

**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  
January 18, 2023

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2022-0137
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 1/18/23
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates (using Microsoft Teams):
("DCPS"),	)	11/21/22 & 1/6/23
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") due to DCPS's failure to include Student's residential school placement on the Individualized Education Program ("IEP"), comprehensively evaluate, allow Parent to participate in a meeting and provide all education records. DCPS responded that there were no violations of the IDEA or denials of FAPE and that all claims were frivolous.

**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 7/13/22, the case was assigned to the undersigned on 7/14/22. Petitioner filed an amended due process complaint on

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<sup>1</sup> 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.

## Hearing Officer Determination

Case No. 2022-0137

7/18/22, restarting the timelines. Respondent filed an amended response after hours on 7/28/22, which it corrected on 7/29/22, and did not challenge jurisdiction. A resolution meeting took place on 8/2/22, but the parties did not settle the case or shorten the 30-day resolution period, which ended on 8/17/22. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by 69-day and 45-day continuances, which require a Hearing Officer Determination (“HOD”) by 1/23/23.

A prehearing conference was held on 11/4/22 and the Prehearing Order was issued the same day, addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 11/21/22 and 1/6/23 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in some of the hearing, but missed the entire second day due to an unspecified emergency with one of her children.

### Documents and Witnesses

Petitioner’s Disclosure, submitted on 11/14/22, contained documents P1 through P56, all of which were admitted into evidence without objection. Respondent’s Disclosure, also submitted on 11/14/22, contained documents R1 through R32, all of which were offered into evidence except for R6, R12, R15, R22, R23, R29 and R30; all offered documents were admitted into evidence over specified objections.<sup>2</sup>

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

1. *Local Education Agency (“LEA”) Representative*
2. *Parent*
3. *Educational Consultant* (qualified without objection as an expert in Special Education)

Respondent’s counsel also presented 3 witnesses in Respondent’s case (*see* Appendix A):

1. *Resolution Specialist*
2. *School Psychologist* (qualified over objection as an expert in School Psychology)

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<sup>2</sup> Citations herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the page number of the exhibit (consistent Bates numbers are not available), while Respondent’s documents are indicated by an “R” and the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted.

## Hearing Officer Determination

Case No. 2022-0137

### 3. *Nonpublic Monitoring Specialist*

Petitioner's counsel submitted 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 failing to include a residential school placement/services in Student's IEP.<sup>3</sup> (*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 developing a new IEP for Student without parental participation in the IEP meeting. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 3:** Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability by not conducting (a) a psychiatric assessment, and/or (b) a neuropsychological assessment. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 4:** Whether DCPS denied Student a FAPE by failing to provide a complete copy of or access to Student's education records. (*Petitioner has the burden of persuasion on this issue.*)

The relief requested by Petitioner is:

1. Within 10 days, DCPS shall convene an eligibility/IEP meeting to include Parent and her representative at an agreeable time.
2. DCPS shall fund a comprehensive psychiatric assessment and a comprehensive neuropsychological assessment, both at market rates.
3. DCPS shall provide a complete copy of or access to all of Student's education records.
4. DCPS shall provide compensatory education services for any denials of FAPE.
5. Any other just and fair relief.

### **Frivolousness**

DCPS requested a finding of frivolousness on all issues in this case. While Issue 4 is particularly close, in light of the findings of fact and conclusions of law below the undersigned denies DCPS's request.

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<sup>3</sup> A further assertion that DCPS denied FAPE by failing to "offer placement in an appropriate residential school program that can meet Student's needs" was withdrawn without prejudice by Petitioner's counsel at the prehearing conference.

## Hearing Officer Determination

Case No. 2022-0137

### **Findings of Fact**

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact<sup>4</sup> are as follows:

1. **Background.** Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age, Gender, in Grade* during 2022/23 at *Nonpublic School* after being at *Prior School*.<sup>6</sup> Student's special education disability classification is Emotional Disturbance ("ED"), with diagnoses of Disruptive Mood Dysregulation Disorder, Major Depressive Disorder, and Oppositional Defiance Disorder.<sup>7</sup> On 4/13/22, the psychological triennial reevaluation found, based on current and historical data, that Student continued to meet the criteria of a student with ED.<sup>8</sup> No one (including Petitioner's counsel and Parent) challenged or disagreed with Student's ED disability classification.<sup>9</sup>

2. **IEPs.** Student's 4/22/22 IEP provided for 30 hours/week of specialized instruction outside general education and 240 minutes/month of Behavioral Support Services ("BSS") outside general education; a fulltime dedicated aide was added to Student's IEP by amendment on 10/13/22.<sup>10</sup>

3. **Cognitive Abilities.** Student has a variable cognitive profile; in April 2020, Student's cognitive abilities were measured near the High Average range, with a Full Scale IQ ("FSIQ") of 109 based on the Wechsler Abbreviated Scale of Intelligence – Second Edition ("WASI-II"); in February 2021, Student's cognitive abilities were measured in the Low Average range, with an FSIQ of 81 based on the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V").<sup>11</sup>

4. **Academics.** Student's academic performance is below same age peers, impacted by behavior.<sup>12</sup> Student is making progress toward goals and passing core academic courses.<sup>13</sup>

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<sup>4</sup> 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.

<sup>5</sup> Parent.

<sup>6</sup> Parent; P2-1.

<sup>7</sup> P25-1.

<sup>8</sup> P25-15.

<sup>9</sup> LEA Representative; Parent.

<sup>10</sup> P8-13; P2-12.

<sup>11</sup> P25-3,4,5,12; P27-1,2.

<sup>12</sup> P25-5.

<sup>13</sup> P25-12.

## Hearing Officer Determination

Case No. 2022-0137

5. Behavior. Parent testified that Student is “all over” the place and getting worse; Student was doing well in school, but then was locked up on a gun charge, and had just cut off an ankle bracelet.<sup>14</sup> Student often eloped from foster care for long periods, engaged in substance abuse and risky sexual behaviors, and refused to engage in therapy or medication administration.<sup>15</sup> Student has been placed with several foster homes which were disrupted by Student’s behavior.<sup>16</sup> Student has been in psychiatric facilities, including after threatening siblings with a weapon.<sup>17</sup>

6. Student had ongoing and increasing displays of aggression, which is one of Student’s most significant behavioral and emotional problems.<sup>18</sup> Student frequently provoked peers, causing other students to get off task, and frequently used inappropriate sexual language, causing class-wide distraction and disruption.<sup>19</sup> Student appeared to seek out vulnerable students to tease and provoke.<sup>20</sup> Student had been suspended for bullying, harassment, intimidation, reckless behavior, fighting with significant injury or harm; once while fighting, the assistant principal attempted to intervene and was assaulted and sustained a concussion.<sup>21</sup>

7. In her disclosure, Petitioner submitted 127 pages of incident reports and related documents from 2021/22, including details about Student punching a staffer in the face, chipping her tooth; pushing and hitting staffers; and kicking a hole in the wall and tearing down pieces of the ceiling, requiring an EMT for Student.<sup>22</sup> Student had a total of 23 restraints and 7 exclusions as of 5/27/22, which were to be used only in emergency situations of imminent danger as the intervention of last resort.<sup>23</sup> A Functional Behavioral Assessment (“FBA”) was completed for Student on 12/17/21 and Behavioral Intervention Plan (“BIP”) updated.<sup>24</sup> Student’s BIP (as of 4/13/22) addressed aggression, elopement, and impulse control.<sup>25</sup>

8. Residential Placement. During the 5/27/22 IEP team meeting, the team discussed and agreed on residential placement for Student, for whom things were escalating.<sup>26</sup> Student’s increased physical aggression toward staff and peers was reviewed; the Multi-disciplinary Team (“MDT”) all agreed on the appropriateness of a residential school placement for Student due to increased aggression and lack of response to interventions and

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<sup>14</sup> Parent.

<sup>15</sup> R3p7.

<sup>16</sup> P25-2; P46-14.

<sup>17</sup> P25-2; Parent.

<sup>18</sup> P25-12,13.

<sup>19</sup> P8-3.

<sup>20</sup> *Id.*

<sup>21</sup> P8-10.

<sup>22</sup> P50; P50-22, 25, 50.

<sup>23</sup> P5-2; P8-3.

<sup>24</sup> P8-3.

<sup>25</sup> P25-15.

<sup>26</sup> Parent.

## Hearing Officer Determination

Case No. 2022-0137

consequences.<sup>27</sup> Educational Consultant testified that once residential placement was agreed upon at the 5/27/22 IEP team meeting, it should have been added to Student's IEP at that time.<sup>28</sup> Student's IEP did not include or describe a residential school placement, stating (in the Other Classroom Aids and Services section) that Student "requires a placement in a non-public setting that provides grade level curriculum and behavior supports embedded into the classroom."<sup>29</sup> The LRE page of Student's IEP stated that 30 hours/week of specialized instruction are required in a small and structured environment to enable a focus on learning without distraction; the LRE page also stated that Student was in a separate day school setting.<sup>30</sup>

9. Student was not in a residential school so residential placement was not added to Student's IEP.<sup>31</sup> LEA Representative testified that Student's IEP could not be amended to add residential placement without being "out of compliance" due to delays in identifying a location of service.<sup>32</sup> In the 10/11/22 meeting, Petitioner's counsel requested that residential placement be added to Student's IEP.<sup>33</sup> Student's IEP was amended on 10/13/22 to add a fulltime dedicated aide, but residential placement was not added.<sup>34</sup>

10. OSSE sent out referrals to find a residential placement for Student; many referrals were made by 9/23/22.<sup>35</sup> Parent received emails concerning residential placement that she did not answer.<sup>36</sup> One residential school rejected Student when Student refused to participate in an interview required by the school.<sup>37</sup> DCPS identified a residential placement with an admissions date of 8/19/22, but the acceptance was rescinded, so the referral process was reopened.<sup>38</sup> After the rescinded acceptance, Prior School sent an exclusion notice based on Student's excessive aggression; DCPS was able to identify Nonpublic School, a separate day school, as an interim placement where Student has been awaiting a residential placement.<sup>39</sup>

11. OSSE does not require the IEP to include residential placement before making referrals.<sup>40</sup> LEA Representative credibly concluded that there was no impact on Student from not having residential placement on the IEP.<sup>41</sup> Even Educational Consultant

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<sup>27</sup> P5-3.

<sup>28</sup> Educational Consultant.

<sup>29</sup> P8-13; P2.

<sup>30</sup> P8-14.

<sup>31</sup> Nonpublic Monitoring Specialist.

<sup>32</sup> P1-3.

<sup>33</sup> R2p6.

<sup>34</sup> P2; P2-12,13.

<sup>35</sup> P1-2; P41.

<sup>36</sup> Parent.

<sup>37</sup> Nonpublic Monitoring Specialist.

<sup>38</sup> P4-1 (8/30/22 Prior Written Notice ("PWN")); R24p107.

<sup>39</sup> P4-1; P35-1.

<sup>40</sup> Educational Consultant.

<sup>41</sup> LEA Representative.

## Hearing Officer Determination

Case No. 2022-0137

acknowledged that it was not possible to tell if there was any harm caused by not adding residential placement to Student's IEP.<sup>42</sup>

12. Key Meetings. Parent didn't attend Student's 4/22/22 eligibility/IEP team meeting because she was in court for the murder trial of a nephew where she received word that her son had been shot.<sup>43</sup> Parent told her counsel that she was not able to participate in the 4/22/22 meeting and asked for it to be rescheduled, but the meeting was held without Parent.<sup>44</sup> Parent had been expected to participate in the 4/22/22 meeting, so when she did not join DCPS attempted to reach Parent 3 times over the objection of Petitioner's counsel who sought to reschedule.<sup>45</sup> Petitioner's counsel objected to continuing without Parent and did not participate in the meeting herself; the rest of the MDT agreed to go forward and to schedule another meeting when Parent was available to review eligibility and the IEP.<sup>46</sup> The 4/22/22 eligibility/IEP team meeting involved 7 school personnel, as well as Petitioner's counsel and Student's guardian ad litem.<sup>47</sup> Eligibility for special education had last been determined on 5/1/19, so was about to "expire."<sup>48</sup> At the 4/22/22 meeting, after reviewing the Analysis of Existing Data ("AED") and psychological triennial reevaluation, the MDT determined there was enough information to find Student eligible for special education services as a student with an emotional disturbance disability.<sup>49</sup> The MDT agreed to discuss a more restrictive placement (as Petitioner's counsel had requested earlier in April 2022) in the subsequent meeting with Parent.<sup>50</sup>

13. DCPS scheduled a meeting on 5/27/22 to discuss the outcome of the 4/22/22 eligibility/IEP meeting that Parent did not attend; Petitioner's counsel was provided documents from the 4/22/22 meeting.<sup>51</sup> DCPS asserted that the 5/27/22 meeting was only a "review meeting" and not the "actual eligibility or IEP meeting," but if there were any concerns with the IEP, the team was willing to consider Parent's concerns and update the IEP as needed.<sup>52</sup> The psychological triennial reevaluation was reviewed on 5/27/22 and Parent did not have any questions; the team reviewed the IEP present levels and goals.<sup>53</sup> Petitioner and her counsel had no concerns about other disabilities or PLOPs or goals or levels of BSS in the IEP.<sup>54</sup>

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<sup>42</sup> Educational Consultant.

<sup>43</sup> Parent.

<sup>44</sup> Parent.

<sup>45</sup> P9-1,2; P1-3; LEA Representative.

<sup>46</sup> P9-2.

<sup>47</sup> P9-1.

<sup>48</sup> LEA Representative; P9-1.

<sup>49</sup> P9-3; P7-1 (4/29/22 PWN); P10-1; LEA Representative.

<sup>50</sup> P9-2; P51-4.

<sup>51</sup> P5-1,2; LEA Representative.

<sup>52</sup> P5-2; P51-20 ("we'll make any necessary changes that are agreed upon by the team"); LEA Representative.

<sup>53</sup> P5-2.

<sup>54</sup> LEA Representative.

## Hearing Officer Determination

Case No. 2022-0137

14. On 11/4/22, Nonpublic Monitoring Specialist offered to schedule another MDT meeting to review Student's IEP and eligibility documents, which was declined as being too close to the hearing in this case.<sup>55</sup> Nonpublic Monitoring Specialist testified that a meeting could still be held, for an HOD is not required for Petitioner to get a meeting with DCPS.<sup>56</sup>

15. Evaluations. Based on the 3/15/22 AED meeting, the MDT determined that Student needed only a psychological triennial reevaluation, based in part on Student's "refusal to compete testing" and the team's reluctance to put Student "under any more stress" with more cognitive testing; Petitioner's counsel requested neuropsychological and psychiatric evaluations, but DCPS advised that those evaluations were not offered or warranted at that time to determine educational impact.<sup>57</sup> Neuropsychological and psychiatric evaluations would not help with Student's eligibility determination, because all needed information was already available.<sup>58</sup> Conducting neuropsychological and psychiatric evaluations would not change the conclusion of ED.<sup>59</sup> Educational Consultant asserted that neuropsychological and psychiatric evaluations were needed for IEP determinations beyond eligibility, but had no concerns with Student's IEP.<sup>60</sup>

16. School Psychologist completed the psychological triennial reevaluation on 4/13/22; no additional testing of Student was needed after Spring 2022, as the team had enough information to program for Student, and would need Student to participate if anything else was conducted.<sup>61</sup> Student had previously refused testing or had not been available, and did not want to be tested.<sup>62</sup> School Psychologist persuasively explained that neuropsychological and psychiatric evaluations provided clinical information useful outside school, but were not typically needed for educational purposes; Student did not need a neuropsychological or psychiatric evaluation.<sup>63</sup>

17. Student's entire team was concerned about the lack of educational testing on 4/22/22, but Student refused educational testing, including Woodcock-Johnson, beginning-of-year benchmarks and middle-of-year benchmarks.<sup>64</sup> Despite multiple attempts prior to 5/27/22, the team was not able to conduct educational testing of Student, due to lack of physical or emotional availability as Student was often in crisis or absent.<sup>65</sup>

18. On 8/2/22, DCPS authorized independent educational evaluations ("IEEs"), with a neuropsychological evaluation capped at \$2958.25 and a psychiatric evaluation capped at

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<sup>55</sup> P51-21; R28p140; Nonpublic Monitoring Specialist.

<sup>56</sup> Nonpublic Monitoring Specialist.

<sup>57</sup> P12-1 (3/15/22 PWN); R11.

<sup>58</sup> LEA Representative.

<sup>59</sup> Educational Consultant.

<sup>60</sup> *Id.*

<sup>61</sup> School Psychologist.

<sup>62</sup> Educational Consultant.

<sup>63</sup> School Psychologist.

<sup>64</sup> P9-2; LEA Representative.

<sup>65</sup> P5-2; R19p90.



## Hearing Officer Determination

Case No. 2022-0137

\$2704.30.<sup>66</sup> On 9/14/22, Resolution Specialist authorized IEEs for a comprehensive psychological capped at \$2500 and a duplicate psychiatric evaluation capped at \$2704.25.<sup>67</sup> The IEE authorizations were provided by DCPS outside of settlement and could be used by Petitioner when issued.<sup>68</sup> The DCPS IEE authorizations have not been used, nor has there been any request for increased funding for the evaluations, which can be sought.<sup>69</sup>

19. Education Records. The Special Education Data System (“SEDS”) is an OSSE database that DCPS and other LEAs use to maintain special education records for students.<sup>70</sup> A SEDS Index or SEDS Document Index/Student History does not exist in SEDS; a list of documents can be generated in SEDS, but not printed apart from screen shots showing the list generated by searches in SEDS.<sup>71</sup> A SEDS list of documents is not itself an education record.<sup>72</sup> With notable effort, DCPS created and provided a 7-page, comprehensive, searchable, table of contents listing over 900 pages of documents; the list and documents were provided electronically to Petitioner’s counsel in September 2022 in response to her request for all education records; in addition to all of Student’s SEDS documents, DCPS listed and provided communications logs and Student’s education records from the Aspen and Student Behavior Tracker (“SBT”) databases.<sup>73</sup>

### 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.’” *Endrew 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.” *Endrew F.*, 137 S. Ct. at 994,

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<sup>66</sup> R25p108; Resolution Specialist.

<sup>67</sup> P49-1; Resolution Specialist.

<sup>68</sup> R26p122.

<sup>69</sup> Resolution Specialist.

<sup>70</sup> Resolution Specialist; LEA Representative.

<sup>71</sup> P45; P1-2; P52-4,5; LEA Representative; Resolution Specialist.

<sup>72</sup> Resolution Specialist.

<sup>73</sup> R26p114-22; P47; P52-5; Resolution Specialist.

## Hearing Officer Determination

Case No. 2022-0137

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

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

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z. B. v. Dist.*

## Hearing Officer Determination

Case No. 2022-0137

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 failing to include a residential school placement/services in Student's IEP. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a *prima facie* case concerning the failure of Student's IEP to include Student's placement, shifting the burden to DCPS, which failed to meet its burden of persuasion on the procedural violation as discussed below, although there was no substantive harm. Parents are entitled to "a description of specialized instruction and services that the child will receive." *Endrew F.*, 137 S. Ct. at 1000. The court in *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 121 (D.D.C. 2018), citing *Brown* (below) explained that "[c]ourts in this jurisdiction have concluded that an IEP Team is required to discuss a student's specific 'Least Restrictive Environment' ('LRE') and that the IEP is required to include at least a brief description of the child's LRE." The decision in *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 27 n.2 (D.D.C. 2016), found a student's IEP legally deficient when it merely stated the hours per week of specialized instruction and behavioral support, but omitted a sufficient description of student's LRE and placement. *See also Jones v. Dist. of Columbia*, No. 17-1437, 2019 WL 532671, at \*1 n.1 (D.D.C. 2019); 34 C.F.R. § 300.320(a)(5),(7).

Here, Petitioner's only criticism of Student's relevant IEPs (the 4/22/22 IEP and the 10/13/22 amended IEP) was that they did not include a description of Student's LRE requiring a residential school placement. There is no dispute that Student needs a residential school placement or that DCPS/OSSE have been diligent in seeking a residential school placement for Student. But the DCPS practice is to wait to include a residential placement on the IEP until a suitable location has been identified for Student, so that the IEP does not appear to be "out of compliance" by requiring a residential placement when a location has not yet been found. However, this Hearing Officer concludes that is not sufficient and can easily be seen to be an erroneous procedural violation by considering, for instance, if other services were withheld from a child's IEP until the service providers could be identified and were available. *See S.S. by & through St. v. Dist. of Columbia*, 68 F. Supp. 3d 1, 18 (D.D.C. 2014) ("student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP," citing *Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006)); 34 C.F.R. §§ 300.324(a)(6), 300.322.

The next question is whether a failure to set forth Student's LRE and placement in the IEP amounts to a substantive violation, for a procedural violation "will constitute a denial of a [FAPE] only if it 'results in loss of educational opportunity' for the student." *Leggett v. Dist. of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015) (alteration omitted) (*quoting Lesesne ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)). Here, all were in agreement that Student needed a residential placement and there was no dispute that it should be included on the IEP. The only question was the timing of when it would be added. Student certainly was not denied a residential school placement because Student's IEPs did not include a statement about residential placement, for OSSE did not delay

## Hearing Officer Determination

Case No. 2022-0137

sending referrals to possible residential facilities. DCPS's expert was clear – and persuasive – that there was no impact on Student from not having residential placement on the IEP, while Petitioner's expert acknowledged that it was not possible to tell if there was any harm.

This Hearing Officer thus concludes that the failure to include a residential school placement in Student's IEP did not significantly impede Parent's opportunity to participate in decision-making regarding a FAPE, impede Student's right to a FAPE, or deprive Student of educational benefit under 34 C.F.R. § 300.513(a). *See Brown*, 179 F. Supp. 3d at 25-26. Accordingly, there was no substantive violation or a denial of FAPE, so compensatory education need not be considered or awarded. The procedural violation simply results in an order below that DCPS must amend Student's IEP to include a residential school placement within 10 days. 34 C.F.R. § 300.513(a)(3).

**Issue 2:** *Whether DCPS denied Student a FAPE by developing a new IEP for Student without parental participation in the IEP meeting. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on DCPS failing to obtain Parent's participation or input when developing Student's IEP on 4/22/22, as a procedural violation. The IDEA clearly requires parental involvement in IEP development. *See Endrew F.*, 137 S. Ct. at 999 (crafting an appropriate program of education contemplates the input of the child's parents or guardians); *Z.B. by & through Sanchez v. Dist. of Columbia*, 382 F. Supp. 3d 32, 47 (D.D.C. 2019), and cases collected therein, *aff'd sub nom. Sanchez v. Dist. of Columbia*, 815 Fed. Appx. 559 (D.C. Cir. 2020), *cert. denied sub nom. Z.B. by & through Sanchez v. Dist. of Columbia*, 141 S. Ct. 375, 208 L. Ed. 2d 97 (2020) (the IDEA requires that a student's parents be part of the team that creates the student's IEP and determines the student's educational placement).

Here, Parent sought to participate in the eligibility/IEP team meeting on 4/22/22, but – as Parent testified – had terrible scheduling conflicts, as she was in court for the murder trial of her nephew when she received word that her son had been shot. Parent's counsel objected to proceeding with the meeting without Parent and refused to continue participating in the meeting herself. However, the rest of the team agreed to proceed with the meeting and to schedule another when Parent was available to review eligibility and the IEP.

The Ninth Circuit Court of Appeals dealt with a very similar situation in a case cited by Petitioner's counsel, *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1042 (9th Cir. 2013), where the parent sought to reschedule an IEP meeting due to sickness, but the agency went forward with the meeting and held a follow-up meeting to review the revised IEP line by line, to which parent provided no substantive input. The Ninth Circuit found this insufficient, criticizing the agency for not prioritizing parental input and being overly concerned about meeting IEP deadlines. *Doug C.*, 720 F.3d at 1045-46. The Ninth Circuit found the failure to include the parent in the IEP meeting a clear infringement of his ability to participate in the IEP formulation process, noting that an agency cannot blame the parent, for the IDEA is designed to benefit the student, not the parent. *Doug C.*, 720 F.3d at 1045, 1047. However, the IEP meeting in *Doug C.* changed placement for the first time in six years in the parent's absence, and the court held there was a "strong likelihood" that parent's

## Hearing Officer Determination

Case No. 2022-0137

preferred placement would have been “more thoroughly considered” if parent had been present. *Doug C.*, 720 F.3d at 1047.

In the present case, by contrast, Petitioner has not pointed to anything in the 4/22/22 meeting that did not come out as she wished. Indeed, Petitioner’s requested remedy for not being present at the 4/22/22 eligibility/IEP meeting is not to make any change in Student’s eligibility or IEP, but simply to re-do the meeting even though no desired change has been identified. However, given the emphasis on parental participation in IEP meetings, the undersigned concludes that the refusal to delay the 4/22/22 meeting was a procedural violation that should be remedied by DCPS conducting another eligibility/IEP team meeting for Petitioner, as DCPS has been willing to do. 34 C.F.R. § 300.513(a)(3). The required meeting should take place within 30 days at a mutually agreeable time for the parties. However, the undersigned does not consider this violation to rise to the level of a substantive denial of FAPE, given Petitioner’s inability to show that anything of significance did not turn out as Petitioner desired in the 4/22/22 meeting, or any other harm, so compensatory education need not be considered or awarded.

**Issue 3:** *Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability by not conducting (a) a psychiatric assessment, and/or (b) a neuropsychological assessment. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on the need for neuropsychological and psychiatric evaluations, which are clinical assessments not generally used for educational purposes. The importance of assessing students in all areas of suspected disability was emphasized in *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Court of Appeals explained in *Z. B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. However, “[t]he IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use ‘a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information.’ *See* 20 U.S.C. § 1414(b)(2)(A).” *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60 (D.D.C. 2011).

Here, School Psychologist completed a psychological triennial reevaluation and concluded that Student did not need a neuropsychological or psychiatric evaluation, which the undersigned found more credible than Petitioner’s witness who was not as qualified and had only reviewed records. School Psychologist further explained that neuropsychological and psychiatric evaluations provide clinical information that may be useful outside school, but are typically not needed for educational purposes. Nor would the outcome have been different if these evaluations had been conducted. There is no disagreement that Student should have been found eligible for special education services with the disability classification of ED. Nor is there any challenge to or disagreement over Student’s IEP which might have been impacted by conducting these additional evaluations. Further, the evidence is that Student was resisting additional testing at the time these evaluations were sought, so Petitioner failed to show that it would have been possible to further evaluate

## Hearing Officer Determination

Case No. 2022-0137

Student at that time. Student's team was appropriately taking into account the impact that additional testing might have had on Student.

Finally, DCPS did authorize these evaluations in August and September 2022 at OSSE rates, but Petitioner has failed to use the authorizations. Petitioner's counsel asserts that the rates authorized were not high enough, but presented no evidence that providers were not willing to evaluate Student at the rates authorized. However, Resolution Specialist credibly testified that she was aware of providers accepting these rates for neuropsychological and psychiatric evaluations. As the court explained in *M.V. v. Shenendehowa Cent. Sch. Dist.*, 2013 WL 936438, at \*7 (N.D.N.Y. 2013), the reasonableness of an IEE fee cap can be shown by the existence of several willing providers. Petitioner's counsel argued that DCPS should authorize a "market" rate. But the fact that other parents were able to have these evaluations conducted at the authorized rates persuades the undersigned that these were indeed market rates, even though there is no doubt that other providers might prefer higher rates.

In sum, Petitioner has not made a persuasive case that Student required neuropsychological and psychiatric evaluations. But in case the evaluations were needed, DCPS authorized IEEs months ago. Petitioner has not attempted to use the IEEs, arguing the rate is too low, even though other Parents have obtained evaluations at the authorized rate. For these various reasons, DCPS prevails on this issue.

**Issue 4:** *Whether DCPS denied Student a FAPE by failing to provide a complete copy of or access to Student's education records. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of persuasion on the issue of access to education records. As a general matter, parents of a child with a disability have the right to examine all education records that pertain to the identification, evaluation, and educational placement of the child, and provision of a FAPE. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a), 34 C.F.R. § 300.613(a) (parents must be permitted to inspect and review any education records relating to their child that are collected, maintained, or used by an agency). *See also Jalloh ex rel. R.H. v. Dist. of Columbia*, 535 F. Supp. 2d 13, 21 (D.D.C. 2008) ("parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records"). An "education record" under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). Under FERPA, an education record includes records, files, documents, and other materials which "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. Part 99.

Here, Petitioner's counsel made clear during the hearing that despite her requests for all education records of Student, Petitioner only was challenging the lack of an index to all of Student's records maintained within SEDS, which contains the special education records for DCPS (and other LEA) students. Extensive testimony clarified that a list of documents can be generated in SEDS through a user's query, which could be as broad as all documents of a student. But there is no SEDS index as such, and even the list of documents cannot be

## Hearing Officer Determination

Case No. 2022-0137

printed, apart from screen shots. Moreover, even if an electronic list of documents generated within SEDS were to be construed as a record, file, document or other material, such a list of search results is transient, existing only at the time of the search, and was not shown by Petitioner to be “maintained” by an educational agency or any person. Thus, the list of documents fails the definition of an education record and need not be made available to Petitioner.

In any case, DCPS took notable effort to generate a comprehensive, searchable list of all of Student’s education records, which it provided to Petitioner in September 2022 along with a complete set of education records that Petitioner sought in her complaint. This Hearing Officer is clear that DCPS did not fail to provide required education records of Student and there was no denial of FAPE.

### **ORDER**

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

- (1) Within 10 days, DCPS shall amend Student’s IEP to include a residential school placement.
- (2) Within 30 days, DCPS shall hold an eligibility/IEP team meeting with Petitioner at a mutually agreeable time.

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

**IT IS SO ORDERED.**

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

### **NOTICE OF RIGHT TO APPEAL**

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

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