

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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OSSE  
Office of Dispute Resolution  
December 1, 2023

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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: 10/30/23, 10/31/23,</b>
	)	<b>11/17/23</b>
<b>v.</b>	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No. 2023-0148</b>
<b>District of Columbia Public Schools,</b>	)	
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services. A due process complaint (“Complaint”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) on July 31, 2023. The Complaint was filed by the Student’s parent (“Petitioner”). On August 10, 2023, Respondent filed a response.

**II. Subject Matter Jurisdiction**

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

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<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

### **III. Procedural History**

A resolution meeting was held on August 11, 2023. The parties were unable to resolve the case. A prehearing conference took place by telephone on September 5, 2023. Participating in the prehearing conference were Attorney A, Esq., attorney for Petitioner, and Attorney B, Esq., attorney for DCPS. On September 11, 2023, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. This order was reissued on October 30, 2023.

On October 4, 2023, Petitioner moved to extend the timeline for filing the Hearing Officer Determination (“HOD”). The motion was granted by order dated October 14, 2023. The matter proceeded to hearings on October 30, 2023, and October 31, 2023. Testimony and evidence were not completely presented on those two days. An additional hearing date, November 17, 2023, was added on consent. On November 2, 2023, DCPS moved to extend the HOD timeline in light of the additional hearing date. The motion was granted by an order dated November 10, 2023. The trial was completed on November 17, 2023. The HOD is due on December 1, 2023.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After testimony and evidence, the parties presented oral closing statements on October 12, 2023. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-5; P-7 through P-28; P-49 through P-62; P-64; P-66 through P-69; P-71; P-74; P-76 through P-78; P-85 through P-92; and P-94 through P-108. Objections were filed to exhibits P-1 through P-5; P-49; P-51; P-52; P-54; P-55 through P-57; P-61; P-71; P-97 through P-105; and P-108. All objections were overruled except for exhibits P-54 and P-61, which were excluded. Exhibits P-1 through P-5; P-7

through P-28; P-49 through P-53; P-55 through P-60; P-62; P-64; P-66 through P-69; P-71; P-74; P-76 through P-78; P-85 through P-92; and P-94 through P-108. DCPS moved into evidence exhibits R-1 through R-54 without objection. Petitioner presented as witnesses, in the following order: Witness A, an advocate (expert in special education as it relates to Individualized Education Program (“IEP”) programming and placement); Petitioner herself; and Witness B (expert in clinical psychology and trauma-informed therapy). Respondent presented as witnesses: Witness C, a social worker at School A (expert in school-based social work); Witness D, a case manager at School B (expert in special education); Witness E, a local educational agency (“LEA”) representative at School B (expert in special education); and Witness F, a teacher and LEA designee at School A (expert in special education).

#### **IV. Issues**

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

**1. Did Respondent violate the IDEA and the DCMR when it failed to comprehensively re-evaluate the Student in or about October 2022? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**

Petitioner contended that Respondent should have updated the Student’s Functional Behavior Assessment (“FBA”) and Behavior Intervention Plan (“BIP”). Petitioner also contended that an addendum to the Student’s existing psychological evaluation needed to be completed to address his/her executive functioning, cognitive functioning, and emotional and behavior functioning. Petitioner contended that this testing was needed to determine if the Student was also eligible for services as a student with Other Health Impairment and/or Emotional Disturbance.

**2. Did Respondent violate the IDEA and the DCMR by failing to revise the Student's IEP in or about January 2023? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student's IEP needed to include more behavioral supports, in view of his/her extreme behaviors in school after the May 2022 IEP was issued. Petitioner also contended that the Student required self-contained special education classes in all academic areas by January 2023.

**3. Did Respondent violate the IDEA and the DCMR by failing to write an appropriate IEP for the Student in May 2023? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student required self-contained special education class in all academic areas. Petitioner also contended that the Student needed a revised BIP and supports and goals in executive functioning.

**4. Did DCPS violate the IDEA and the DCMR by failing to provide Petitioner with the Student's educational records in or about November 2022?**

Petitioner contended that she did not receive the requested service trackers for the 2021-2022 and 2022-2023 school years.

As relief, Petitioner seeks the following findings: that the Student was denied a FAPE; that DCPS shall amend the Student's current IEP, increasing his/her specialized instruction to at least twenty hours per week outside general education, and then timely place him/her in an appropriate self-contained Behavior and Education Support ("BES") or Behavior Learning Support ("BLS") program; that DCPS shall timely conduct and review a comprehensive FBA of the Student and then update the Student's BIP as appropriate; that DCPS shall timely conduct and review an addendum to the Student's April 2022 psychological evaluation through assessments of (1) cognitive functioning, (2) adaptive functioning, (3) social, emotional and behavior functioning, and (4)

executive functioning, or, alternatively, conduct and review a new comprehensive psychological evaluation to include the aforementioned assessment areas; that, upon completion of the aforementioned assessments, DCPS shall timely reconvene the Student's IEP team to review and revise the IEP as appropriate, based on the updated evaluative data; that DCPS shall provide compensatory education for the denials of FAPE or fund compensatory education evaluations to determine the appropriate amount of compensatory education warranted; and that there shall be a reservation of rights for additional compensatory education.

#### **V. Findings of Fact**

1. The Student is an X-year old who is eligible for services as a student with Specific Learning Disability. The Student functions cognitively at the very low range, with very low scores in reasoning and memory, and performs below grade level in all academic subjects. The Student does not function well in large classroom settings but does not like being pulled out of class. The Student can resist learning new concepts. Testimony of Witness F; Testimony of Petitioner; P-22; P-53.

2. The Student frequently engages in verbal aggression toward peers. Testimony of Witness C. A September 23, 2016, report issued to the Child and Family Services Agency indicated that the Student had begun exhibiting behaviors that were potential indicators of trauma or abuse. The Student would expose him/herself sexually, lay on the floor and scream and cry for unknown reasons, and make threats to teachers and students such as, "My brother is going to stab all y'all." P-7-2. By the 2019-2020 school year, the Student was walking out of the classroom during group lessons and was acting disrespectfully to both teachers and peers. The Student would intentionally do

things to make situations more pronounced and use curse words, call peers stupid, and tell peers to “shut up.” P-13; P-15.

3. For the 2020-2021 school year, the Student attended School A. The Student’s November 5, 2020, IEP provided for five hours per week of specialized instruction inside general education, five hours per week of specialized instruction outside general education, 120 minutes per month each of speech-language pathology and occupational therapy, and 240 minutes per month of behavioral support services. The IEP included “area of concern” sections in reading; math; written expression; communication/speech and language; emotional, social and behavioral development; and motor skills physical development. P-31.

4. In or about January 2021, the Student expressed feelings of self-harm, including suicidal ideation, and was admitted to a hospital. The Student was diagnosed with major depressive disorder, and a treatment plan was created for him/her. Testimony of Witness C. During the 2020-2021 school year, the school team considered placing the Student in a more restrictive setting, such as a BES program, but Petitioner resisted this idea. The Student began having attendance issues during this school year. Testimony of Witness F. An IEP was issued for the Student on March 29, 2021. This IEP largely continued the Student’s program from the prior year, keeping the same specialized instruction mandate and related services. P-34.

5. The Student continued at School A for the 2021-2022 school year. The Student’s behavior improved during that school year. Petitioner was satisfied with the Student’s progress and felt that this had been the Student’s best academic year. The Student was doing homework and excited because his/her math scores went up. The

Student especially liked his/her teachers that school year, including his/her special education teacher, Witness F. Testimony of Petitioner. Still, the Student spent a lot of time outside the classroom with Witness F because of behavioral issues. Testimony of Witness C. Additionally, the Student's attendance issues persisted, as discussed in a March 2022 analysis of existing data ("AED") meeting. Testimony of Witness F; R-10.

6. A psychological evaluation of the Student was conducted in April 2022. The corresponding report, dated April 19, 2022, included academic testing through the Woodcock Johnson Tests of Achievement-Fourth Edition ("WJ-IV"). On the WJ-IV, the Student scored in the below-average range in broad reading, in the low range in broad math, and in the below-average range in written language. Behavioral Assessment System for Children-Third Edition ("BASC-3") parent and teacher rating scales were also administered for the Student. BASC-3 results from two of the Student's general education teachers indicated that the Student had difficulties in multiple areas, and that s/he did not have adequate everyday skills to function in and meet the demands of his/her environment. The Student exhibited issues with aggression, social skills, and study skills. S/he also struggled with inward distress, such as being socially withdrawn, noticeably sad, or overly fearful of certain situations. The Student's scores suggested that s/he was nervous, fearful, or worried about real or imagined problems and experienced feelings of unhappiness and stress, resulting in an inability to carry out everyday activities. P-22.

7. An assistive technology evaluation of the Student was conducted in April 2022, with the corresponding report issued on April 25, 2022. The report indicated that the Student often left the general education classroom for personal reasons and tended to work in the special education classroom. The evaluator noted improvements in the

Student's reading and felt that the school team was providing appropriate accommodations, including text-to-speech technology, graphic organizers, and sentence starters. The Student was able to use dictation to produce a complete statement. P-23.

8. A comprehensive speech and language re-evaluation of the Student was conducted in March 2022. The corresponding report, dated April 25, 2022, indicated normal articulation/phonology, fluency, and voice skills. The evaluator concluded that the Student's oral communication skills were within functional limits to support learning across academic settings, given appropriate accommodations and supports inside the classroom. R-20. A comprehensive occupational therapy evaluation of the Student was conducted in April 2022. The evaluator's report, dated April 29, 2023, found that the Student had age-appropriate writing skills. Teacher responses indicated that the Student exhibited typical performance in all sensory processing areas assessed, including social participation, vision, hearing, touch, body awareness, balance and motion, and planning and ideas. The evaluator did not recommend occupational therapy services for the Student. P-24.

9. An FBA of the Student was written on April 27, 2022. The assessment indicated that the Student initiated or engaged in peer conflict when s/he experienced frustration or anxiety due to work difficulty, or when s/he lost interest in the learning activity and desired entertainment. The assessment also stated that, though the Student's behaviors were not as severe as in the past, they impacted his/her social relationships and ability to access the general education curriculum consistently. The assessment indicated that the Student loved anything art-related as a reward but noted that the Student had twenty-six unexcused absences for the current school year. P-25.



10. A BIP was written for the Student on May 10, 2022. Like the FBA of April 27, 2022, the BIP noted that the Student deliberately antagonized peers when s/he experienced frustration or anxiety due to work difficulty, or when s/he lost interest in the learning activity and desired entertainment. The BIP also indicated that the Student's chronic absenteeism made it difficult to maintain consistent tools for learning. The BIP stated that the Student engaged in negative peer conflicts throughout the day, though the incidents had decreased in severity since the beginning of the school year. The Student was more likely to engage in negative behaviors in English language arts ("ELA") class and "specials" classes. The BIP suggested a schedule of structured breaks throughout the school day, each lasting no longer than ten minutes, during which the Student could engage in an activity of choice. P-26.

11. An IEP meeting was held for the Student on May 27, 2022. The IEP team again recommended a total of ten hours per week of specialized instruction (five hours inside general education and five hours outside general education). The IEP was meant to be flexible to accommodate the Student's willingness to be part of a push-in or pull-out arrangement. The IEP kept the Student's behavioral support services at 240 minutes per month but did not include speech-language pathology or occupational therapy. The "area of concern" sections of the IEP included reading, math, written expression, and emotional, social and behavioral development. Testimony of Witness F.

12. An evaluation summary report from May 29, 2022, indicated that the Student's i-Ready scores in math had dropped to the first-grade level, though the Student's reading scores had improved to the third-grade level. For ELA, the Student would often start in the special education classroom, then join the general education

classroom when asked to do so. The report incorporated comments from Witness F to the effect that that the Student had become a more fluid reader. The Student read whole sentences without stopping and could figure out words s/he did not know from context. The Student was also working well with certain students in the class. P-27.

13. The Student continued to attend School A for the 2022-2023 school year. During that school year, the classroom was a “bit rowdy,” and the Student would join in the rowdiness. The Student had extreme feelings but was self-aware; s/he would say things to Witness F like Witness F had to get him/her out of the class or s/he would end up hurting someone. The Student did not enjoy writing and had issues discussing reading work with peers. Testimony of Witness F; Testimony of Witness C. The Student had a high number of absences during the 2022-2023 school year. When the Student was upset, s/he frequently disregarded redirection or instructions from the school staff. The Student spent a lot of time out of the classroom. Staff sometimes put the Student with a younger grade in an “alternate luncheon recess” to try to avoid the conflicts that the Student had with peers. Staff also provided a cooldown or common space for the Student outside the classroom setting. Testimony of Witness C.

14. The Student’s IEP progress report for the first reporting period of the 2022-2023 school year indicated progress on just one goal. The Student was reported to regress on two of three emotional, social and behavioral goals. The report indicated that the Student demonstrated a sharp decrease in effective self-regulating skills and had engaged regularly in verbal and attempted physical altercations with peers since the start of the school year. P-59. In the second reporting period, the Student progressed on two goals, but no progress was reported on emotional, social and behavioral goals. The report

indicated that the Student had had several incidents during this grading period where s/he had acted with severe verbal aggression in response to difficult emotions and s/he could not be redirected by adults. The report noted that, per a recent Strengths & Difficulties Questionnaire (“SDQ”) completed by a teacher, the Student often threatened students, often instigated, and engaged in bullying. P-60.

15. An IEP meeting was held for the Student on May 25, 2023. At the time of this meeting, the Student had been saying that s/he did not want to live any longer and was in a hospital due to emotional issues. School staff said that they did not have enough data on the Student in math because of his/her absences and tardiness, and that his/her math performance was on the third-grade level. The team also felt that they did not have enough qualitative data on the Student in reading and writing, because s/he was pulled out of class for behavior support services or to work on his/her IEP goals. However, the team noted that the Student did better in small groups. Petitioner asked for unmastered goals to be repeated and for baselines for social and emotional goals. The team agreed. Because the Student’s social issues were escalating, Petitioner requested a therapeutic day school with a self-contained program where the Student would receive support for all academic classes. The Student’s general education math teacher agreed with Petitioner’s position, stating that the Student worked much better in a small group setting and needed the therapeutic supports of a self-contained program. Witness F understood Petitioner’s view but indicated that she did not have the authority to change the Student’s IEP to twenty hours per week of specialized instruction outside general education given Least Restrictive Environment (“LRE”) considerations. Witness F stated that DCPS required more incremental changes to the Student’s IEP. No team members clearly explained why

they disagreed with Petitioner's request. Testimony of Witness F; Testimony of Witness A.

16. The Student's IEP was changed to recommend twelve hours per week of specialized instruction outside general education and three hours per week of specialized instruction inside general education. Witness F said that the LRE team would then observe the Student and determine if s/he should be placed in a more restrictive setting. The IEP mentioned that the Student had several office referrals during the 2022-2023 school year, including for saying about another student, "I'll shoot up her house." The IEP also said that the Student was offered the use of a hall pass and could talk to staff when s/he needed time to de-escalate, though the team felt it was important to set a time limit of 15-20 minutes with a staff member, unless the Student was in crisis. The Student also had a behavior chart for each class and debriefs with teachers at the end of each class to determine if s/he would receive points for work done. The IEP stated that, in the past, the Student had control over where s/he received academic services; s/he could decide to stay inside the general education classroom or receive services outside the classroom in a smaller group. However, due to a lack of instructional time with teachers during this school year, the team did not believe it would be in the Student's best interest to continue this approach. The IEP also reported that, on i-Ready math tests, the Student scored at grade 3 at the start of the school year but at grade 2 in the middle of the year. On i-Ready reading tests, the Student also scored at grade 3 at the start of the school year but at grade 2 in the middle of the year. The Student also scored below basic on the "HMH" reading inventory. The IEP reported further that, on the "ANET" measure in math, the Student scored 0% at the start of the year, 36% in the middle of the year, and "null" at the end of

the year. The IEP noted that the Student had a total of sixty-seven absences and thirty-four tardies as of May 22, 2023. Testimony of Witness A; P-50.

17. During the 2022-2023 school year, the Student's maladaptive behaviors occurred every day, throughout the school day. The function of the behaviors was escape or avoidance, and these behaviors occurred when the Student believed that the work was challenging or too difficult for him/her. A meeting was held on June 20, 2023, to discuss the Student's BIP. A new BIP was written for the Student on June 21, 2023. This new BIP, which mostly restated interventions that had been tried earlier, indicated that the Student engaged in negative peer conflicts on all days that s/he was present in school, that s/he tended to initiate or engage in peer conflicts without clear triggers, and that s/he had repeatedly threatened physical violence. The BIP recommended that staff try a token economy system for the Student, as well as check-ins and a "cool down" period. P-28; Testimony of Witness C; Testimony of Witness A.

18. In September 2023, the Student attended School B. Early in the school year, the Student "destroyed the entire front office" and was "calling several individuals out." School B staff quickly realized that the Student needed to be in a more restrictive program. The decision at the time was to amend the Student's IEP so that s/he could be placed in a setting that would best accommodate him/her. Testimony of Witness D.

19. A "thirty-day review" meeting was held at School B in September 2023. At this meeting, Witness E said that the Student required a full-time special education program consisting of self-contained academic classes, with specialized instruction for twenty hours per week outside general education. Testimony of Witness A. The Student has not attended school regularly during the 2023-2024 school year. When the Student

has attended school, incidents usually occur. DCPS plans to place the Student at School

C. Testimony of Witness E.

## VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement,” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #1 and Issue #4, the burden of persuasion is on Petitioner. On Issue #2 and Issue #3, the burden of persuasion is on Respondent if Petitioner presents a *prima facie* case.

### **1. Did Respondent violate the IDEA and the DCMR when it failed to comprehensively reevaluate the Student in or about October 2022? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that Respondent should have updated the Student’s FBA and BIP, and that an addendum to the Student’s existing psychological evaluation needed to be completed to address his/her executive functioning, cognitive functioning, and emotional and behavior functioning. Petitioner contended that this testing was needed to determine if the Student was also eligible for services as a student with Other Health Impairment and/or Emotional Disturbance.

A child's initial evaluation or re-evaluation must consist of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments, classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. Sect. 300.305(a)(1). Second, based on a review of the existing data and input from the child's parents, the evaluators must identify what additional data, if any, is needed to assess whether the child has a qualifying disability and, if so, administer such assessments and other evaluation measures as needed. 34 C.F.R. Sect. 300.305(a)(2)(c). The LEA is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." 34 C.F.R. Sect. 300.304(b). A student must be "assessed in all areas related to the suspected disability." 34 C.F.R. 300.304(c)(4).

However, even if the school district errs by failing to order new testing, the parent has the burden of demonstrating that the Student was denied a FAPE as a result. Not all procedural violations constitute FAPE denials. Only those procedural violations that affect a student's substantive rights deny that student a FAPE. McLean v. District of Columbia, No. 16-2067, 264 F. Supp. 3d 180, 183-84, 2017 WL 3891669, at \*3 (D.D.C. Sept. 5, 2017). A hearing officer may find that a procedural violation caused the denial of a FAPE in any of three circumstances: the procedural inadequacy "(i) [i]mpeded the child's right to a FAPE; (ii) [s]ignificantly 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) [c]aused a deprivation of educational benefit." 34 C.F.R. Sect. 300.513(a)(2).

DCPS conducted a thorough re-evaluation of the Student in the spring of 2022. A psychological evaluation of the Student was conducted in April 2022, including academic testing and BASC-3 parent and teacher rating scales. The evaluation indicated that the Student exhibited issues with aggression, social skills, and study skills, and struggled with inward distress, such as being socially withdrawn, noticeably sad, or overly fearful of certain situations. The evaluation suggested that the Student tended to be nervous, fearful, or worried about real or imagined problems, and experienced feelings of unhappiness and stress that resulted in an inability to carry out everyday activities. An assistive technology evaluation of the Student was conducted in April 2022. The evaluator noted improvements in his/her reading and felt that the school team was providing appropriate accommodations, including text-to-speech technology, graphic organizers, and sentence starters. A comprehensive speech and language re-evaluation of the Student was conducted in March 2022. The evaluator concluded that the Student's oral communication skills were within functional limits to support learning across academic settings. An occupational therapy evaluation of the Student was conducted in April 2022. The evaluator found that the Student had age-appropriate writing skills and typical performance in all sensory processing areas assessed, including vision, hearing, touch, body awareness, balance and motion, planning and ideas, and social participation.

Additional behavioral data was gleaned through an FBA and BIP. An FBA of the Student was written on April 27, 2022. The assessment indicated that the Student initiated or engaged in peer conflict when s/he experienced frustration or anxiety due to work difficulty, or when s/he lost interest in learning activities and desired entertainment. The FBA also stated that, though the Student's behaviors were not as severe as they had



been in the past and s/he loved anything art-related as a reward, the Student's negative behaviors impacted his/her social relationships and ability to access the general education curriculum consistently. A BIP was written for the Student on May 10, 2022. Like the FBA, the BIP noted that the Student deliberately antagonized peers when s/he experienced anxiety due to work difficulty or when s/he lost interest in the learning activity. The BIP also indicated that the Student's chronic absenteeism made it difficult to maintain consistent tools for learning. The BIP stated that the Student engaged in negative peer conflicts throughout the school day, though the severity of the conflicts had decreased significantly since the start of the school year, and that the Student was more likely to engage in negative behavior in ELA and "specials" classes. The BIP suggested a schedule of structured breaks throughout the school day, each lasting no longer than 10 minutes, during which time the Student could engage in an activity of his/her choice.

To Petitioner, this was not enough. In closing, Petitioner argued that, by October 2022: 1) additional testing was needed to determine the Student's eligibility classification and secure a placement for the Student; 2) the existing testing did not address the cause of the Student's behavioral and emotional issues; 3) an updated FBA and BIP were required for the Student; 4) the Student needed testing in the area of executive functioning; and 5) the Student needed testing in the area of cognitive functioning. Petitioner also contended that there should have been "more objective" measures in Respondent's testing.

However, DCPS *did* conduct behavioral and emotional testing of the Student. An FBA, a BIP, and BASC-3 testing were conducted. Petitioner contended that the FBA and BIP were not done properly, but there is no requirement for an FBA or a BIP to be done in a particular way. Richardson v. District of Columbia, 273 F. Supp. 3d 94, 101 (D.D.C.

2017) (no requirement that psychological evaluations have to contain a classroom observation or teacher interviews). Moreover, the existing FBA and BIP adequately described the Student's behavioral issues, which were largely a function of his/her difficulties in class. No additional testing was needed at that point. And there is nothing in the record to suggest that these measures were not objective. As DCPS pointed out, an increase in the Student's negative behaviors during the 2022-2023 school year did not necessarily mean that s/he was not evaluated properly in regard to behavioral issues. Indeed, there is no regulatory requirement to write an FBA or a BIP for disabled students at all in the IDEA, its regulations, the D.C. Code, or the DCMR, except for certain discipline cases brought pursuant to 34 C.F.R. Sect. 300.532(a). Moreover, there is some question, at least in this jurisdiction, whether an FBA should be considered an assessment for the purposes of determining the completeness of an evaluation. E.L. Haynes P.C.S. v. Frost, 66 IDELR 287 (D.D.C. 2015) ("behavioral concerns" are not one of the enumerated disabilities identified in the IDEA).

Petitioner also contended, through the testimony of Witness B, that the Student needed additional cognitive testing. However, this witness's testimony suggested that a student must receive cognitive testing through a re-evaluation every three years. There is no such rule and Petitioner presented no authority in support of such a proposition. Moreover, the witness admitted that he had reviewed no documentation from teachers suggesting that the Student's recent behavioral issues related to cognitive ability. Petitioner also suggests that the Student needed testing on executive functioning, but there is little evidence in the record about any executive functioning concerns, other than the behavioral concerns that were addressed through the BASC-3 scales, the FBA, and

the BIP. Finally, this Hearing Officer is unpersuaded by the contention that additional testing would have allowed the Student to be eligible for services as a student with Emotional Disturbance because that is a prerequisite for admission into the BES program. There is no eligibility claim in this case, eligibility categories do not confer substantive benefits under the law, and any failure to accurately deem a student to be eligible for services as a student with Emotional Disturbance should be deemed a procedural violation only. This claim is dismissed.

**2. Did Respondent violate the IDEA and the DCMR by failing to revise the Student’s IEP in or about January 2023? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student’s IEP needed to include more behavioral supports, which were necessary due to the Student’s extreme behaviors in school since the May 2022 IEP was issued. Petitioner also contended that the Student required self-contained special education classes in academic areas by January 2023.

The IEP is the “centerpiece” of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Endrew F. v. Douglas County School District, 580 U.S. 386 (2017), the Court held that an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 399. The Court also held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 404. However, the “educational program must be appropriately ambitious in light of ... circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The

goals may differ, but every child should have the chance to meet challenging objectives.” Id. at 402. An IEP that fails to satisfy these statutory directives may be remedied through an IDEA claim to the extent that the IEP “denies the child an appropriate education.” Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018).

The review and revision of IEPs are addressed by 34 C.F.R. Sect. 300.324(b), which states that the LEA must revise the IEP “as appropriate” to address “any lack of expected progress toward the annual goals in the general education curriculum, if appropriate.” In Questions and Answers on Andrew F. v. Douglas County School District RE-1, 71 IDELR 68 (EDU 2017), the United States Department of Education reinforced the Supreme Court’s decision in Andrew F. and clarified that if it turns out a child is not making progress at the level the IEP team expected, the team must revisit the IEP with the Andrew F. standard in mind and revise it as necessary to ensure that the student receives appropriate special education and related services and that the goals are individualized and ambitious. The memorandum affirmed that the IDEA provides for revisiting the IEP if the expected progress does not occur, and that this is “particularly important because of the Court’s decision in Andrew F., which clarifies that the standard for determining whether an IEP is sufficient to provide FAPE is whether the child is offered an IEP reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances.” The memorandum indicated that, if a child is not making expected progress toward his or her annual goals, the IEP team must revise the IEP, as appropriate, to address the lack of progress. Olympia School District, 123 LRP 17977 (SEA WA 05/17/23) (absenteeism and lack of engagement should have caused a district to revisit the IEP); Upper Sandusky Exempted Village

Schs., 82 IDELR 40 (SEA OH 2022) (student's removal from school five times within three weeks should have prompted the IEP team to address the student's current social and behavioral problems since they were evident from attendance records, behavior logs, discipline, and removals).

Petitioner contended that the facts here warranted a mid-year review, and the record supports Petitioner's contention. The Student experienced such violent impulses at this time that s/he said to Witness F that Witness F had to get the Student out of the class, otherwise s/he would end up hurting someone. It was reported that, since the start of the 2022-2023 school year, the Student had demonstrated a sharp decrease in effective self-regulating skills and regularly engaged in verbal and attempted physical altercations with peers. The Student had several incidents during this period in which s/he acted with severe verbal aggression in response to difficult emotions, and s/he could not be redirected by adults. According to an SDQ completed by a teacher at the time, the Student often threatened students, instigated, and engaged in bullying. The Student was reported to be regressing in two of three emotional, social and behavioral goals.

The Student also had a high number of absences during the 2022-2023 school year. The record suggests that this is because the Student was unable to manage the academic material and was engaging in school refusal. The Student regressed in school, according to mid-year testing. On i-Ready math tests, the Student scored at grade level 3 at the start of the year and at grade level 2 in the middle of the year. On reading tests, the Student also scored at grade level 3 at the start of the year and at grade level 2 in the middle of the year. It is therefore not surprising that the Student was expressing a preference to spend time in special education classrooms.

Respondent did not really explain why it allowed this situation to continue, except to stress that IEPs are ordinarily written once a year and underscore the importance of placing the Student in his/her least restrictive environment. However, while the LRE mandate is important, it does not trump a student's right to a FAPE. Maintaining a less restrictive placement at the expense of educational benefit is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994). The Student engaged in wild and dangerous behavior, did not respond to directions, and, according to testing, was not learning. Moreover, it appears that the Student's general education math teacher felt that s/he needed more services. This teacher, Teacher A, stated that the Student worked much better in a small group setting and needed the therapeutic supports of a self-contained program. It is noted that by May 25, 2023, the Student was hospitalized, expressing that s/he did not want to live any longer. This Hearing Officer agrees with Petitioner that Respondent denied the Student a FAPE when it failed to review and revise the Student's IEP in or about January 2023.

**3. Did Respondent violate the IDEA and the DCMR by failing to write an appropriate IEP for the Student in May 2023? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student required self-contained special education classes in all academic areas. Petitioner also contended that the Student needed more supports and goals in executive functioning, and that s/he needed a revised BIP.

This IEP's recommendation was changed from ten hours per week of specialized instruction (five hours inside general education and five hours outside general education)

to twelve hours per week of specialized instruction outside general education and three hours per week of specialized instruction inside general education. DCPS contended that there was not enough data to support a change to a more restrictive setting.

However, the “area of concern” sections of the IEP did include data to support such a change. The Student’s test scores also indicated that s/he did not understand the materials in class. In reading, the Student scored at grade 3 at the start of the year and at grade 2 in the middle of the year. In math, the Student also scored at grade 3 at the start of the year and at grade 2 in the middle of the year. The Student also scored below basic on the “HMH” reading inventory. And on the “ANET” measure in math, the Student scored 0% at the beginning of the year, 36% in the middle of the year, and “null” at the end of the year.

The Student also engaged in negative peer conflicts every day that s/he was in school, tended to initiate or engage in peer conflicts without clear triggers, and repeatedly threatened physical violence. The Student had several office referrals during the 2022-2023 school year, including for saying about another student, “I’ll shoot up her house.” The record suggests that the Student’s escalating behavioral issues may have been triggered, at least in part, by the widening achievement gap between the Student and his/her peers. The FBA accordingly found that the Student’s maladaptive behaviors, which occurred throughout every school day, happened when the Student believed that schoolwork was challenging or too difficult for him/her.

It is true that a BIP was written for the Student on June 21, 2023. However, this BIP mostly restated interventions that had been tried earlier without success. While this BIP was not defective per se, because there are no standards by which BIPs are measured

and because this BIP did add a token economy system to the Student's program,<sup>2</sup> the addition of this BIP did not materially change the Student's program, which was effectively the same program that had not worked for the Student earlier.

It must also be pointed out that on May 25, 2023, the Student had been saying that s/he did not want to live any longer and s/he was in a hospital due to emotional issues. Because the Student's social issues were escalating, Petitioner requested a therapeutic day school with a self-contained program where the Student could receive support for all academic classes. The Student's general education math teacher agreed with Petitioner's position. Witness F also sympathized with Petitioner but indicated that she did not have the authority to change the Student's IEP to twenty hours per week of specialized instruction outside general education. No team members disagreed with Petitioner's request. DCPS denied the Student a FAPE through the IEP dated May 25, 2023.

**4. Did DCPS violate the IDEA and the DCMR by failing to provide Petitioner with the Student's educational records in or about November 2022?**

Petitioner contended that she did not receive the requested service trackers for the 2021-2022 and 2022-2023 school years. The IDEA regulations provide: "(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to 'examine,' or 'inspect and review' all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child." 20 U.S.C. Sect. 1415(b)(1); 34 C.F.R. 300.501(a); 5-A DCMR Sect. 2600.1. The term "education

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<sup>2</sup> Petitioner's argument that the IEP did not address the Student's executive functioning needs was unclear from the record, which in any event did not establish that the Student had separate "executive functioning" needs that could be separated from the Student's behavioral needs.



records” means the type of records covered under the definition of “education records” in 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 USC 232g). 34 CFR Sect. 300.611-300.625.

Petitioner did not clearly argue in support of this claim during closing argument. There is no testimony in the record about the availability of the service trackers or their importance. A federal magistrate opined on a similar case where a parent contended that DCPS’s failure to produce education records amounted to FAPE denial under the IDEA. As explained by the magistrate: “Plaintiff has not explained how, precisely, the other missing evidence—progress reports, additional report cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing.” The magistrate continued: “Rather, [Plaintiff] paints in the broadest of strokes, asserting that the evidence ‘would have provided the basis for services’ and that they ‘related to the identification, evaluation, and educational placement’ of [the subject student].” Simms v. District of Columbia, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at \*23 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB) (GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018); compare Amanda J. v. Clark Cty Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (records revealed that the student was autistic, a diagnosis not known by the student’s parents or IEP team).

Accordingly, this claim must be dismissed.

### **RELIEF**

As relief, Petitioner seeks the following: that DCPS shall amend the Student's current IEP, increasing his/her specialized instruction to at least twenty hours per week outside general education, and then timely place him/her in an appropriate self-contained

BES or BLS program; that DCPS shall timely conduct and review a comprehensive FBA of the Student and then update his/her BIP as appropriate; that DCPS shall timely conduct and review an addendum to the Student's April 2022 psychological evaluation through assessment of (1) cognitive functioning, (2) adaptive functioning, (3) social, emotional and behavior functioning, and (4) executive functioning, or, alternatively, conduct and review a new comprehensive psychological evaluation to include the aforementioned assessments; that, upon completion of the aforementioned assessments, DCPS shall timely reconvene the Student's IEP team to review and revise the IEP as appropriate, based on the updated evaluative data; that DCPS shall provide compensatory education for the denials of FAPE or fund compensatory education evaluations to determine the appropriate amount of compensatory education warranted; and that there shall be a reservation of rights for additional compensatory education.

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

In regard to the request for compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's

purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F.3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award tailored to the unique needs of the disabled student”). A petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner seeks 360 hours of academic tutoring with thirty-six hours of counseling as compensatory education for the Student’s FAPE denials. Given the credentials of the expert, the extensiveness of the compensatory education plan that was submitted, and the lack of any compelling testimony to the contrary, this Hearing Officer finds this to be a reasonably calculated and complete award, given that the Student was denied a FAPE starting in January 2023 and that the issues related to the Student’s program have still not been resolved to this day. There is no need to reserve Petitioner’s rights to future compensatory education in light of this award, especially since Petitioner presented no authority in support of this principle.

Petitioner also seeks evaluations, including an FBA, a BIP, and an addendum to the Student’s comprehensive psychological evaluation. But DCPS’s FBA, BIP, and

psychological evaluations were not ruled to be deficient, so this Hearing Officer will decline to order relief on this basis. This Hearing Officer will, however, order DCPS to amend the Student's IEP (if it has not done so already), by increasing the specialized instruction mandate to at least twenty hours per week outside general education, and then timely place the Student in an appropriate self-contained BES or BLS program.

### **VII. Order**

As a result of the foregoing:

1. Respondent shall pay for 360 hours of compensatory tutoring for the Student, to be provided by a certified special education teacher, at a usual and customary rate in the community;
2. Respondent shall pay for 36 hours of counseling for the Student, to be provided by a qualified social worker or psychologist, at a usual and customary rate in the community;
3. The Student's IEP shall be revised to require twenty hours per week of specialized instruction outside general education;
4. The Student shall be placed in the BES or BLS program;
5. Petitioner's other requests for relief are denied.

Dated: December 1, 2023

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.

### **VIII. Notice of Appeal Rights**

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 days from the date of the Hearing Officer Determination in accordance with 20 USC Sect. 1415(i).

Dated: December 1, 2023

Michael Lazan  
Impartial Hearing Officer