

**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 03, 2021

<i>Student</i> , ¹)	Case No.: 2021-0133
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 12/3/21
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	11/15/21 & 11/16/21
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”) due to DCPS’s failure to comprehensively evaluate and use the appropriate standard for determining eligibility for special education. DCPS responded that Student was evaluated as needed and eligibility was properly determined.

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 8/31/21, the case was assigned to the undersigned on 9/1/21. Respondent filed a response on 9/10/21, and did not challenge jurisdiction, although a dozen “affirmative defenses” were listed in a footnote without

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics. Personal pronouns and other terms that would indicate Student’s gender are omitted.

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explanation. Petitioner filed a motion for stay-put on 9/21/21, which was opposed by Respondent on 9/29/21, a reply submitted on 10/2/21, and the motion granted by the undersigned on 10/13/21. A resolution meeting took place on 9/9/21, which did not settle the case or shortened the 30-day resolution period, which ended on 9/30/21. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 20-day continuance, which requires a Hearing Officer Determination (“HOD”) by 12/4/21.

A prehearing conference was held on 10/21/21 and the Prehearing Order was issued the same day addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 11/15/21 and 11/16/21 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.

Documents and Witnesses

Petitioner’s Disclosure, submitted on 11/5/21, contained documents P1 through P13, which were all admitted into evidence over limited objections. Respondent’s Disclosure, also submitted on 11/5/21, contained documents R1 through R33, of which R1, R4, R6, R9, R13, R15 through R17, R19 through R21, R23, R31 and R32 were offered and admitted into evidence without objection.²

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

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

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see* Appendix A):

1. *School Psychologist* (qualified without objection as an expert in School Psychology)
2. *Assistant Principal at Public School* (qualified without objection as an expert in Special Education Programming and Placement)

Petitioner’s counsel did not submit any rebuttal evidence.

² Citations herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted, while Respondent’s documents are indicated in the same manner beginning with an “R.”

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Issues and Relief Requested

The issues³ to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability, by (a) failing to fund an independent psychological evaluation following Parent’s objections to the evaluation DCPS relied on to deny eligibility; and/or (b) failing to evaluate prior to exiting Student from special education, including failure to perform a comprehensive psychological evaluation, an occupational therapy evaluation, and a comprehensive functional behavioral assessment. *(Petitioner has the burden of persuasion on this issue.)*

Issue 2: Whether DCPS denied Student a FAPE by failing to use the appropriate standard for determining Student’s eligibility for special education services on 12/17/20, which is “educational impact” rather than “academic impact.” *(Petitioner has the burden of persuasion on this issue.)*

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall fund at market rates either a comprehensive psychoeducational evaluation or a neuropsychological evaluation, at Parent’s option.
3. OMITTED⁴: DCPS shall fund at market rates an occupational therapy evaluation, including all necessary sensory integration assessments.
4. DCPS shall complete or fund at market rates (at Parent’s choice) a comprehensive functional behavioral assessment.
5. DCPS shall convene a meeting and find or determine that Student is eligible for special education.

³ At the beginning of the due process hearing, Petitioner withdrew Issue 3 without prejudice, which the undersigned permitted based on the relevant provisions of the Prehearing Order; DCPS objected to withdrawal of the issue without prejudice. Issue 3 stated in full, “Whether DCPS denied Student a FAPE by failing to find eligibility for special education on 12/17/20, where (a) Student had a diagnosis of autism spectrum disorder (‘ASD’); (b) Student’s ASD negatively impacted behaviors and executive functioning, including attention and organization, completion of school assignments, and socialization with peers and adults; (c) at the 12/17/20 eligibility meeting, DCPS failed to consider any executive function or behavioral issues or pragmatic language issues related to ASD; (d) Student’s disability had a negative educational impact in school; and/or (e) the 1/28/21 Section 504 plan is not a substitute for an IEP. *(Petitioner has the burden of persuasion on this issue.)*”

⁴ Petitioner clarified at the beginning of the due process hearing that she was not requesting an OT evaluation as set forth in paragraph 3.

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6. DCPS shall provide or fund compensatory education for any denial of FAPE (a) as determined by the Hearing Officer, (b) based on a compensatory education study ordered by the Hearing Officer, and/or (c) which will be reserved and determined, settled or litigated later.⁵
7. Any other just and reasonable relief.

Motions During Hearing

Respondent made a total of 5 motions during this due process hearing, with 3 prior to Petitioner's opening statement and 2 at the end of Petitioner's case-in-chief, all of which were taken under advisement by the undersigned and are hereby **DENIED**.

Due process hearings are not governed by formal rules of procedure or evidence.⁶ The conduct of the due process hearing is left to the discretion of the Hearing Officer, subject to review under 34 C.F.R. §§ 300.514, 300.516. *See* SOP § 601 ("Hearing Officers are independent and have discretion in managing a due process hearing"); *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995). Parties may file motions and Hearing Officers may use the Federal Rules of Civil Procedure ("FRCP") by analogy in ruling on motions.⁷ Here, each of Respondent's motions is denied for the reasons set forth below.

Motion 1. Respondent's first motion seeks to dismiss Issue 2 as not stating a legal claim, akin to FRCP 12(b)(6). A motion to dismiss is to be granted only when it appears "beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [plaintiff] to relief." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2000) (citations omitted). "At the motion to dismiss stage, counseled complaints, as well as pro se complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005). Here, the focus of Issue 2 is whether the correct legal standard was applied, which this Hearing Officer understands as being about whether a high-achieving student can nonetheless be entitled to an IEP based on needs other than academics. This motion is denied and the issue is discussed below.

Motion 2. Respondent's second motion sought to vacate the stay-put order entered in this case by the undersigned on 10/13/21 based on the withdrawal of Issue 3 by Petitioner in this case, even though Petitioner is still disputing Student's lack of eligibility and seeking further evaluation. In any case, Respondent's counsel emailed late on 11/15/21 stating that

⁵ Petitioner clarified at the beginning of the due process hearing that she was not seeking any compensatory education in this hearing, but sought to reserve any compensatory education claims to be determined, settled or litigated later.

⁶ Office of Dispute Resolution, *Standard Operating Procedures Manual (2018)* ("SOP") § 601.

⁷ SOP §§ 501, 601, 709.

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no order was needed on stay-put, which is effectively a withdrawal of this motion, which otherwise would be denied.

Motion 3. Respondent's next motion seeks to dismiss Petitioner's request for compensatory education in the due process complaint, although Petitioner made clear at the beginning of the hearing that she is not seeking compensatory education in this case, although she may pursue compensatory education in the future. This motion is also denied.

Motion 4. Respondent next seeks a partial directed verdict on the grounds that Petitioner cannot seek an IEE from DCPS as matter of law, when the evaluation that is being challenged was not conducted by DCPS. This is indeed an issue that must be addressed in this HOD, but cannot be resolved on a summary basis prior to clarity on the facts and law, so is denied.

Motion 5. Finally, Respondent seeks a second partial directed verdict on the basis that a Functional Behavioral Assessment ("FBA") was done and is in the record, so the alleged lack of a comprehensive FBA in Issue 1 should be rejected. However, questions were raised about the level of the FBA conducted by DCPS, so the motion is denied.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁸ are as follows:

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁹ Student is *Age*, *Gender* and in *Grade* at Public School, where Student began in 2020/21¹⁰; Student previously attended *Public Charter School*.¹¹ Student is motivated, loves learning and participating in class, and brings joy to class every day.¹² Student is "always" raising hand to answer questions and does an excellent job keeping peers on task; during individual group time, Student is focused and on task 100% of the time.¹³ Student is very amicable, with a great deal of potential, and is a wonderful student.¹⁴

⁸ 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.

⁹ Parent.

¹⁰ All dates in the format "2020/21" refer to school years.

¹¹ Parent.

¹² P6p63.

¹³ P6p65.

¹⁴ P6p70.

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Parent is “absolutely” an active, involved parent who is cooperative and attends meetings for Student.¹⁵

2. IEPs. Student’s 1/23/19 IEP at Public Charter School, based on the disability classification Autism Spectrum Disorder (“ASD”), provided 30 minutes/week of specialized instruction inside general education, 30 minutes/week of Speech-Language Pathology (“SLP”) outside general education, 30 minutes/week of Behavioral Support Services (“BSS”) inside general education, and 30 minutes/month of occupational therapy (“OT”) consultation.¹⁶ Student’s 5/26/20 IEP at Public Charter School continued to be based on the disability classification ASD, and provided 5 hours/week of specialized instruction inside general education, 30 minutes/week of BSS outside general education, 30 minutes/month of SLP inside general education, and 30 minutes/month of SLP consultation.¹⁷ After Student was no longer eligible for special education in December 2020, Student received a Section 504 plan on 1/28/21 based on ASD, which provided 120 minutes/month of BSS focused on peers and frustration at school, along with accommodations.¹⁸

3. Cognitive Abilities. The Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) was used to measure Student’s intellectual ability, which was found to be solidly Average with a Full Scale IQ (“FSIQ”) of 107 at the 68th percentile compared to peers, and other indices ranged from 86 (the only index below 100) at the 18th percentile for Visual Spatial to 119 for Processing Speed at the 90th percentile.¹⁹

4. Academic Abilities. WJ-IV Achievement results indicated that of the 5 clusters, Student was Superior in 4 with percentile ranks of 93 or better, while the fifth, Academic Applications, was Average with a percentile rank of 55; in both Broad Mathematics and Broad Reading Student was High Average, while in Broad Written Language Student was Superior.²⁰ The week of 10/19/20, in an English Language Arts (“ELA”) assessment, Student scored 46%, above the class average of 35%; Student’s Reading Inventory assessment was Lexile 472, just below grade level, and below the 605-755 Lexile range Student previously scored at Public Charter School.²¹ By 12/17/20, Student’s ELA work was consistently above grade level; Student took an ELA ANet on 12/17/20 and Student scored 54%, an 8-point improvement from beginning-of-year, and the 2nd highest score in Student’s class.²² Student’s math ANet assessment the week of 10/19/20 was 86% compared to the class average of 50%, and above grade level.²³ In math, Student is a leader

¹⁵ School Psychologist.

¹⁶ P2p11,20.

¹⁷ P5p36,46.

¹⁸ P8p81-83,85.

¹⁹ P3p26.

²⁰ P3p28-29.

²¹ P9p93; P6p63 (offering possible explanations for lower score).

²² P7p76; P6p64 (reading above grade level).

²³ P9p93; P6p63.

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who is above average and performing at or above grade level based on assessments and teacher notes.²⁴ Student was performing at or above grade level in each domain.²⁵

5. Behavior. Data showed a decrease in challenging behaviors since the first quarter of 2019/20; data for February 2020 showed that Student engaged in 100% positive behaviors.²⁶ Student mastered all 3 goals in Emotional, Social, Behavioral Development prior to Public Charter School closing for Covid on 3/16/20.²⁷ Student was observed many times and generally did very well.²⁸ Observations in May 2020 of virtual PE class reported that Student sustained attention throughout, without engaging in behaviors of concern; during virtual general education Student sustained attention to complete assignments as given; a recording from Parent showed Student leaving seat 9 times in 28 minutes, but Student had seen recording device which may have impacted behavior.²⁹

6. Student initially had difficulty transitioning from remote learning to in-person in a CARES classroom; Student was in the first CARES cohort in mid-October or early November 2020.³⁰ Parent stated that Student showed signs of distress when switched to the CARES in-person classroom; Student showed signs of distress from being detached from an iPad upon returning to in-person instruction, but teachers did not witness any behaviors at school.³¹ Student expressed frustration going from remote to an in-person setting, but adjusted well, interacting with peers and observing others and taking social cues; Student would benefit from continued behavior support.³² Student is on the same level as peers; Student's transition difficulties were the same as others; Student's struggles to be away from an iPad were the same as others.³³

7. Student showed mastery of goals such as wearing a mask and staying in seat 100% of the time in the classroom.³⁴ Student's 10/30/20 Behavioral Intervention Plan ("BIP") stated that Student's problematic behaviors were moving around in Student's seat and talking out of turn; the first occurred once an hour for 10 seconds, the second once a day for 1 second.³⁵ Student's general education ELA teacher did not have any major behavior concerns about Student, and merely needed to redirect Student to raise hand.³⁶ Parent stated

²⁴ P7p76.

²⁵ P11p100 (12/22/20 Prior Written Notice ("PWN")).

²⁶ P5p39 (5/26/20 IEP present levels of performance ("PLOPs")).

²⁷ R4p23.

²⁸ R16p94 (3/3/20, attended to the lesson well).

²⁹ P4p35; School Psychologist.

³⁰ 11p99; Assistant Principal.

³¹ P11p98,99 (Parent stated that Student was "obsessed" with iPad); Assistant Principal.

³² P7p77.

³³ P7p77; Assistant Principal.

³⁴ P11p98.

³⁵ P8p87.

³⁶ P6p65.

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that Student has been doing well in person during 2021/22, but needs prompting to stop moving around; Student's curriculum is not complex enough.³⁷

8. Student loves playing and socializing with peers; Student made "enormous" progress in ability to engage "prosocially" with peers; Student initiates play and involves self in play with peers with zero incidents or altercations.³⁸ Upon returning to in-person classes, Student had access to general education and built positive relationships with peers.³⁹ Multiple teachers noted that Student's interactions with peers were positive and that Student helped peers both with their work and staying on task.⁴⁰

9. Parent is doing all she can to push Student into social activities, but Student has not easily made friends and Parent is concerned that Student has no friends at school.⁴¹ Assistant Principal convincingly testified that Student does well at recess and lunch and has a couple of preferred friends; Student is typical in engagement with peers.⁴²

10. Evaluation. DCPS must go through an evaluation process with Student before removing Student's classification as a child with ASD; the process might include formal assessments or might not, along with classroom assessments and all data.⁴³ An Analysis of Existing Data ("AED") dated 10/21/20 reviewed the information available to the IEP team when determining more information was needed; available information included classroom and school-level assessments, input from Parent and teachers, related service provider input, results of previous evaluations, and IEP and progress notes from Public Charter School.⁴⁴ The classroom-based data included ANet (both ELA and math) and Reading Inventory.⁴⁵ The IEP team determined it needed additional information in order to determine eligibility, so proposed to review Student's June 2019 psychological evaluation, conduct a new speech evaluation, and conduct an FBA-Level 1 and develop a BIP-1.⁴⁶ Petitioner sought an FBA-2, but was rejected by the team because members did not observe reported behaviors, no safety concerns or behaviors preventing access to the curriculum, and no need was indicated based on progress reports and IEP notes from Public Charter School.⁴⁷

11. Specifically, eligibility was determined based on Speech Independent Assessment Review, BIP, FBA, Speech Service Tracker, Behavior Service Tracker, IEP Progress Report

³⁷ Parent.

³⁸ P5p39,43 (5/26/20 IEP PLOPs).

³⁹ P11p98; P6p66 (beginning to build relationships with other students; does well with peers).

⁴⁰ P11p99.

⁴¹ Parent.

⁴² Assistant Principal.

⁴³ *Id.*

⁴⁴ R4p19-25; R13; P9p93; Assistant Principal.

⁴⁵ P9p93.

⁴⁶ P9p92,93; Assistant Principal (FBA included due to Parent's concerns).

⁴⁷ P9p93; Assistant Principal.

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for Quarter 1 (2020/21), and Review of the Comprehensive Psychoeducational Evaluation.⁴⁸ DCPS's 12/4/20 Review of the Comprehensive Psychoeducational Evaluation included a significant quantity of additional assessment results and interpretation.⁴⁹ All of this information was sufficient for the IEP team to make an eligibility determination; the IEP team developed a holistic view of Student, including both social-emotional and academic aspects before determining eligibility.⁵⁰

12. Autism. Student was diagnosed with ASD at an early age (approximately 2 years) and received intensive early intervention services; Student responded well and made "tremendous" growth in the development of language, social, adaptive, and academic skills since then.⁵¹ Student displayed minimal symptoms of ASD based on Parent's behavior rating scales and during the June 2019 evaluation.⁵² During the June 2019 evaluation, Student easily transitioned with examiner, an unfamiliar adult, smiled often, and readily answered questions about summer plans and school experiences.⁵³

13. The GARS-3 results from Parent yielded an overall Autism Index score of 63, less than 1st percentile in the Unlikely Probability range for ASD; the Childhood Autism Rating Scale-High Functioning, Second Edition ("CARS-2-HF") yielded behavior ratings that fell within the Minimal Symptoms range for ASD.⁵⁴ Parent's T-scores from the BASC-3 show Student was well-adjusted and adaptive and behavioral functioning were within normal limits for age and grade level.⁵⁵ Autistic symptoms were reported as remitting in 2019 due to intensive therapeutic services, structured educational environment and unwavering support of Parent.⁵⁶

14. In June 2019, Student did not appear to need specialized instruction since academic skills were assessed between Average and Very Superior ranges.⁵⁷ School Psychologist closely reviewed the 6 criteria for ASD and concluded that data from both June 2019 and December 2020 showed that Student does not meet the criteria as a student with ASD.⁵⁸ Educational Consultant testified that the proper standard is that specialized instruction may be needed even if Student is high functioning; DCPS used the wrong standard by not looking beyond academic issues; IEPs are often developed without academic goals and with

⁴⁸ P11p100.

⁴⁹ P6p63-72 (total length is 10 pages for the 2019 report and 24 pages for the December 2020 review; *see* P3 and P6).

⁵⁰ Assistant Principal.

⁵¹ P3p32.

⁵² *Id.*

⁵³ P3p25.

⁵⁴ P3p31; P6p68.

⁵⁵ P6p70; P3p30.

⁵⁶ P3p32; P6p70.

⁵⁷ P3p33.

⁵⁸ P6p68-70 (School Psychologist concurs with June 2019 evaluation that Student's diagnosis was ASD with symptoms remitting without accompanying language or intellectual impairment); R17p102-03.

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more social goals.⁵⁹ School Psychologist agreed that a gifted/talented child with ASD can have an IEP.⁶⁰ Assistant Principal asserted that in DCPS there are not IEPs without specialized instruction and academic goals.⁶¹

15. Parent requested that the Public School IEP team not take supports from Student before knowing Student for “a long time” in a traditional school setting.⁶² Parent stated that regardless of what assessments say, she knows Student has weaknesses.⁶³ As result of observations and data collected and documented, Student’s IEP team felt that Student did not meet the criteria for ASD and that Student’s education was not adversely affected by a disability; Parent submitted a dissenting statement.⁶⁴ On 12/17/20, Student’s IEP team found Student no longer eligible as a student with a disability who continued to need special education and related services.⁶⁵

16. Related Services. An SLP assessment was conducted in March 2020, with supplemental SLP assessments in November 2020; Student mastered or almost mastered goals for related services, according to speech pathologist and occupational therapist.⁶⁶ Neither of Student’s IEPs provided any direct OT services, and only the older IEP provided any OT consultation.⁶⁷ As of 10/22/20, Parent did not have any OT concerns about Student, who had not been receiving any OT services since 2018; Parent was not seeking review of Student’s prior OT evaluation at Public Charter School in March 2020.⁶⁸

17. IEE Request. In late 2020, Petitioner requested an IEE due to disagreement with the Comprehensive Psychoeducational Evaluation conducted by Public Charter School in June 2019; DCPS rejected the request due to the evaluation being conducted by another LEA and because an IEE cannot be granted for review of an evaluation.⁶⁹ Parent, on advice from her previous counsel, declined to share specific components of the evaluation with which she disagreed, as was her right.⁷⁰ Parent received Procedural Safeguards at Public Charter School, which explained her rights to an IEE, but was not aware she could ask for an IEE from Public Charter School when the evaluation was first completed.⁷¹

18. Credibility. The undersigned finds that School Psychologist’s testimony was not credible on basic key points, even with gentle questioning by DCPS’s counsel, which causes

⁵⁹ Educational Consultant.

⁶⁰ School Psychologist.

⁶¹ Assistant Principal.

⁶² P11p98; P7p77.

⁶³ P7p76.

⁶⁴ P11p98.

⁶⁵ R4p17.

⁶⁶ P9p93; P11p99.

⁶⁷ P5p46; P2p20.

⁶⁸ R19p135,136.

⁶⁹ P12p101 (2/4/21 PWN).

⁷⁰ P11p99; P7p79.

⁷¹ Parent; R21p168; R31p243 (Parent signed for Procedural Safeguards on 4/4/18).

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the undersigned to heavily discount her testimony unless favorable to Parent and/or in line with documents or other witnesses in the case. Specifically, School Psychologist repeatedly emphasized that no child may be evaluated or tested more often than every 3 years, regardless of the circumstances; while testing every 3 years may not be needed, testing any sooner was a “no-no.”⁷² Asked by DCPS’s counsel whether there were any exceptions permitting testing sooner than 3 years, School Psychologist said she was not aware of any exceptions.⁷³ DCPS’s counsel then hypothetically inquired about a traumatic brain injury occurring a year after evaluation, but School Psychologist was adamant that the child would have to wait the remaining 2 years before a brain injury could be evaluated or the evaluator would “get in trouble.”⁷⁴ School Psychologist also testified with certainty that Student no longer had ASD, and not simply that Student had shifted on the autism spectrum.⁷⁵

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).

⁷² School Psychologist.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

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The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew 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.” *Endrew F.*, 137 S. Ct. at 1001.

In addition, the local education agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455 (CKK), 2018 WL 4623572, at *3 (D.D.C. 2018).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “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 comprehensively evaluate Student in all areas of suspected disability, by (a) failing to fund an independent psychological evaluation following Parent’s objections to the evaluation DCPS relied on to deny eligibility; and/or (b) failing to evaluate prior to exiting Student from special education, including failure to perform a comprehensive psychological evaluation, an*

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occupational therapy evaluation, and a comprehensive functional behavioral assessment. (Petitioner has the burden of persuasion on this issue.)

Petitioner failed to meet her burden of persuasion on this issue based on either the IEE process or the requirement of evaluating prior to determining a student is no longer a child with a disability. The claims are considered in turn.

(a) IEE. The basic framework for IEEs is straightforward. Under 34 C.F.R. § 300.502(b), with certain limitations Parent has a right to seek an IEE at public expense if she disagrees with a public agency evaluation. *See Taylor v. Dist. of Columbia*, 770 F. Supp. 2d 105, 109 (D.D.C. 2011); *Letter to Baus*, 115 LRP 8855 (OSEP 2/23/15). Once an IEE at public expense is requested, the public agency must without unnecessary delay either (i) file a due process complaint to show that its evaluation is appropriate; or (ii) ensure that an IEE is provided at public expense. *Id.*; 34 C.F.R. § 300.502(b). *See also L.S. ex rel. K.S. v. Abington School Dist.*, 2007 WL 2851268, at *6 (E.D. Pa. 2007).

Here, the claim diverges from the usual path because in late 2020, Petitioner requested an IEE from DCPS based on her disagreement with the Comprehensive Psychoeducational Evaluation conducted by Public Charter School in June 2019 rather than any evaluation conducted by DCPS. Parent explained that she did not realize that she could ask for an IEE from Public Charter School when the evaluation was first completed, despite having received her Procedural Safeguards at Public Charter School, which thoroughly explained the right to an IEE. DCPS rejected Parent's IEE request due to the evaluation being conducted by another LEA and because an IEE cannot be granted – even if it had been requested – for the review DCPS had just completed of the Public Charter School evaluation. 34 C.F.R. § 300.502(b)(1) (IEE if the parent disagrees with an “evaluation”). The undersigned concludes in these circumstances that the IDEA regulations do not require DCPS to provide an IEE to Parent at public expense based on her objection to the June 2019 Public Charter School evaluation.

(b) Evaluation Prior to Change in Eligibility. Petitioner asserts in the alternative that DCPS should have evaluated Student before DCPS determined that Student was no longer a child with a disability; pursuant to 34 C.F.R. § 300.305(e) a public agency must evaluate in accordance with §§ 300.304 through 300.311. *See Dist. of Columbia v. West*, 699 F. Supp. 2d 273, 279 (D.D.C. 2010). Specifically, Petitioner asserted in her due process complaint that DCPS should have conducted a comprehensive psychological evaluation, an OT evaluation, and a comprehensive FBA. However, 34 C.F.R. § 300.304(b)(1) provides that in evaluating a student, the district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about Student. Here, Assistant Principal correctly explained that the process might or might not include formal assessments, along with classroom assessments and other data.

The team conducted a 10/21/20 Analysis of Existing Data, reviewing the information available to the IEP team and determining whether more information was needed. The team reviewed classroom and school-level assessments, input from Parent and teachers, related service provider input, results of previous evaluations, and IEP and progress notes from Public Charter School; the classroom-based data included ANet (both ELA and math) and

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Reading Inventory results. Beyond this, the IEP team concluded that it needed additional information in order to determine eligibility, so proposed to review Student's June 2019 Comprehensive Psychoeducational Evaluation, conduct a new speech evaluation, and conduct an FBA-Level 1 and then develop a BIP-1.

Ultimately, Student's eligibility was determined based on a Speech Independent Assessment Review, BIP, FBA, Speech Service Tracker, Behavior Service Tracker, IEP Progress Report, and Review of the Comprehensive Psychoeducational Evaluation. The IEP team developed a holistic view of Student, including both social-emotional and academic aspects before determining eligibility. Taken together, the undersigned concludes that all of this information was a sufficient basis on which the IEP team could make an eligibility determination.

Turning to the specific assessments sought by Parent, DCPS's 12/4/20 Review of the Comprehensive Psychoeducational Evaluation was thorough and included a significant quantity of additional assessment results and interpretations, which increased the length of the report from 10 pages to 24 pages (including the final 2-page checklist).

As for an OT assessment, neither Student's 1/23/19 IEP nor 5/26/20 IEP provided any direct OT services, with only the older IEP providing even OT consultation. As of 10/22/20, Parent did not have any OT concerns about Student, who had not received any OT services since 2018. Parent was not seeking review of Student's prior OT evaluation at Public Charter School and there was no change in OT eligibility to be analyzed.

Finally, an FBA-1 was conducted based on Parent's concerns, but Parent sought an FBA-2 which was rejected by the team because its members did not observe reported behaviors. Further, there were no safety concerns or behaviors preventing access to the curriculum, as required for a Level-2 FBA. Indeed, Student's problematic behaviors were merely moving around in Student's seat and talking out of turn, with the BIP stating that the first occurred once an hour for 10 seconds and the second occurred once a day for 1 second.

In sum, the undersigned was not persuaded that DCPS's evaluation was inadequate prior to determining that Student was not eligible as a Student with ASD. Moreover, in these circumstances any shortcoming would merely have been a procedural violation and not a substantive denial of FAPE.

Issue 2: *Whether DCPS denied Student a FAPE by failing to use the appropriate standard for determining Student's eligibility for special education services on 12/17/20, which is "educational impact" rather than "academic impact." (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this issue as well, for DCPS did consider more than Student's academic needs, as discussed below.

To begin, the definition of "autism" is set forth in 34 C.F.R. § 300.8(c)(1)(i) as a developmental disability that adversely affects "educational performance." Then, to be eligible under the IDEA as a "child with a disability" as defined in 34 C.F.R. § 300.8(a)(1),

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Student must not only have autism (or another listed condition), but “by reason thereof” need special education and related services.⁷⁶ “Special education” is defined in turn in 34 C.F.R. § 300.39(a) as “specially designed instruction” to meet the unique needs of a child with a disability. *See Q.C-C. v. Dist. of Columbia*, 164 F. Supp. 3d 35, 51 (D.D.C. 2016). Further, “specially designed instruction” means adapting “the content, methodology, or delivery of instruction” to address the unique needs of the child to ensure access to the general curriculum, so the child can meet educational standards. 34 C.F.R. § 300.39(b)(3). *See Leggett v. Dist. of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015).

Here, the evidence is clear that Student is bright, with a solidly average FSIQ of 107 at the 68th percentile compared to peers and Processing Speed Index at the 90th percentile. Student’s academic skills were tested with the WJ-IV, which looked at 5 clusters in which Student was Superior in 4 with percentile ranks of 93 or better, while the fifth was Average with a percentile rank of 55. The WJ-IV testing indicated that Student was High Average in both Broad Mathematics and Broad Reading, while in Broad Written Language Student was Superior.

When the eligibility decision was made, Student’s ELA work was consistently above grade level. Student scored 54% on an ELA ANet on 12/17/20, the 2nd highest score in the class. In math, Student was a leader who was above average compared to peers and performing at or above grade level based on assessments and teacher notes. Student was performing at or above grade level in each domain.

If DCPS stopped there, it might be considering only academic impact in determining eligibility. But as noted above, Student’s FBA/BIP noted that Student’s problematic behaviors were moving around in Student’s seat and talking out of turn, which happened relatively infrequently. Data just prior to the pandemic shutdown showed that Student engaged in 100% positive behaviors. While Student reportedly experienced frustration transitioning back to in-person learning and giving up an accustomed iPad while in class, teachers did not witness any negative behaviors at school. Assistant Principal credibly testified that Student’s transition difficulties were about the same as other children. Student’s general education ELA teacher did not have any major behavior concerns about Student, and merely needed to redirect Student to raise hand. Parent acknowledged that Student has been doing well in 2021/22, merely needing prompts to stop moving around and needing to receive more complex curriculum.

Teachers also noted that Student’s interactions with peers were positive and that Student helped peers both with their work and staying on task. Parent encouraged Student’s social activities, noting it had not been easy for Student to make friends. Indeed, Parent fears that Student has no friends at school. However, Assistant Principal persuasively testified that Student does well at recess and lunch, has a couple of preferred friends, and is

⁷⁶ A child who meets one of the disability classifications under the IDEA who solely is in need of behavioral intervention or a related service and does not require special education services, does not qualify as a child with a disability under the IDEA. 34 C.F.R. § 300.8(a)(2)(i).

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typical in the level of engagement with peers. Student received a Section 504 Plan a month after Student was found not eligible for special education, which is not relevant to whether DCPS applied the incorrect standard for special education eligibility, but does helpfully provide 120 minutes/month of BSS focused on peers and frustration at school, along with accommodations.⁷⁷

The experts in this case disagreed about whether an IEP can be provided to a DCPS student without the inclusion of academic goals or specialized instruction. But the need for students with high cognition to be eligible for special education is confirmed by *Letter to Anonymous*, 110 LRP 52277 (OSEP 1/13/10), in which the U.S. Department of Education's Office of Special Education Programs stated that "the IDEA and its regulations do provide protections for students with high cognition and disabilities" and provided an example that could apply to Student's situation:

[A] child with Asperger's Syndrome [high functioning] could be considered under the disability category of autism and the individualized evaluation would address the special education and related services needs in the affective areas, social skills and classroom behavior, as appropriate.

See also Indep. Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 1082 (8th Cir. 2020) ("[t]he IDEA guarantees disabled students access to [an education], no matter their innate intelligence"), *cert. denied sub nom. Indep. Sch. Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, 20-905, 2021 WL 4507624 (U.S. Oct. 4, 2021).

The problem here with Petitioner's argument is that Public School did look beyond cognitive and academic abilities to consider behavior and other areas of possible concern, but did not find justification for continuing Student as needing special education and related services by reason of Student's ASD. 34 C.F.R. § 300.8(a)(1). Accordingly, the undersigned concludes that there was no violation of the IDEA or denial of FAPE.

ORDER

Petitioner did not prevail on any of the issues in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.

⁷⁷ Providing a Section 504 plan does not suffice for a student who is entitled to an IEP. "[T]he requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a broad anti-discrimination statute." *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 696 n.5 (6th Cir. 2003) (citing *Muller v. Comm. on Special Educ.*, 145 F.3d 95, 100 n.2 (2d Cir. 1998)).

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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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