

**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
July 15, 2018

<i>Student</i> , ¹)	Case No.: 2018-0119
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 7/15/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 6/25/18, 6/27/18 &
("DCPS"),)	7/10/18 in ODR Hearing Room 111
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been comprehensively evaluated and related services were reduced on Individualized Education Programs (“IEPs”) which were fully implemented in an appropriate placement. DCPS responded that it had sufficiently evaluated Student and appropriately reduced related services to increase specialized instruction, and was diligently seeking to find a new nonpublic school for Student.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 5/1/18, the case was assigned to the undersigned on 5/2/18. Respondent filed a response on 5/15/18 and did not challenge

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

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jurisdiction. The resolution session meeting was held on 6/14/18 without success. The 30-day resolution period ended on 5/31/18. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 7/15/18.

The due process hearing took place on 6/25/18, 6/27/18 and 7/10/18, and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in most of the hearing.

Petitioner’s Disclosures, submitted on 6/18/18, contained documents P1 through P46, which were admitted into evidence without objection; certain pages containing information about other students were redacted and all disclosures resubmitted.

Respondent’s Disclosures, submitted on 6/18/18, contained documents R1 through R105, which were admitted into evidence without objection, although R69 was withdrawn as it was about another student and the disclosures resubmitted. On 6/29/18, Respondent submitted additional documents R106 and R107; R106 was admitted pursuant to agreement by Petitioner except for pages 741 through 752 which were not admitted; Petitioner did not agree to R107 so it was not admitted.²

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
2. *Private Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
3. *Educational Advocate* (qualified over objection as an expert in Special Education Programming and Interpretation of Evaluations)
4. Parent

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

1. *School Psychologist* (qualified without objection as an expert in School Psychology)
2. *Monitoring Specialist*

² References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages, separated by commas). By contrast, Respondent’s documents are consecutively Bates numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number(s) without leading zeros.

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3. School Speech Pathologist

Petitioner's counsel recalled Educational Advocate as the only rebuttal witness.

At the beginning of the due process hearing, the parties agreed to a single stipulation, which was: "The parties stipulate that the information in exhibits P40 through P42 is accurate."

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

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement/location of services on 2/16/18 or thereafter, where (a) Student was not doing well academically or behaviorally but remains in an inappropriate placement, and (b) on 4/2/18 related services on Student's IEP were reduced when more services were needed, as (i) behavioral support services ("BSS") were reduced from 240 to 120 minutes/month despite Student being in in-school or out-of-school suspension most days, and (ii) speech-language services were reduced from 240 minutes/month to zero despite Student's communication skills declining over time.³ *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability where (a) adaptive testing was not conducted by January 2017 despite Student's last IQ score of 57, (b) an Applied Behavior Analysis ("ABA") evaluation was not conducted to see if Student qualified for ABA therapy when Student was not making progress and failed to respond to traditional counseling services, (c) a vocational level II evaluation was not conducted, and (d) a Functional Behavioral Assessment ("FBA")/Behavioral Intervention Plan ("BIP") was not updated despite Parent's 2/15/17 request. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to fully implement Student's IEPs from 5/1/16 to present by not providing (a) occupational therapy ("OT") services, (b) speech-language services, and (c) BSS services, as required by Student's 5/2/16 IEP, 1/9/17 Amended IEP, and 4/27/17 IEP. *Petitioner has the burden of persuasion on this issue.*

Issue 4: Whether DCPS denied Student a FAPE by failing to provide access to Student's educational records for 5/1/16 to present, pursuant to numerous written requests, including all (a) IEP progress reports, (b) IEP service trackers, (c) attendance logs, (d) disciplinary records, and (e) meeting notes. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.

³ Issue 1 combines issues a. and b. from pp. 6-9 of the due process complaint.

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2. DCPS shall convene an IEP team meeting to provide an appropriate IEP for Student, including (a) 240 minutes/month of speech-language services, and (b) 240 minutes/month of behavioral support services.
3. DCPS shall fund an appropriate placement in a nonpublic day school.
4. DCPS shall fund independent evaluations, including (a) an FBA, followed by a meeting to develop an appropriate BIP, (b) an Applied Behavior Analysis evaluation, and (c) a vocational level II evaluation.
5. DCPS shall fund compensatory education for any denial of FAPE.⁴
6. Any other just and reasonable relief.

Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and was in *Grade* at *Nonpublic School* in 2016/17⁷ and repeated Grade in 2017/18 (until Student was required to leave Nonpublic School in May 2018).⁸

2. IEPs. Student has been eligible for special education and related services since March 2009, with an initial disability classification of Specific Learning Disability ("SLD"),

⁴ Petitioner's request for compensatory education is considered below except to the extent that it depends on the findings of assessments that may be carried out in the future and future determination of impact on the appropriate level of special education services, which will be reserved.

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

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ All dates in the format "2017/18" refer to school years.

⁸ Parent; R76p396; Monitoring Specialist.

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resulting in specialized instruction and 240 minutes/month⁹ of speech-language services.¹⁰ By the end of 2009, Student was classified as having Multiple Disabilities (“MD”), based on Emotional Disturbance (“ED”), SLD and Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”), which resulted in increased specialized instruction and 240 minutes/month of BSS being added to the 240 minutes/month of speech-language services.¹¹ A dedicated aide for Student was added in 2010.¹² Subsequently, OT services were added; the amount of OT provided on Student’s IEPs is not at issue in this case (although implementation is disputed).¹³

3. Student’s first IEP at Nonpublic School was dated 2/2/16 and provided 26.5 hours/week of specialized instruction, 240 minutes/month of speech-language services, 360 minutes/month of BSS and 240 minutes/month of OT, all outside general education, but no dedicated aide; Student was classified as MD (ED and OHI).¹⁴

4. Student’s next IEP at Nonpublic School was dated 5/2/16 and provided 25.5 hours/week of specialized instruction, 480 minutes/month of speech-language services, 360 minutes/month of BSS and 240 minutes/month of OT, all outside general education, with a dedicated aide; Student continued to be classified as MD (ED and OHI).¹⁵ During ESY from 7/5/16 to 8/12/16, Student was to receive 90 minutes/week of speech-language services, 90 minutes/week of BSS, and 30 minutes/week of OT, all outside general education.¹⁶

5. Student’s IEP was amended on 1/9/17 to decrease related service hours, and provided 27.5 hours/week of specialized instruction, 240 minutes/month of speech-language services, 240 minutes/month of BSS and 120 minutes/month of OT, all outside general education, with a dedicated aide; Student was classified as only ED.¹⁷

6. Student’s next IEP at Nonpublic School was dated 4/27/17 and provided 27.5 hours/week of specialized instruction, 240 minutes/month of speech-language services, 240 minutes/month of BSS and 120 minutes/month of OT, all outside general education, with a dedicated aide; Student continued to be classified as only ED.¹⁸ During ESY from 7/3/17 to

⁹ The undersigned follows schools’ standard practice of treating months as having an even 4 weeks, so that 60 minutes/week is equivalent to 240 minutes/month.

¹⁰ P13-2; P12-1.

¹¹ P13-2,3.

¹² P13-3.

¹³ P13-3; Administrative Notice.

¹⁴ P14-1,12.

¹⁵ P15-1,14.

¹⁶ P15-21.

¹⁷ P16-1,13.

¹⁸ P17-1,15; R27p147 (ADHD dropped due to lack of diagnosis in Student’s files).

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8/11/17, Student was to receive 60 minutes/week of speech-language services, 90 minutes/week of BSS, and 30 minutes/week of OT, all outside general education.¹⁹

7. Student's final IEP at issue is dated 4/2/18 and provided 29 hours/week of specialized instruction, no speech-language services, 120 minutes/month of BSS and 120 minutes/month of OT, all outside general education, with a dedicated aide; Student was classified as MD (Intellectual Disability ("ID") and OHI).²⁰

8. Evaluations. A 12/7/09 psychological evaluation reported borderline general intellectual ability and included an adaptive assessment; the evaluation noted lead poisoning and found the criteria met for ED and OHI in addition to learning disabled.²¹ A 5/3/10 psychiatric evaluation recommended that speech-language services continue with 60 minutes/week and noted the desirability of a medication trial to address ADHD.²² An 11/5/13 speech-language evaluation found that Student had significant language weaknesses that should be addressed through weekly speech-language services.²³

9. A 9/13/17 comprehensive psychoeducational evaluation was conducted by School Psychologist because Student's IEP team sought more cognitive data to determine if Student was ID and should shift from diploma to certificate track.²⁴ This psychological evaluation had been sought since the fall of 2016 and would have been completed in 2016 except that Parent's consent could not be obtained despite many attempts.²⁵ Parent testified that she was not opposed to the evaluation and "never refused" to provide consent, but did not sign (and return) the consent form until 7/3/17 so that the evaluation could proceed.²⁶ Parent did not provide parental input for the 2017 psychoeducational evaluation.²⁷ After the psychoeducational and speech-language evaluations were completed in September 2017, it was difficult to schedule a meeting with Parent to review them, which did not occur until 4/2/18.²⁸

10. Student's IEP team on 10/24/16 discussed whether OHI due to lead poisoning should be the primary disability, with ID (rather than ED or SLD) as a secondary disability.²⁹ Student's IEP team discussed the classification issue with Parent at an 11/1/16 meeting; Parent was upset by the suggestion of moving Student to the certificate track.³⁰ In the

¹⁹ P15-21.

²⁰ P21-1,15.

²¹ P4-1,2,5,6.

²² P5-1,4.

²³ P9-1,5.

²⁴ P12-1,15.

²⁵ School Psychologist; P37-1; P18-1,4; R39p182; P40-14,33,34; P41-1,2,3,47,59,60,62.

²⁶ R45p220; P41-64; Parent.

²⁷ School Psychologist; P12-4,12.

²⁸ P41-70,83; R97p501; P42-2; R76p395.

²⁹ R18p117; School Psychologist (agreed).

³⁰ R20p122.

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absence of consent and an updated psychological evaluation, Student's 1/9/17 IEP was based on older information and continued the prior ED/OHI classification.³¹

11. To get a well-rounded view of Student's cognitive abilities, in the psychoeducational evaluation Student was administered the Reynolds Intellectual Assessment Scales – Second Edition (“RIAS-2”), the Test of Nonverbal Intelligence – Fourth Edition (“TONI”), and the Cognitive Assessment Systems-2 (“CAS-2”); Student's performance resembled prior cognitive assessments; Student's FSIQ was 67 in 2009 and 57 in 2013.³² In 2017, on the CAS-2, Student's full scale score was 59.³³ On the RIAS-2, Student had a Composite Intelligence Index (“CIX”) of 40, a Verbal Intelligence Index (“VIX”) of 48, and a Nonverbal Intelligence Index (“NIX”) of 40, all of which are in the Significantly Below Average range.³⁴ Student's results on the TONI were higher than the CIX on the RIAS-2, with a full scale nonverbal IQ of 80, but remained in the Well Below Average range overall.³⁵ Student's academic and behavioral profile are very consistent with a child exposed to lead.³⁶

12. DCPS had agreed to include adaptive functioning with the psychological evaluation.³⁷ The 2017 psychoeducational evaluation included an adaptive skills assessment which found Student to be in the significantly below average range, and indicated that Student will require adaptive support in all areas to care for basic needs.³⁸

13. Speech-language assessments of Student indicated that the ROWPVT (Receptive) score declined from 80 in 2009 to 60 in 2013 and 47 in 2017 (on the comparable PPVT-4), while the EOWPVT (Expressive) score declined from 72 in 2009 to 56 in 2013 and then was 58 in 2017 (on the comparable EVT-2).³⁹ School Speech Pathologist credibly testified that the scores compare Student to typically developing students so that the decreases in scores over time did not indicate regression by Student but simply that Student was falling increasingly behind general education students as need vocabulary increased over the years.⁴⁰

14. Speech-Language Issues. Soon after Student began at Nonpublic School (on 1/12/16), Student was more willing to actively participate in speech-language therapy in the spring of 2016, so Student's speech-language services were increased on the 5/2/16 IEP

³¹ Monitoring Specialist; P41-33.

³² P12-14,3.

³³ P12-14.

³⁴ P12-7,14.

³⁵ P12-14,8.

³⁶ P12-14.

³⁷ P18-1,4.

³⁸ P12-9,11,12,14.

³⁹ P13-4,5,9; School Speech Pathologist.

⁴⁰ School Speech Pathologist; P13-11 (decline in standard scores is not a regression, but lack of progress); R76p395 (scores may decrease as academic language demands increase).

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from 240 to 480 minutes/month (2 hours/week).⁴¹ The increase was an effort to maximize Student's learning potential and realize gains in deficit areas, but with the stipulation that Student's speech-language progress would be reviewed in the fall of 2016.⁴² School Speech Pathologist considered the increase "excessively intensive" for a child of Student's age and cognitive/academic level.⁴³ To increase Student's willingness to attend speech-language sessions, the two 1-hour sessions were divided into 30-minute sessions 4 days a week, but Student declined in availability for service.⁴⁴

15. In the fall 2016 review, it was determined that Student's progress had been hampered by increasing absences (shown on the chart on P27-1), out-of-school suspensions, and Student's refusal of service.⁴⁵ Data from a chart of Student's progress on rapid sound drills showed that Student's results on the 10th try were exactly the same as weeks earlier on the second, fourth and fifth attempts.⁴⁶ Student's speech-language pathologist at Nonpublic School recommended in January 2017 that speech-language services be reduced back to 1 hour/week; the IEP team made the change as Student was refusing services, walking out and cussing out staff.⁴⁷

16. With the 9/22/17 speech-language evaluation, data suggested that Student had maximized benefit from direct speech-language intervention services and no longer required a speech-language pathologist, although communication must continue to be addressed at Nonpublic School by every adult Student encountered.⁴⁸ Student had reached a speech-language plateau.⁴⁹ Student's prognosis for continued improvement with speech-language services was Poor; there was not likely to be functional improvement from further therapeutic intervention, so Nonpublic School concluded that speech-language therapy should be discontinued.⁵⁰

17. At Nonpublic School, Student's progress in speech-language therapy had been limited by Student's absences, out-of-school suspensions, cognitive-academic profile and refusal of service.⁵¹ Minor progress had been noted, such as speech-language performance improving during ESY in 2017 and "limited progress" in speech-language noted in the IEP Progress Report for the first quarter of 2017/18, although other speech-language goals at that time showed No Progress and Regressing.⁵² Student had received speech-language services since initial eligibility in 2009; Student's oral communication skills had shown

⁴¹ P15-8,14.

⁴² P27-1; R37p178; R39p183 (seeking to give boost with extra speech-language services).

⁴³ P13-4.

⁴⁴ R37p178; P13-4.

⁴⁵ P27-1.

⁴⁶ P27-3.

⁴⁷ R37p178; R39p183; P13-4.

⁴⁸ P13-13,14; P38-2; R76p396.

⁴⁹ R76p395; School Speech Pathologist; School Psychologist.

⁵⁰ P13-13; School Speech Pathologist; School Psychologist.

⁵¹ P11-7; P13-5,13.

⁵² R56p267; R63p329,330.

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limited measurable progress since 2009.⁵³ Student's oral communication profile was characteristic of children with Student's cognitive-academic profile; Student did not present with a separate and distinct speech or language impairment.⁵⁴

18. As of 4/2/18, Student was found no longer eligible for speech-language services based on a review of the speech-language evaluation, and the speech-language services were removed from Student's IEP.⁵⁵ Private Speech-Language Pathologist and Petitioner's counsel disagreed with the removal of speech-language services on 4/2/18 because Student has made no progress on speech-language goals.⁵⁶ Reducing related services maximizes Student's time in the classroom, which is important given the level of academic deficits.⁵⁷

19. BSS. Student's BSS was reduced from 360 to 240 minutes/month in the 1/9/17 IEP, and then from 240 to 120 minutes/month on 4/2/18 based on the school therapist's unequivocal statement that 120 minutes/month was the maximum level that Student could tolerate; Student did not want services and got frustrated with the length of 60 minute sessions.⁵⁸ Parent and Petitioner's counsel disagreed because Student's behaviors had not improved, and they asserted that Student may tolerate the higher level of services at a new school.⁵⁹

20. Applied Behavior Analysis (or ABA) is usually applied to those on the autism spectrum but can be applied as therapy for those with ID as well.⁶⁰ ABA might work better with Student, for instance, for a therapist to seek to talk with Student while playing basketball in the gym where Student often went when leaving the classroom.⁶¹ There is no ABA evaluation as such, so to determine if ABA might be helpful one would look at adaptive and current levels of functioning; a new FBA would be a good place to begin.⁶²

21. Refusing Related Services. Student refused to meet with a new therapist and refused to attend other related service sessions at Nonpublic School.⁶³ Student had also refused speech-language therapy prior to Nonpublic School.⁶⁴ At the 10/24/16 IEP meeting, the team wanted to discuss reductions in related services with Parent (who was not present or reachable by telephone despite confirming the meeting); School Psychologist tried hard to

⁵³ P13-4,13.

⁵⁴ P13-13,11; P22-2.

⁵⁵ P38-1.

⁵⁶ Private Speech-Language Pathologist; P23-2.

⁵⁷ P38-2.

⁵⁸ P16-13; P38-2; P23-2; R89p450; School Psychologist (suggested reducing BSS).

⁵⁹ P23-2; *but see* R89p450 (new school could increase BSS as appropriate).

⁶⁰ Clinical Psychologist.

⁶¹ *Id.*

⁶² *Id.*

⁶³ P11-9.

⁶⁴ P14-6.

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communicate with Parent through calls and home visits, but Parent was hard to reach and kept calls very short.⁶⁵

22. Student's related service providers stated that Student was refusing to come to services and then acting out or running out of location or refusing to participate, so not benefiting from the services and would be better served by having additional class time.⁶⁶ The IEP team, other than Parent and counsel, shared how strongly they felt about the importance of decreasing Student's related services.⁶⁷

23. Attendance Issues. Attendance and truancy issues had been an ongoing problem for Student for many years.⁶⁸ In the new 2016/17 year, Student was absent 8 of the first 10 days (with none excused).⁶⁹ Nonpublic School was in frequent contact with Parent about Student's absences; after 10 unexcused absences during a school year (or 7 consecutive absences) Nonpublic School had to obtain written authorization from DCPS to hold a placement open and continue billing for Student.⁷⁰

24. Nonpublic School tried to work with Parent to create a plan for Student to be more successful with "chronic" attendance problems.⁷¹ In addition to phone calls and letters, Student Support Team ("SST") meetings were held.⁷² A truancy referral was made to the DC Superior Court on 2/6/17.⁷³

25. Student began 2017/18 with 6 unexcused absences in the first 12 days and declined from there.⁷⁴ In the first 93 school days in 2017/18, Student was absent 52 days and present for 41; 33 of the absences were excused.⁷⁵ Nonpublic School was concerned about Student's frequent absences and aggression with staff when present, so sought to convene a meeting as soon as possible after a suspension; Parent objected through counsel to being "constantly" called in an effort to convene the meeting.⁷⁶

26. Many absences were excused – often for good reasons – although Student was still not present to learn; for instance, notes from Parent stated that on 10/2/17 Student was absent for a family funeral; on 10/3/17 Student had a root canal; on 10/4/17 Student was

⁶⁵ R18p116,118; School Psychologist.

⁶⁶ R33p171 (1/9/17 PWN); R36p176 (PWN re amending IEP).

⁶⁷ R39p184.

⁶⁸ P13-3,4.

⁶⁹ R16p112.

⁷⁰ R16p109,111 (certified letter to Parent re 7th consecutive unexcused absence on 9/19/16); R22 (15 absences out of first 45 days in 2016/17); R40 ("deep concern").

⁷¹ P12-2.

⁷² R41.

⁷³ *Id.*

⁷⁴ R58; R65; R67 (SST Meeting); R68 (6 consecutive absences, Parent planned to take Student to doctor soon).

⁷⁵ P29-1; P35-3.

⁷⁶ P35-2,3.

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absent due to pain from the root canal; and on 11/3/17, 11/4/17, 11/5/17, 11/6/17, 11/7/17, 11/8/17, 11/9/17, 11/10/17, 11/17/17 and 11/20/17 Student was absent due to being sick with “some kind of virus.”⁷⁷

27. Behavior. In a single quarter soon after arriving at Nonpublic School (4th quarter, 2015/16), Student earned about 70 “timeouts” in the Behavior Crisis Center (“BCC”) for classroom disruption, unsafe behavior, verbal abuse, “posturing” staff and peers, and being out of location, along with 2 out-of-school suspensions for similar behaviors and physical aggression.⁷⁸ Student continued to have behavioral difficulties in 2016/17 and 2017/18, “often” being sent to the BCC, as Student displayed “complete disregard” for the rules.⁷⁹ Student often went to BCC of Student’s own volition rather than remaining in class.⁸⁰ School Psychologist believed that Student was acting out in the classroom due to frustration and that a move to certificate track would alleviate behavior in the classroom; Student’s behavior problems would “likely evaporate.”⁸¹

28. Physical restraint was used when Student was physically assaulting staff or peers.⁸² Student was involved in numerous serious behavioral incidents described in detail in incident reports, including choking a staff member with her necklace, running wild through the school building repeatedly, threatening to destroy a staff member’s classroom, threatening to physically harm staff, kicking doors so they would not stay closed, fighting, pushing a staff member’s head down to Student’s groin while making oral sex gestures, trying to break a window, spitting on a staff member, and verbally abusing and threatening Student’s therapist before upending her office (resulting in criminal charges being pressed with the police).⁸³

29. Student had a full-time dedicated aide for both safety and educational needs.⁸⁴ Student benefited from the dedicated aide and made a lot of progress with the aide present, but was very disrespectful without the aide and unable to demonstrate progress.⁸⁵ “Like clockwork,” Student had incidents or was written up on days without the dedicated aide.⁸⁶

30. FBA/BIP. A 9/17/13 FBA and BIP focused on defiance, physical aggression, bullying, fighting, yelling and distracting others, which occurred “continuously” in all settings, especially when Student did not understand a request or assignment; the

⁷⁷ R59.

⁷⁸ R18p117,118; P11-8.

⁷⁹ P21-11; Monitoring Specialist.

⁸⁰ R68p357.

⁸¹ School Psychologist.

⁸² P21-3.

⁸³ P28-1,5,7,12,18,23; R90p453.

⁸⁴ R52p255.

⁸⁵ P18-3.

⁸⁶ R50p238.

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inappropriate behavior avoided or delayed academic tasks or admitting that Student needed help.⁸⁷ The associated BIP was only 1 page and lacked detail.⁸⁸

31. Petitioner's counsel requested a meeting to review Student's FBA in March 2016; DCPS proposed dates.⁸⁹ The 4/17/18 IEP meeting notes state that the most recent FBA was dated 4/29/16; that FBA is not in the record.⁹⁰

32. At the 10/24/16 and 1/9/17 IEP meetings, the team concluded that a 5/4/16 BIP remained appropriate; there was no mention of an FBA.⁹¹ At the 4/27/17 IEP meeting, the team reviewed and agreed with a proposed BIP.⁹² A 4/25/18 BIP in the record was essentially 1 page long and lacked detail; School Psychologist testified that the BIP should have followed an FBA.⁹³ Monitoring Specialist testified that the 2016 and 2018 BIPs are in Student's record in SEDS.⁹⁴

33. On 2/15/17, Petitioner's counsel requested a "Functional Behavior Skills Assessment" for Student, and Monitoring Specialist asked if Parent was requesting an FBA; Petitioner's counsel clarified that Parent was not seeking an FBA, which made sense to Monitoring Specialist as she testified that an FBA had been conducted 10 months earlier (which would have been about April 2016).⁹⁵ Educational Advocate testified that if Student had not made meaningful progress and showed no growth, an updated FBA/BIP should be pursued.⁹⁶

34. Academics. Despite intensive levels of specialized instruction over many years, Student made marginal academic progress.⁹⁷ Student is functioning at least 5 grade levels below expectations, based on school data.⁹⁸ Based on Student's 5/2/16 Woodcock-Johnson ("WJ") scores as reported in Student's recent IEPs, in math Student was 6 grades behind, in reading 8 grades behind, and in writing 8 grades behind.⁹⁹

35. The WJ-IV in the 2017 psychoeducational evaluation found that Student performed in the Well Below Average range in all academic domains assessed, which was consistent with prior academic assessments.¹⁰⁰ A majority of Student's scores suggest ID, as

⁸⁷ P7-1,2,3; Educational Advocate.

⁸⁸ P8-1.

⁸⁹ P40-3,4.

⁹⁰ R89p449; Monitoring Specialist.

⁹¹ R18p118; R39p183; BIP not in the record.

⁹² R50p239; proposed BIP not in the record.

⁹³ School Psychologist; R92p459.

⁹⁴ Monitoring Specialist.

⁹⁵ P41-34; Monitoring Specialist.

⁹⁶ Educational Advocate.

⁹⁷ P13-13.

⁹⁸ P12-16.

⁹⁹ P15-4,5,6; P17; P21.

¹⁰⁰ P12-14,3.

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performance was typically “flat” without many elevated scores.¹⁰¹ The interventions for ID are very different from ED.¹⁰²

36. DCPS’s 1/9/17 IEP meeting notes acknowledge that Student “can’t read” and that there is “nothing more frustrating”; Student can’t read 3-letter words.¹⁰³ Student is aware of significant reading/learning deficits and avoids tasks and refuses assistance which could highlight those deficits in the classroom environment.¹⁰⁴

37. Student’s grades may be based on attempts rather than merit, as Student’s grades are above performance level.¹⁰⁵ Student’s final grades in 2015/16 included 2 Bs, 1 B+, and 5 Cs.¹⁰⁶ By the 3rd quarter of 2017/18, Student had only 1 D (Barbering) and the other 6 grades were all Fs.¹⁰⁷

38. Diploma track is not consistent with Student’s educational performance or ability.¹⁰⁸ Student is unable to meet the academic demands for a high school diploma and may be better suited to a life/functional skills curriculum to be as independent as possible when transitioning beyond high school.¹⁰⁹ Parent and counsel resisted the shift to certificate track, which was a consistent topic at the several meetings during the relevant time period.¹¹⁰ Parent agreed to a trial of the certificate track for Student, which began on 2/16/18, although Student’s first day was 3/19/18; Student was restrained on 2/16/18, with Parent stating that Student had bruises “all over” Student’s body.¹¹¹ Student was shifted to the Certificate of Completion track in the 4/2/18 IEP.¹¹²

39. Vocational classes may make Student happier and less frustrated.¹¹³ One of Student’s favorite classes was Barbering.¹¹⁴ Student was initially not able to participate in either Barbering or Small Engine Repair due to safety issues with Student’s behavior.¹¹⁵ Being on the certificate track would permit multiple vocational classes.¹¹⁶

¹⁰¹ P12-14.

¹⁰² School Psychologist.

¹⁰³ R39p183,185.

¹⁰⁴ P11-7.

¹⁰⁵ P12-2; School Psychologist.

¹⁰⁶ P11-9.

¹⁰⁷ R89p447.

¹⁰⁸ P12-2.

¹⁰⁹ P13-13.

¹¹⁰ R18p118; R39p185; R76p396 (Parent agreed on a shift to certificate track on 4/2/18).

¹¹¹ P20-1; R73p388.

¹¹² P21-4,7.

¹¹³ P38-2.

¹¹⁴ P13-12; P18-3 (excited about Barbering and autoshop); P21-25.

¹¹⁵ P17-23.

¹¹⁶ R39p185.

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40. Implementation of Related Services. School Speech Pathologist testified that DCPS policies and guidelines for providing related services require (a) provider unavailability to be made up, (b) school closures, including holidays, need not be made up, (c) student absences need not be made up, but (d) student unavailable due to school activities are to be made up if possible with 3 attempts.¹¹⁷ Going beyond DCPS's policies, Student's related service providers often stated that they would make up services when they were initially refused or Student was absent.¹¹⁸

41. The undersigned compiled the charts below and tabulated the total minutes of each related service offered to Student by month during the relevant period when (1) direct services were provided, (2) services were offered but Student was absent, (3) services were offered but Student refused them, and (4) Nonpublic School was closed (holiday or weather/emergency); the "Net Cumulative" compares the minutes required by Student's IEPs to those offered by Nonpublic School and keeps a running tally of whether extra minutes or too few minutes were offered.¹¹⁹ Periods when the provider was unavailable or the student was unavailable (due to school activities or suspensions) were to be made up and were not included in the minutes offered Student for the month.¹²⁰ Some categorization adjustments were made by the undersigned as deemed appropriate based on the descriptions provided in the service trackers; at least a few of Student's suspensions were marked as Student Absent or Direct Service, which the undersigned changed to Student Unavailable in the tables below.¹²¹

42. The speech-language services for Student were as follows:

SPEECH-LANGUAGE/ Month	Data Source	MINUTES IEP REQUIRED	Direct Services Provided	Student Absent	Student Refused	School Closed/Holiday	TOTAL MINUTES OFFERED (NET CUMULATIVE)	Provider Unavailable	Student Unavailable
5/2016	P26-4,5	480	540	120		60	720 (+240)		
6/2016	P26-5,6,7	480	420	210			630 (+390)		

¹¹⁷ School Speech Pathologist.

¹¹⁸ See, e.g., P24-8,17; R106p660,693,696.

¹¹⁹ Administrative Notice.

¹²⁰ *Id.*

¹²¹ See, e.g., R106p719,725,726,727.

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7/2016	P26-7,8	360 ESY	390	60			450 (+480)	90	
8/2016	P26-8	180 ESY	180	90			270 (+570)		
9/2016	P26-8,9	480	120	240	120		480 (+570)		60
10/2016	P26- 10,11,12	480	270	150			420 (+510)	30	120
11/2016	P26-13,14	480	270	180		60	510 (+540)	30	30
12/2016	P26-16,17	480	90	120		120	330 (+390)	60	90
1/2017	R106p633, 634	240	210	210	30	60	510 (+660)		
2/2017	R106p648	240	210	60			270 (+690)		
3/2017	R106p654	240	240	120			360 (+810)		
4/2017	R106p666	240	150	60		60	270 (+840)		60
5/2017	R106p672, 673	240	360		60		420 (+1020)		
6/2017	R106p681	240	60	60			120 (+900)	60	
7/2017	R106p693	240 ESY	240		60		300 (+960)		
8/2017	R106p696	120 ESY	120	60			180 (+1020)		
9/2017	R106p697	240	150	120			270 (+1050)		
10/2017	R106p710, 711	240	180	120			300 (+1110)		30
11/2017	R106p712	240	30	120		60	210 (+1080)		

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12/2017	R106p716	240	0		60	60	120 (+960)	60	60
1/2018	R106p718, 719	240	120	180			300 (+1020)		120
2/2018	R106p725, 726	240	150	60			210 (+990)	60	60
3/2018	R106p728	240	0	60	60	60	180 (+930)		120
4/2018		0					0 (+930)		
5/2018		0					0 (+930)		

43. The BSS for Student was as follows:

BSS/Month	Data Source	MINUTES IEP REQUIRED	Direct Services Provided	Student Absent	Student Refused	School Closed/Holiday	TOTAL MINUTES OFFERED (NET CUMULATIVE)	Provider Unavailable	Student Unavailable
5/2016	P25-4	360	270	180		60	510 (+150)	60	
6/2016	P25-6	360	330	120			450 (+240)		
7/2016	P25-7	360 ESY	300	60			360 (+240)		
8/2016	P25-8	180 ESY	180	60			240 (+300)		
9/2016	P25-9	360	180	150			330 (+270)	30	
10/2016	P25-11	360	300	240		60	600 (+510)		

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11/2016	P25-13	360	300	120		60	480 (+630)		30
12/2016	R106p641	360	120	150		30	300 (+570)	60	
1/2017	R106p644	240	180	210		120	510 (+840)		
2/2017	R106p682	240	240	60		60	360 (+960)		
3/2017	R106p683	240	255				255 (+975)	60	
4/2017	R106p684	240	210	60		120	390 (+1125)		
5/2017	R106p686	240	180	60			240 (+1125)	60	
6/2017		240					0 (+885)		
7/2017		360 ESY					0 (+525)		
8/2017		180 ESY					0 (+345)		
9/2017	R106p703	240	240	120			360 (+465)		
10/2017		240					0 (+225)		
11/2017		240					0 (-15)		
12/2017		240					0 (-255)		
1/2018	R106p722	240	45			4 days	45 (-450)		
2/2018	R106p727	240	60	1 day		1 day	60 (-630)		60
3/2018	R106p735	240	60	60		60	180 (-690)	60	60

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4/2018	R106p738	120	120	120		120	360 (-450)		
5/2018	R106p727	60 ¹²²	30				30 (-480)		30

44. The OT services for Student were as follows:

OT/Month	Data Source	MINUTES IEP REQUIRED	Direct Services Provided	Student Absent	Student Refused	School Closed/Holiday	TOTAL MINUTES OFFERED (NET CUMULATIVE)	Provider Unavailable	Student Unavailable
5/2016	P24-7	240	240				240 (0)		
6/2016	P24-8	240	60	60	180		300 (+60)		
7/2016	P24-7	120 ESY	150				150 (+90)	30	
8/2016	P24-11	60 ESY	30				30 (+60)	30	
9/2016	P24-12	240	60	180			240 (+60)		60
10/2016	P24-13	240	120		120		240 (+60)		
11/2016	P24-15	240	240			60	300 (+120)		
12/2016	P24-17	240	0	120		60	180 (+60)		60
1/2017	R106p637	120	90	120			210 (+150)		

¹²² Student was at Nonpublic School for only about half of May 2018.

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2/2017	R106p652	120	90	30			120 (+150)		
3/2017	R106p658	120	60			30	90 (+120)		30
4/2017	R106p666 0	120	0	90		30	120 (+120)		
5/2017	R106p668	120	330	60			390 (+390)		30
6/2017	R106p677	120	210				210 (+480)		30
7/2017	R106p689	120 ESY	180				180 (+540)		
8/2017		60 ESY	0				0 (+480)		
9/2017	R106p701 ,702	120	150	90			240 (+600)		
10/2017	R106p708 ,707	120	30	60	30		120 (+600)	30	60
11/2017	R106p713	120	30	30		30	90 (+570)	30	
12/2017	R106p717	120	0	60			60 (+510)	30	
1/2018	R106p720	120	60	90			150 (+540)		30
2/2018	R106p723 ,724	120	180	90			270 (+690)		
3/2018	R106p730	120	60	60	30	30	180 (+750)		
4/2018	R106p736	120	60	90	30		180 (+810)		
5/2018	R106p739	60 ¹²³	0	30			30 (+780)		60

¹²³ Student was at Nonpublic School for only about half of May 2018.

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45. Transition Plans. For age-appropriate transition assessments, on 4/21/16 Nonpublic School conducted an interview of Student and used the Career Game Explorer.¹²⁴ On 2/22/17, Student was given the Learning Styles Inventory, Career Interest Inventory, and Life Skills Inventory.¹²⁵ As of 4/17/18, Student had not been available for updated vocational assessments/student interviews.¹²⁶ Petitioner's counsel requested a vocational level II evaluation on 4/17/18, 2 weeks prior to filing the due process complaint.¹²⁷

46. Medication. Student's records repeatedly note the importance of medication to Student being accessible to learning and on better behavior, but often Student was not taking prescribed medications.¹²⁸ Parent testified that Student sometimes could not sleep when on medication.¹²⁹

47. Document Requests. Petitioner's counsel requested Student's documents by email from Monitoring Specialist on 1/10/17, sending a detailed list of 14 categories of requested documents and seeking access if the documents could not be provided.¹³⁰ The only reference to future information about Student was in Parent's authorization form which stated that the authorization covered information relating to the child's future condition; the authorization form was dated 6/3/14, some 16 months prior to an earlier due process complaint that was filed and subsequently settled on behalf of Student.¹³¹ DCPS provided a stack of documents "several" inches thick in response to Petitioner's counsel's request for Student's documents.¹³² Recent service trackers for related services provided to Student were all in SEDS (providers have to submit them to get paid), but only those for the time period requested were provided to Petitioner's counsel prior to the hearing.¹³³

48. Petitioner's counsel's notes from the 4/17/18 meeting contain a bold, italicized line beginning, "KH: request [certain documents]."¹³⁴ Petitioner's counsel did email Respondent's counsel about documents immediately following the 6/11/18 prehearing conference when documents were discussed, but Petitioner's counsel merely forwarded the 1/10/17 records request without any request for or mention of updated documents (or any

¹²⁴ P15-23.

¹²⁵ P17-23,24; R42.

¹²⁶ P38-1 (PWN); R89p449,451.

¹²⁷ P23-3.

¹²⁸ P11-8; P12-15; P15-8,11; P17-11; R68p357 (no medication for 2 weeks due to Medicaid issues).

¹²⁹ Parent.

¹³⁰ P41-14,16.

¹³¹ P41-15; R1; R5.

¹³² Monitoring Specialist.

¹³³ *Id.*

¹³⁴ P23-2.

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message at all).¹³⁵ DCPS (through Monitoring Specialist) was cooperative in providing requested documents.¹³⁶

49. Alternative Schools. At a 3/19/18 meeting, Nonpublic School raised concerns that it might not be the best place for Student; Parent had previously raised concerns, as Student was not flourishing.¹³⁷ Various other schools being considered for Student were discussed at a 4/2/18 meeting.¹³⁸ The IEP team recommended a change in location of services.¹³⁹ Referrals were sent out to other schools by 4/20/18; most of the schools have rejected Student.¹⁴⁰

50. On 5/4/18, Nonpublic School issued a “15-day letter” stating that Student could not continue attending Nonpublic School after 15 days.¹⁴¹ Student was conditionally accepted at another nonpublic school and DCPS issued a prior written notice (“PWN”) on 5/23/18, although a school visit was required which Parent was slow to schedule and ultimately did not go well.¹⁴²

51. Compensatory Education. In her compensatory education proposal, Educational Advocate sought to apply the *Reid* standard to determine what would put Student in the position Student would have been in but for the FAPE violation.¹⁴³ Parent testified that a mentor may be helpful for Student; Student had a mentor in the past which went very well.¹⁴⁴

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”).

¹³⁵ R102p562; Administrative Notice.

¹³⁶ R97p544,545; R98; Monitoring Specialist.

¹³⁷ R73p388.

¹³⁸ P22-2; R76p396.

¹³⁹ R89p450.

¹⁴⁰ P42-13;16; Monitoring Specialist.

¹⁴¹ Monitoring Specialist.

¹⁴² P39-1; P42-15; Monitoring Specialist.

¹⁴³ Educational Advocate.

¹⁴⁴ Parent.

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

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

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

In addition, Respondent 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; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

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).

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

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement/location of services on 2/16/18 or thereafter, where (a) Student was not doing well academically or behaviorally but remains in an inappropriate placement, and (b) on 4/2/18 related services on Student’s IEP were reduced when more services were needed, as (i) BSS was reduced from 240 to 120 minutes/month despite Student being in in-school or out-of-school suspension most days, and (ii) speech-language services were reduced from 240 minutes/month to zero despite Student’s communication skills declining over time. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden to Respondent which met its burden of persuasion on both related services and placement.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the U.S. Court of Appeals for the District of Columbia Circuit recently emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA” compared to the decision under review in *Z.B.* by requiring more than “merely some” educational benefits. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”).

The measure and adequacy of the IEP are determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving a perfect IEP, but one reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA “stops short of requiring public schools to provide the best possible education”). *See also Hill*, 2016 WL 4506972, at *21, *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.¹⁴⁵ *See* 34 C.F.R.

¹⁴⁵ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013),

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300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

Behavioral Support Services. Student's BSS was reduced from 360 to 240 minutes/month in the 1/9/17 IEP (which was not challenged in this case), and then further reduced from 240 to 120 minutes/month on 4/2/18. The IEP team's reduction of Student's BSS was based on the school therapist's unequivocal view that 120 minutes/month was the maximum level that Student could tolerate, which the undersigned finds persuasive along with the explanation that Student did not want services and was frustrated with the length of 60-minute sessions. All of Student's related service providers stated that Student was refusing to come to services and then acting out or running out of location or otherwise refusing to participate. The IEP team, other than Parent and counsel, felt very strongly about the need to reduce Student's related services, including BSS. Further, to the extent that Student was not benefiting from the related services, Student was better served by having additional academic time in specialized instruction, given Student's severe deficits.

Parent and counsel disagreed with the BSS reduction because Student's behaviors had not improved, and they asserted that Student might tolerate the higher level of services at a new school, although clearly the new school could increase BSS as appropriate. It is true that Student's behaviors remain a concern, as discussed below relating to the need for an updated FBA/BIP. But seeking to force Student to participate in services from which Student is rebelling serves little value and may well be counterproductive. Further, unlike other cases where the child is not in a full-time placement, here every minute of reduction of related services is a minute by which specialized instruction is increased, which Student urgently needs and can increase the hands-on vocational focus that Student desires.

Speech-Language Services. Speech-language services had a more dramatic decrease, going from 240 minutes/month to zero in the recent 4/2/18 IEP (after previously being tried at 480 minutes/month before returning to 240 on 1/9/17).

The results of the 9/22/17 speech-language evaluation suggested that Student had maximized benefit from direct speech-language intervention services and no longer gained value from a speech-language pathologist, even though Student's communication issues can and will continue to be worked on in the classroom. The undersigned found DCPS's much more experienced speech-language pathologist more persuasive than Petitioner's pathologist who took the view that speech-language services must continue since Student continued to have serious speech-language deficits. But the unfortunate truth is that Student's prognosis for continued improvement with speech-language services was poor and there was not likely to be functional improvement from further therapeutic intervention, so there was no benefit in continuing speech-language therapy.

Student's progress in speech-language therapy had been limited by Student's absences, out-of-school suspensions, cognitive-academic profile and refusal of service. The minor progress to which Petitioner's counsel pointed did not come close to tipping the

quoting Rowley, 458 U.S. at 206-07. No specific procedural violations were alleged in this case.

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weight of the evidence. Indeed, Student had received speech-language services since initial eligibility in 2009, but Student's oral communication skills had shown limited progress over all that time. While regrettable, this was not a surprise to those with long experience in the field, as Student's oral communication profile was characteristic of children with Student's cognitive-academic profile. While Private Speech-Language Pathologist and Petitioner's counsel disagreed with the removal of speech-language services because Student had made no progress, that was the very reason for focusing Student's limited time at school on the academic deficits and areas where Student can actually benefit.

Accordingly, the undersigned finds no IDEA violation or denial of FAPE from the reduction in BSS and speech-language services.

Placement. As for the placement claim, the legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements). Here, the undersigned holds that Nonpublic School was a setting in which Student's IEP could be met, even though the parties agreed that a new start in a different nonpublic school would be desirable for Student.

Diligent efforts were and are being made to find a new school for Student. The fact that Student has been rejected and no new school yet found that will accept Student does not mean that there is a placement failure for which DCPS is responsible. Indeed, Petitioner's counsel acknowledged during the due process hearing that the goal was simply to find a new school similar to Nonpublic School, as Student was already in a full-time therapeutic nonpublic day school, with a full-time dedicated aide, so DCPS is seeking a mere change in location of services. The fact that Nonpublic School issued a "15-day letter" in early May 2018 (after the due process complaint was filed) stating that Student would no longer be welcome at Nonpublic School in 15 days certainly heightens the urgency of finding another school for Student but does not change the legal issues in the pending complaint.

Issue 2: *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability where (a) adaptive testing was not conducted by January 2017 despite Student's last IQ score of 57, (b) an ABA evaluation was not conducted to see if Student qualified for ABA therapy when Student was not making progress and failed to respond to traditional counseling services, (c) a vocational level II evaluation was not conducted, and (d) an FBA/BIP was not updated despite Parent's 2/15/17 request. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on this issue on the need for an updated FBA/BIP, but not on the other claims.

The recent D.C. Court of Appeals decision emphasized the importance of assessing children in all areas of suspected disability. *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 Court went on to explain in *Z.B.*, 888 F.3d at 524, that failing to conduct adequate assessments, such as an FBA, was a

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procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student's behaviors (in the absence of an FBA), leading to them being addressed in the IEP inadequately or not at all. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) ("in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable [the student] to receive educational benefits" (citation omitted)); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *18 (D.D.C. 2016); 34 C.F.R. 300.304(c)(4).

FBA/BIP. Student had serious behavioral issues at Nonpublic School, with as many as 70 "timeouts" in the Behavior Crisis Center in a single quarter for classroom disruption, unsafe behavior, verbal abuse, "posturing" staff and peers, as well as numerous incident reports and out-of-school suspensions for more serious behavior, including physical aggression. School Psychologist believed that Student was acting out in the classroom due to frustration and that a move to certificate track would alleviate behavior in the classroom and that Student's behavior problems would "likely evaporate." This is a situation that seemingly calls out for an FBA to explore that premise (and other possibilities), but Nonpublic School did not conduct an updated FBA and develop a suitable BIP.

Respondent asserted that an FBA had been conducted in 2016 and that BIPs were found acceptable at various IEP meetings. But even if there was a 2016 FBA (which is not in the record), given Student's behavior and issues, it certainly should have been reviewed and/or updated. Further, the IEP team found that a 5/4/16 BIP remained appropriate during the 10/24/16 and 1/9/17 IEP meetings. That BIP was not in the record, but based on the rudimentary 1-page BIPs for Student in 2013 and 2018, it is a safe bet that the 2016 BIP was not what it could have been, and in any case needed to be updated following an updated FBA. Respondent argued that it asked Petitioner's counsel whether they were requesting an FBA early in 2017 when Petitioner sought a "Functional Behavior Skills Assessment." But the fact that Petitioner asked for a different assessment at that time doesn't absolve Respondent from providing the FBA that Student did need.

In certain circumstances failing to conduct an FBA and develop a BIP may be a denial of a FAPE. *See, e.g., Z.B.*, 888 F.3d at 524; *Long*, 780 F. Supp. 2d at 61. Here, the failure to conduct an updated FBA could have made a very significant difference for Student, if it had been able to help Student move beyond the frustrations underlying many of the behaviors. At a minimum, a formal FBA may have helped Parent understand the need for the certificate track, while the failure to conduct an FBA created uncertainty about Student's needs that significantly impeded Parent's decision-making and is thus held by the undersigned to be a substantive denial of FAPE pursuant to 34 C.F.R. 300.513(a). This denial is the basis for the compensatory education awarded below.

Adaptive Assessment. An adaptive functioning assessment was conducted as part of the 2017 psychoeducational evaluation and had been part of the much earlier 2009 psychological evaluation. DCPS had agreed to conduct the adaptive as part of the new psychological evaluation for which it had such difficulty obtaining consent from Parent. Accordingly, Petitioner cannot now complain about delay due to the adaptive measure not being conducted sooner (the complaint specifies by January 2017) when the extensive delay

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in the evaluation was attributable to Petitioner's own failure to provide consent.

ABA Evaluation. According to Petitioner's expert, there is no "ABA evaluation" as such, so to determine if ABA therapy might be helpful for Student one would look at adaptive and current levels of functioning, which have been determined in the psychoeducational evaluation. Clinical Psychologist also testified that a new FBA would be a good place to begin, which is ordered below based on the discussion above.

Vocational Level II. Student did receive age-appropriate evaluations relating to transition and would have received more if present. In 2016, Nonpublic School conducted an interview of Student and used the Career Game Explorer, while in 2017 Student was given the Learning Styles Inventory, Career Interest Inventory, and Life Skills Inventory. As of 4/17/18, Student had not been available for updated vocational assessments or student interviews, so Petitioner's counsel's request for a vocational level II evaluation on 4/17/18, a mere 2 weeks prior to filing the due process complaint, has no merit.

Moreover, the IDEA does not require a public agency to administer every test requested by a parent, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *See, e.g., Z.B.*, 888 F.3d at 518 (decisions on the areas to be assessed are to be made based on the suspected needs of the child).

Issue 3: *Whether DCPS denied Student a FAPE by failing to fully implement Student's IEPs from 5/1/16 to present by not providing (a) OT services, (b) speech-language services, and (c) BSS services, as required by Student's 5/2/16 IEP, 1/9/17 Amended IEP, and 4/27/17 IEP. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on the issue of full implementation of related services required by Student's IEPs, as fully described in the factual findings above.

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

Here, Petitioner's counsel asserted in closing arguments that Student's absences cannot be counted toward required services in assessing an implementation claim, relying on *Joaquin v. Friendship Pub. Charter Sch.*, 2015 WL 5175885, at *8 (D.D.C. 2015). However, *Joaquin* makes clear that the services simply need to be offered to a student, even

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if the student “would not have been present to receive any” of them. *Id.* Here, Student’s related services were offered and the providers stood ready to provide them as indicated on the service trackers whenever Student attended school. Further, as in *Joaquin*, Nonpublic School did have multiple communications with Parent about Student’s sporadic attendance and, as in *Joaquin*, referred Student to Superior Court for truancy as required by the level of absences, without notable improvement in attendance. *Id.*

Further, School Speech Pathologist credibly testified about DCPS’s policies and guidelines for related services, explaining that related services missed due to: (a) provider unavailability must be made up, (b) school closures, including holidays, need not be made up, (c) student absences need not be made up, but (d) student unavailable due to school activities are to be made up with 3 attempts. In contrast, Educational Advocate testified that she thought DCPS should make up services whenever Student was absent or unavailable and whenever the provider was unavailable and whenever school was closed, including winter break and holidays (but not summer break other than ESY). However, the August 2013 DCPS *Missed Related Service Sessions, Truancy and Due Diligence Guidelines* (cited in Petitioner’s 7/12/18 emailed list of citations) summarizes on p. 8 that a related service provider is not required to make up missed service sessions for Student absence (excused or unexcused), Student refusal to participate or attend, or when School is closed for holiday or emergency. This is in line with *Joaquin* as well as *Letter to Balkman*, 23 IDELR 646 (OSEP, 4/10/95), which requires missed services due to provider or student unavailability for school functions to be made up, but not student absences.

Turning to whether the required related services were actually provided or offered to Student, the undersigned carefully reviewed the service trackers for speech-language, BSS and OT for the relevant periods on a month by month basis to determine how many minutes Nonpublic School provided or offered to Student and noting whether they totaled more or less than the minutes/month required by Student’s IEPs for each related service.

Beginning with speech-language services, Student’s service trackers for the 25 months from May 2016 through May 2018 indicated that Student was provided a total of 930 minutes more than was required over the course of that time period. (*See Finding of Fact ¶ 42.*)

Turning to BSS, Student’s available service trackers for the 25 months from May 2016 through May 2018 indicated that Student was provided a total of 480 minutes less than was required over the course of that time period. However, service trackers for 6 months were not included in the record (June to August 2017 and October to December 2017) during which 1500 minutes of services were required but none were shown to be offered. The undersigned notes that there was nothing in the record to suggest that services were abruptly terminated for those 3-month periods and then restarted. Furthermore, there were 6 days in January and February 2018 when school was closed or Student absent when the provider indicated that zero minutes were missed rather than the usual 60 minutes per missed session, which would have been 360 minutes applied to the deficit. Taken at face value in the light worst for Respondent, however, the 480 minutes not provided was about 2 months of services, which over 25 months is less than 10%, which the undersigned finds *de minimis* and not a material deviation from Student’s IEPs for BSS. (*See Finding of Fact ¶*

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43.)

Finally, turning to OT, Student's service trackers for the 25 months from May 2016 through May 2018 indicated that Student was provided a total of 780 minutes more than was required over the course of that time period. (See Finding of Fact ¶ 44.)

Thus, based on this Hearing Officer's computations that Nonpublic School actually provided or offered more services than required in speech-language and OT, and likely in BSS if the missing service trackers were available, there was no failure to implement Student's IEPs. Indeed, even taking minutes of BSS missed at face value, the deficit is less than 10% of the BSS services required, which this Hearing Officer concludes is *de minimis* and not a FAPE violation.

Issue 4: *Whether DCPS denied Student a FAPE by failing to provide access to Student's educational records for 5/1/16 to present, pursuant to numerous written requests, including all (a) IEP progress reports, (b) IEP service trackers, (c) attendance logs, (d) disciplinary records, and (e) meeting notes. (Petitioner has the burden of persuasion on this issue.)*

Finally, Petitioner did not meet her burden of persuasion on the issue of access to Student's educational records.

Petitioner's counsel requested Student's educational documents by email on 1/10/17, seeking a list of 14 categories of requested documents and seeking access if the documents could not be provided. However, it is not clear that Petitioner ever sought such documents after January 2017, even after documents were discussed at the prehearing conference on 6/11/18 when Petitioner's counsel again emailed the 1/10/17 request without comment. Whenever Petitioner requested other specific documents, DCPS – and Monitoring Specialist in particular – was cooperative and quick to respond. Respondent's counsel chose not to provide or disclose documents not requested, however, despite their relevance to the case. In particular, service trackers for 2017 and 2018 that were highly relevant to the implementation claim were not provided to Petitioner or submitted in disclosures prior to the hearing, although Respondent's counsel offered to make a supplemental disclosure of the documents during the hearing. By the terms of the 6/11/18 Prehearing Order (at 7), no supplemental disclosure would be admitted over objection of the opposing party. But after considerable hesitation, Petitioner's counsel agreed to the supplemental disclosure, which resulted in about 170 additional pages being filed between the second and third days of the hearing, after which Respondent offered a key witness and Petitioner put on a rebuttal witness.

DCPS did provide directly to Petitioner the documents requested, rather than merely offering an opportunity to inspect, review and copy Student's education records. See 34 C.F.R. 300.501(a) (opportunity to "inspect and review" all educational documents), 300.613(a) (right to "inspect and review" records); *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").

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At the hearing, other than the service trackers there were no documents of significance that Petitioner's counsel asserted had not been provided by DCPS. While the complaint listed IEP progress reports as the first documents of import, the most recent IEP progress report (dated 6/20/18) was included in the supplemental disclosure at R106p741-752 along with the service trackers, but Petitioner's counsel objected so it was not admitted as part of the record in this case. Importantly, Petitioner did not show that there was any impact on Student's education from the lack of requested documents or that Parent's opportunity to pursue her rights was significantly impeded. *See* 34 C.F.R. 300.513(a), 300.613(a). Thus, this Hearing Officer finds no violation of the IDEA and no denial of FAPE.

Compensatory Education

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

Here, the impact on Student from not having an updated FBA conducted, followed by a thorough BIP, is challenging to calculate. This Hearing Officer relies on his experience in similar circumstances and takes into account the Compensatory Education Plan prepared by Petitioner's expert as substantially adjusted to fit the modest denial of FAPE found in this case. Carefully considering the totality of the circumstances, the undersigned is persuaded that 50 hours of mentoring or counseling would be most appropriate to put Student in the place Student should have been had there been no denial of FAPE. The challenge is to help Student overcome the frustration about schooling that has built up and try to get Student re-engaged, which may occur with either a mentor or counselor of Petitioner's choosing with input from Petitioner's counsel. This reduction of frustration and re-engagement would achieve much if not all of what an updated FBA/BIP would have done while Student was at Nonpublic School.

All compensatory education hours are to be used within 12 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

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ORDER

Petitioner has prevailed on a single element of her claims, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 45 days of Student’s enrollment at a new school and the commencement of classes, an independent Functional Behavioral Assessment of Student shall be conducted, followed by the prompt development of an appropriate Behavioral Intervention Plan.
- (2) As compensatory education for the denial of FAPE found above, DCPS shall provide a letter of authorization for 50 hours of either mentoring or counseling (at Petitioner’s option) from an independent provider chosen by Petitioner, with such letter to be provided within 10 business days after Petitioner’s request. All hours are to be provided and used within 12 months; any unused hours will be forfeited.

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

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