

**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 27, 2019

<i>Student</i> , ¹)	Case No.: 2019-0135
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 7/27/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (Room): 7/11/19 (423),
("DCPS"),)	7/15/19 (112) & 7/16/19 (Teleconf.)
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to lack of an appropriate Individualized Education Program (“IEP”), placement, and location of services; failure to develop a timely Behavior Intervention Plan (“BIP”); failure to conduct an Occupational Therapy (“OT”) evaluation; and failure to provide full access to education records. DCPS asserted that it had not denied Student a FAPE on any claim.

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 5/22/19, the case was assigned to the undersigned on 5/23/19. On 6/4/19, Respondent filed a late response and did not challenge jurisdiction. The resolution meeting occurred on 6/7/19, but did not resolve the

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

Hearing Officer Determination

Case No. 2019-0135

case or shorten the 30-day resolution period, which ended on 6/21/19. 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 8/5/19.

Following the prehearing conference on 6/26/19 and issuance of the Prehearing Order that same day, the due process hearing took place on 7/11/19, 7/15/19 and 7/16/19 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present for all of the hearing, apart from closing arguments.

Petitioner’s Disclosures, submitted on 6/28/19, contained a cover letter and documents P1 through P77, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 7/2/19, contained a cover letter and documents R1 through R48, which were also admitted into evidence without objection.

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

1. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
2. *Special Education Advocate* (qualified without objection as an expert in Special Education Programming)
3. Parent

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

1. *Behavior and Education Support (“BES”) Special Educator at Public School* (qualified without objection as an expert in Special Education Programming)
2. *BES Support Specialist* (qualified without objection as an expert in Special Education Programming)
3. *LEA Representative at Public School* (qualified without objection as an expert in Special Education Programming)

Petitioner’s counsel recalled Parent as the sole rebuttal witness.

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, placement, and/or location of services during 2018/19,² due to lack of (a) a more restrictive setting, (b) increased Behavioral Support Services (“BSS”), (c) other supports,

² All dates in the format “2018/19” refer to school years.

Hearing Officer Determination

Case No. 2019-0135

such as a dedicated aide, and/or (d) present levels of performance (“PLOPs”) and baseline data consistent with standardized testing. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to develop a timely and appropriate Behavior Intervention Plan (“BIP”) during 2017/18 or 2018/19, where a BIP was only developed on 10/15/18, and the Functional Behavioral Assessment (“FBA”) was not conducted until 12/7/18. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to conduct a comprehensive and timely evaluation when it did not conduct an Occupational Therapy (“OT”) evaluation. *Petitioner has the burden of persuasion on this issue.*

Issue 4: Whether DCPS denied Student a FAPE by failing to provide Parent full access to Student’s education records, including those relating to incidents in January and April 2019 when Student was allegedly struck and injured by adults at school. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 10 days, DCPS shall amend Student’s IEP to provide (a) placement in a full-time therapeutic separate day school or additional services and supports such as a dedicated aide, and (b) not less than 240 minutes/month of BSS.
3. DCPS shall identify a suitable location of services in a nonpublic school agreed upon by Petitioner, issue a notice of placement, and arrange for transportation.
4. DCPS shall conduct or fund an occupational therapy evaluation for Student that addresses visual perception, motor skills, sensory issues and executive functioning issues.
5. For any denials of FAPE, DCPS shall provide compensatory education or fund a compensatory education evaluation, with reservation of Petitioner’s right to additional compensatory education once the evaluation above is completed.³

³ So far as Petitioner’s request for compensatory education depends on the findings of an assessment that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student’s evaluation and a determination of eligibility for additional special education services.

With regard to any remaining request for compensatory education, Petitioner’s counsel was put on notice at the prehearing conference that 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 to introduce evidence

Hearing Officer Determination

Case No. 2019-0135

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 Fact⁴ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent and is herself a special educator in a DCPS BES program.⁵ Student shifts between Parents, who share custody, which impacts Student.⁶ Student is *Age*, *Gender* and in *Grade* at Public School, where Student began in 2018/19 in a BES program.⁷ Student is savvy, creative, energetic and playful.⁸

2. Student attended school in Maryland, then DCPS in August 2016, and then public school in Virginia before going back to Maryland in February 2017, and then another DCPS school for a couple months in a general education classroom early in 2017/18 before beginning *Prior School* in a BES program.⁹ In 2018/19, Student attended a newly-developed BES self-contained classroom at Public School with only 1 other student and 3 or 4 adults – the classroom teacher, educational aide, and behavior technician, with support from a clinical social worker and behavior specialist.¹⁰ At the beginning of 2018/19, the new BES program at Public School was considered a “great placement” for Student.¹¹

3. Student has a complex and multi-generational trauma history, with abandonment by father, homelessness, lack of sleep, and several transitions.¹² Student's profile is consistent with children who experienced trauma or have suffered from abandonment and anxiety.¹³

contravening the requested compensatory education in the event a denial of FAPE was found.

⁴ 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.

⁵ Parent.

⁶ Parent; BES Special Educator; P5-4,6; P74-1; P13-1,2 (living in 2 different households); P35-3; R4-11 (structure quite different in 2 households).

⁷ Parent.

⁸ P35-3.

⁹ P23-2,6; P17-2; Parent; Special Education Advocate.

¹⁰ P71-1; R3-7; P1-1; BES Special Educator.

¹¹ P1-2.

¹² P35-3; P17-2; P16-2; BES Support Specialist.

¹³ P17-19.

Hearing Officer Determination

Case No. 2019-0135

Student reported feeling traumatized by staff members at Public School, so eventually refused to attend school in 2018/19.¹⁴ Student even found the word “school” to be a trigger; Parent sought help from a psychiatric hospital.¹⁵ Parent asserted that Student was abused by Public School staff, but the staffer was cleared of the accusation.¹⁶

4. IEPs. Student has had IEPs during the entire time period at issue in this case; a 2016 IEP in Maryland was based on an Emotional Disturbance (“ED”) disability classification, as well as Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”) or Attention Deficit Disorder (“ADD”); all IEPs in 2017/18 and 2018/19 were based solely on OHI and all noted that Student’s behavior impeded the learning of Student or other children.¹⁷

5. Student’s most recent IEP dated 5/6/19 provided 25 hours/week of specialized instruction outside general education and 240 minutes/month of BSS outside general education, but did not state the need for a more restrictive environment and that a nonpublic school would be Student’s Least Restrictive Environment (“LRE”), despite agreement by Student’s team.¹⁸ The 5/6/19 IEP generally contained detailed PLOPs and baselines, with some areas more thorough than others.¹⁹ Student’s prior IEP on 5/1/19 provided the same services as on 5/6/19.²⁰

6. Student’s 4/11/19 IEP provided the same 25 hours/week of specialized instruction outside general education and 240 minutes/month of BSS outside general education.²¹ The IEP team had not decided about placement for Student by 4/11/19; DCPS brought in a reviewer but Student was absent.²² The 4/11/19 IEP had deficiencies in its PLOPs by asserting that Student had “recently” joined Public School so formal assessment data had yet to be determined, although the year at Public School was mostly completed.²³ The 4/11/19 IEP had deficiencies in baselines, stating at one point only that Student was “[b]elow grade level” and another baseline stating only “Moderate Level of support,” while failing to provide any baselines at all for the 3 goals for the Emotional, Social, and Behavioral Development area of concern.²⁴ On 4/11/19, the team agreed to change PLOPs and baselines to address concerns of Student’s advocates, with were updated on 5/6/19.²⁵

¹⁴ R3-1.

¹⁵ P1-2; P5-6; Parent.

¹⁶ Parent; BES Special Educator.

¹⁷ P17-3 (ED); P40 (Maryland 5/25/17); P14-1,2 (11/9/17); P12-1,2 (10/22/18); P10-1,2 (12/17/18); R8-1,2 (4/11/19); R6-1,2 (5/1/19); P2-1,2 (5/6/19).

¹⁸ P2-1,11; BES Special Educator.

¹⁹ P2-3,4,5,6,7,8,9,10.

²⁰ R6-1,3,4,5,6,7,8,9,10,11.

²¹ R8-1,8.

²² LEA Representative.

²³ R8-4.

²⁴ R8-4,7.

²⁵ P5-14; R7-16; LEA Representative; Special Education Advocate.

Hearing Officer Determination

Case No. 2019-0135

7. Student's 12/17/18 IEP provided 25 hours/week of specialized instruction outside general education but only 120 minutes/month of BSS outside general education; Student was responding to interventions.²⁶ Among other PLOPs, the 12/17/18 IEP asserted that Student had recently joined Public School so formal assessment data had yet to be determined.²⁷ The 12/17/18 IEP had deficiencies in baselines (as above), stating at one point only that Student was "[b]elow grade level" and another stating only "Moderate Level of support," while failing to provide any baselines for the 3 goals for Emotional, Social, and Behavioral Development.²⁸

8. Student's first IEP at Public School was dated 10/22/18 and provided 25 hours/week of specialized instruction outside general education and 120 minutes/month of BSS outside general education; everyone on the team agreed that the IEP was appropriate for Student at the time, based on needs.²⁹ The 10/22/18 IEP had generally reasonable PLOPs.³⁰ The 10/22/18 IEP had deficiencies in baselines (as above), stating for one only that Student was "[b]elow grade level" and for another only "Moderate Level of support," while failing to provide any baselines for the 3 goals for Emotional, Social, and Behavioral Development.³¹

9. Student's 11/9/17 IEP at Prior School provided 25 hours/week of specialized instruction outside general education and 120 minutes/month of BSS outside general education.³² Student came to DC in 2017/18 with an IEP from Maryland and was provided a Comparable Services letter providing 25 hours/week of specialized instruction outside general education and 120 minutes/month of BSS outside general education to begin on 9/29/17, but not a BIP.³³ The specifics of the Maryland BIP could not be fully implemented in DCPS.³⁴

10. Cognitive. Student's intellectual functioning was in the Average range with a General Intelligence Ability of 101.³⁵

11. Academics. Student's main area of concern was math, which was in the Low Average range and caused academic frustration which was exacerbated by ADHD characteristics.³⁶ Student showed progress by increasing 3 grades in math iReady scores

²⁶ P10-1,8; LEA Representative.

²⁷ P10-3,4,5,6,7; P14-1.

²⁸ P10-4,7.

²⁹ P12-1,8.

³⁰ P12-3,4,5,6,7.

³¹ P12-4,7.

³² P14-1,7.

³³ P15-1; Special Education Advocate; BES Support Specialist.

³⁴ Special Education Advocate.

³⁵ P17-7,18.

³⁶ P17-18.

Hearing Officer Determination

Case No. 2019-0135

from beginning-of-year to middle-of-year 2018/19, putting Student on grade level.³⁷ Student's iReady scores in math dropped at end-of-year to be a grade behind.³⁸

12. Student performed at or above the level of peers in reading.³⁹ At midyear 2018/19, Student was reading at level "Z," 2 grade levels above Student's grade.⁴⁰ Student's Reading Inventory score at middle-of-year was 890, but at end-of-year was only 482, although BES Special Educator testified at the due process hearing that Student could still read as well as previously.⁴¹

13. In term 2 of 2018/19, which ended on 1/18/19, Student earned 8 grades of Proficient and 2 of Basic.⁴² Student was able to obtain better grades than expected by Student's advocates in the first semester due to Summit, which permits students to work at their own pace; Student was able to complete work on the Summit platform once calmed down.⁴³ For term 3 of 2018/19, which covered 1/24/19 to 4/5/19, all of Student's grades had declined to Below Basic, the lowest level.⁴⁴

14. Behavior. Student's behavior impacted academics significantly; Student was impulsive, easily frustrated by demands, and had difficulty regulating emotions.⁴⁵ Student ripped up assignments and attempted to leave the classroom or school building when given an undesirable task or one not understood.⁴⁶ Student was running from the classroom and building early in 2018/19.⁴⁷

15. Student threatened on 9/27/18 to bring a knife to school and kill all BES staff.⁴⁸ Student's behavior and physical aggression got worse in the middle of 2018/19.⁴⁹ Student displayed physical aggression toward others and self; Student sometimes hit and kicked staff, threw a computer monitor across the room, banged head against wall, threatened to slap teacher if she continued to direct Student, and attacked social worker more than once.⁵⁰

16. On 12/20/18, social worker observed Student trying to stab self with a fork, a stapler and then wrap cord around neck, yelling during a safety hold that Student would kill self at

³⁷ P19-1.

³⁸ R26-1.

³⁹ P17-13.

⁴⁰ P24-1; R27-1 (level Z at end-of-year was rolled over from middle-of-year and not based on new data, according to BES Special Educator's testimony).

⁴¹ BES Special Educator; R25-1.

⁴² P24-1; R23-1.

⁴³ P24-1; P5-15.

⁴⁴ R28-1 (no grades available for term 4); R22-1.

⁴⁵ P17-19.

⁴⁶ P71-1.

⁴⁷ R3-2 (9/4/18, 9/26/18 (twice), 10/1/18).

⁴⁸ R3-2.

⁴⁹ P1-1.

⁵⁰ P71-1; P4-1; R3-2,3,4,5; P5-10.

Hearing Officer Determination

Case No. 2019-0135

home, so ChAMPS was called and Student was sent for a psychiatric evaluation.⁵¹ On 1/30/19 after hitting staff with a surge protector, Student was placed in a safety hold which Mother said caused a scratch, so Student did not attend school on 1/31/19.⁵² Petitioner's counsel stated that Public School advised parent of the January 2019 incident and ensuing investigation.⁵³

17. Attendance. In 2016/17, Student was absent for over 6 weeks of school during the first semester.⁵⁴ In 2017/18, Student had 34 absences; in 2018/19 Student had 56 unexcused absences by late May 2019.⁵⁵ Student attended school more regularly at the beginning of 2018/19; attendance worsened after mid-January 2019.⁵⁶ Student did not attend school at all between 3/21/19 and 4/11/19.⁵⁷

18. Public School staff repeatedly called Parents to see why Student was absent; staff conducted home visits; and staff offered to pick Student up.⁵⁸ Staff members picked up and brought Student to school at least 9 times to assist with Student's attendance, such as when Student missed the bus.⁵⁹ Mother told Public School she was "overwhelmed" and stated more than once that she could not get Student up and ready for school.⁶⁰ Parent said Mother was disinclined to bring Student to school if "an hour later" the school would call to complaint about Student's behavior.⁶¹

19. Lack of sleep had been an ongoing issue for Student.⁶² Early in 2018/19, Parent said she kept "thinking fatigue is a factor" so "did an experiment" by putting Student to bed by 8:00 PM, which resulted in a good day at school the next day.⁶³ As 2018/19 progressed, Student was often so tired Student could not stay awake through the school day.⁶⁴ Student often slept for hours at school, which was reported to Parents.⁶⁵ Mother said that if Student

⁵¹ R3-3; P31-6,24.

⁵² P31-26.

⁵³ P49-1.

⁵⁴ P23-6.

⁵⁵ P1-2; P17-2; R29-3.

⁵⁶ P1-1; R19-3,4,5; R19-1,2,4,6,8 (Public School's Behavior Plan Data Summary shows that Student went from attending school almost every day early in 2018/19, to missing quite a lot, to hardly going to school at all from mid-February 2019).

⁵⁷ P5-10.

⁵⁸ P31-8,9; BES Special Educator.

⁵⁹ R3-7; R1-1; P31-7.

⁶⁰ P31-7.

⁶¹ P5-7.

⁶² P23-2 (5/23/17 evaluation noted that Student "often complains about lack of sleep, and will often come to school very tired").

⁶³ P11-3.

⁶⁴ P1-1.

⁶⁵ P71-1; P5-10 ("sleeping the whole day"); P31-11,14,16,17.

Hearing Officer Determination

Case No. 2019-0135

wanted to lay on the floor and sleep all day at school, staff should allow it.⁶⁶ Late in 2018/19, even when at school Student was not ready for learning or ready to participate.⁶⁷

20. Efforts to Address Behaviors. Public School used a variety of interventions to address Student's behaviors, including sticker charts, classroom behavior charts, school-wide point system, and classroom incentive exchange systems; staff used group support, in-classroom support, and one-on-one interactions with Student; direct interventions included play therapy, fidget/therapeutic toys, introduction of consequences, earned time, movement breaks, verbal prompts, safety care holds and guides; Student had walking breaks, water breaks, and could use puzzles and coloring to assist with self-regulation.⁶⁸

21. Other interventions used with Student included extended time to complete assignments and assessments, point sheets, wait strategy, prompt strategy, and behavior momentum strategy.⁶⁹ Student had a visual schedule and morning check-in with a preferred staff member to review the schedule.⁷⁰ Student had a behavior tracker to obtain "earn time" for preferred activities at the end of the day.⁷¹ To create incentives to assist with transitions from one subject to another the BES team used a behavior contract, as well as token boards, sticker chart, and point sheet.⁷²

22. Interventions worked with Student earlier in 2018/19, but not later in the year.⁷³ Staff in Student's classroom were switched twice in 2018/19 due to Student refusing services.⁷⁴ Student's schedule was switched to ensure that preferred activities were increased and were "sandwiched" around non-preferred activities.⁷⁵

23. BSS. Student's BSS service trackers indicated that Student often missed services due to being absent or sleeping; as of 4/10/19, Student had not participated in a session in over 5 weeks.⁷⁶ BSS was discussed on 12/17/19, but was not increased; there was no request for an increase by Parent.⁷⁷ Student's team had attempted to increase BSS hours on 2/15/19, but the increase was delayed by Parent due to scheduling.⁷⁸ Based on behavior

⁶⁶ P31-19.

⁶⁷ P1-1.

⁶⁸ P35-2.

⁶⁹ R3-8; BES Special Educator.

⁷⁰ R3-7.

⁷¹ R3-7; BES Special Educator.

⁷² R3-8; BES Special Educator.

⁷³ P1-1.

⁷⁴ R3-7.

⁷⁵ *Id.*

⁷⁶ P39-1,2,3,4,5,6,8,9; R22-5.

⁷⁷ LEA Representative.

⁷⁸ P31-12; LEA Representative.

Hearing Officer Determination

Case No. 2019-0135

data, Public School proposed increasing Student's BSS to 240 minutes/month at the 4/11/19 meeting and did so.⁷⁹

24. Dedicated Aide Request. Student often succeeded in eloping, although many attempts to elope were quickly redirected due to the number of adults in Student's classroom.⁸⁰ Staff were not permitted to physically restrain Student from leaving the classroom or building; the "Safety Care" policy had many steps before physical restraint was an option.⁸¹ By 4/24/19, Public School agreed not to use physical management through Safety Care pursuant to Parents' request; instead staff would move everyone to safety and call ChAMPS when unsafe behavior was presented.⁸²

25. DCPS personnel noted at the 4/11/19 meeting that a dedicated aide could not put hands on Student to prevent elopement any more than the existing staff could, and that Student may be bothered by a dedicated aide following Student around.⁸³ Four adults were listed as responsible for monitoring Student's elopement.⁸⁴ DCPS attempted to observe Student in the classroom in order to determine the need for a dedicated aide; Student was absent on each of the 3 observation attempts.⁸⁵ Analysis of the dedicated aide request concluded that use of a dedicated aide was not recommended.⁸⁶

26. BIPs and FBAs. Coming from another DCPS BES program, BES Support Specialist expected Student to have both an FBA and BIP; all students in BES programs have BIPs or should have them.⁸⁷ Student first had a DCPS BIP in 2018/19 on 10/15/18, which was modified on 1/31/19, 4/24/19, and 5/6/19.⁸⁸ At the 10/15/18 meeting, Parent and Student's team collaborated in an effort to find patterns impacting Student's behavior.⁸⁹ An FBA-II was to be completed by the social worker early in 2018/19.⁹⁰ An FBA was conducted on 12/7/18 and indicated a great deal of dysregulation and sensory processing issues.⁹¹ An earlier FBA had been completed in Maryland on 5/13/16, with BIPs following on 6/17/16 and 5/25/17, which relied to a limited degree on a Maryland-specific "PRIDE behavior point system."⁹²

⁷⁹ P5-13; LEA Representative.

⁸⁰ R3-2,3,4,5; P71-2.

⁸¹ P5-8.

⁸² P34-5; R4-4,11; R13-5.

⁸³ P5-14.

⁸⁴ P34-8.

⁸⁵ P71-1.

⁸⁶ P71-3.

⁸⁷ BES Support Specialist; LEA Representative (typical for BES students to have FBA-II).

⁸⁸ R3-8; R14-1; P34-1; R13-1; BES Special Educator.

⁸⁹ P13-3,4,5.

⁹⁰ P11-5.

⁹¹ P35-1; Occupational Therapist.

⁹² P40-12; P41-1, P45-3.

Hearing Officer Determination

Case No. 2019-0135

27. Safety Plans. Student had safety plans for elopement and safety plans for reintegration to school; Student did not feel safe at school and needed to be reintegrated into the school day.⁹³ A request for a Safety Transfer was submitted for consideration, but did not meet the basic requirements; Public School moved the staffer at issue.⁹⁴

28. Occupational Therapy Evaluation. Student's advocates sought an OT evaluation to help with regulation and sensory issues; Special Education Advocate testified that Student's sensory needs, executive functioning, dysregulation, handwriting and refusal to complete work were "red flags" pointing to the need for an OT evaluation.⁹⁵ Petitioner sought sensory and executive functioning assessment in an OT evaluation in order to provide insight into possible autism.⁹⁶

29. Student's team did not agree that there was an OT concern.⁹⁷ A 6/6/19 prior written notice ("PWN") reported that DCPS proposed not conducting an OT evaluation after first observing Student and interviewing Student's teacher to see if there was any OT impact in the academic setting; Student's teacher did not report any concerns.⁹⁸ The school occupational therapist tried to observe Student in the classroom, but one day Student was sleeping and another day Student was absent.⁹⁹ Occupational Therapist credibly testified that simply talking to Student's teacher was not sufficient to rule out OT deficits.¹⁰⁰

30. Occupational Therapist concluded that an OT evaluation was appropriate for Student based on review of disclosures and the many factors prevalent throughout the school record.¹⁰¹ Student had trouble writing and keeping up with peers, impacting goals; Student's handwriting was poor and not age appropriate, with writing samples showing difficulties overall with sizing, spacing, incomplete work and tasks refused.¹⁰² Student may have had OT issues over a period of years; Occupational Therapist noted that in 2015 Student's fine motor skills were very poor.¹⁰³

31. Occupational Therapist based her opinion in part on Student having difficulty getting thoughts on paper and trouble visually processing numbers.¹⁰⁴ OT issues may impact Student's math and appropriately addressing potential OT needs could provide a

⁹³ R3-7; P38-1 (10/15/18 Individual Student Safety Plan); R17-1 (4/24/19 Individual Student Safety Plan); P33-1 (4/24/19 Student Safety and Integration Plan); R16-1 (5/10/19 Student Safety and Integration Plan); P33-1.

⁹⁴ R3-7; P4-1 (principal of Public School); R4-5; Parent.

⁹⁵ Special Education Advocate; P5-14.

⁹⁶ R4-7; Occupational Therapist.

⁹⁷ P1-3.

⁹⁸ P72-1; R4-6.

⁹⁹ R2-3; P4-4; R4-6.

¹⁰⁰ Occupational Therapist.

¹⁰¹ *Id.*

¹⁰² Occupational Therapist; P26-29,30,32,33.

¹⁰³ P47-1.

¹⁰⁴ Occupational Therapist; P17-5,9.

Hearing Officer Determination

Case No. 2019-0135

foundation to permit Student to be able to do math better.¹⁰⁵ Self-harming behavior, such as banging head or body can be a way of obtaining more sensory feedback which relates to OT and should be ruled out.¹⁰⁶ OT remediation can help the child process information.¹⁰⁷ Occupational Therapist testified that she had sufficient information to be able to determine that Student needed an OT evaluation.¹⁰⁸

32. Education Documents. On 3/29/19, Petitioner's counsel requested 14 categories of documents and on 4/8/19 requested a list of documents "as soon as possible"; on 4/9/19, LEA Representative transmitted requested documents to Petitioner's counsel.¹⁰⁹ LEA Representative emailed all the documents she had access to, which comprised 15-20 emails with multiple documents attached to each, and included all of Student's documents in SEDS.¹¹⁰ LEA Representative did not have earlier documents which could be requested directly from Student's prior schools.¹¹¹

33. At the 5/6/19 IEP meeting, Petitioner's counsel requested incident reports for the incidents on 1/30/19 and 4/24/19.¹¹² Respondent's counsel responded that there was no report for a January 2019 incident.¹¹³ The 4/24/19 incident report was provided and Petitioner's counsel then sought the investigation report relating to the incident.¹¹⁴ The 4/24/19 incident was investigated by the police, who determined that after throwing chairs at staff, Student was in a safety hold which might have scratched the back of Student's neck accidentally, but in any case the scratch was very small.¹¹⁵

34. Next Steps. At the 4/11/19 IEP meeting, BES Support Specialist stated that data showed that Student would benefit from a more therapeutic setting and the team discussed a more restrictive setting.¹¹⁶ Public School submitted a Change in Placement Request to OSSE on 5/15/19 recommending that Student's placement be changed to a nonpublic day school to support Student and Student's behavioral needs.¹¹⁷ An LRE review team was involved, but did not override Student's team.¹¹⁸ The shift to a more restrictive environment could not have occurred sooner and have sufficient time to try less restrictive alternatives.¹¹⁹

¹⁰⁵ Occupational Therapist.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ P59-1; P58-2.

¹¹⁰ LEA Representative.

¹¹¹ P58-2.

¹¹² P4-3; P31-26.

¹¹³ P49-1,2.

¹¹⁴ *Id.*

¹¹⁵ P70-4.

¹¹⁶ R7-8; BES Support Specialist; LEA Representative.

¹¹⁷ P1-2; R3-1,8.

¹¹⁸ LEA Representative.

¹¹⁹ *Id.*

Hearing Officer Determination

Case No. 2019-0135

Petitioner's advocate submitted a letter on 5/16/19 asserting that a more restrictive environment was needed.¹²⁰

35. During the resolution meeting on 6/7/19, Petitioner's counsel suggested that *Nonpublic School* and another school in Virginia be considered for Student.¹²¹ OSSE indicated on 6/12/19 that it was considering 3 schools, including Nonpublic School.¹²² On 6/26/19, a PWN listed a new placement for Student at Nonpublic School, stating that an acceptance letter and OSSE letter had been sent to Parent; Parent has not visited Nonpublic School.¹²³

36. Compensatory Education. But for the denial of FAPE, Special Education Advocate testified that Student would have experienced a year of academic and behavioral growth in 2018/19 for which compensatory education is required to make up.¹²⁴ Special Education Advocate developed a detailed Compensatory Education Proposal analyzing Petitioner's 4 issues; the proposal concluded that making up for the alleged denials of FAPE in this case and restoring Student to the place Student should have been would require 180 hours of tutoring (3 hours/week for 60 weeks), 30 hours of independent counseling (1 hour/week for 30 weeks), and 30 hours of mentoring (1 hour/week for 30 weeks).¹²⁵

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

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

¹²⁰ P52-8 (dissent letter).

¹²¹ R2-3.

¹²² P48-1.

¹²³ R30-1; Parent.

¹²⁴ Special Education Advocate.

¹²⁵ P75; P75-9; Special Education Advocate.

Hearing Officer Determination

Case No. 2019-0135

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 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, the 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; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

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

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

Hearing Officer Determination

Case No. 2019-0135

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, placement, and/or location of services during 2018/19, due to lack of (a) a more restrictive setting, (b) increased BSS, (c) other supports, such as a dedicated aide, and/or (d) PLOPs and baseline data consistent with standardized testing. (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, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “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 Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *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 IEPs are determined as of the time they were 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). The appropriateness of Student’s IEPs is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.¹²⁶ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Appropriate Setting. As an initial matter, Petitioner asserts that it was inappropriate for Student’s IEPs not to have a more restrictive environment and, as discussed below, that a more restrictive environment was required for Student’s placement and location of services as well. There is no dispute in this case that DCPS agreed by the end of 2018/19 that Student needed a more restrictive environment with a nonpublic school. But even when DCPS did agree that a more restrictive environment was required, it neglected to include that as the LRE in Student’s IEP, which is required by the Order below. *See Jones v. Dist. of Columbia*, 2019 WL 532671, at *1 n.1 (D.D.C. Feb. 11, 2019) (an “IEP is required to include at least a brief description of” LRE, quoting *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 27 (D.D.C. 2016)).

¹²⁶ 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), quoting *Rowley*, 458 U.S. at 206-07. Some of the allegations in this matter were merely procedural violations, as discussed in the text.

Hearing Officer Determination

Case No. 2019-0135

Nor was there any question about the BES program at Public School being a suitable setting for Student at the beginning of 2018/19 when considered prospectively, as there were high hopes that the newly-developed BES program at Public School with its extraordinary ratio of 3 or 4 adults for only two students would make the difference in Student's education. The issue here is whether it should have become clear to DCPS during the middle of 2018/19 that a more restrictive environment was needed for Student to make educational progress at that point. Petitioner argues that Student's need for a more restrictive environment was clear by the 12/17/18 IEP. But the facts in this case persuade the undersigned that DCPS could not have been expected to shift Student to a more restrictive environment in the middle of 2018/19.

First, Student's main academic area of concern was math, yet Student showed remarkable progress by apparently increasing 3 grades in math iReady scores from beginning-of-year to middle-of-year 2018/19, putting Student on grade level, although Student's iReady scores in math dropped at end-of-year to be a grade behind. Similarly, at midyear 2018/19, Student was reading at level "Z," 2 grade levels above Student's grade, although Student's Reading Inventory score declined from 890 at middle-of-year to only 482 by end-of-year. This testing did not suggest the need for a mid-year change. Nor did Student's grades suggest any need for a change until well into 2019, as Student earned 8 grades of Proficient and 2 of Basic in term 2, while in term 3, which began on 1/24/19 and did not end until 4/5/19, all of Student's grades dropped to Below Basic, the lowest level.

Student's behavior was very challenging in 2018/19 – which was why Student was in a full-time self-contained BES program – so Public School provided safety plans to Student both to address elopement and for reintegration into school as Student did not feel safe at school later in the year. Specifically, Individual Student Safety Plans were developed on 10/15/18 and 4/24/19, while Student Safety and Integration Plans were developed on 4/24/19 and 5/10/19. Student's behavior did not clearly worsen over the year because Student was not there to have more behavioral incidents, as attendance declined significantly, with 56 unexcused absences by late May 2019.

Student went from attending school nearly every day early in 2018/19, to missing quite a lot, and then hardly going to school at all from mid-February 2019. However, this was not a situation where DCPS was disengaged and uncaring about Student's absences. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009); *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if not in school, student could not be said to be receiving "a free appropriate public education"). Here, Public School staff repeatedly called Parents to see why Student was absent, staff conducted home visits, and staff offered to pick up and bring Student to school – and did so at least 9 times.

Moreover, Public School used a variety of interventions to address Student's behaviors, including sticker charts, classroom behavior charts, school-wide point system, classroom incentive exchange systems, extended time to complete assignments and assessments, point sheets, wait strategy, prompt strategy, and behavior momentum strategy. Staff also used group support, in-classroom support, and one-on-one interactions with Student. Direct interventions included play therapy, fidget/therapeutic toys, introduction of

Hearing Officer Determination

Case No. 2019-0135

consequences, earned time, movement breaks, verbal prompts, and safety care holds and guides. Student was permitted walking breaks, water breaks, and could use puzzles and coloring to assist with self-regulation.

In sum, Student was doing reasonably well at Public School into the middle of the school year, with positive results from standardized tests in both math and reading, and reasonable grades until things went downhill in third term, which was the same time attendance became such an issue. From that point DCPS did begin to consider a more restrictive setting, which could not be done immediately since Student was already in a full-time self-contained program. At the 4/11/19 IEP meeting, BES Support Specialist explained that data showed Student would benefit from a more therapeutic setting, so the team discussed a more restrictive setting. Public School developed and submitted a Change in Placement Request to OSSE on 5/15/19 seeking to change Student's placement to a nonpublic day school to support Student and Student's behavioral needs. LEA Representative credibly testified that the shift to a more restrictive environment could not have occurred sooner and still had sufficient time to try less restrictive alternatives, as Public School was obliged to do. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000. It is notable that Petitioner's advocates did not submit a dissent letter urging a more restrictive environment until 5/16/19. For all the reasons set forth above, the undersigned is persuaded that a more restrictive setting was not required for Student sooner than it was developed.

(b) Increased BSS. Student's IEPs consistently had 120 minutes/month of BSS from at least 2016/17 in Maryland until 4/11/19, when it was doubled to 240 minutes/month based on Student's behavior data. Petitioner argued that it should have been increased sooner, but the evidence in the case was that Student's team had attempted to increase BSS hours on 2/15/19, but were delayed by Parent (due to scheduling). Further, BSS was discussed on 12/17/19, but was not increased at that time as there had been no request for an increase from Parent. Moreover, Student often missed BSS due to being absent or sleeping in school, so it is not clear that an earlier increase in hours would have had a nontrivial impact on Student's behavior in any case. For instance, the record shows that in the 5 weeks leading up to the 4/11/19 increase, Student had not participated in any BSS sessions. The undersigned finds no violation and no denial of FAPE from not increasing BSS sooner.

(c) Dedicated Aide or Other Supports. Petitioner sought a dedicated aide for Student due to her understandable concerns about Student often running from the BES classroom and even from the school building. DCPS took the request seriously and attempted to observe Student in the classroom in order to determine the need for a dedicated aide, but Student was absent on each of the 3 observations attempts. But with 4 adults already responsible for monitoring Student's elopement and a ratio in the classroom of 3-4 adults for Student and only 1 other child, the issue appeared to be that Public School staff were not permitted to physically restrain Student from leaving the classroom or building. Importantly, a dedicated aide could not put hands on Student to prevent elopement any more than existing staff could. Detailed analysis by DCPS of the dedicated aide request, despite the lack of observation, concluded that use of a dedicated aide was not recommended. This Hearing Officer concurs in that conclusion, for Student does not require a dedicated aide to access the curriculum. *See Rowley*, 458 U.S. at 203 (dedicated aide required if necessary "to permit the child to benefit educationally from [the IEP personalized] instruction"). Other

Hearing Officer Determination

Case No. 2019-0135

supports were not raised by Petitioner apart from shifting to a more restrictive environment, with which Student's team agreed as the school year progressed.

(d) PLOPs and Baseline Data. The statements of present levels of performance in Student's IEPs, as required by 34 C.F.R. 300.320(a)(1), were generally sufficient. However, the 4/11/19 IEP had deficiencies by asserting that Student had "recently" joined Public School so formal assessment data had yet to be determined, even though the year was mostly completed by that point. Similar statements made in Student's 12/17/18 IEP were of less concern, even though Student had been at Public School for a few months at that point. Student's team did agree on 4/11/19 to modify PLOPs to address concerns and they were updated on 5/6/19.

The IDEA does not expressly require "baselines" in IEPs, but does require a description of how progress toward meeting a student's IEP goals will be measured, in 34 C.F.R. 300.320(a)(3). That measurement is typically in the form of baselines stating the level at which a child begins so one can determine whether the special education services provided were sufficient to bring about the desired improvement. The baselines in the May 2019 IEPs were fine, but the baselines in the 4/11/19, 12/17/18 and 10/22/18 IEPs all had identical deficiencies, stating at one point only that Student was below grade level, which is imprecise, while another baseline stated only "Moderate Level of support," which has little, if any, meaning without context. Worse, the 3 IEPs failed to provide any baselines at all for the 3 goals for the Emotional, Social, and Behavioral Development area of concern. On 4/11/19, Student's team agreed to change baselines to address concerns and they were updated on 5/6/19.

This modest failure to provide adequate PLOPs and baselines is a procedural violation, which does not mean Student was denied a FAPE unless there was an "educational harm" as a result. *See, e.g., Taylor v. Dist. of Columbia*, 770 F. Supp. 2d 105, 109-10 (D.D.C. 2011); 34 C.F.R. 300.513(a). Here, the undersigned finds there was no educational harm, for the PLOPs and baselines were updated by the end of the year when a new team would take over. Here, Student's teacher and other staff were working closely with Student during the school year and were well aware of Student's abilities and changes throughout the year, compared to where Student began, about which BES Special Educator testified in some detail.

Educational Placement and Location of Services. The applicable legal standard for educational placement under the IDEA requires "school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018) *citing O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS "must place the student in a setting that is capable of fulfilling the student's IEP"). Here, as noted above, there was no real question about the BES program at Public School being a suitable placement for Student at the beginning of 2018/19, when there were high hopes that the new BES program with the remarkable ratio of 3-4 adults for only two students would make all the difference for Student's education. Moreover, by the end of 2018/19 Student's entire team agreed that

Hearing Officer Determination

Case No. 2019-0135

Student needed placement in a more restrictive, nonpublic school. The question here is simply whether that shift in Student's placement should have come sooner than May 2019.

Based on the facts discussed above, the undersigned is persuaded that Student's situation had not deteriorated so far that a more restrictive placement was required until well after the December IEP, which was the timeframe argued by Petitioner. As for the location of services, Petitioner's counsel expressly stated during the resolution meeting that Nonpublic School should be considered for Student. No case was presented at the due process hearing that Nonpublic School was not a suitable location of services.

The undersigned concludes that on balance DCPS met its burden of persuasion on educational placement, as the placement and location proposed will afford Student the opportunity to actually attend school and make appropriate progress in Student's circumstances. *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), quoting *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Denial of FAPE. In considering the concerns above, the undersigned is cognizant of the fact that the analysis is not about achieving perfection, but merely IEPs and placement reasonably calculated to enable Student to make appropriate progress. *Andrew 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 v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016), quoting *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). This is especially true here where numerous interventions and other steps were taken to try to help Student overcome the behavioral and academic challenges Student faced and could only be implemented step by step to see what Student's reaction would be. On balance, whether the concerns above are considered individually or as a whole, this Hearing Officer concludes that DCPS met its burden of persuasion and the IEPs were reasonably calculated to enable Student to make appropriate progress in Student's circumstances, and that the placement and location of services were also appropriate.

Issue 2: *Whether DCPS denied Student a FAPE by failing to develop a timely and appropriate BIP during 2017/18 or 2018/19, where a BIP was only developed on 10/15/18, and the FBA was not conducted until 12/7/18. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on this issue. The IDEA requires in the case of a student whose behavior impedes the student's own learning, as here, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). See *Middleton*, 312 F. Supp. 3d at 146 (failing to address attendance can be a denial of FAPE). Here, an FBA had been completed in Maryland on 5/13/16, with BIPs following on 6/17/16 and 5/25/17, which relied to some extent on a Maryland-specific behavior point system, and the Maryland BIP was not included in the comparable services brought into Prior School in 2017/18.

DCPS staff were quite clear in their testimony that all students in DCPS BES programs have BIPs, or should have them. Yet for all of Student's behavioral and attendance issues and need for a full-time, self-contained BES program in 2017/18 and

Hearing Officer Determination

Case No. 2019-0135

2018/19, a BIP was not developed at all for Student in 2017/18, which was not a successful year for Student and required a shift to the new BES program at Public School for 2018/19. Student first had a DCPS BIP on 10/15/18, which was modified on 1/31/19, 4/24/19, and 5/6/19. DCPS staff also were clear that Student should have had an FBA, which is foundational for a BIP, yet a DCPS FBA for Student was not conducted until 12/7/18, which found a great deal of dysregulation and sensory processing issues.

The lack of a timely FBA may have impacted the quality of the 10/15/19 BIP, although Petitioner did not seek to raise and prove specific quality problems in the BIPs. The Court in *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011), quoting *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008), explained that an FBA is “essential” in addressing behavioral difficulties, so plays an integral role in the development of an IEP. See 34 C.F.R. 300.324(a)(2)(i); *Middleton*, 312 F. Supp. 3d at 146.

In circumstances such as these, this Hearing Officer concludes that failing to develop a BIP for over a year goes beyond a mere procedural violation and is a denial of FAPE. See, e.g., *Z.B.*, 888 F.3d at 524. Here, the failure to develop a BIP caused a deprivation of educational benefit to Student by not providing as much support as appropriate for Student’s behavioral and attendance needs. Thus, it is held by the undersigned to be a substantive violation and a denial of FAPE pursuant to 34 C.F.R. 300.513(a). This denial of FAPE is the basis for compensatory education, which is awarded below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to conduct a comprehensive and timely evaluation when it did not conduct an OT evaluation. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on the need for an OT evaluation of Student. The importance of assessing children in all areas of suspected disability was emphasized in *Z.B.*, 888 F.3d at 518, quoting 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.301. The Circuit Court explained in *Z.B.*, 888 F.3d at 524, that failing to conduct adequate assessments was a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. See also *Long*, 780 F. Supp. 2d at 60-61, (“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*, 2016 WL 4506972, at *18; 34 C.F.R. § 300.304(c)(4).

On the other hand, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information based on the suspected needs of the child. *Z.B.*, 888 F.2d at 518; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006); *James*, 194 F. Supp. 3d at 143.

Here, Student’s advocates sought an OT evaluation in an effort to address Student’s regulation and sensory issues, as well as seeking an executive functioning assessment in the OT evaluation in order to provide insight into possible autism. Special Education Advocate

Hearing Officer Determination

Case No. 2019-0135

persuasively testified that Student's sensory needs, executive functioning, dysregulation, handwriting and refusal to complete work were "red flags" calling for an OT evaluation. Student's team was not persuaded about OT concerns, but sought to observe Student and interview Student's teacher to see if there were any OT impacts in the academic setting. When the school occupational therapist tried to observe Student in the classroom, however, Student was sleeping one day and absent another day. In such circumstances, Occupational Therapist credibly testified that simply talking to Student's teacher was not sufficient to rule out OT deficits.

Providing uncontradicted expert testimony, Occupational Therapist concluded that an OT evaluation was appropriate for Student, based on Student having trouble writing and keeping up with peers, impacting Student's goals; Student's handwriting was poor and not age appropriate, with writing samples showing difficulties with sizing, spacing, incomplete work and tasks refused. Student may have had OT issues over a number of years, for Occupational Therapist noted that in 2015 Student's fine motor skills were also very poor. Occupational Therapist also noted Student having difficulty getting thoughts on paper and trouble visually processing numbers. Further, self-harming behavior, such as banging head or body can be a way of obtaining more sensory feedback, which relates to OT and should be ruled out. Occupational Therapist testified that she had sufficient information to be able to determine that Student did need an OT evaluation.

In sum, the undersigned concludes that Petitioner did meet her burden on the issue of an OT evaluation, which is ordered below. As indicated in footnote 3 above, compensatory education is reserved as to this issue, as an appropriate award of compensatory education depends on whether Student is found to need OT services.

Issue 4: *Whether DCPS denied Student a FAPE by failing to provide Parent full access to Student's education records, including those relating to incidents in January and April 2019 when Student was allegedly struck and injured by adults at school. (Petitioner has the burden of persuasion on this issue.)*

Parent did not meet her burden on the issue of 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.

Hearing Officer Determination

Case No. 2019-0135

Here, Petitioner's counsel requested numerous categories of documents on 3/29/19 and a more specific list on 4/8/19. In response, LEA Representative on 4/9/19 emailed all the education documents she had access to, including all of Student's documents in SEDS, although LEA Representative did not have documents from Student's prior schools. Petitioner's counsel specifically requested reports for incidents on 1/30/19 and 4/24/19. The 4/24/19 incident report was provided, but DCPS's counsel responded that there was no report for a January 2019 incident. Based on the evidence in the case, the undersigned concludes that Petitioner failed to meet its burden of proving that Public School did not provide the documents it maintained as part of Student's education records. *See, e.g., Burnett v. San Mateo Foster City Sch. Dist.*, 739 Fed. Appx. 870, 873-74 (9th Cir. 2018).

Remedy

In determining compensatory education for a denial of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, the Compensatory Education Proposal prepared for this case assumed that Petitioner would prevail on all issues, while it is only the second issue on lack of BIPs that results in compensatory education at this time. The other issue on which Petitioner prevailed – the need for an OT evaluation – is not suitable for compensatory education now, and the remedy is reserved until it is known whether Student should have been receiving OT services.

Based on all the evidence and the various factors discussed in this case, and carefully considering the totality of the circumstances, the undersigned considers that the 30 hours of independent counseling from Special Education Advocate's proposal relates to the lack of timely BIPs and is needed to restore Student to the place Student should have been but for the denial of FAPE. In addition, if Student had appropriate BIPs in place during 2017/18, Student might well have been more engaged in school during that year. Accordingly, based on all the evidence in this case and the experience of the undersigned in comparable cases, an additional 30 hours of academic tutoring is awarded to make up for the lack of BIPs. While ordering a detailed compensatory education evaluation was carefully considered, the undersigned is of the view that such an assessment would not add sufficient value to justify the delay and cost, if indeed it added any value.

These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir.

Hearing Officer Determination

Case No. 2019-0135

2005). 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.

ORDER

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

- (1) Within 10 business days, DCPS shall amend Student’s IEP to state that Student’s LRE is a full-time therapeutic day school.
- (2) Within 10 business days, DCPS shall provide an IEE at market rates for an Occupational Therapy evaluation of Student.
- (3) As compensatory education for the denial of FAPE found herein, DCPS shall provide letter(s) of authorization within 10 business days after Petitioner’s request(s) for a total of (a) 30 hours of academic tutoring from independent provider(s) chosen by Petitioner, and (b) 30 hours of independent counseling from an independent provider chosen by Petitioner. All hours are to be provided and used within 12 months; any unused hours shall be forfeited.

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

- Counsel of Record (Appendix A, by email)
- OSSE-SPED (due.process@dc.gov)
- ODR (hearing.office@dc.gov)
- ██████████@k12.dc.gov
- ██████████@k12.dc.gov