

**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 07, 2022

<i>Student</i> , ¹)	Case No.: 2022-0182
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 12/7/22
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	11/28/22, 11/29/22 & 11/30/22
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 Respondent's failure to provide a residential placement and to fully implement Student's Individualized Education Programs ("IEPs"). Respondent responded that residential placement was not appropriate and that it did not fail to implement Student's IEPs.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter A30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 10/6/22, the case was assigned to the undersigned on 10/7/22. Respondent filed a response on 10/17/22 and did not challenge jurisdiction. A resolution meeting took place on 10/21/22, but the parties did not

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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settle the case or shorten the 30-day resolution period, which ended on 11/5/22. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 12/20/22.

A prehearing conference was held on 11/8/22 and a Prehearing Order was issued that 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 11/28/22, 11/29/22 and 11/30/22 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. Respondent was represented by *Respondent’s counsel*. Petitioner was present for the hearing.

Documents and Witnesses

Petitioner’s Disclosure, submitted on 11/18/22, contained documents P1 through P54, which were all admitted into evidence over various objections. Respondent’s Disclosure, submitted on 11/18/22, contained documents R1 through R26, which were all admitted into evidence without objection, except for R16, R21, R25 and R26, which were not offered into evidence.²

Petitioner’s counsel presented 6 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Psychiatrist* (qualified without objection as an expert in Psychiatry)
2. *Housing Clinical Director* (qualified without objection as an expert in Social Work)
3. *Educational Advocate* (qualified over objection as an expert in Special Education as it relates to IEP Implementation, Development and Placement)
4. *Housing Case Manager*
5. *Housing Director* (qualified without objection as an expert in Social Work)
6. Parent

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

1. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
2. *Special Education Teacher*

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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3. *Special Education Coordinator* (qualified without objection as an expert in Special Education)
4. *Assistive Technology Specialist* (qualified without objection as an expert in Speech-Language Pathology and Assistive Technology)

Petitioner's counsel presented no rebuttal evidence.

Issues and Relief Requested

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

Issue 1: Whether DCPS denied Student a FAPE by refusing to place Student in a residential program for 2022/23,³ where Student requires assistance 24/7 and is at risk to self and others. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to fully implement IEPs over the past 2 years (a) by failing to provide access to assistive technology during periods of distance learning, (b) when Student could not access specialized instruction online, (c) when Student missed at least 80% of occupational therapy services, and (d) when Student missed 75% of speech-language services. (*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 immediately place and fund Student in a residential placement, with transportation for Parent and Student.
3. DCPS shall provide training to Parent on how to help Student access assistive technology.
4. DCPS shall provide compensatory education for any denials of FAPE.⁴
5. Any other just and reasonable relief.

³ All dates in the format "2022/23" refer to school years.

⁴ Petitioner's counsel was put on notice at the prehearing conference that, at the due process hearing, 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 invited to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE were found.

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Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁵ are as follows:

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age, Gender, in Grade* during 2022/23 at *Public Charter School*, where Student has been enrolled since August 2012.⁷ Student is "joyful" and enjoys spending time with peers and staff, watching videos, and is often the first to greet those visiting Student's classroom.⁸

2. A neuropsychological evaluation completed on 6/22/18 noted that Student had focal epilepsy, Attention Deficit Hyperactivity Disorder ("ADHD"), and Intellectual Disability ("ID") in the severe range, with severe communication impairment; Autism Spectrum Disorder ("ASD") was also considered, but Student did not meet the criteria.⁹ Subsequent emergency department (colloquially, "ER") and doctors' visits stated that Student had a diagnosis of ASD.¹⁰ In the neuropsychological evaluation, Student was cooperative in all tasks, able to remain engaged, eager to please, and had good pragmatic social skills.¹¹

3. The 2018 neuropsychological evaluation included a clinical interview with Student's maternal great-grandmother and legal guardian which noted a family history of alcohol and substance abuse, bipolar disorder, anxiety, and developmental delays; Student's great-grandmother was concerned about Parent living in the home due to continued substance abuse; Student was exposed to alcohol, tobacco, and illicit substances in utero.¹² Student lived with grandmother and great-grandmother until January 2019 when Student began to live with Parent.¹³ Parent is herself disabled with low stress tolerance and said to be bipolar.¹⁴

⁵ 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.

⁶ Parent.

⁷ P8p74; Parent.

⁸ P7p65.

⁹ P4p37,40-41.

¹⁰ P32p321; P33p330; Psychiatrist.

¹¹ P4p40,41.

¹² P4p37.

¹³ P6p57.

¹⁴ Housing Clinical Director; Housing Case Manager (difficulties from Parent's own challenges).

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4. Student's language milestones were significantly delayed, with 5 words at age 4.¹⁵ Student remains non-verbal and is estimated to be able to speak only 5-10 words that can be understood by most people.¹⁶ Student is socially inept and gets too close to people and may touch them.¹⁷ According to Parent, Student is increasingly aggressive with Parent and home aides who then quit; aides were also aggressive toward Student to protect themselves, which caused upset.¹⁸ Parent can't control Student, who needs to be supervised around the clock; Student is getting bigger, weighing 105 pounds when admitted to a hospital in April 2022.¹⁹

5. IEPs. Student's disability classification is Multiple Disabilities ("MD"), due to ID and Other Health Impairment ("OHI") based on ADHD.²⁰ Student has always received specialized instruction outside the general education classroom, with IEPs since preschool.²¹ The three IEPs at issue each provide for 28 hours/week of specialized instruction outside general education, plus 60 minutes/week of speech-language pathology outside general education and 60 minutes/week of occupational therapy outside general education.²² In the pending due process complaint, Petitioner does not seek any changes to Student's IEPs, such as baselines and present levels of performance, or assert denials of FAPE based on the IEPs.²³

6. Access to Assistive Technology. When the Covid-19 pandemic closed down schools in March 2020, Public Charter School made sure Student had an appropriate communications device, as required by the IEPs; Parent received other materials to help Student access school virtually.²⁴ Public Charter School provided manipulatives and Chromebooks and called and emailed parents if their children were not showing up virtually.²⁵ Special Education Teacher sent a "first/then" chart home to Parent and explained it to her, so that what works in school could be used at home.²⁶

7. Student had access to the communications device during distance learning, although Student often did not want to use it.²⁷ Student has a "love-hate" relationship with the communications device, and only used it at school if prompted.²⁸ During distance learning in 2020/21, Student was resistant to using the communication device at home.²⁹ In 2020/21,

¹⁵ P4p37.

¹⁶ Psychiatrist; Assistive Technology Specialist; Occupational Therapist.

¹⁷ Psychiatrist.

¹⁸ *Id.*

¹⁹ Psychiatrist; P32p328.

²⁰ P45p395.

²¹ P4p38.

²² P21p145; P22p170; P23p196.

²³ Educational Advocate.

²⁴ Special Education Coordinator; Parent; P21p136; P22p161.

²⁵ Special Education Coordinator.

²⁶ Special Education Teacher.

²⁷ Parent; Assistive Technology Specialist.

²⁸ Special Education Teacher.

²⁹ P25p227; Parent.

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Student wouldn't pay attention and walked away from the camera, would turn on the TV or walk out into the apartment lobby.³⁰

8. More recently, Student was using the communications device at Public Charter School to communicate and recent service trackers indicated Student was making progress.³¹

9. Public Charter School regularly provides training and support to parents and offered to set up a time to train Parent on Student's device, which occurred on 11/15/22.³² Great-grandmother had been trained on Student's communications device in 2018.³³ In 2020/21, the speech-language therapist worked to train Parent and other caregivers for Student on how to set up and charge the device.³⁴

10. Specialized Instruction. Public Charter School was closed to in-person instruction during 2020/21 (August 2020 to July 2021), but offered distance learning via Zoom.³⁵ A 7/7/20 Prior Written Notice ("PWN") stated how specialized instruction, occupational therapy and speech-language services were to be provided.³⁶ Student was provided weekly schedules including live Zoom meeting links, weekly video lessons on YouTube and other assigned lessons.³⁷ Parent indicated on weekly Zoom check-ins that Student missed school or was off task in class due to physical aggression at home, biting, kicking, yelling, etc.; Student was home with Parent, and Public Charter School could not control Student's home environment.³⁸ Educational Advocate concurred that Public Charter School made instruction available to Student, but couldn't intervene in Student's home; Parent couldn't make Student available for instruction.³⁹ Public Charter School continued to attempt to provide specialized instruction, speech-language services and occupational therapy in the quarter ending 7/23/21; Student did not use the communication device during sessions.⁴⁰ Parent Contact Logs for 2019/20 and 2020/21 indicated scores of contacts by Public Charter School with Parent concerning Student's online education.⁴¹

11. After distance learning ended, Student was considered for compensatory education services, but was not identified as needing them as Student was able to get back on track and make expected progress on skills after a period of recoupment upon returning to in-person

³⁰ Parent.

³¹ Psychiatrist; R10p102-03.

³² R1p2; Assistive Technology Specialist; Educational Advocate; Special Education Teacher.

³³ P4p38.

³⁴ P24p216.

³⁵ Special Education Coordinator.

³⁶ R17p161.

³⁷ P24p211-15.

³⁸ P24p211-12; Special Education Coordinator.

³⁹ Educational Advocate.

⁴⁰ P25p222-29.

⁴¹ R18; R19.

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instruction.⁴² Student primarily needed to recover work tolerance; there was no significant regression on specific skills.⁴³

12. Occupational Therapy. Public Charter School attempted to provide weekly services, but Student's attendance and participation were inconsistent.⁴⁴ The occupational therapist had little data on Student's occupational therapy goal in 2020/21 due to distance learning, Student's limited attention skills, and the availability of Parent; the therapist provided Parent with information and activities on how to target Student's objectives at home and efforts were ongoing.⁴⁵ Service trackers indicated "consultation" for sessions that included Student receiving direct services or would have included provision of direct services if Student had participated; when Student was unavailable, service trackers often did not state the intended length of the sessions.⁴⁶ In 2021/22, Student made progress on occupational therapy goals.⁴⁷

13. Detailed computations based on the occupational therapy service trackers in the record for 2020/21, 2021/22 and early 2022/23 (from October 2020, as Petitioner advocated, through October 2022) indicate that Public Charter School provided or offered 3495 minutes of occupational therapy, while Student's IEPs (at 240 minutes/month, with each August at 60 minutes) required 5640 minutes of occupational therapy services, for a deficit of 2145 minutes or 35.75 hours, which is a failure by Public Charter School to offer 38% of Student's occupational therapy services.⁴⁸

14. Speech-Language Services. Public Charter School attempted to provide speech-language services online during 2020/21; the speech-language pathologist provided therapy activities through Google Classroom, emailed weekly newsletters with a variety of speech-language activities targeting goals, and pre-recorded video lessons.⁴⁹ The therapist and Parent scheduled weekly teletherapy sessions for Student, but Student (and Parent) attended only 1 of 10 sessions one quarter and 2 of 10 the next quarter; even when attending, Student did not have the communications device and Parent was not able to locate it for the sessions.⁵⁰ The therapist attempted to educate Parent on the importance of continuous usage of the device.⁵¹

15. Detailed computations based on the speech-language service trackers in the record for 2020/21, 2021/22 and early 2022/23 (from October 2020, as Petitioner advocated, through October 2022) indicate that Public Charter School provided or offered 4528 minutes

⁴² R20p172; Special Education Coordinator; Occupational Therapist; R17p161 (7/7/20 PWN stated Student will be reassessed once school resumes).

⁴³ Occupational Therapist.

⁴⁴ P24p218.

⁴⁵ P24p218; Occupational Therapist.

⁴⁶ *See, e.g.*, P29p258,260; P31p301.

⁴⁷ Occupational Therapist.

⁴⁸ P29; R7; R11; R12; Occupational Therapist.

⁴⁹ P24p216.

⁵⁰ *Id.*

⁵¹ *Id.*

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of speech-language services, while Student's IEPs (at 240 minutes/month, with each August at 60 minutes) required 5640 minutes of speech-language services, for a deficit of 1112 minutes or 18.5 hours, which is a failure by Public Charter School to offer 20% of Student's speech-language services.⁵²

16. Behavior at School. Student is doing well in school, displaying none of the behaviors of concern raised by Parent.⁵³ Student works well with classroom peers, is willing to do work and has made a lot of progress on IEP goals; Student's team feels that the classroom teacher and peers are a great fit for Student, and the environment supports growth of skills and abilities.⁵⁴ Student mastered the behavior goal and objectives with zero instances of environmental disturbances in the quarters ending 5/6/22 and 7/22/22.⁵⁵ Student's Behavior Graph at Public Charter School shows almost no targeted behaviors for March 2022 to September 2022.⁵⁶ This is in line with 2018, when no behavioral concerns or aggressive behaviors were reported at school; Student was generally happy and smiling; Student enjoyed attending school.⁵⁷

17. Behavior Outside School. On 10/12/22, Student attacked Parent and tried to abscond from home.⁵⁸ Student visited a dentist on 10/18/22 and at the end of the appointment pulled pants down to expose self in the office vestibule, and began hitting and trying to bite Parent.⁵⁹ Student was taken to a hospital emergency department on 10/24/22.⁶⁰

18. Student was taken by the police from home to a hospital emergency department on 4/4/22 for a psychiatric evaluation, which provided the diagnosis, "agitation states as acute reaction to exceptional (gross) stress"; Student was discharged on 4/15/22.⁶¹ Parent stated during the April 2022 hospital stay that Student bites her and has given her two black eyes in the past; Student never tried to hurt anyone but Parent and never tries to hurt self.⁶² Parent reported that Student has broken her nose and attacked police officers.⁶³

19. Two complaints have been made to Parent's housing authority due to Student disrobing in public; Student also took clothes off and ran naked around the room in the

⁵² P31; R6; R9; R10; Assistive Technology Specialist.

⁵³ R2p6; Psychiatrist (Public Charter School not seeing violence at school).

⁵⁴ R20p172.

⁵⁵ P27p250.

⁵⁶ R15p152.

⁵⁷ P4p39.

⁵⁸ P39p359.

⁵⁹ P19p101.

⁶⁰ P34p332.

⁶¹ P32p321.

⁶² P32p326; Parent.

⁶³ P52p437; Parent; R20p171 (aggressive to the police).

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emergency department in April 2022.⁶⁴ Parent is potentially at risk of eviction due to Student's behavior; Student is raising concerns among neighbors and destroying property.⁶⁵

20. Student visited another hospital emergency department in March 2022; Parent described taking Student to the emergency department "very frequently" when she feels she cannot manage Student's behavior at home; Parent stated that Student's behaviors are well-managed at Public Charter School.⁶⁶ Student is very aggressive toward Parent and has "busted" her head and put Parent in the hospital "multiple times."⁶⁷ Student is "extremely bad" and destructive at home, breaking doors and putting holes in walls.⁶⁸ As of 2018 at home, Student had daily tantrums that included crying, self-injurious behavior (banging head against wall) and shaking stair railing, as well as chasing, hitting, and choking a cat.⁶⁹ In 2018, Student required significant assistance with daily living activities, such as bathing, and was resistant to brushing teeth; Student would attempt to walk across the street without looking.⁷⁰

21. Attendance. Student's special education teacher considered Student's attendance to be "pretty good" and that Student is "super well behaved."⁷¹ In 2019/20, Student was present 90 days and absent 35, often due to doctors' appointments.⁷² In virtual 2020/21, Student was present 163 days and absent 51, with many absences due to technology and doctor or emergency department visits for Student or Parent.⁷³ Returning in person to Public Charter School in 2021/22, Student was present 126 days and absent about 50, with the bulk of absences being doctors' visits or illnesses, with 6 absences due to Student's significant behaviors.⁷⁴ Student's 6 absences due to behavior was not impacting access to education in 2021/22.⁷⁵ In 2022/23, Student has missed a few days due to behaviors according to emails in the record from Petitioner's counsel, which have not impacted Student significantly.⁷⁶ Parent has trouble at home getting Student to dress for school, so she called Metropolitan Police for assistance on multiple occasions.⁷⁷

22. Need for Residential Placement. Student's aggressive behavior and agitation at home make it increasingly difficult for Parent to care for Student on her own at home; Parent had home health care for support (7 days a week), but the most recent aide quit; a

⁶⁴ P32p326,327; Parent.

⁶⁵ Psychiatrist; Housing Clinical Director.

⁶⁶ P32p326 (pages 9-30 of medical record not included in Petitioner's disclosure).

⁶⁷ Parent.

⁶⁸ *Id.*

⁶⁹ P4p39.

⁷⁰ *Id.*

⁷¹ Special Education Teacher.

⁷² P8p74-75.

⁷³ P12p85-86.

⁷⁴ P14p90; Special Education Coordinator; Educational Advocate.

⁷⁵ Educational Advocate.

⁷⁶ Educational Advocate; Special Education Coordinator; P37p353; P38p355; P39p359.

⁷⁷ P38p355; P16p94; P17p96; P18p98; Parent; Housing Clinical Director.

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new aide was being sought, but a medical institution concluded on 7/8/22 that a residential school would best serve Student.⁷⁸ Psychiatrist stated on 9/22/22 that he definitely wanted Student in residential care; if there is a medical reason for residential care, a patient can go through insurance to be medically placed.⁷⁹ The serious symptoms at home need to be addressed somehow, but it is not an education issue.⁸⁰ Housing Director supports residential placement based on observation and knowledge of Student's home situation, not school or any records.⁸¹ Student needs residential care because of issues at home.⁸²

23. Special Education Teacher concluded that Student does not need a residential setting for education, as Student is doing so well at Public Charter School, is getting work done, is well supported, and has friends; transferring Student to a residential setting might not go well as Student would have to start over again getting adjusted and making connections.⁸³ Occupational Therapist agreed that Student is making progress and doesn't need a residential placement for school, so she would hate to move Student.⁸⁴

24. Parent seeks a residential school to obtain basic living skills and hygiene; Parent tries to teach Student to brush teeth and wash, but has problems.⁸⁵ Public Charter School provides a hygiene kit for brushing teeth, using deodorant and washing hands, and Student is largely able to be independent.⁸⁶ Skills may not have transferred home due to the home environment; Parent can't provide structure for Student.⁸⁷ Showers are available for children at Public Charter School, but Parent did not request showers.⁸⁸ Prior to the pandemic, Public Charter School would take students into the community, such as the grocery store, and plans to soon begin again.⁸⁹

25. Other Considerations. When Petitioner requested a residential facility for Student, the Multi-Disciplinary Team ("MDT") invited a representative from the District of Columbia Department on Disability Services ("DDS") to attend the MDT meeting on 9/22/22 to provide information on its process for working with families for placement in residential facilities; the application process could begin at any time and the school team was willing to assist, although it was not clear whether Student would be accepted.⁹⁰

⁷⁸ P33p330; Housing Clinical Director.

⁷⁹ Psychiatrist; P52p437,438.

⁸⁰ Psychiatrist.

⁸¹ Housing Director.

⁸² Housing Clinical Director.

⁸³ Special Education Teacher; Special Education Coordinator; Assistive Technology Specialist.

⁸⁴ Occupational Therapist.

⁸⁵ Parent.

⁸⁶ Special Education Teacher; Special Education Coordinator.

⁸⁷ Special Education Teacher; Assistive Technology Specialist.

⁸⁸ Special Education Coordinator; Special Education Teacher.

⁸⁹ Special Education Coordinator.

⁹⁰ R20p172-73; R2p7; P52p438-39.

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Student will become eligible in December 2022.⁹¹ A group home is a possibility through DDS, which Psychiatrist thought would be a good option to avoid disrupting education at Public Charter School, where Student has built relationships and has no behavior problems.⁹²

26. Psychiatrist, while highly credible, was hampered by not having seen or talked to Student since the beginning of the pandemic, and thus was dependent on reports from Parent and information provided by Public Charter School.⁹³

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*

⁹¹ Housing Clinical Director.

⁹² Psychiatrist.

⁹³ *Id.*

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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).

Issue 1: *Whether DCPS denied Student a FAPE by refusing to place Student in a residential program for 2022/23, where Student requires assistance 24/7 and is at risk to self and others. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did establish a *prima facie* case on the central issue in the case based on expert testimony and documentation, shifting the burden of persuasion to Respondent, which met its burden on whether residential placement was required for Student to receive educational benefit.

Quite simply, the applicable legal standard under the IDEA is that Respondent "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist.*

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of *Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements). Here, the IEPs at issue require 28 hours/week of specialized instruction along with an hour/week of each occupational therapy and speech-language as related services. The issue is whether Student requires a residential placement in order to benefit educationally from the services and hours set forth in Student's IEPs.

While on the most restrictive end of the IDEA's continuum of placements at 34 C.F.R. § 300.115, a residential placement may be appropriate if necessary for educational purposes, but not if the residential placement is a response to medical, social or emotional problems that are segregable from the learning process. See *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985); 34 C.F.R. § 300.104 (a residential program must be at no cost to parents, if "necessary" to provide special education and related services to disabled child). See also *Dist. of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (residential placement may be appropriate if necessary to obtain "any kind of educational benefit" and not used for medical, social, or emotional reasons with only "incidental educational benefit," quoting *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 431 (3d Cir. 2013)).

In support of residential placement, Petitioner emphasized in its list of citations the Third Circuit cases that are actually more helpful to Respondent in explaining the limitations on residential placement. Thus, the Third Circuit decision in *Munir*, 723 F.3d at 432, quoted above, states in more detail that:

School districts are not, however, financially responsible for the placement of students who need twenty-four-hour supervision for medical, social, or emotional reasons, and receive only an incidental educational benefit from that placement. See *Mary T.*, 575 F.3d at 245–46; *Kruelle*, 642 F.2d at 693 ("Analysis must focus ... on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.").

Significantly, as noted above, the IDEA expressly mandates that disabled students be educated in their least restrictive environment ("LRE") to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5). So an LEA must consider less restrictive alternatives before placing a student in a residential facility. See *Leggett v. Dist. of Columbia*, 793 F.3d 59, 72 (D.C. Cir. 2015) (residential placement necessary only where school officials failed to offer a day school reasonably calculated to provide educational benefits); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993) (residential placement is not appropriate when less restrictive placements can adequately meet a student's needs).

Here, Student's aggressive behaviors toward Parent and agitation at home make it increasingly difficult for Parent to care for Student on her own at home. Petitioner presented witnesses who support residential placement, but they were largely focused on the home situation, rather than Student at school or even Student's education records. In addition to Student's harmful behaviors directed at her, Parent sought a residential setting to help Student with basic living skills and hygiene, but the record was clear that Public Charter School is able to assist Student in those areas. Indeed, those skills may not have

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transferred home due to issues in the home environment, not because of flaws with Public Charter School.

On the other hand, Respondent's witnesses were focused on Student's education and were persuasive that Student does not need a residential setting to benefit educationally. Student is doing well at Public Charter School, is getting work done, is well-supported, and has friends. Several witnesses clearly testified that moving Student to a residential setting might be harmful to Student's education, as Student would have to start over again getting adjusted and making connections at school with staff and peers. This Hearing Officer found Psychiatrist to be highly credible, who was clear that the serious situation at home needed to be addressed somehow, but that it was not an education issue.

Petitioner asserts that Student's difficult behaviors impacted Student's ability to go to school, so that residential placement was necessary for educational purposes, but the evidence did not support that argument. While Student was absent about 50 days in 2021/22, the log kept by the school demonstrated that the bulk of absences were doctors' visits or illnesses, with only 6 absences due to Student's significant behaviors. Even Educational Advocate concurred that 6 absences due to behavior did not impact Student's access to education in 2021/22. The impact appeared to be much the same thus far in 2022/23, with only a handful of absences due to Student's serious behaviors.

In response to the request for a residential facility for Student, the MDT turned to DDS to obtain information about other options for Parent and Student. A group home is a possibility through DDS, which Psychiatrist thought would be a good option to avoid disrupting Student's education at Public Charter School, where Student has built relationships and has no behavior problems. Further, Psychiatrist stated at the 9/22/22 meeting that he definitely wanted Student in residential care, and with a medical reason a patient may be able to rely on insurance to be medically placed.

However, whether or not another source could or should provide residential care for Student is outside the purview of this Hearing Officer. The only issue before the undersigned is whether a residential placement is necessary for Student to benefit educationally from Student's IEP. Based on the compelling evidence in this case, this Hearing Officer concludes that the answer to that question is quite clearly No. Student does not need a residential placement to be able to access Student's education and receive appropriate educational benefit based on Student's circumstances.

Issue 2: *Whether DCPS denied Student a FAPE by failing to fully implement IEPs over the past 2 years (a) by failing to provide access to assistive technology during periods of distance learning, (b) when Student could not access specialized instruction online, (c) when Student missed at least 80% of occupational therapy services, and (d) when Student missed 75% of speech-language services. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on IEP implementation as to related services, but not her other claims. 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.*

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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).

However, the law is clear that a student refusing services, missing services by being absent, and some hours of unavailability due to testing are not to be held against the school. In *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), the court 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.*, Civ. No. 14–01119, 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) (does not require missed services due to student absences to be made up, but does require provider or student unavailability for school functions to be made up).

Recently, the Court in *White v. Dist. of Columbia*, 20-CV-3821 (APM), 2022 WL 971330, at *5 (D.D.C. 3/31/22), stated that a school must do more than merely “offer” the services in the IEP, and must ensure that a child actually receives them, but goes on to explain that the child was not absent and the school just “dropped the ball,” scheduling services when the child was taking a standardized test, was on a fieldtrip, and that the school missed services for “no reason at all.” See also *Robles v. Dist. of Columbia*, 1:21-CV-02568 (CJN), 2022 WL 3700947, at *12-13 (D.D.C. 8/26/22) (in an IEP implementation case, “[t]he school cannot be faulted for making good-faith efforts to provide the required services when [student] failed to attend on his own volition”).

Further, Petitioner argued throughout this case that Respondent failed to implement the IEPs because Student did not make progress. Respondent persuasively responded that Student did make progress based on the record, but as a legal matter the lack of a desired outcome does not demonstrate that Respondent did not provide the required inputs by implementing Student’s IEPs. See, e.g., *Holman v. Dist. of Columbia*, 153 F. Supp. 3d 386, 389-90 (D.D.C. 2016) (while a FAPE is required, there is no guarantee of “any particular outcome or any particular level of academic success”).

(a) Assistive Technology. Petitioner’s first failure-to-implement claim concerns Student’s access to the communications device required by Student’s IEPs during distance learning (October 2020 to July 2021). As the Court made clear in *White*, 2022 WL 971330, at *5, distance learning due to the pandemic should not have been blocked by a child’s lack of the requisite technology. Here, however, there is no doubt that Student had access to

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required assistive technology during distance learning. Public Charter School made sure Student had the necessary communications device and provided other materials to help Student access school virtually, including manipulatives. Public Charter School also made training available as needed on use of the communications device, including to Parent. While Student had access to the communications device during distance learning, Student often did not want to use it due to a “love-hate” relationship with the device, using it at school when prompted, but generally not using it at home, which was not the fault of Public Charter School. Thus, the undersigned determines there was no failure by Public Charter School to satisfy Student’s IEPs concerning required assistive technology during distance learning.

(b) Specialized Instruction. Petitioner next asserts that Public Charter School failed to implement Student’s IEPs because Student could not access specialized instruction online. The Court in *White*, 2022 WL 971330, at *5, also ruled that specialized instruction “should not have been suspended” during distance learning due to the pandemic. Here, in Student’s case, it was not. When Public Charter School was closed to in-person instruction during 2020/21, it offered distance learning via Zoom. A 7/7/20 PWN stated how specialized instruction – as well as occupational therapy and speech-language services – were to be provided. Student was provided weekly schedules including live Zoom links, weekly video lessons on YouTube and other assigned lessons. As noted above, Student also had the communications device, but Parent indicated that Student missed instruction or was off task due to physical aggression at home directed at Parent, with biting, kicking, yelling and more.

The undersigned is clear that with Student home with Parent, Public Charter School had no way to control Student’s home environment to get Student to access specialized instruction online, although Public Charter School did what it could with dozens of contacts with Parent. Even Educational Advocate concurred that Public Charter School made instruction available to Student, but couldn’t intervene or control Student’s home. Parent simply couldn’t make Student available for instruction, as Student wouldn’t pay attention and walked away from the camera, would turn on the TV or walk out into the apartment lobby.

However, that is not the end of the inquiry, for the U.S. Department of Education, Office of Special Education and Rehabilitative Services (“OSERS”) issued guidance on the requirements of the IDEA given the many challenges of the pandemic, emphasizing that “it is critically important that the IEP Team . . . consider any adverse impacts of the COVID-19 pandemic on each child with a disability.” U.S. Department of Education, *Return to School Roadmap: Development and Implementation of IEPs* at 24 (Sept. 30, 2021). Here, once distance learning ended, Student was in fact considered for compensatory education services by Public Charter School, but was not identified as needing them. Upon returning to in-person instruction, Student was able to get back on track and make expected progress on skills after a period of recoupment. Student primarily needed to recover work tolerance; there was no significant regression of Student’s specific skills. While keeping this standard in mind, the burden remains on Petitioner to prove that there has been a material deviation from the specialized instruction outside general education that is required by Student’s IEPs.

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Petitioner failed to demonstrate the required material deviation, so the undersigned concludes that there is no IDEA violation.

(c) Occupational Therapy. Turning to related services and considering Student's occupational therapy first, Student's IEPs required 240 minutes/month of occupational therapy during the two-year period challenged by Petitioner from October 2020 through October 2022 (with adjustment for each August), which totaled 5640 minutes. Based on Student's available service trackers, only 3495 minutes of occupational therapy were offered to Student during this period, so 2145 minutes were missed. That amounts to provision of 62% of the occupational therapy services that Student was supposed to receive during this period and failure to provide 38%, which is a material deviation from Student's IEPs and a denial of FAPE. *See Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*); *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material). This denial of FAPE is addressed with an award of compensatory education below.

(d) Speech-Language Services. Finally, shifting to Student's missed speech-language services, Student's IEPs also required 240 minutes/month of speech-language services during the two-year period challenged by Petitioner from October 2020, which totaled 5640 minutes. Based on Student's available service trackers, only 4528 minutes of speech-language services were provided or offered to Student during this period and 1112 minutes were missed. That amounts to provision of 80% of the speech-language services that Student was supposed to receive during this period and failure to provide 20%, which is also a material deviation from Student's IEPs and a denial of FAPE based on *Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*). This denial of FAPE is also addressed with an award of compensatory education below.

Remedies

Having analyzed and resolved the issues in this case, what remains is to consider the compensatory education necessary to make up for the denials of FAPE found above. In determining the amount of compensatory education for the denials 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). Further, with a failure to implement claim, Petitioner need not even show that there was educational harm to Student. *James*, 194 F. Supp. 3d at 139.

Here, a fair amount of occupational therapy and speech-language services are required to make up for the failure to implement the related services to which Student was entitled, with the goal of restoring Student to the position in which Student would be but for

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the denials of FAPE. Educational Advocate testified that the compensatory education sought in her plan would put Student in the position Student would have been but for the denials of FAPE, but that plan must be adjusted very significantly as it is based on remedies and approaches that the undersigned does not adopt. Here, based on the experience and judgment of the undersigned, the Order below awards 40 hours of occupational therapy and 20 hours of speech-language services based on the services not offered to Student.

These determinations by the undersigned have been carefully considered and specifically tailored to address Student's unique needs as a matter of equity, as "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). All compensatory education hours are to be used within 24 months to avoid administrative burdens on Respondent, although the undersigned encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without delay.

ORDER

Petitioner has prevailed on a portion of the second issue in this case, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denials of FAPE found herein, Respondent shall provide (with Petitioner's agreement) or fund: (a) 40 hours of occupational therapy, and (b) 20 hours of speech-language services. Respondent may itself provide the services required if Petitioner agrees; if there is not agreement for Respondent to provide the services, within 10 business days after requested by Petitioner, Respondent shall provide a letter(s) of authorization for the required services to be provided by independent providers chosen by Petitioner; all hours are to be used within 24 months and any unused hours shall be forfeited.

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

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controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (dueprocess.dcps@k12.dc.gov)

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov