

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

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: August 15, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0140

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: August 14, 2018

Respondent.

Office of Dispute Resolution, Room 112  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to provide an appropriate Individualized Education Program (IEP) and behavior interventions in the 2017-2018 school year.

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

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 31, 2018, named DCPS as respondent. The undersigned hearing officer was appointed on June 1, 2018. On June 14, 2018, the parties met for a resolution session and were unable to reach an agreement to resolve the dispute. On June 28, 2018, I convened a prehearing telephone conference with counsel to discuss the issues to be determined, set the hearing date and address other pre-hearing matters.

The due process hearing was held before the undersigned impartial hearing officer on August 14, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called EDUCATIONAL ADVOCATE as an additional witness. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-54, exclusive of Exhibits P-5 and P-33, were admitted into evidence without objection. Exhibits P-5 and P-33 were not offered. DCPS' Exhibits R-2 through R-15 were admitted into evidence without objection. Exhibit R-1 was not offered. At the conclusion of the presentation of the evidence, counsel for the respective parties made oral closing arguments. There was no request to file post-hearing written closings.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

## **ISSUES AND RELIEF SOUGHT**

The issues for determination, as memorialized in the June 28, 2018 Prehearing Order, are:

Whether since October 2017, DCPS has denied Student a free appropriate public education by providing inappropriate IEPs and behavioral support services, specifically, including insufficiently restrictive, therapeutic and structured least restrictive environment (LRE) setting and placement/setting/location of services, less than full time special education outside of general education, insufficient hours of behavioral support services, no provision for a dedicated aide and/or a behavioral tech and lack of a safety plan;

Whether since September 2017, DCPS has failed to timely and appropriately update Student's functional behavioral assessment (FBA) and behavior intervention plan (BIP);

Whether, since spring 2018, DCPS has failed to afford the parent and her representatives full access to Student's education records;

Whether DCPS failed to timely provide the parent a copy of its proposed IEP for Student in advance of the last, May 15, 2018, IEP team meeting.

For relief, the Petitioner requests that the hearing officer order DCPS to:

- a. fund placement and transportation for Student to a public or non-public school that can provide Student with educational benefit;
- b. alternatively, convene an MDT meeting with the parent and counsel to discuss and determine an appropriate placement/setting/location of services for Student;
- c. ensure that Student's IEP team reviews and revises Student's IEP to afford appropriate Behavioral Support Services and goals, and an appropriately restrictive and therapeutic LRE, a dedicated aide, behavioral tech, sufficient therapeutic wrap around services as warranted, and appropriate counseling hours;
- d. ensure that Student's IEP team reviews and revises Student's IEP to include any amendments discussed at the May 15, 2018 IEP/MDT meeting, including updating the student's disability classification to ED and the goals and programming to reflect the same or, alternatively, convene an IEP/MDT meeting to review and revise Student's IEP as warranted;
- e. fund and/or devise an appropriate safety plan;
- f. fund, conduct, implement an appropriately modified FBA and BIP;

g. furnish parent through counsel full access to Student's education records including, specifically a finalized IEP, most recent MDT notes, and complete standardized test scores from the past two years and

h. fund compensatory education, as warranted, or, alternatively, conduct any assessments, evaluations, observations and or screenings required to appropriately determine compensatory education and harm.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the argument of counsel, this hearing officer's findings of fact are as follows:

1. Student, an age child, resides in the District of Columbia with Mother.

#### **Testimony of Mother.**

2. At all times concerned in this matter, Student has been eligible for special education. Prior to February 2017, Student had received special education and related services from DCPS under the disability classification, Intellectual Disability (ID).

Student was evaluated by DCPS in December 2016. Cognitive functioning results on the Reynolds Intellectual Assessment Scales (RIAS) indicated significantly below average functioning overall. The results of the Adaptive Behavior Assessment System, Third Edition (ABAS-III) rating scales indicated that Student was functioning in a range equivalent to a pre-kindergarten child. Exhibit P-12.

3. In February 2017, the parent and Student moved to Prince George's County Maryland, where Student was enrolled in Prince George's County Public Schools (PGCPS). In May 2017, Student was evaluated by a PGCPS school psychologist, who determined that the assessment results did not support Student's identification as a student with an ID. Student's performance on the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition, (WPPSI-IV) resulted in low-average to well-above

average scores for Student's age group. Student appeared to have functional communication deficits when upset and performed poorly on cognitive tests when uncomfortable. Responses by Mother and Student's teacher on the BASC-3 rating scales indicated that Student's functioning was pretty similar at home and at school. Ratings were largely convergent on the areas of greatest concern. Consistent with parent and teacher interviews and classroom observations, outward behaviors such as aggression and misconduct stood out as the most significant areas of need. Adaptive scale ratings indicated that Student was "at risk" in multiple domains. Student seemed to have difficulty regaining composure once past Student's threshold for frustration tolerance, and once upset, Student had difficulty managing behaviors. This could make it difficult for Student to maintain consistent positive relationships with peers and adults. The PGCPS school psychologist concluded that Student continued to need a high level of individualized support to be successful in school and that, based upon the historical record and Student's present functioning, Student appeared to meet criteria for identification as a student with an Emotional Disability. Exhibit P-15.

4. In May 2017, PGCPS also administered to Student the Test of Early Reading Ability, 3<sup>rd</sup> Edition, and Student obtained an overall reading quotient score of 68 (Very Low). Student was also administered the Test of Early Math Ability, 3<sup>rd</sup> Edition, and obtained an overall math ability score of 76 (Low). Exhibit P-12.

5. A PGCPS IEP team met to revise Student's IEP on June 8, 2017. Student's primary disability was identified as Emotional Disability, affecting the following areas: Academic - Math Calculation; Academic - Reading Comprehension; Academic - Reading Phonics; Behavioral - Social/Emotional/Behavioral and Physical - Fine Motor. For the 2017-2018 school year, the PGCPS IEP team decided that Student should receive 22

hours per week of special education classroom instruction outside general education, 1.5 hours per month of Occupational Therapy (OT), and 30 minutes per week of individual Counseling Services. With regard to special education services, the PGCPs IEP team decided that Student needed a full-time special education program within a small structured classroom setting to address social/emotional needs as well as academics. The team determined that Student would participate with non-disabled peers during non-academic and extracurricular activities. Exhibit P-12.

6. The parent and Student moved back to the District of Columbia on September 1, 2017. Mother took Student's IEP package from PGCPs, including the PGCPs evaluations to CITY SCHOOL 1 and was told that City School 1 could service Student. Student started at City School 1 in the 3<sup>rd</sup> week of September, 2017. City School 1 initially placed Student in a regular education classroom with some 20 students and 1 instructor. Testimony of Mother.

7. By a "Comparable Services Consultation Letter" issued October 10, 2017, DCPS informed Mother that it proposed to provide services to Student that would be comparable to the PGCPs services. This included 22 hours per week of Specialized Instruction outside general education, 60 minutes per week of Behavioral Support Services and 120 minutes per month of Occupational Therapy. Exhibit P-31. CASE MANAGER informed Mother that CITY SCHOOL 2 would be a better fit for Student and by October 20, 2017, Student was transferred to City School 2. Testimony of Mother, Exhibit P-29.

8. On October 13, 2017, Student's IEP team at City School 1 developed an IEP for Student. The IEP identified Student's disability as ID and listed Mathematics, Reading, Emotional, Social and Behavioral Development and Motor Skills/Physical

Development as areas of concern. An annual goal, supported by several specific objectives, was provided for each area of concern. The October 13, 2017 IEP provided for Student to receive 22 hours per week of Specialized Instruction outside general education, 60 minutes per week of Behavioral Support Services and 120 minutes per month of Occupational Therapy. The IEP specified that Student required a Behavior and Education Support (BES) program to meet emotional needs and that Student “would be a full-time student according to [Student’s] recent diagnosis change from Intellectually Disabled to Emotionally Disabled.” Exhibit P-11.

9. On October 13, 2017, City School 1 staff developed a Behavior Intervention Plan – Level 1 (BIP) for Student. The form listed Student’s “problems definitions” as Student engages in disruptive and impulsive behaviors throughout school. Student yells, gets out of the seat and disrupts peers and talks excessively. Student often runs out of the classroom and hides in the bathroom or attempts to get into other classrooms. Student often cries inconsolably when upset. Student becomes overly aggressive with peers, unprovoked, or is driven by a desire to seek revenge or to access preferred activity. Exhibit P-30. The hearing evidence does not establish whether the BIP was ever implemented after Student transferred to City School 2.

10. There were about 9 children in Student’s classroom at City School 2 served by 3 adults. Testimony of Mother.

11. Student’s behavior at City School 2 was moderate at first but began to decline in February 2018. Student did not want to cooperate because Student did not get along with the teacher. There was an incident in May 2018 when Student allegedly suffered bruises from being physically restrained by a teacher. Mother was told that Student was restrained to stop an altercation with another child. Testimony of Mother.

12. At City School 2, Student was provided weekly group counseling services in a group size of up to 9 or more children. The social worker's notes indicate that Student was generally disruptive and uncooperative in these sessions. Exhibit P-25. Student's present levels of functional performance in Emotional, Social and Behavioral Development declined over the 2017-2018 school year. In the October 13, 2017 City School 1 IEP, it was reported that Student scored in the Very High Range in the domain of Behavior Difficulties and in the Slightly Raised Range for Attention Difficulties, but that Student responded well to prompting, coaching and the opportunity to earn incentives. The May 15, 2018 IEP states that Student has difficulty persevering when it comes to completing tasks wherein Student feels the task is difficult or Student simply does not want to complete. Student's responses to adults and limits-setting are poor and often require intensive supports when redirected, and unfortunately redirection is required often. At times, Student becomes restless and has difficulty focusing. On the SDQ (Strengths and Difficulties Questionnaire), Student was scored in the Very High Range in the domain of Behavior Difficulties and in the Very High range for Attention Difficulties. Exhibits P-11, P-8. A sampling of behavior reports shows that Student was regularly written up for refusing to do class work, verbal and physical altercations, disruptive behavior, talking back to adults and being oppositional. Exhibit P-29.

13. By the end of the second term of the 2017-2018 school year at City School 2, Student's grades were "Below Basic" in all core academic courses, except for Science. Exhibit R-13.

14. On May 15, 2018, Student's IEP team at City School 2 met to review and revise Student's IEP. Student's IEP disability classification of ID was not changed, although the new IEP repeated the language from the October 13, 2017 IEP that



Student's diagnosis had been "recent[ly]" changed from ID to ED. (Student's diagnosis had actually been changed to ED by PGCPs in May 2017.) For the Mathematics and Reading areas of concern, Student's present levels of performance were repeated from the October 13, 2017 City School 1 IEP, which was based on the data and testing reported in Student's May 2017 PGCPs IEP. Student's IEP special education and related services were continued from the October 13, 2017 IEP (26 hours per week of Specialized Instruction, 60 minutes per week of Behavioral Support Services and 120 minutes per month of Occupational Therapy), except that Specialized Instruction had been increased from 22 to 26 hours per week, to conform to the actual class time in the BES classroom at City School 2, where Student had been placed since October 2017. Exhibit R-3. No formal reevaluations of Student were completed for the May 2018 IEP team meeting. Testimony of Mother.

### Burden of Proof

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

### Analysis

1. Whether since October 2017, DCPS has denied Student a free appropriate public education by providing inappropriate IEPs and behavioral support services, specifically, including insufficiently restrictive, therapeutic and structured least restrictive environment (LRE) setting and placement/ setting/location of services, less than full time special education outside of general education, insufficient hours of behavioral support services, no provision for a dedicated aide and or a behavioral tech and lack of a safety plan;
2. Whether since September 2017, DCPS has failed to timely and appropriately update Student's functional behavioral assessment (FBA) and behavior intervention plan (BIP).

Prior to February 2017, Student had received special education and related services from DCPS under the disability classification, Intellectual Disability (ID). In February 2017, the parent and Student moved to Prince George's County Maryland, where Student was served in a Prince Georges's County Public Schools (PGCPS) school. In May 2017, PGCPS educators reevaluated Student and revised Student's PGCPS IEP. The PGCPS IEP team changed Student's disability classification to Emotional Disability (ED) and decided that Student needed a full-time special education program, within a small structured classroom setting, to address social/emotional needs as well as academics. The PGCPS team determined that Student would participate with non-disabled peers during non-academic and extracurricular activities. This IEP was developed at the end of the 2016-2017 school year and was not implemented in PGCPS.

In September 2017, after the start of the 2017-2018 school year, Student moved back from Maryland to the District of Columbia and was enrolled in DCPS' City School 1. Mother provided Student's PGCPS IEP package, including special education evaluations, to City School 1 staff. For several weeks, Student was placed in a general education classroom at City School 1. On October 13, 2017, the City School 1 IEP team developed an IEP for Student that generally followed the service plan from the PGCPS

IEP, including full-time placement in a Behavior and Education Support (BES) classroom with pull-out Behavioral Support and OT related services. Student was transferred to the BES classroom City School 2, where the October 13, 2017 IEP would be implemented. Mother testified that at City School 2, Student's behavior was "moderate" at first but began to decline by February 2018. The hearing record established that Student's behavior difficulties at City School 2 were pervasive and significant and contributed to academic difficulties in the classroom.

Mother contends in her due process complaint that Student's October 13, 2017 IEP and subsequent DCPS IEPs were inappropriate because the IEPs provided an educational setting that was not sufficiently restrictive, therapeutic or structured, provided insufficient hours of behavioral support services and did not include provision for a dedicated aide, a behavioral tech or a safety plan. DCPS, which has the burden of persuasion on this issue, contended in its response to the complaint that its IEPs were appropriate, but at the due process hearing, called no witnesses to explain the decisions of its IEP teams.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Moradnejad* at 274-75. Petitioner does not allege that DCPS failed to comply with IDEA procedural requirements when the October 13, 2017 IEP was developed. Therefore, I move to the second prong of the *Rowley* inquiry. Was the IEP appropriate for Student? In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated *Rowley, supra*, for what constitutes an appropriate IEP. As explained by the D.C. Circuit in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018),

The Supreme Court . . . in *Endrew F.* . . . , raised the bar on what counts as an adequate education under the IDEA. *Endrew F.* held that the Act requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard that the Court described as “markedly more demanding than the ‘merely more than *de minimis*’” standard the Tenth Circuit had applied. . . . In requiring more than merely some “educational benefits,” *id.* at 77 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ), the Court in *Endrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000. *Z. B.*, 888 F.3d at 517. Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the individual child, *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034. *Z. B.*, 888 F.3d at 519.

...

The IDEA calls on public schools throughout the United States to provide a free, appropriate education. Congress has not committed to educational perfection: “Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Endrew F.*, 137 S.Ct. at 999 (emphasis in original). If there is a gap between the best education that money can buy at a private school for a student with disabilities and the free and appropriate education at a public school that the IDEA promises, one might justly hope to close that gap for all students. Meanwhile, what Congress has required is that public schools be “ambitious” for every child, giving each the opportunity to “meet challenging objectives.” *Id.* at 1000. Disabilities can be subtle and complex. They may require expertise to identify accurately. *Z. B.*, 888 F.3d at 528.

...

Understanding the particulars of a child’s current skills and needs is critical to

developing an “individualized” educational plan: “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F.*, 137 S.Ct. at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) ). *Z. B.*, 888 F.3d at 522.

...

Ordinarily, states must ensure “removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A). [In *Endrew F.*, the Supreme Court] affirmed that “the IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’ “ *Endrew F.*, 137 S.Ct. at 999 (quoting *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034). *Z. B.*, 888 F.3d at 527–28.

...

Applying the IDEA as interpreted in *Endrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Endrew F.*, 137 S.Ct. at 999. *Z. B.*, 888 F.3d at 524. . . . The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress. *See Endrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated. *Z. B.*, 888 F.3d at 524 (internal quotations and citations omitted.)

When the City School 1 IEP team developed the October 13, 2017 IEP, Student had only been back in a DCPS school for several weeks. The City School 1 IEP team incorporated the data on Student’s current skills and needs derived from the PGCPs May 2017 IEP and devised a full-time special education program for Student in a DCPS BES classroom. The proposed Special Education and Related Services in the October 13, 2017 IEP matched or exceeded the services in the PGCPs IEP. I find that, taking account of what City School 1 staff should have known of Student’s needs in October 2017, the IEP team’s decision to continue Student’s program from PGCPs with

comparable DCPS services was objectively reasonable.

The City School 1 IEP team failed to change Student's disability classification from ID to ED, as had been done by the PGCPS IEP team. However, this appears to have been an oversight, because in the Least Restrictive Environment (LRE) section of the DCPS IEP, the IEP team specified that Student required a Behavior and Education Support (BES) program to meet emotional needs and that Student would be a full-time student according to Student's recent diagnosis change from Intellectually Disabled to Emotionally Disabled. This classification error does not appear to have resulted in educational harm to Student or to have impaired Mother's opportunity to participate in decision making. *See* 34 CFR § 300.513(a)(2).<sup>2</sup> I conclude that DCPS has met its burden of persuasion that at the time it was developed, the October 13, 2017 IEP was reasonably calculated to enable Student's progress.

DCPS transferred Student from City School 1 to the BES classroom at City School 2 for implementation of the October 13, 2017 IEP. According to Mother, Student's behavior was "moderate" when Student initially transferred to City School 2, but Mother's testimony, supported by the documentary evidence, establishes that by February 2017, Student's behavior at City School 2 was significantly impeding Student's

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<sup>2</sup> Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child;  
or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2).

learning. A sampling of behavior reports shows that Student was regularly written up for refusing to do class work, verbal and physical altercations, disruptive behavior, talking back to adults and being oppositional. The City School 2 social worker's service tracker reports show that Student was not progressing – and was at times was regressing – with group counseling. By the end of the second term of the 2017-2018 school year, Student's grades were "Below Basic" in all academic courses, except for Science.

Because individual IEPs must be "tailored to the unique needs" of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 1817, 102 S.Ct. 3034 (1982), the IEP must be revised regularly in response to new information regarding the child's performance, behavior, and disabilities. *Pinto v. District of Columbia*, 938 F. Supp. 2d 25, 30 (D.D.C. 2013), citing 20 U.S.C. § 1414(d)(4). *See, also*, 34 CFR § 300. 324(b)(ii). I conclude that by the end of the 2017-2018 2<sup>nd</sup> Term at City School 2, DCPS had sufficient new information that Student was not progressing in the BES classroom educational placement prescribed by the October 13, 2017 IEP. By that point, it was incumbent upon DCPS to ensure that Student's IEP was revised, based upon the new information about Student's performance and behavior. DCPS has not met its burden of persuasion that the October 13, 2017 IEP continued to be appropriate for Student.

The City School 2 IEP team met to review Student's IEP on May 15, 2018. For the most part, the May 15, 2018 IEP team continued Student's October 13, 2017 IEP unchanged, including the erroneous ID disability classification and the out-of-date academic present levels of performance from the May 2017 PGCPS IEP. In view of these shortcomings and especially the failure to revise Student's IEP program to address the child's worsening Emotional, Social and Behavioral concerns, I find that DCPS has not

met its burden of persuasion that the May 15, 2018 IEP was reasonably calculated to enable Student to make educational progress appropriate in light of Student's circumstance. *See Andrew F., supra.*

The Petitioner also alleges that DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIP). School staff at City School 1 developed a BIP for Student in October 2017, but there was no evidence that City School 1 or City School 2 ever conducted an FBA of Student. The IDEA requires, in the case of a child, such as Student, whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See 34 CFR § 300.324(a)(2)(i).* An FBA is "essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C.2008). An LEA's failure to complete an FBA and BIP, when warranted, will constitute a denial of a FAPE. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

The evidence establishes that Student's behavior problems were well-known to staff at both City School 1 and City School 2 from the time that Student re-enrolled in DCPS in fall 2017. I find that DCPS' failure to ensure that a timely FBA of Student was conducted, and that Student's BIP was revised, at least after Student's behavior deteriorated in February 2018 at City School 2, was a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district's failure to adequately evaluate student was a procedural error.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—



- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child;  
or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). In this case, Student's severe behavioral issues impeded Student's learning throughout the 2017-2018 school year, but especially after February 2018. I find that Petitioner has established that DCPS' failure to ensure that City School 2 staff timely conducted an FBA and updated Student's BIP impeded Student's right to a FAPE.

3. Whether, since spring 2018, DCPS has failed to afford the parent and her representatives full access to Student's education records.

Educational Advocate testified that beginning in spring 2018, she requested DCPS to provide copies of Student's education records, but DCPS only provided limited records and no records at all from the period Student attended DCPS schools prior to February 2017. The IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. *See* 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. *See* 34 CFR § 300.613(a). I will order DCPS to provide the parent, through her legal representatives, copies of all education records for Student maintained by the District.

4. Whether DCPS failed to timely provide the parent a copy of its proposed IEP for Student in advance of the last IEP team meeting.

District of Columbia law requires that no fewer than 5 business days before a scheduled IEP meeting, DCPS must provide the parent an accessible copy of any draft IEP that will be discussed at the meeting. *See* D.C. Code § 38–2571.03(3). Petitioner alleged as an issue in this case that DCPS did not meet this requirement to provide a copy of its draft IEP for Student before the last, May 15, 2018, IEP team meeting. At the due process hearing, Petitioner offered no evidence in support of this claim. I find that Petitioner did not meet her burden of persuasion on this issue.

#### Remedy

In this decision, I have concluded that DCPS denied Student a FAPE by not ensuring that Student's IEP was reviewed and appropriately revised, by the beginning of the 3rd term of the 2017-2018 school year, to address the impact of Student's worsening behavior challenges on Student's learning. I have further found that DCPS' May 15, 2018 revised IEP for Student was not reasonably calculated to enable Student to make educational progress appropriate in light of Student's circumstances. The parent has requested a host of relief remedies, including *inter alia*, a special education reevaluation, a revised IEP to include a new educational placement in a therapeutic setting at a suitable public or non-public school, wrap-around services, a functional behavioral assessment and behavior intervention plan and a safety plan, as well as compensatory education.

The parent did not propose a nonpublic school that would be appropriate for Student. *See Branham v. Government of the Dist. of Columbia*, 427 F.3d 7 (D.C. Cir. 2005). (Petitioner's counsel represented that due to Student's behavior profile, her

office has not yet been able to obtain Student's acceptance by a private special education day school.)

Student has not been reevaluated by DCPS since returning to DCPS in September 2017. The data on Student's needs that result from the child's disability and Student's other educational needs, as well as Student's present levels of academic and functional performance stated in the May 15, 2018 IEP, are out of date. I will, therefore, order DCPS to conduct a comprehensive special education reevaluation of Student.

Educational Advocate testified, without rebuttal, that Student requires a small, structured, therapeutic day setting for Student's full-time educational placement.

Although Educational Advocate's familiarity with Student's records had gaps<sup>3</sup>, this opinion was supported by the PGCPS' May 2017 IEP and I found it credible.

Educational Advocate's other IEP and placement recommendations – a dedicated aide, wrap-around services, complete segregation from non-disabled peers, a safety plan – went beyond what Student was found to need by the PGCPS IEP team based on the May 2017 evaluations. Pending a comprehensive reevaluation of Student, I find that Educational Advocate's recommendations for a more restrictive placement and other accommodations are not credibly based on Student's needs.

Petitioner also requests compensatory education for Student for the denials of FAPE in this case. The D.C. Circuit pronounced in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), that if a hearing officer concludes that the school district denied a student a FAPE, he has "broad discretion to fashion an appropriate remedy,

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<sup>3</sup> Educational Advocate showed confusion in her testimony as to which DCPS schools Student had attended and the dates attended, and testified, incorrectly, that DCPS has not conducted an adaptive functioning assessment of Student, when contrary information was in the PGCPS IEP.

which may include compensatory education.” *Id.* at 800. “That inquiry requires “figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.” *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017), citing *B.D.* at 799. Educational Advocate recommended that to compensate Student in this case, an appropriate award would be 50 hours of academic tutoring and 80 hours of counseling/mentoring services. This recommendation was not rebutted by DCPS. I find that Petitioner’s proposed compensatory education award is “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,” see *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir. 2005), and I will order this relief.

### **ORDER**

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

**ORDERED:**

1. Within 20 school days of the date of this order, subject to obtaining parental consent, DCPS, shall conduct a comprehensive special education reevaluation of Student, to include a comprehensive psychological evaluation, a functional behavioral assessment, and such other assessments as may be needed to determine Student’s IDEA disability, educational needs, present levels of academic achievement and related developmental needs. See 34 CFR § 300.305(a). Upon completion, DCPS shall promptly convene Student’s IEP team to review and revise, as appropriate, Student’s IEP and educational placement. DCPS shall ensure that Student’s updated educational placement provides for a full-time small, structured, therapeutic classroom setting in a public or nonpublic day school, appropriate to Student’s behavioral challenges;
2. As compensatory education for the denials of FAPE in this case, beginning not later than 21 days from the date of this decision, DCPS shall provide Student 50 hours of 1:1 academic tutoring and 80 hours of 1:1 counseling/mentoring services by qualified professionals. DCPS may provide these services directly or provide funding authorization to the parent to obtain the services for Student.
3. Within 10 business days of the date of this order, DCPS shall provide Mother’s representatives copies of all education records relating to Student for the 2016-

2017 and 2017-2018 school years, not heretofore provided, that are collected, maintained, or used by DCPS and

4. All other relief requested by the Petitioner herein is denied.

Date: August 15, 2018

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE - SPED  
DCPS Resolution Team