support to transition within the class and school - Individual visual schedule - Consistent routines - Total communication approach verbal and non-verbal (i.e., eye gaze, pointing, etc.) - First/Then board around the classroom to follow during centers - First/Then language - Prompt Fading Strategies (hand over hand, verbal prompts, gestures, visuals etc.) - Intensive Trial Teaching - Visual Timers/countdowns - Classroom visuals - Toileting step-by-step visuals - Washing step-by-step hands visuals - Arrival/Departure step-by-step visuals - Meal table visuals - Language modeling - Alternate seating (e.g., trampoline, preferred red couch chair, bean bag) - Social stories - Behavior Momentum - Adult and visual support to respond to questions or make requests - Child proof door locks for her/his safety in the class - Bike locks on the playground for her/his safety - Simplified language/directions - Wait time to process and respond - Repetition - Explicit instructions of academic and social skills - Small group instruction - Break board with highly preferred options - Social Reinforcers - Edible Reinforcers - Extended practice for newly learned skills - Re-teaching of previously learned skills - Basic American Sign Language (i.e, help, more, toilet, water) - Adult and Peer models.

⁴³ P17:9 (257).

⁴⁴ P31:1-2 (349-50).

⁴⁵ P33:1 (366).

15. For the 2023-24 school year, Student received grades of “1” (Does Not Meet the Standard) in every subject except Art, where s/he earned a “2” (Approaches the Standard) and Health and Physical Education, where s/he earned a 4 (Exceeds the Standard). Student was absent 39 days.⁴⁶

16. On December 16, 2024,⁴⁷ Examiner A conducted a Psychological Triennial Reevaluation. It was reported to Examiner A that Student had improved in her/his adaptive skills like toileting independently, communication, and decreasing her/his level of frustration when asked to engage in pre-academic activities. Student was not able to speak independently; s/he used an Augmentative Alternative Communication (“ACC”) device to communicate his/her requests. When s/he gets aggravated while completing a task, Student may cry or flap his/her hands.⁴⁸ Examiner A attempted to administer the Test of Nonverbal Intelligence (“TONI-4”) due to her/his language deficits, but Student would not engage, and efforts to administer the test were discontinued.⁴⁹ Examiner A also administered a subtest of the Woodcock Johnson test of Early Cognitive and Academic Development (ECAD), but did not provide a comparison of Student’s performance to her/his same-age peers. In a classroom observation, Student was crying and flapping his/her hands, but with encouragement and praise s/he completed the activity. Examiner A noted that on her/his Term 1 Report Card. Student’s grades were Below Basic in every subject except Health & Physical Education, in which s/he earned a grade of Proficient.⁵⁰ Examiner A concluded that Student remained eligible for services as a student with ASD:

Based on the results of this evaluation, [Student] continues to be eligible for specialized services under the classification of autism spectrum disorder (ASD). [Student’s] limited attention span and low tolerance for frustration make it difficult for [her/him] to engage in academic activities and to participate in standardized testing. Informal testing showed an increase in [Student’s] number recognition compared to [her/his] last assessment, but the rate of progress is slower than expected due to [Student’s] difficulties sustaining [his/her] attention. Additionally, due to [his/her] communication differences, informal assessments are a better measure of [Student’s] progress as standardized assessments rely heavily on expressive and receptive language...⁵¹

17. On December 20, 2024, DCPS completed a Comprehensive Occupational Therapy Reevaluation. Student was referred to Witness E for an assessment of concerns regarding his/her self-regulation, sensory processing skills, visual motor skills, fine motor skills, and adaptive daily living skills during structured classroom activities. Student was in grade C at School A and was assigned to a self-contained CES classroom with students in grades H through C.⁵² Student’s special education teacher, Teacher A, reported that Student could use his/her AAC device when prompted to request preferred food items, could remove her/his shoes and clothes independently, could rip her/his diaper from the sides when provided a verbal and gestural prompt,

⁴⁶ P38:1-4 (406-409).

⁴⁷ P8:1 (79). Examiner A signed the evaluation on January 13, 2025. *Id.* at 7 (85).

⁴⁸ *Id.* at 1 (79).

⁴⁹ *Id.* at 4 (82).

⁵⁰ *Id.* at 5 (83).

⁵¹ *Id.*

⁵² P9:1-2 (87-88)

could match identical items, eat his/her food with his/her fingers or a fork when prompted, and open her/his juice with verbal prompting, but required prompting from adults in order to follow directions and classroom routines. Student did not like loud noises, crowded areas, arts & crafts, teacher led activities, and whole group activities.⁵³ Witness E considered the results of the evaluation to be valid, but stated that the results “should be interpreted with caution as [Student] was unable to complete many of the standardized assessments according to protocol due to difficulty understanding the verbal directions, lack of motivation, and some self-directed tendencies.”⁵⁴

Student’s responses to various sensory experiences were measured on the Sensory Processing Measure (“SPM-II”) and was completed by Teacher A. Student’s T-Scores were in the Severe Difficulties range in all areas: Social Participation (78). Vision (80), Hearing (80), Touch (80), Body Awareness (75), Balance and Motion (78), Planning and Ideas (80), and Total Sensory System (80).⁵⁵ The Beery-Buktenica Development Test of Visual-Motor Integration (“VMI”) assess the extent to which the student can integrate his/her visual and motor abilities. Student’s standard score of <45 was in the Very Low range, and the test was discontinued when Student was unable to copy three figures when presented with a visual model. Student was also unable to complete the Visual Perception and Motor Coordination subtests.⁵⁶ The Bruininks-Oseretsky Test of Motor Proficiency (“BOT-2”) measures a wide array of motor skills. On the Manual Dexterity Subtest, Student’s scale score of 1 was Well Below Average.

Witness E made a number of clinical observations: Visual Tracking – s/he was unable to sustain attention on a moving stimulus; Eye Contact – s/he demonstrated intermittent eye contact when engaging with school staff and peers, the most when requesting something or advocating for help on a task; Muscle Tone – within functional limits; Range of Motion – adequate in upper and lower extremities; Muscle Strength – within functional limits; Motor Planning – required moderate support in order to motor-plan when presented with novel multi-step tasks (threading her/his arm through the sleeve of her/his coat); Postural Control – adequate; Fine Motor Skills – s/he presented with immature prehension patterns with holding school based tools and manipulatives such as a fist power grasp on writing utensils; had not established a hand preference; required support for container management skills and clothing fasteners; Visual Perceptual Skills – could discriminate and differentiate between visual stimuli; able to choose an alphabet letter from an array of options when prompted; Bilateral Coordination – intermittently used his/her supporting hand to stabilize his/her paper during pre-writing activities; required hand-over-hand support in order to operate scissors; Handwriting – utilized an immature, fist power grasp on writing utensils; was not yet imitating prewriting strokes.⁵⁷

Witness E concluded that Student “demonstrates profound delays in sensory processing skills, self-regulation, and motor skills which impact his/her ability to access the general education curriculum. S/he requires individualized support in order to utilize school-based manipulatives functionally and safely.” She recommended the use of one-step directions with Student to ensure

⁵³ *Id.* at 3-4 (89-90).

⁵⁴ *Id.* at 6 (92).

⁵⁵ *Id.* at 6-7 (92-3).

⁵⁶ *Id.* at 9-10 (95-6).

⁵⁷ *Id.* at 11-13 (97-99).

comprehension of what is expected of her/him. She also recommended the continued use of her/his individualized visual schedule to prepare her/him for upcoming classroom activities, encouragement to use her/his AAC device, and embedding regular sensory breaks (jumping on a trampoline, bouncing on a therapy ball, popping bubbles, etc.) into Student daily classroom routine before highly structure activities.⁵⁸

18. On December 20, 2024, Witness C completed a Speech and Language Reevaluation of Student.⁵⁹ Teacher A reported that that Student's strength was requesting help when needed. Student requires increased support with managing emotion, using coping strategies, and communicating wants and needs. Teacher A stated that task avoidance was Student's greatest challenge; s/he requires multiple prompts to complete tasks. Student uses an AAC device to communicate, so fluency and articulation "were unable to be judged at this time."⁶⁰

The *Communication Matrix* is an evidence-based assessment tool, based on descriptions of the child's behaviors to determine how the child is communicating using multiple modalities, including AACs. Communication behaviors are deemed to be Emerging or Mastered. In the Seven Levels of Communication, Student was found to have Surpassed the first two levels, Pre-Intentional Behavior and Intentional Behavior, to have Mastered Unconventional Behavior, Emerging to Mastered in Conventional Behavior, Emerging in Concrete Symbols and Abstract Symbols, and Not Yet Used in Language.⁶¹ Student was found to have attained 40% of mastery in using communication to refuse things, 50% of mastery to obtain things s/he wants, 23% of mastery in social interaction (greeting people, directing attention to something, etc.), and 0% of mastery in seeking information.⁶²

Witness C concluded that Student presents with delays in language and communication that negatively impact his/her communication skills in the classroom setting as s/she interacts with peers, participates in the general education curriculum, and expresses his/her wants and needs:

Per teacher response to survey questions, [Student's] strengths in the classroom lie primarily with requesting assistance. This was supported by results of the Communication Matrix, wherein strengths included protestation and obtainment. [Student] can use a variety of communication methods to protest or request: vocalizations, gestures, facial expressions, concrete/abstract symbols. In this area, [Student's] communication is especially strong related to preferred snacks. [S/he] has emerging skills in naming objects, using symbols to make choices, and engaging social interactions. Across several levels of communication, [Student] does not yet answer/ask questions or make comments on an object or activity.⁶³

Witness C stressed the need to (1) ensure the constant availability of Student's AAC device, (2) modeling communication modes, (3) modeling what Student wants to say on his/her device, (4) modeling a variety of communication purposes (commenting, sharing

⁵⁸ *Id.* at 15 (101).

⁵⁹ P10:1 (103).

⁶⁰ *Id.* at 4 (106).

⁶¹ *Id.* at 5 (107).

⁶² *Id.*

⁶³ *Id.* at 9 (111).

information or feelings, refusing, asking questions), and (5) responding to all communicative output by Student.⁶⁴

19. [Student] On December 19, 2024, DCPS developed a Functional Behavior Assessment (“FBA”) that it amended on January 23., 2025. A Behavior Intervention Plan was developed on January 24, 2025.⁶⁵ The Targeted Behaviors were Task Refusal/Non-Compliance and Tantrums. The antecedent events for tantrums were being denied a request for an item, seeing another person with a desired item, being given a direction or task, facing a challenging task or activity, having a preferred activity interrupted or terminated, receiving a reprimand, and receiving a physical prompt to complete a task.. The antecedent events for task refusal were denied request for an item, receiving a direction or a task, facing a challenging task or activity, having a preferred activity interrupted or terminated, receiving a reprimand, initiating a social interaction, and receiving a physical prompt to complete a task.⁶⁶ The strategies to help Student learn replacement behaviors included Ongoing Preference Assessments, Increased Positive Praise, Clear, concise language and expectations, Visuals, and Functional Communication Training for Access to Preferred Items/Activities and Escape (Breaks).⁶⁷ Incentives were Electronics (iPad, videos, games), Edibles, and Sensory Items (cause and effect toys, fidgets), Swing Time, and Bouncing Ball).⁶⁸

20. On March 19, 2025, DCPS sent Petitioner an authorization for thirteen hours of independent speech and language therapy.⁶⁹

21. Petitioner testified that Student has limited communications skills; s/he cannot consistently say words and uses gestures to communicate. S/he cannot hold a crayon properly, cannot tie her/his shoes and is very sensitive to loud noises and crowded rooms. Student has “big struggles” with toileting. Petitioner attributed many of Student’s absences during the 2022-23 school year to private Applied Behavior Analysis treatments s/he was receiving. Petitioner wanted Student to attend those sessions every Friday but School A would not allow it. Petitioner testified that s/he was concerned about the class size, which she believed to be ten students. In her opinion, Student was not getting enough attention; “It was like sending [her/him] to daycare.” Petitioner had safety concerns, noting that s/he fell down the stairs and broke her/his leg; Petitioner believed someone should be holding Student’s hand when negotiating stairs. Petitioner applied for and received home instruction for Student while s/he recuperated from the leg fracture, including specialized instruction, occupational therapy services, and speech and language services. Petitioner testified that the OT therapist only came one time, the speech therapist only came three times, and the tutor came “a handful of times,” then said the tutor only missed one session, but said the tutor did tutoring. Petitioner could not recall how long Student received home services before returning to school. Petitioner asserted that Student has made no progress in three years at School A because there are too many students in the class.

⁶⁴ *Id.*

⁶⁵ P35:1 (375).

⁶⁶ *Id.* at 7 (381).

⁶⁷ *Id.* at 17 (391).

⁶⁸ *Id.* at 18 (392).

⁶⁹ R55 (Supplemental Disclosure); R36 (297).

On cross-examination, Petitioner conceded that Student received no academic instruction during his/her private ABA therapy sessions at home. Student sometimes has balance issues when s/he walks. S/he bites, spits, and disrobes spontaneously at home, but Petitioner conceded that the disrobing has decreased at school. Petitioner testified that Student has also received private speech and language services for four years. The private speech therapist has not recommended that DCPS increase the level of services.⁷⁰

22. Witness A was Petitioner's Educational Consultant, a board-certified behavior analyst ("BCBA"). As previously noted, she was admitted as an expert in behavior analysis. She explained that the principles of ABA include gaining an understanding the antecedents and consequences of behaviors and implementing function-based strategies to ameliorate the behaviors. In her observations of Student, s/he was sensitive to noise and was nonverbal. Witness A testified that Student's VB-MAPP scores from the 2022-23 to the 2023-24 school year evinced regression in Student's development. She stated that based on the VB-MAPP, Student has severe deficits across a majority of the domains and is functioning at the 0-18 months age level. Witness A opined that Student requires an FBA and a BIP that addresses prompt fading (reduction over time), generalization (i.e., the ability to advocate for her/himself in various environments), and sensory issues. She opined that Student's IEPs lacked necessary goals for play and social skills. Witness A also opined that Student needed a dedicated aide to assist with safety concerns and to redirect Student from maladaptive behaviors. She also opined that the IEP was inappropriate because repeated goals on IEPs indicate a lack of progress. Witness A added that the IEP should have included behavior support services ("BSS") to address safety concerns, eloping, and issues raised in the FBA and BIP.

Witness A developed a Compensatory Education Plan for Student.⁷¹ Witness A testified that the harms suffered because of the denial of FAPE were the lack of appropriate IEPs, the lack of academic progress, and the lack of an FBA and a BIP. The period of harm was from January 2023 to the present. When asked how much progress Student should be expected to make, based on her experience, Student would master 75% of the skills in Level 11 on the VB-MAPP. Witness A proposed that Student be awarded 350 hours of tutoring, 100 hours of speech services (for 61 hours missed), 50 hours of occupational therapy services (for 15 hours missed), 400 hours of ABA therapy, 50 hours of BSS, a dedicated aide, and parent training.

On cross-examination, Witness A conceded that she had never observed Student in class. In response to my questions, conceded that she was not conversant with the requirements of *Reid v. District of Columbia*.⁷² She offered no explanation of how she arrived at 350 hours as an appropriate amount of tutoring. The 400 hours of ABA therapy was based on Student's current needs and the "typical" amount of weekly services, five to forty hours. The 50 hours of BSS services was "what there should have been."⁷³

⁷⁰ Testimony of Petitioner.

⁷¹ P65:1 (571).

⁷² 401 F.3d 516 (D.C. Cir. 2005).

⁷³ Testimony of Witness A. Witness A offered additional opinions in areas in which she was not qualified as an expert including special education, speech and language services, and OT services. She also was not qualified to develop a compensatory education plan, having no expertise in special education or psychology. However, I admitted her plan into evidence because it was the only proposal Petitioner was prepared to offer. At the very least, the author of a compensatory education proposal must know the requirements of *Reid*.

23. Father testified that he has talked to School A staff “all the time” about Student’s need for a dedicated aide but conceded that he has observed Student “barely” more than ten times in the classroom. He was told that Student broke his/her tibia when s/he missed the last step while descending a staircase. Father testified that Student’s gait has always been “a little off.” When asked if he knew if Student was getting all of his/her OT services, Father conceded that he was not sure. When asked why he was seeking a new placement, he said it was because School A was “out of date” and “they don’t have the proper equipment.” On cross-examination, Father testified that Student has always walked with a limp. He conceded that he was unaware that there were four staff members in Student’s class.⁷⁴

24. Witness C was a speech and language therapist at School A. She conducted the December 20, 2024 Speech and Language Reevaluation of Student and began providing direct services to Student at the beginning of the 2024-25 school year, one-on-one for three hours per month. She testified that she discussed Student’s treatment and development with Student’s private speech therapist in September or early October 2024. Consistent with the private therapist’s advice, Student uses his/her AAC device, his/her “most efficient mode of communication,” in therapy sessions at School A. Witness C reported that Student can make verbal requests and use sign language, but Student is “adept” making requests with his/her AAC (an iPad), which, for her/him, “is more robust and gives [her/him] access to language and communication.” Witness C discussed with Student’s special education teacher the importance of the device always being readily accessible to Student. Witness C testified that Student does not need support making requests because of her/his facility with the iPad. S/he does need support for other pragmatic functions, but Witness C stated that Student has made steady progress using a variety of modalities. She cited the ability to make requests independently, using more core vocabulary, and following one and two-step directions as areas in which Student has made progress. When asked if three hours of services per month were sufficient, Witness C opined that it was: s/he was progressing, his/her tolerance level for individual therapy was limited – by the end of sessions s/he will stop responding, and s/he has been absent a considerable number of times when Witness C has come to pull Student out of class for services. Witness C testified that she had not witnessed crying or tantrums except for one occasion when one of Witness C’s sessions had to be terminated. S/he opined that Student has progressed significantly since s/he was evaluated in 2019; “[S/he’s] learned quite a few strategies, pointing, verbal words, and use of the AAC device.” As for missed services, Witness C testified that compensatory speech services were offered at a recent eligibility meeting. On cross-examination, Witness C testified that she reduced Student’s sessions to 30-45 minutes because of her/his lack of participation in the latter half of hour-long sessions. “[S/he’s] more tolerate for a higher percentage of the time” in shorter sessions.⁷⁵

25. Witness D was another speech and language therapist at School A. She began providing direct services to Student in November 2023. At that time, Student was receiving four hours of services per month. Witness D’s therapy focused on improving Student’s ability to request things and using her/his AAC device. Witness D conceded that the first Communications goal in the March 1, 2024 IEP, relating to requesting, was similar to the first goal in Student’s March 17, 2023 IEP, while the third goal, relating to following directions, added two-step directives to the one-step directives in the 2023 IEP. She testified that the goals were repeated because Student had

⁷⁴ Testimony of Father.

⁷⁵ Testimony of Witness C.

not mastered them. She supported reducing Student's service hours to three hours per month because s/he lacked tolerance for longer service sessions. Witness D testified that on at least five occasions, Student was absent when she came to pull him/her out of class for speech services. On redirect testimony, Witness was directed to the Student Attendance History⁷⁶ and testified that Student was absent nine times in May and June 2024.⁷⁷

26. Witness E was Student's OT service provider at School A. During the 2022-23 school year, she focused on Student's pre-writing skills and joint attention (with Student's teacher), providing Student hand-over-hand support. Student's improvement during the 2022-23 was "incremental." There was little carry-over from session to session, requiring constant re-teaching of skills. Witness E was in and out of Student's classroom on a daily basis. She never noticed any imbalance in Student's gait prior to her/his fall down the steps. She conceded that the OT goals in the 2023 IEP were unchanged although the terms of measurement were changed. Student's service hours were increased from 120 to 150 minutes per month to increase her/his stamina. Witness E testified that Petitioner expressed no concerns about the OT provisions of the 2023 IEP. Student's sessions were 30-60 minutes long, but s/he would get frustrated near the end of sessions. On the 2024 IEP, Witness E added the goal of Student independently threading her/his arms into upper body garments. Witness E testified that Petitioner expressed no concerns about the OT provisions of the 2024 IEP. Witness E opined that the goals and service hours on the 2024 IEP were appropriate for Student and that additional independent services were not necessary.⁷⁸

27. Witness F was a BCBA at School A who was assigned to Student's classroom. She was available to assist the special education teacher with any instances of maladaptive behaviors exhibited in the classroom. Witness F testified that she saw Student on a daily basis. She conducted three formal observations of Student for the FBA that was developed in December 2024. Student requires considerable redirection and "proximity priming" to give her/him advanced notice as to what is about to be covered in class. Strategies used in the classroom with Student included prompting, prompt fading, positive reinforcement, redirection, generalization, environmental training, discrete trial training, visual supports, and chaining (step-by-step direction such as how to brush teeth). Although the IEP team requested that she develop the FBA, she had not observed behaviors by Student that warranted an FBA; his/her maladaptive behaviors were not extreme, they were already using strategies that were supporting him/her, and the maladaptive behaviors (specifically referring to walking away from adults during non-preferred activities) did not occur at a frequency that would warrant an FBA. When asked when an FBA would be needed, Witness F stated (a) unsafe behaviors, (b) extreme behaviors, and (c) strategies not working. Witness F testified that the strategies they were using were working with Student: s/he was able to transition with prompting, and with proximity priming, prompting, and reinforcement, s/he has been able to participate in class. Witness F testified that she learned nothing new about Student developing the FBA. On cross-examination, Witness F testified that she has never seen Student disrobe, flopping on the floor, or climb on furniture, but she has seen him/her react to loud noises. When I asked Witness F why ASD students are assigned to CES classrooms, she responded that it was due to the low student to teacher ratio and the use of ABA principles.⁷⁹

⁷⁶ P58:1-2 (476-77).

⁷⁷ Testimony of Witness D.

⁷⁸ Testimony of Witness E..

⁷⁹ Testimony of Witness F.

28. Witness G was School A's Assistant Principal. She testified that three educational aides reported how Student suffered his/her leg fracture; they were accompanying her/him at the time. Student was descending the staircase across from Witness G's office when s/he missed the last step and fell. The aides helped Student into Witness G's office and Petitioner was notified. When it was subsequently determined that Student would recuperate from the injury at home, Witness G informed Petitioner of DCPS' Home and Hospital Instruction Program ("HHIP"), which provides services to students who are unable to attend school for medical reasons.⁸⁰

29. Witness H was DCPS' Manager of Academic Supports Program. She manages DCPS' HHIP. She testified that instruction in the home is adjusted to reflect that it is provided one-on-one instead of to a larger classroom audience. No IEP meeting is held because it is anticipated that the services will be temporary. Staff Member A was assigned to provide OT services, Staff Member B was assigned to provide S/L services, and Staff Member C was assigned to provide tutoring services. Staff Member C reported to Witness H that providing services to Student in the home was complicated by Student's distractibility and access to items readily accessible in the home. Staff Member B reported that Student was swatting and throwing things during the sessions. Witness A reported that Student was reluctant to engage in the sessions. Witness H conceded that all of the providers missed some sessions, but some of these were attributed to Petitioner indicating that Student would not be available. Witness H testified that when Staff Member B attempted to make-up missed services, Petitioner did not make Student available. On cross-examination, Witness H conceded that Staff Member C was supposed to provide services three days per week for thirty minutes.⁸¹

30. Witness J has been Student's special education teacher at School A for the past three years. The profile of CES students is primarily ASD students, but includes students classified with developmental delay ("DD"), communications delay, and cognitive delay. During the 2022-23 school year, her classroom included eight students, two paraprofessionals, and one dedicated aide. Student's ASD affects her/his communication, attention, social skills, organization skills, executive functioning, repetitive behavior, hand washing, and toileting. When asked what strategies were employed that year, Witness J replied: consistent routines, a visual schedule, A/T, seating modalities, a trampoline, a beanbag, sign language, PECS, a sensory board, and an individualized schedule. The primary behavioral concern was disrobing. The typical response was redirection with direct support and use of preferred activities including snacks, pluffle, a bean bag, and seating on the couch. Transitions were difficult at the beginning of the year because his/her classmates were unfamiliar to him/her, but with a consistent approach and a visual schedule, s/he improved throughout the year. Witness J gave a similar report as to Student's following directions; with verbal prompting and hand over hand support s/he improved. She recalled that Student would flap his/her hands and cover his/her ears, behavior stereotypical of ASD students. Student would also flop onto the ground, walk away from staff if s/he did not want to do something, and would climb onto tables. The responses in these instances were to redirect him/her with verbal prompts and gestures to which s/he responded well. Witness J had no concern for Student's safety because the behaviors were stereotypical of ASD students and s/he was amenable to redirection. When asked why there were no academic goals on Student's 2023 IEP, Witness J testified that Student did not have the sustained attention to accomplish academic goals. When asked why there were no

⁸⁰ Testimony of Witness G.

⁸¹ R28 (274); Testimony of Witness H.

social/emotional goals, she testified that the staff implemented CES strategies to address stereotypical behaviors. Witness J testified that neither the parents nor the staff recommended the need for a dedicated aide; s/he did not need a dedicated aide because s/he was responding to the strategies. His/her climbing on tables was not a safety concern because s/he would simply lay on the surface, which was only 2-3 feet off the ground, and did not attempt to stand or jump off the table. When asked if Student had made progress under the prior IEP, Witness J testified that s/he stopped disrobing, whining decreased, and improved in requesting items, tracing, toileting, and identifying upper and lower case letters. Witness J testified that the parents did not object to the 2023 IEP.

In school year 2023-24 Witness J's classroom included seven students, two paraprofessionals and a dedicated aide. When asked why the 2024 IEP did not include academic goals, she stated it was due to Student's absences and the fact that s/he remained at Level 1 on VB-MAPP assessments. She testified that Student's functioning level is that of a "younger child." Nevertheless, Student was exposed to an academic environment in the classroom. Witness J testified that Father requested a dedicated aide at the 2024 IEP meeting, but the staff ultimately decided that Student did not need one because s/he was still responding to the strategies. Goals were repeated from the prior IEP because they had not been mastered, but they were still appropriate for the new IEP because Student was still progressing. Absences were a factor in Student's progress due to a lack of consistency of skill instruction; s/he was not coming to school on Fridays so that s/he could receive private ABA therapy. Witness J opined that Student's Milestone score improvement in 2022-23 from 6.5 to 13 was a significant improvement for him/her.⁸²

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program 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.⁸³

⁸² Testimony of Witness J.

⁸³ D.C. Code § 38-2571.03(6)(A)(i).

The issues in this case involve the alleged failure of DCPS to provide appropriate IEPs and placements. Under District of Columbia law, DCPS bears the burden of persuasion as to these issues. Petitioner bears the burden as to all other issues.⁸⁴

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on March 17, 2023, which was amended on April 11, 2023. Specifically, Petitioner asserts that the IEP was inappropriate because (a) occupational therapy (“OT”) services should have been increased given his/her limited progress, (b) additional supports and training should have been included in the assistive technology (“A/T”) section of the IEP, (c) a dedicated aide should have been considered, (d) behavioral support services (“BSS”) and/or services from a board certified behavior analyst (“BCBA”) should have been added in light of behavior concerns, (e) the IEP was not based on comprehensive evaluative data; (f) Student required a more restrictive educational environment in light of his/her lack of progress and evidence of regression, and (g) goals for academic areas like Reading; Mathematics; and Written Expression should have been added.

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁸⁵ The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”⁸⁶ Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”⁸⁷ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁸⁸

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁸⁹ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁹⁰ The Court rejected the Tenth

⁸⁴ *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁸⁵ 458 U.S. 176, 187 (1982).

⁸⁶ *Id.* at 189-90, 200

⁸⁷ *Id.* at 200.

⁸⁸ *Id.* at 203-04.

⁸⁹ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁹⁰ *Id.* at 997.

Circuit's interpretation of the state's obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁹¹

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When 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. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."⁹²

Petitioner offered her testimony along with that of Father and a BCBA to make her *prima facie* in this cause. Petitioner testified that Student's class sizes were too large and Student was not getting enough attention. Father testified that he has talked to the school "all the time" about the need for a dedicated aide. Witness A, Petitioner's educational consultant, testified that the IEP was inappropriate because Student needed a dedicated aide for safety concerns and to redirect her/him from maladaptive behaviors. She also cited the lack of goals in playing and social skills and Student's lack of progress as proof of the inappropriateness of the IEP.

Class Size

Petitioner testified that the IEP was inappropriate because the class size was too large and Student was not getting enough attention. In fact, Witness J testified that during the 2022-23 school year, there were only eight students in the class, and Witness J had two paraprofessionals assisting her along with a dedicated aide for one of the other children. Thus, both the student to teacher ratio, 8:1, and student to staff ratio, 8:3, were optimal and facilitated individualized attention and prompt redirection as needed.

Behavior Support Services

Petitioner asserted in the *Complaint* that BSS and/or services from a BCBA should have been added in light of behavior concerns. Witness A, Petitioner's behavioral expert, testified the

⁹¹ *Id.* at 1000-01 (citations omitted).

⁹² 137 S.Ct. at 1000-01.

Behavior goals in the IEP were deficient for failing to address playing and social skills. This testimony is oblivious to the fact that the CES classroom to which Student was assigned was designed to address stereotypical behavior of students on the autism spectrum. The class size is small, there was a teacher and two paraprofessionals available to redirect any maladaptive behaviors that might arise throughout the day. Moreover, Witness F, a BCBA, was in the classroom daily to ensure that ABA principles were being observed. BSS services are normally added to an IEP to have a social worker pull a student with severe behavioral issues out of class one to four hours a month to address behavioral goals. However, DCPS elected to create CES classrooms for students on the autism spectrum who have severe developmental delays. There is no reason to pull the student out of class to work on behavioral goals if the special education teacher, in collaboration with a BCBA and two paraprofessionals are using ABA principles and the Classroom Aids and Services designed specifically for CES classrooms, throughout each school day. Witness F, who saw Student on a daily basis, testified that Student requires considerable redirection and “proximity priming” to give her/him advanced notice as to what is about to be covered in class. Strategies used in the classroom with Student included prompting, prompt fading, positive reinforcement, redirection, generalization, environmental training, discrete trial training, visual supports, and chaining. While the Behavior section of the 2023 IEP does not include specific goals for play time, it does include goals for transitioning and following one-step directions. With Student being nonverbal and at her/his current level of cognitive development, these goals certainly contribute to Student’s social development.

Safety/Dedicated Aide

While the need for a dedicate aide was mentioned in the *Amended Prehearing Order*, Petitioner’s focus on the IEP’s failure to address safety concerns was not. Nevertheless, the only evidence offered for the need for a dedicated aide was Witness A’s testimony that a dedicated aide would provide an extra measure of safety for Student. The record does not support a finding that School A was unsafe for Student or that s/he regularly engaged in unsafe behaviors. Rather, the record supported that because of his/her low cognitive functioning, Student had little “safety awareness” as documented in the Consideration of Special Factors. However, there was no evidence that Student’s behavior in the classroom endangered her/himself or others. The only *potentially* unsafe behavior that received considerable attention in the IEP was Student’s proclivity to climb onto furniture. However, Witness J, her/his special education teacher, explained that he would climb on a table that was 2-3 feet off the ground to lay on it, and did not stand or jump off the table. As discussed above, the low student-to-staff ratio and the reliance on ABA principles obviated the need for a dedicated aide for a child with Student’s profile; his/her behaviors were stereotypical of those for whom the CES classroom was designed and were not inherently unsafe or unmanageable by the staff.

OT Services

Petitioner asserts that OT services should have been increased due to Student’s limited progress. In fact, the IEP team increased Student’s OT services from 120 to 150 minutes per month. Petitioner offered no expert testimony that that the increase was necessary or insufficient. However, Witness E, who proposed the increase, testified as to diminishing returns the longer Student remains

in an individual therapy session. She also testified that Petitioner expressed no concerns about the OT section of the IEP at the IEP meeting.

Assistive Technology

Petitioner offered no expert testimony that the IEP was deficient for failing to address Student's need for A/T. In fact, the record supports a finding that because Student is nonverbal, s/he relies most heavily on an AAC device to communicate his/her wants and needs. The record also indicates that the staff routinely prompts her/him to use the device. Witness C, Student's speech therapist made a point of advising Witness J to ensure that Student's device is always readily available, because it is her/his most efficient means of communication.

IEP Not Based on Comprehensive Evaluative Data

Student's Triennial Reevaluation was conducted in 2022. Examiner A stated that "Due to [Student's] communications needs as well as [her/his] need for hand over hand support when engaging in academic tasks a formalized achievement assessment was not administered." Petitioner offered no expert testimony that Examiner A's decision not to administer achievement test was inappropriate. At no time has Petitioner availed herself of the option to challenge the appropriateness of that evaluation under 34 C.F.R. Section 300.502(b). Moreover, she did not offer testimony from an expert witness to challenge the comprehensiveness of Examiner A's evaluation. Most important, Student's scores on the VB-MAPP, as to which Petitioner's educational advocate testified in detail, provided the IEP team ample data to evaluate Student's functional performance level. The VB-MAPP data was discussed in the Behavior section of the IEP.

Goals in Math, Reading, and Written Expression

Student's performance on the VB-MAPP revealed that s/he was functioning at the level of a 0-18 months-old infant. For this reason, Examiner A elected not to administer achievement tests. It was also for this reason that the IEP team elected to focus on Student's functional development rather than his/her academic development. Student is not only nonverbal, s/he also requires prompting to use his/her AAC device, his/her only efficient mode of communication. S/he is responsive to redirection, but it is required throughout the day. Witness J, Student's special education teacher for the past three years, opined that Student did not have the sustained attention to accomplish academic goals. Petitioner offered no persuasive testimony, expert or lay, to refute the opinions that Student was not yet capable of accomplishing academic goals.

Student required a more restrictive educational environment in light of his/her lack of progress and evidence of regression

Petitioner's primary argument that Student was not making progress is the IEP team's repeating goals from year to year. However, the only objective measures of Student's performance, the VB-MAPP, refute the suggestion that s/he was not making progress under the 2022 IEP. During the 2022-23 school year, Students Milestone scores increased from 6.5 in October 2022 to 11 in February and to 13 after the 2023 IEP was developed. Increasing Milestone scores indicate improvement in skill development, although Student remained at Level 1 in overall performance. On the Barriers, Student's scores decreased from 90 in October to 73 in February, a positive development because it indicated a reduction in barriers to

development. When I asked Witness J if the increase in Student's Milestone score was significant, she replied that for Student, at his/her level of functioning, it was. In January 2023, DCPS issued Student IEP Progress Report for the second reporting period. Student was progressing on most of her/his goals and her/his providers gave reasons why s/he was not progressing on others. Goals were repeated or modified minimally on the 2023 IEP where Student was not making significant progress, but new goals were also added. All of Student's service providers who testified asserted that s/he has made progress since coming to School A. Witness C opined that Student has progressed significantly since s/he was evaluated in 2019; "[S/he's] learned quite a few strategies, pointing, verbal words, and use of the AAC device." Witness D, another speech therapist noted that one of Student's goal of following one-step directions was upgraded by adding two-step directions in 2023. Witness E, Student's OT provider, conceded that Student's progress was incremental, but Witness E increased Student's service hours from 120 to 150 minutes per month. Witness J, Student's special education teacher for three years, testified that during the 2022-23 school year, Student stopped disrobing, whining decreased, and s/he improved in requesting items, tracing, toileting, and identifying upper and lower case letters. Witness J also testified that the parents did not object to the 2023 IEP. The only expert testimony that Student is not making progress is from Witness A, Petitioner's educational consultant, who is not an expert in special education and who has never observed Student in class. Moreover, Petitioner offered no testimony from an even more restrictive non-public facility willing to suggest that it could improve on School A's performance with Student.

While Student's progress is slow and unsatisfying to her/his parents, his/her progress during the 2022-23 school year appears to have been meaningful in light of his/her particular circumstances: nonverbal, requiring constant prompting to remain engaged, relying on an AAC device to communicate wants and needs, and functional at the level of an 18-months-old infant. For all of these reasons, I conclude that DCPS has met its burden of proving that the IEP it developed on March 17, 2023 was reasonably calculated for Student to make progress consistent with his/her circumstances.

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on March 1, 2024, which was amended in June 2024. Specifically, Petitioner asserts that the IEP was inappropriate because (a) speech and language ("S/L") services were reduced despite a lack of progress, (b) occupational therapy ("OT") services should have been increased given his/her limited progress, (c) additional supports and training should have been included in the assistive technology ("A/T") section of the IEP, (d) a dedicated aide should have been considered, (e) behavioral support services ("BSS") and/or services from a board certified behavior analyst ("BCBA") should have been added in light of behavior concerns, (f) the IEP was not based on comprehensive evaluative data; (g) Student required a more restrictive educational environment in light of her/his lack of progress and evidence of regression, and (h) goals for academic areas like Reading; Mathematics; and Written Expression should have been added.

The circumstances related to the development of the March 1, 2024 IEP are quite similar to those in March 2023. Instead of eight students and three paraprofessionals, Witness J's class had seven students and two paraprofessionals: a lower student to teacher ratio and a comparable student

to staff ratio. In OT services, Witness reported on the February 2024 IEP Progress Report that Student was Progressing on all three goals, and service levels remained at 150 minutes per month. In Communication, Witness C reported that Student was Progressing on all four goals and recommended reducing service hours to three hours because Student's was unable to engage in the latter half of hour-long sessions. In Behavior, the IEP included goals for play time as Witness suggested were needed.

With respect to safety concerns, while Student broke her/his tibia in a fall down the steps in late February 2024, there was nothing in her/his history to warrant concern for her/his ability to navigate hallways or staircases without assistance, despite Father's questionable testimony that Student had "always" walked with a limp. That physical characteristic was not described in the Physical PLOP of the 2023 IEP, no dedicated aide was prescribed in the IEP, and Witness E, Student's OT provider testified that she never noticed any imbalance in Student's gait. Witness E also testified that Petitioner expressed not concerns about the OT provisions of the IEP at the IEP meeting. As for Student's fall, it appears that it was a freak accident. S/he unfortunately missed the last step and suffered a serious leg injury. There is no prior or subsequent history of imbalance warranting a dedicated aide. Setting aside safety concerns, there is no evidence that Student required a dedicated aide in the classroom for assistance. Witness J expressed no difficulty in being able to redirect Student from stereotypical behaviors as necessary to get Student to refocus on assigned tasks. Finally, I note that in both the 2022-23 and 2023-24 school years, the only subject in which Student received an Exceeds the Standard grade was Health and Physical Education, and there was ever an indication of a problem with Student's gait at School A. Therefore, while Father requested a dedicated aide at the IEP meeting, there was no reason from a behavioral or safety standpoint to honor that request.

On the VB-MAPP Milestones during the 2023-24 school year, Student scored 6.5 in September, 17 in January, and 24 in May. On the Barriers, s/he scored 86 in September, 76 in January, and 77 in May. Witness A argued that the 86 Barriers score in September indicated a regression from Student's score of 73 in February of 2023. Similarly, his/her September 2023 Milestones score of 6.5 reflects a regression from his/her May 2023 score of 13. While Student may have regressed over the summer, the data indicates that Student improved on both the Milestones and Barriers during the 2023-24 school year.

For all of these reasons, I conclude that DCPS has met its burden of proving that the IEP it developed on March 1, 2024 was reasonably calculated for Student to make progress consistent with his/her circumstances.

Whether School A is an appropriate placement for Student.

To establish that a placement or, in this case, location of service is inappropriate, a petitioner must make a prima facie showing that the school is incapable of implementing the child's IEP.

The benchmark under IDEA for determining the appropriateness of a student's educational placement is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. District of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). "[C]ourts have identified a set of considerations

‘relevant’ to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, ... and the extent to which the placement represents the least restrictive educational environment.” *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005). School districts “need only demonstrate that the student's placement was appropriate; a placement need not satisfy a parent's every desire and need not represent the best possible programming for the student.” *Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018); see *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988) (“[P]roof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).⁹³

Petitioner has not even argued that School A is incapable of implementing Student’s IEP. She has argued that School A has failed, on occasion, to provide prescribed OT and S/L services, but she has not asserted that School A lacks the qualified staff to provide the services prescribed in Student’s IEP. Therefore, I conclude that Petitioner has failed to meet her burden of making a prima facie showing that School A is not an appropriate placement for Student.

Whether DCPS Student a FAPE by failing to implement Student’s IEPs during the 2022-2023 and 2023-2024 school years. by failing to provide the student with speech and occupational therapy and tutoring services. Specifically, Petitioner asserts that DCPS failed to provide approximately 38 hours of S/L services and 10 hours of OT services during the 2023-2024 school year and 23 hours of S/L services and 5 hours of OT services during the 2022-2023 school year based on the service trackers provided by the school. Services were missed primarily due to the absence of a provider as noted in this student’s November 9, 2023, IEP Progress Report. In addition, DCPS did not implement home-based instruction for the student with fidelity in that during the almost two months that the student was home due to an injury, the OT provider and tutor only appeared once, and the speech provider only appeared twice.

An LEA is culpable for failing to implement a child’s IEP if the services provided materially deviate from the services prescribed in the IEP.⁹⁴ A material deviation requires more than a minor discrepancy or a “de minimis failure to implement all elements of [the student’s]

⁹³ *R.B. v. District of Columbia*, Civil Action No. 18-662, 2019 WL 4750410 at 12 (D.D.C. Sep. 30, 2019).

⁹⁴ *Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, 502 F.3d 811, 822 (9th Cir. 2007).

IEP.”⁹⁵ It is “...[t]he 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.”⁹⁶

During the 2022-23 school year, beginning on January 12, 2023, Service Trackers reveal that out of the approximately 11.87 hours of OT services to which Student was entitled,⁹⁷ s/he received 4.7 hours. However, Student was absent 17.2% of the time during the school year, which would reduce his/her entitlement 9.83 hours during the relevant period. Thus, Student was denied 5.13 hours of OT services during the 2022-23 school year. For speech services, s/he was entitled to 20 hours on his/ her IEP,⁹⁸ but received 12.42 hours. Her/his absences reduce her/his entitlement to 16.56 hours. Thus, Student was denied 4.14 hours of S/L service during the 2022-23 school year. For the 2023-24 school year, there were no credible OT service records introduced. For S/L services, the only records available were for December, January, and February. Student was entitled to 12 hours for those three months, but was absent 21.7% of the time during the school year. S/he received 3.1 hours of services during the three months. Assuming Student was only available for 9.4 hours, s/he was denied 6.3 hours of speech services during the 2023-24 school year. Thus, I conclude that during the two school years, Student was deprived of 5.13 hours of OT services and 10.44 hours of speech services.⁹⁹ In each case, the OT services in 2022-23 and the S/L services in both school years, the deprivations exceed 25% of the services to which Student was entitled even considering the rate of his/her absences. Thus, the deprivations were material and a denial of FAPE.

Whether DCPS denied Student a FAPE by failing timely to provide Student with an appropriate FBA and/or provide a BIP from December 2022 to present.

Witness A, Petitioner’s educational advocate, opined that DCPS denied Student a FAPE from December 2022 to the present by failing to develop an FBA and BIP. Setting aside the facts that the statute of limitations limits the claim to no earlier than January 21, 2023, and that an FBA was developed in December 2024, there is no persuasive evidence that Student was harmed by the lack of an FBA. Witness F, who like Witness A, is a BCBA, testified that after conducting three observations of Student, interviewing relevant staff, reviewing Student’s records and developing the FBA, she learned nothing that she and the staff did not already know about Student. This indicates that the FBA did not reveal any deficits in the manner in which classroom services have been provided to Student over the past two years, and will not have a meaningful impact on how services will be provided going forward. I conclude that Petitioner has failed to meet her burden of proving that DCPS denied Student a FAPE by failing to develop an FBA or BIP at least two years ago.

⁹⁵ *Johnson v. District of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). See *J.B. ex rel. Belt v. District of Columbia, Report and Recommendation*, Case No. 17-cv-1298, 2018 WL 10399853 at 17 (D.D.C. May 8, 2018)(a deviation of less than 10% of the school day was deemed *de minimus*).

⁹⁶ *Turner v. District of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).Fe

⁹⁷ S/he was entitled to approximately 0.7 hours in January, two hours in February, 2.5 hours in March, April and May, and 1.7 hours in June.

⁹⁸ S/he was entitled to approximately 1.33 hours in January, 4 hours in February through May, and 2.67 hours in June.

⁹⁹ The testimony and records involving the period February 26 – March 4, 2024, when Student was recuperating from his/her leg injury, were too imprecise to determine what services Student was owed or denied. Despite the attention paid to this period during the hearing, it only encompassed five school days.

RELIEF

For relief, Petitioner requests, *inter alia*, (1) an order requiring DCPS to amend Student's IEP to provide not less than four hours of OT and S/L services per month, consultative service hours, add goal section for Mathematics, Reading, and Written Expression, add BSS services, a dedicated aide, and transportation and transportation supports, (2) an order requiring DCPS to revise the student's FBA and develop a BIP, (3) an order requiring DCPS to place and fund Student in a suitable nonpublic program of the parent's choice with transportation., (4) compensatory education, and (8) attorneys' fees.

Petitioner has the burden of establishing entitlement to compensatory education services.¹⁰⁰ Absent such a showing, any award by the hearing officer would be arbitrary. In this jurisdiction, petitioners have the burden of persuasion on all issues other than the appropriateness of IEPs and placements. From a practical standpoint, it would be both counterintuitive and unreasonable to require the educational agency to propose a compensatory education plan when its position is that it did not deny a FAPE in the first place. The requirements for an appropriate compensatory education plan are set forth in the D.C. Circuit's decision in *Reid v. District of Columbia*:¹⁰¹

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award 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.¹⁰²

Thus, Petitioner must show (1) what educational harm Student suffered as a result of the alleged denial of FAPE, (2) what type and amount of compensatory services Student requires to put him/her in the position s/he would be had there been no denial of FAPE, and (3) the assessments or educational, psychological, or scientific studies that support the type and amount of services requested.¹⁰³

¹⁰⁰ *J.T. v. District of Columbia*, Civil Action No. 21-3002, 2023 WL 8369938 at 15 (D.D.C. Dec. 4, 2023)(plaintiff failed to demonstrate what compensatory education should be provided to the student to remedy what the plaintiff contends the student has been denied); (*Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 248 (D.D.C. 2010)(plaintiff has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record.") citing *Friendship Edison Public Charter School. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008)(to comply with the *Reid* standard, the petitioner must propose a well-articulated plan that reflects the student's current educational abilities and needs and is supported by the record); *Smith v. District of Columbia, Report and Recommendation*, Case No. 1:22-cv-027555 at 8 (July 31, 2023) *Report and Recommendation* , *Wade v. District of Columbia, Magistrate Judge's Report and Recommendation*, Case No. 20-cv-1433 at 26 (D.D.C. Feb. 19, 2021) (the plaintiff has the burden of proposing a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record) citing *Phillips*; *Jones v. District of Columbia*, Case No. 15-cv-1505, 2017 WL 10651264 at 9 (D.D.C. Jan. 31, 2017)(Plaintiff presented no evidence concerning a plan of compensatory education as was her burden), citing *Phillips* and *Friendship*.

¹⁰¹ 401 F.3d 516 (D.C. Cir. 2005).

¹⁰² *Id.* at 524. *See also*, *B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016)

¹⁰³ *See Gill v. District of Columbia*, 751 F.Supp.2d 104, 111-12 (D.D.C. 2010) (petitioners offered neither reasoning nor factual findings to support the appropriateness of their proposed compensatory education plan), *further proceedings*, 770 F.Supp.2d 112, 116-18 (D.D.C. 2011).

Witness A's compensatory education proposal did not meet the requirements of *Reid*. It did not quantify what educational loss Student suffered. It did not explain how the proposed services would compensate for a loss that could not be quantified. Moreover, the proposed services bore no relation to the alleged denials of FAPE. For example, the proposal proposed tutoring services, but Student's IEP does not include academic goals. The proposed related service awards exceed the amount of services that were estimated to have been deprived. And it proposes 400 hours of ABA therapy, 50 hours of BSS, a dedicated aide, and parent training, none of which were on Student's IEPs and, therefore, are not eligible for compensation. Nevertheless, I will order DCPS to award OT and S/L in the amounts estimated herein to have been deprived, less the amount already authorized by DCPS.

ORDER

Upon consideration of the *Complaint*, the Response, the *Amended Prehearing Order*, the exhibits that were admitted into evidence, the testimony presented during the hearing, the closing arguments of counsel for the parties, and DCPS' post-hearing submission, it is hereby

ORDERED, that withing fifteen school days of the issuance of this order, Respondent shall provide Petitioner authorization to obtain five (5) hours of independent OT services at the OSSE-approved rates for such services. The authorization may be limited to be used within three years.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).


Terry Michael Banks
Hearing Officer

Date: April 6, 2025

Copies to: Attorney A, Esquire
Attorney B, Esquire
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OSSE Office of Dispute Resolution