

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

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

OSSE
Office of Dispute Resolution
December 11, 2018

<i>Student</i> , ¹)	Case No.: 2018-0244
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 12/11/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 11/28/18
("DCPS"),)	ODR Hearing Room: 111
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been adequately reevaluated, behavior had not been adequately addressed, and IEP was not fully implemented. DCPS responded that it had sufficiently reevaluated Student and sufficiently implemented Student’s IEP and taken appropriate action on other issues.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 9/27/18, the case was assigned to the undersigned on 9/28/18. Respondent filed a response on 10/5/18 and did not challenge jurisdiction. The resolution meeting was held on 10/10/18 without success or shortening the 30-day resolution period, which ended on 10/27/18. A final decision in this

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 12/11/18.

The due process hearing took place on 11/28/18 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in most of the hearing.

Petitioner’s Disclosures, submitted on 11/20/18, contained documents P1 through P44, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 11/20/18, contained documents R1 through R19, which were also admitted into evidence without objection.

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. *Educational Advocate* (qualified without objection as an expert in Special Education Programming and IEP Development for Students with Behavioral Concerns)
2. *Father*
3. *Mother*

Respondent’s counsel presented 1 witnesses in Respondent’s case (*see Appendix A*): *Monitoring Specialist*

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

Issue 1: Whether DCPS denied Student a FAPE by failing to conduct a triennial reevaluation by May 2018, when the previous evaluation was in May 2015 and Student needed updated data due to limited progress and behavior escalations. *Petitioner has the burden of persuasion on this issue.*

Issue 2: Whether DCPS denied Student a FAPE by failing to fully implement Student’s Behavioral Support Services (“BSS”) and Occupational Therapy (“OT”) services during 2017/18,² which coincided with increased negative behaviors. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by reducing BSS and failing to revise Student’s Behavior Intervention Plan (“BIP”) at a 5/22/18 meeting, despite behavior escalations. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

² All dates in the format “2017/18” refer to school years.

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Issue 4: Whether DCPS denied Student a FAPE by allowing Nonpublic School to place undue pressure on Parent to medicate Student to attend school, despite IDEA prohibitions. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall fund the following independent evaluations: (a) Comprehensive Psychological, (b) Occupational Therapy, and (c) Functional Behavioral Assessment (“FBA”).
3. After completion of the evaluations in the paragraph above, DCPS shall convene an IEP team meeting to review the evaluations and revise Student’s IEP and BIP as appropriate, ensuring that among other things Student receives not less than 240 minutes/month of individual counseling, 120 minutes/month of group counseling, and 240 minutes/month of Occupational Therapy.
4. DCPS shall not require, nor unduly pressure, Parent to medicate Student, nor permit Nonpublic School to do so.
5. DCPS shall provide or fund compensatory education for denial of FAPE resulting from any failure to implement fully Student’s IEP in 2017/18.³ Compensatory education for any denial of FAPE due to lack of evaluations is to be reserved until after completion of any evaluations ordered above.

Findings of Fact

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

³ Petitioner’s counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was also encouraged at the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

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

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1. Student is a resident of the District of Columbia; Petitioner is Student's Mother.⁵ Student is *Age*, *Gender* and in *Grade* at Nonpublic School, where Student began on 5/22/17.⁶ Student lives with Father five days a week, which was also the case throughout 2017/18.⁷ During the timeframes at issue, Student had full-time IEPs with the disability classification of Multiple Disabilities ("MD"), with both Emotional Disturbance ("ED") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD").⁸

2. Behavior. Student had a "great" first half of 2017/18 at Nonpublic School, but Student's behaviors worsened after Winter break and Student became very oppositional, verbally abusive and inappropriate.⁹ Student often had to be removed from the classroom for negative behavior.¹⁰ Nonpublic School is concerned about the other children at school, due to Student's aggression, sexualized behaviors, and general acting out behaviors; by the start of 2018/19 the team was discussing whether Student might require residential services based on the severity of behaviors.¹¹

3. In the beginning of 2017/18, Student had mastered refraining from sexual comments and from exposing genitals; Student mastered a self-control strategy and was progressing in refraining from negative communication towards staff and peers.¹² In a 12/7/17 IEP meeting, Nonpublic School noted that Student's behaviors had improved "dramatically" since medication changed, classroom changed, and Student adjusted to therapeutic programming at Nonpublic School.¹³ Student had mastered all social-emotional goals, so had new goals.¹⁴ Student's behavior had improved significantly since beginning at Nonpublic School; if behavior continued to improve or stabilize, Student's team could consider a less restrictive setting.¹⁵

4. Toward the end of 2017/18, Student regressed in applying coping strategies, managing negative emotions and interacting with peers appropriately; Student was unmedicated and became more aggressive, made sexual comments and gestures to staff and peers, and had multiple suspensions.¹⁶ After arriving at Nonpublic School late in 2016/17, Student had displayed inappropriate behaviors of a sexual nature (lewd comments/gestures, exposing genitals, etc.) and behaviors related to bodily functions (spitting, intentional

⁵ Mother.

⁶ Mother; Monitoring Specialist; P6-3.

⁷ Father.

⁸ P4-1; P7-1; P11-1; Mother.

⁹ P28-1; Mother.

¹⁰ P28-1.

¹¹ P1-2.

¹² P28-2; P4-8.

¹³ P6-3; P5-2.

¹⁴ P6-2.

¹⁵ P6-3; R4-2 (possibility of stepping down from nonpublic setting at the end of school year); Monitoring Specialist.

¹⁶ P28-3; R4-2 (difficult behavior seemed to stem from no longer taking medication).

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enuresis), but had not displayed such behaviors in 2017/18 until a short time prior to the 5/22/18 meeting.¹⁷ The 11/13/14 comprehensive psychological evaluation noted possible incidents of sexual abuse suffered by Student at both school and home.¹⁸

5. Student had progressed in applying coping skills when frustrated, accepting responsibility, and interacting with peers appropriately, as of 4/16/18.¹⁹ At the 5/22/18 IEP meeting, Nonpublic School stated that overall Student had been doing well except for the past couple of weeks.²⁰ As of 6/4/18, Student had regressed in applying coping strategies, accepting responsibility, and interacting with peers appropriately.²¹ Student's behavior was so inappropriate that Student was not able to focus on school work.²² Student was in the behavior center (BCC) or in suspensions for most of the second half of the fourth quarter of 2017/18; Student has a lot of potential but was on a negative cycle impacting education.²³ The Nonpublic School team found that incentive plans were not successful with Student.²⁴

6. As of 12/7/17, Student had been involved in two incidents resulting in restraint/seclusion and/or suspension since beginning at Nonpublic School.²⁵ Between 12/7/17 and 5/22/18, Student was the subject of five incident reports.²⁶ In the three weeks between 5/22/18 and 6/13/18 there were eight more incident reports, and then another eight incident reports between 9/5/18 and 10/11/18.²⁷ Student's incidents often covered a significant span of time and range of misconduct.²⁸ Student engaged in sexual improprieties involving exposing genitals and "gyrating on property," grabbing the genitals of male school staff, accusing male staff of sexual behavior toward Student, and a great deal of sexual gesturing and comment about sex acts; bodily functions, including repeatedly spitting on school staff, intentional urinating on the floor and threatening to urinate on staff; violence in frequently throwing chairs, breaking telephones, trying to tip over television set with children nearby, charging at school staff, repeatedly punched staff; threats to kill self with gun or by stabbing neck with pencil, and eloping from school building and running into traffic; and a variety of threats to bring specific types of guns or knives to school to shoot or stab peers, school staff or "everyone" in school.²⁹

¹⁷ P4-8; P31-1,2 (2016/17).

¹⁸ P18-3.

¹⁹ P30-19,20.

²⁰ P3-2; R4-2.

²¹ P30-26,27.

²² P30-22 (6/12/18); P30-25 ("behaviorally not available for learning during quarter four" of 2017/18).

²³ P28-4; P30-22 (fourth quarter was 4/9/18 to 6/13/18).

²⁴ P1-3.

²⁵ P6-2.

²⁶ P34-5 (2/13/18); P34-8 (3/19/18); P34-11 (5/7/18); P34-12 (5/10/18); P34-17 (5/15/18); *cf.* R4-3 (noting only four incidents during time period).

²⁷ P34.

²⁸ *Id.*

²⁹ P34-8,12,17,25,31,34,37,39,42,43,45,49,50,51,52; P35-1,3,4,5,6,7; P36-3,4; P37-1,2.

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7. Nonpublic School called DC Child and Family Services Agency (“CFSA”) on 7/13/18 after Student threatened to bring a gun to school to shoot “everyone,” threatened to stab self in the throat, and ran out of the school building and into the middle of a road, among many other things.³⁰ On 9/5/18, Nonpublic School called the CFSA worker assigned to Student’s case due to Student’s explicit sexual assertions involving another student whom Student sought to fight.³¹ Nonpublic School completed a written Report of Suspected Child Abuse or Neglect on 9/6/18 based on Student not taking medication for ADHD.³² Nonpublic School followed OSSE’s directive about CFSA referral.³³ On 9/14/17, CPS had been involved after Student called the police when brother pulled out a knife and gestured aggressively toward Student.³⁴ Father reported that, unlike at school, Student is not aggressive at home, although Student has a very bad temper and throws things at home; Mother testified that Student has temper tantrums at home if Student doesn’t get own way.³⁵ Student has expressed suicidal ideation, even when not appearing to be under duress.³⁶

8. Cognitive and Academic Abilities. An 11/13/14 comprehensive psychological evaluation found Student to be in the Average range of cognitive ability.³⁷ Academically, the 11/13/14 evaluation found Student to have Average to Above Average scores in all areas assessed by the Woodcock-Johnson III Achievement (“WJ-III ACH”); Student was at or above grade and age equivalencies in most areas.³⁸ A 5/9/15 independent comprehensive psychological evaluation found Student to have Average to Above Average academic skills in reading, writing and math.³⁹

9. A 5/8/18 WJ-IV ACH found that Student was below grade level on all 53 clusters/tests, with Reading and Broad Reading over 2.5 grades behind, Mathematics over 3 grades behind, Broad Mathematics over 2 grades behind, Written Language and Broad Written Language nearly 3 grades behind.⁴⁰ A 7/13/17 WJ-IV ACH also indicated that every cluster and test was below grade level, although there were inconsistent increases and decreases from 7/13/17 to 5/8/18, with Student generally falling further behind academically by May 2018.⁴¹

10. Student’s grades were good in the first half of 2017/18, with all “As” except one “B” in the first two quarters; Student’s grades slipped to all “C” or “C+s” except for one “B” by

³⁰ P34-49,50,51 (three page, single-spaced incident report); P41-1 (confirming 7/13/18 CFSA report).

³¹ P35-6,7.

³² P41-1.

³³ P1-2; Monitoring Specialist (didn’t contact CFSA or tell Nonpublic School to do so).

³⁴ R17-1; Child Protective Services is within CFSA, according to its website.

³⁵ Father; Mother.

³⁶ P1-2 (9/28/18 meeting); P2-1.

³⁷ P21-14.

³⁸ P18-9,10; P21-15.

³⁹ P21-4,15.

⁴⁰ P24-1,2.

⁴¹ P24-1,2,3,4.

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fourth quarter of 2017/18.⁴² Student's academic progress was impeded by Student's negative behaviors at the end of 2017/18.⁴³ In 2017/18, Student loved math class, but was working about two years behind Grade.⁴⁴ Student enjoyed reading class and made some progress in 2017/18, but was nearly three years behind Grade.⁴⁵ Student's biggest area of need remained writing.⁴⁶

11. Reevaluation. The last meeting to determine Student's eligibility for special education was on 5/12/16.⁴⁷ Student's occupational therapist at Nonpublic School stated that Student's last triennial meeting took place on 5/12/16 and was documented in SEDS.⁴⁸ Monitoring Specialist also stated that Student had a triennial in May 2016.⁴⁹ There was no question raised about reevaluation of Student by Parents at the 12/7/17 IEP meeting or by Parents or advocates at the 5/22/18 IEP meeting.⁵⁰ An OT evaluation of Student was most recently completed on 4/23/16, which Educational Advocate acknowledged was "current."⁵¹ A WJ-IV achievement test was conducted in May 2018.⁵² DCPS agreed at the resolution meeting to conduct an FBA, which may have been completed by 12/6/18.⁵³

12. BSS. In 2017/18, Student's IEP provided for 240 minutes/month of individual BSS until reduced to 180 minutes/month on 5/22/18, for a total of 37.25 hours for the school year; based on service trackers, 30 hours of BSS were provided to Student, with 11 of those hours being reported as "observation" of Student in the classroom (and challenged by Petitioner).⁵⁴ Five hours of individual BSS were not provided as a result of school holidays on 11/23/17, 12/21/17, 12/28/17, 3/22/18, 3/29/18; Student was absent on 6/12/18; the April 2018 Service Tracker was not in either Petitioner's or Respondent's disclosures, in which four hours should have been provided.⁵⁵

13. At the 5/22/18 IEP meeting, the BSS therapist explained that Student needed more work "in the moment" so future BSS work would be in the classroom and she might ask for reduction in therapy time.⁵⁶ Student did better in class with push-in services rather than pull-out for BSS, so therapist kept four sessions/month but Student's IEP was reduced to

⁴² P28-4.

⁴³ P28-1.

⁴⁴ *Id.*

⁴⁵ P28-2.

⁴⁶ *Id.*

⁴⁷ P4-1; P7-1; P11-1.

⁴⁸ R16-1.

⁴⁹ P1-2.

⁵⁰ Monitoring Specialist.

⁵¹ Educational Advocate; P23.

⁵² P24.

⁵³ R2-3; Monitoring Specialist.

⁵⁴ P25-1,2; P4-13; R17; Educational Advocate.

⁵⁵ R17-5; R17-7; R17-18; R17-23; P25-1.

⁵⁶ P3-3.

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180 minutes/month due to classes being 45-minutes long.⁵⁷ Although a reduction was made from 240 to 180 minutes/month on the 5/22/18 IEP, there was no impact on the services provided Student in May and June, if Student attending the IEP meeting with therapist is counted.⁵⁸

14. Student's 12/7/17 IEP added 120 minutes/month of group BSS to address Student's social interactions and peer relationships; Student should have received a total of 12.5 hours through the end of 2017/18; as of 5/22/18, Student was doing well building relationships in group therapy.⁵⁹ Student was provided a total of five hours of group BSS, with 30 minutes in January 2018, 120 minutes in February, 30 minutes in March, missing data for April, 90 minutes in May, and 30 minutes in June.⁶⁰ Another three hours (six 30-minute sessions) were accounted for by school closings on 3/2/18 and 3/30/18, Student's absences on 1/26/18, 6/1/18 and 6/15/18, and Student being unable to attend due to behavior on 3/23/18.⁶¹

15. OT. Student's IEP was increased from 120 to 240 minutes/month of OT on 12/7/17.⁶² Student's occupational therapist at Nonpublic School calculated that Student should have received 25 hours of OT between the 12/7/17 IEP and the end of 2017/18, but was 6.5 hours short.⁶³ Both parties calculated that Student was given 18.5 hours of OT between 12/7/17 and the end of 2017/18; school closure (on 12/26) only impacted one session.⁶⁴ During this period Student was absent from OT twice, on 12/19/17 and 6/12/18.⁶⁵

16. FBA and BIP. An FBA and BIP were completed in December 2017 and updated in May 2018 in SEDS.⁶⁶ The BIP's full list of behaviors to be addressed was for Student to positively interact with peers, "serve" consequences and not avoid them by lying, and utilize calming strategies when frustrated.⁶⁷ The BIP for Student was short and included few rewards and only a single consequence; no modifications were made on 5/22/18.⁶⁸ The BIP remained the same in May as in December because Student purportedly was "still working

⁵⁷ Monitoring Specialist (testified that Student was not willing to do pull-out sessions, but the undersigned saw no indication of that in the service trackers).

⁵⁸ P25-2.

⁵⁹ P7-13; P6-3; P3-3; Hearing Officer calculation of hours.

⁶⁰ R17-9,15,16,17,18,21,22,23; oddly, the service trackers relied on by Petitioners do not show the group BSS that is listed on Respondent's service trackers – see P25-11 compared to R17-9, and P25-13 compared to both R17-15 and R17-13 (which is also missing group BSS).

⁶¹ R17-9,17,18,23.

⁶² P11-8; P7-13.

⁶³ R16-1 (although the period from 12/12/17 through 6/13/18 has 27 weeks, the IEP requires four hours per month and two of the months had five weeks).

⁶⁴ R16-1,2; P26-1.

⁶⁵ R16-2,8,23.

⁶⁶ P1-3; P5-2; P6-3; R4-3 (most recent BIP dated 5/21/18).

⁶⁷ P8-1.

⁶⁸ P8-1,2.

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on the same skills” and focused on applying the skills Student already knew, according to the 5/22/18 meeting notes.⁶⁹ Even at the 5/22/18 IEP meeting, the team was still hopeful that Student might be a “great LRE candidate” during the summer, if Student’s behavior improved due to medication management or better personal control.⁷⁰

17. Despite Student’s behavioral and academic challenges, Nonpublic School did not make adjustments to Student’s program.⁷¹ At the 9/28/18 meeting, Petitioner’s counsel asked Nonpublic School to update Student’s BIP after conducting a new FBA; DCPS agreed and Parents signed the consent form for an FBA on 10/4/18.⁷²

18. Medication. The 11/13/14 comprehensive psychological evaluation noted that there were times Student was not administered ADHD medication⁷³ as prescribed, and on those days Student’s behavior could be “uncontrollable.”⁷⁴ The 5/9/15 independent comprehensive psychological evaluation reported that Student had significantly improved behavior while on medication, but Student went to school many days without medication.⁷⁵ Student was on medication in October 2017.⁷⁶

19. Nonpublic School stated at the 5/22/18 meeting that Student was aggressive when off medication, but was doing well before going off medication.⁷⁷ Father reported in the 5/22/18 meeting that Student had been off medication since February 2018 because Student historically complained of physical symptoms; Father noted that medication made Student “zombie-like.”⁷⁸ Mother stated in the 5/22/18 meeting that she spoke to Student about talking to the doctor to adjust dosage; Mother was open to adjusting medication, but Father opposed medication then because Nonpublic School staff was blaming medication rather than “taking responsibility for their actions” with regard to inappropriate restraint and seclusion.⁷⁹

20. After a significant increase in Student’s behavioral incidents, Father reportedly told Nonpublic School on 5/31/18 that he planned to take Student to the doctor to get Student back on medication and see a therapist.⁸⁰ Father took Student to the doctor to lower dosage, but pain in Student’s stomach continued, so couldn’t take medication; they went back again and were recommended a chewable medication that was “like candy,” but it was expensive

⁶⁹ P3-3.

⁷⁰ R4-4.

⁷¹ Monitoring Specialist.

⁷² P1-3; P42-1.

⁷³ All references to “medication” herein refer to ADHD medication.

⁷⁴ P18-2.

⁷⁵ P21-15.

⁷⁶ Father.

⁷⁷ P3-2.

⁷⁸ *Id.*

⁷⁹ R4-2.

⁸⁰ P34-31.

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and insurance wouldn't cover it.⁸¹ Mother testified that they were trying to figure out the right medication for Student.⁸² Mother strongly asserted that she would give medication if Student needed it, but not because Nonpublic School wanted her to provide medication.⁸³ Nonpublic School kept calling, so Mother turned to Petitioner's counsel who said Parents don't have to medicate Student if they don't want to.⁸⁴

21. While hitting and pushing school staff on 6/11/18, Student reportedly stated "if I don't take my medicine, I can't control it."⁸⁵ During an incident on 7/13/18, Student repeatedly warned school staff that Student does not take medication anymore because of the "icky" taste.⁸⁶ School staff only spoke with Father (as Mother's number was disconnected) about the incident and Father stated that there have been days he medicated Student and there were still problems "with the school."⁸⁷

22. On 9/5/18 after another long incident, Father told Nonpublic School staff that Student refuses to take medication and that Father puts medication into Student's breakfast to get Student to take the morning dose but does not regularly give Student medication at night.⁸⁸ After a 9/14/18 incident in which Student was throwing chairs and flipped over a teacher's desk, Student was transported home due to sexual behaviors; Father stated that Student had had a bad morning and Father wasn't able to give Student medication that morning, so Father knew Student would have a bad day.⁸⁹ Father testified that Student's medication "ended for good" in October 2018, but Student had been taking medication off and on before that.⁹⁰

23. Status. By a 9/28/18 meeting, the Nonpublic School team was clear that an alternate placement was required for Student; despite the efforts made, Student had worsening behaviors; there was talk of residential services, based on the severity of behaviors.⁹¹ Student was not accessing education or receiving any educational benefit.⁹² As stated in an 11/13/18 letter, Nonpublic School concluded that it could no longer provide an educational placement due to Student's increasingly threatening, inappropriate, destructive and unsafe behaviors, which put both students and staff at risk; Student's last day at Nonpublic School was to be 12/6/18.⁹³

⁸¹ Father.

⁸² Mother.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ P34-43.

⁸⁶ P34-49.

⁸⁷ P34-51.

⁸⁸ P35-7.

⁸⁹ P35-1.

⁹⁰ Father.

⁹¹ P1-2.

⁹² P1-2.

⁹³ P39-1.

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Conclusions of Law

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

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

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

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

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

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an

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IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to conduct a triennial reevaluation by May 2018, when the previous evaluation was in May 2015 and Student needed updated data due to limited progress and behavior escalations. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this issue. The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student's parent or teacher requests a reevaluation, or if the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student's parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. 300.305(a).

Here, Student was last found eligible for special education on 5/12/16 and both Monitoring Specialist and Student's occupational therapist at Nonpublic School confirmed that Student's last triennial was in May 2016. Petitioner, who bears the burden on this issue, did not demonstrate that the previous evaluation was in May 2015 or that there had been analysis of existing data concerning Student at that time rather than when eligibility was determined in May 2016. Thus, a reevaluation was not required by May 2018 unless Student's parent or teacher or the LEA had sought a reevaluation. Petitioner did not assert that a reevaluation request had been made and Monitoring Specialist testified without contradiction that there was no question of reevaluation of Student raised at the 12/7/17 or 5/22/18 IEP meetings. This Hearing Officer thus concludes that Petitioner has not shown that Respondent violated the IDEA or denied Student a FAPE by not conducting a reevaluation by May 2018.

Issue 2: *Whether DCPS denied Student a FAPE by failing to fully implement Student's BSS and OT services during 2017/18, which coincided with increased negative behaviors. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on the issue of full implementation of related services required by Student's IEPs as to group BSS, but not individual BSS or OT services.

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

Considering Student's individual BSS first, Student's IEP provided for 240 minutes/month of individual BSS in 2017/18 until reduced to 180 minutes/month on the 5/22/18 IEP, which totaled 37.25 hours for the school year. Based on Student's service trackers, 30 hours of individual BSS were provided to Student in 2017/18, with 11 of those hours being reported as “observation” of Student in the classroom, which were challenged by Petitioner. Five hours of individual BSS were not provided as a result of school holidays on 11/23/17, 12/21/17, 12/28/17, 3/22/18, 3/29/18, according to the service trackers. Another hour was not provided because Student was absent on 6/12/18.

In considering the hours missed for various reasons, *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), held that related services sessions missed due to “snow days, holidays, [student's] absence from school, and the like” were not counted toward failure to implement the IEP, while *Joaquin v. Friendship Pub. Charter Sch.*, 2015 WL 5175885, at *8 (D.D.C. 2015), makes clear that services simply need to be offered to a student, even if the student “would not have been present to receive any” of them. *See also Letter to Balkman*, 23 IDELR 646 (OSEP, 4/10/95) (requires missed services due to provider or student unavailability for school functions to be made up, but not student absences). These cases are in line with DCPS's *Missed Related Service Sessions, Truancy and Due Diligence Guidelines* (August 2013)⁹⁴, which summarizes on p. 8 that a related service provider is not required to make up missed service sessions for Student absence (excused or unexcused), for Student refusal to participate or attend, or when School is closed for holiday or emergency. Applying these principles to Student's individual BSS hours above accounts for an additional six hours, pushing the total hours to 36 of the required 37.25 hours of individual BSS, with the difference being *de minimis*.

Further, the April 2018 BSS service tracker was not in either Petitioner's or Respondent's disclosures, in which four hours should have been provided. Since virtually all of the individual BSS hours were provided in months before and after April, the

⁹⁴ See <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/GAGA-2015-R0046-AttachmentJ11MissedRelatedServiceSessionsTruancyandDueDiligenceGuidelines.pdf>.

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undersigned finds it highly likely that hours were similarly provided in April, and no evidence was provided to the contrary. This would push the total number of hours over the required 37.25 hours of individual BSS.

However, as flagged above, the service tracker progress notes for 11 hours of services mentioned that the therapist “observed” Student in the classroom without expressly connecting the observation to therapist’s interactions with Student, which Petitioner found objectionable. When the progress notes mentioned observation and did connect with some action by the therapist, Petitioner understandably raised no concern. There was no clarifying testimony or evidence about the scope of the observation and how it did or did not fit into the work of the therapist with Student.⁹⁵ However the therapist did explain at the 5/22/18 IEP meeting that Student needed more work “in the moment” so future BSS services would be in the classroom. Student reportedly did better in class with push-in services rather than pull-out for BSS, which was clearly building on experience of the therapist in the classroom with Student and apparently being recorded on the service trackers as “observation.” On balance, the undersigned is persuaded that that the hours listed as “observation” were appropriate BSS services and thus all of the individual BSS hours were provided to Student and there was no failure to implement the IEP and no IDEA violation.⁹⁶

Turning next to group BSS, the 12/7/17 IEP meeting added a new requirement of 120 minutes/month of group BSS to Student’s IEP. Student should have received a total of 12.5 hours of such services through the end of 2017/18. Based on the service trackers, Student was provided a total of five hours of group BSS, while another three hours (six 30-minute sessions) were accounted for by school closings on 3/2/18 and 3/30/18, Student’s absences on 1/26/18, 6/1/18 and 6/15/18, and being unable to attend due to Student’s behavior on 3/23/18. That still leaves 4.5 hours unaccounted for out of 12.5 hours, which is 36% and would be a clear violation. *See Middleton*, 312 F. Supp. 3d at 145; *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018). The undersigned is more skeptical about extrapolating group BSS time for April where the figures in other months are erratic, but even assuming that full services were provided in April, that would leave 2.5 hours missing, which is a failure to provide 20% of the required services. The District Court was unambiguous in *Middleton*, 312 F. Supp. 3d at 145, that a 20% deviation from an IEP’s requirements was material and could not be excused as *de minimis*. Thus, this is a violation due to the failure to provide between 20% and 36% of required group BSS services during the relevant timeframe.

Finally, turning to OT services, Student’s IEP was increased from 120 to 240 minutes/month of OT on 12/7/17. Student’s occupational therapist at Nonpublic School

⁹⁵ Respondent’s counsel noted on the record that the BSS provider no longer works at Nonpublic School.

⁹⁶ One hour of BSS services was listed as attending an IEP meeting, which the undersigned has disregarded in concluding that all hours of individual BSS were provided. Even if a substantial portion of hours mentioning “observation” were disregarded, the missing hours would still be *de minimis*.

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calculated that Student should have received 25 hours of OT between the 12/7/17 IEP meeting and the end of 2017/18 on 6/13/18, but was 6.5 hours short. Indeed, both parties calculated that Student was given 18.5 hours of OT during this time. Taking the occupational therapist's calculations at face value, missing 6.5 out of 25 hours amounts to a failure to provide just over one-fourth of the services required, which is a material violation under *Middleton*, 312 F. Supp. 3d at 145 (20% deviation was material), and *Wade*, 322 F. Supp. 3d at 133 (27% deviation was material).. However, applying the principles discussed above to the fact of school closure (on 12/26) impacting one session, and Student being absent from OT twice on 12/19/17 and 6/12/18, these three 1-hour sessions reduce the missed hours to 3.5 out of 25 hours, which is only 14%. This Hearing Officer considers missing 14% of the required OT services to be *de minimis* and not a FAPE violation. *See, e.g., Catalan*, 478 F. Supp. 2d at 76 (related services therapist missing a "handful of sessions" and cutting others short was not substantial), *Johnson*, 962 F. Supp. 2d at 269 (9% deviation not material).

In sum, careful analysis reveals that Student was provided all the individual BSS required by Student's IEP, but suffered a material deviation in the amount of group BSS provided. No harm to Student need be shown, so this deviation contributes to the compensatory education award below. In the view of this Hearing Officer, Student was also provided the OT services required, as the 3.5 hours missed were *de minimis*, although OT is included below as an area in which Petitioner can use some of the 60 compensatory education hours awarded, if Petitioner desires to make up the 3.5 lost OT hours.

Issue 3: Whether DCPS denied Student a FAPE by reducing BSS and failing to revise Student's BIP at a 5/22/18 meeting, despite behavior escalations. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)

Petitioner established a prima facie case on this issue, and Respondent did not meet its burden of persuasion on the BIP issue. Student's behavior worsened from the beginning of 2018 and the problems became significantly worse in the couple of weeks before the 5/22/18 IEP meeting where Petitioner asserts that Respondent should have revised Student's BIP and should not have reduced the amount of BSS.

Looking closely at the incident reports in 2018, there were none in January, only one in February, one in March, and none in April. But as the 5/22/18 IEP meeting approached, there were incident reports on 5/7/18, 5/10/18 and 5/15/18, which raised concerns but apparently still left the team hoping that with medication or other behavioral changes Student might be ready to move to a less restrictive setting over the summer.

As discussed above, at the 5/22/18 IEP meeting the BSS therapist explained that Student needed more work "in the moment" so planned to conduct future BSS sessions in the classroom, which led to adjusting the four 1-hour sessions/month to fit the 45-minute long classes by reducing Student's IEP by 15 minutes/week (240 to 180 minutes/month). Although it is difficult to prospectively view the change as it would have been considered

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by the team on 5/22/18,⁹⁷ the undersigned concludes that with the serious incidents immediately prior to the IEP meeting, Student's level of BSS should have been maintained (or increased), rather than decreased. Student clearly required BSS to benefit from special education and access the curriculum rather than frequently being suspended or sent to the behavior center. *See* 34 C.F.R. 300.34(a). Maintaining the then-current BSS level (or above) was required to provide related services at a level "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. However, this is merely a procedural violation, as the nominal reduction made very little practical difference in 2017/18, although the IEP carried over into 2018/19. If Student attending the IEP meeting with the therapist on 5/22/18 is counted as suitable BSS services (which the undersigned disregarded above), there was no reduction at all in BSS services in the three weeks to the end of 2017/18, while not counting the time in that single meeting can hardly be said to have a notable educational impact on Student. *See* 34 C.F.R. 300.513(a)

As for the failure to update Student's 12/7/17 BIP, it is clear to the undersigned and should have been clear to the IEP team that Student's sexualized and aggressive behaviors had re-emerged as a serious problem by 5/22/18 and the BIP – which was quite insubstantial to begin with – certainly needed to be bolstered. Student's BIP was very short and included few rewards and only a single consequence. The BIP's full list of behaviors to be addressed was for Student to positively interact with peers, "serve" consequences and not avoid them by lying, and utilize calming strategies when frustrated, even though Student had just threatened to bring a gun to school and shoot everyone, along with many other threats and misdeeds. It was no excuse to assert that Student was still working on the same skills, for more behavioral help was definitely needed for Student at that point.

The IDEA requires, in the case of a student whose behavior impedes the student's own learning or that of others, as here, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. 300.324(a)(2)(i); *Middleton*, 312 F. Supp. 3d at 146. Here, the failure to update Student's BIP caused a deprivation of educational benefit to Student and is thus held by the undersigned to be a substantive violation and a denial of FAPE pursuant to 34 C.F.R. 300.513(a). This denial of FAPE contributes significantly to the compensatory education awarded below.

Issue 4: *Whether DCPS denied Student a FAPE by allowing Nonpublic School to place undue pressure on Parent to medicate Student to attend school, despite IDEA prohibitions. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of persuasion on the final issue of medication for Student's ADHD. The prohibition on mandatory medication is clear in 34 C.F.R. 300.174(a), which states that parents cannot be required to obtain a prescription for controlled substances as a condition for a student attending school, being evaluated or

⁹⁷ Analysis must be prospective, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

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receiving services. It is worth noting that 300.174(b) provides a rule of construction to make clear that school personnel may still consult and share classroom-based observations with parents about a student's performance and behavior. The prohibition on mandatory medication is not intended to keep school staff from discussing the reality of a child's situation, but merely from conditioning services on medication. *See Evergreen Sch. Dist.*, 106 LRP 18815 (SEA WA 2006).

Here, as set forth in the detailed findings of fact above, Parents had long been engaged in communication with school staff (and evaluators) about Student's performance and behavior and how it was impacted by medication or the lack of medication. Parents at times seemed fully supportive of efforts to ensure Student took medication when needed and at other times appeared to oppose medication out of concern for the side effects on Student or due to other conflicts with the school. In any case, it is the conclusion of the undersigned based on the in-person testimony of both Father and Mother, along with other evidence in this case, that medication (or a prescription for medication) was never required as a condition for Student to attend school, be evaluated or receive other services.

It is true that by the 9/28/18 team meeting, the Nonpublic School team was clear that an alternate placement was required for Student. Despite the efforts that had been made, Student had worsening behaviors to the point that there was talk of Student needing residential services. In the formal 11/13/18 letter, Nonpublic School concluded it could no longer provide an educational placement due to Student's increasingly threatening, inappropriate, destructive and unsafe behaviors which put both students and staff at risk. However, these steps were not conditioned on Student's medication and on this record the undersigned concludes that there was no violation of 34 C.F.R. 300.174(a) by Nonpublic School, much less Respondent.

Compensatory Education

In determining compensatory education for a denial of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Here, Educational Advocate's Compensatory Education Proposal is based on a variety of claims only some of which the undersigned has found to be denials of FAPE, so the Proposal has been adjusted by the undersigned as appropriate to provide compensatory education for the violations found herein. Further, with Student leaving Nonpublic School

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and going to another setting, the needs of Student are especially difficult to determine at this time. Thus, the undersigned is providing a range of services that Petitioner can choose among, with input from her educational advocate and counsel, to best apply the hours awarded to Student's current needs. Accordingly, taking into account the denials of FAPE found in this case, and carefully considering the totality of the circumstances, the undersigned concludes that it is appropriate to award a total of 60 hours of counseling, behavior support, academic tutoring, occupational therapy, and/or mentoring, in order to put Student in the place Student should have been, but for the denials of FAPE found herein.

ORDER

Petitioner has prevailed on certain claims in this case, as set forth above. Accordingly, **it is hereby ordered that:**

DCPS shall provide letter(s) of authorization for a total of 60 hours of counseling, behavior support, academic tutoring, occupational therapy, and/or mentoring (at Petitioner's option) from independent providers chosen by Petitioner, with such letter(s) to be provided within 10 business days after Petitioner's request(s).

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

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