

**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 10, 2020

<i>Student,</i> ¹)	Case No.: 2020-0097
through <i>Parent,</i>)	
<i>Petitioner,</i>)	Date Issued: 7/10/20
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 6/17/20
("DCPS"),)	Video Platform: Microsoft Teams
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”) to address behavior needs, lack of full implementation, and lack of comprehensive evaluation. DCPS responded that its actions were reasonable and there was no denial of FAPE.

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 4/29/20, the case was assigned to the undersigned on 4/30/20. Respondent filed a response on 5/8/20 and a corrected response on 5/12/20, but did not challenge jurisdiction. A resolution meeting was held on 5/14/20, which did not resolve the dispute or shorten the 30-day resolution period, which

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

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ended on 5/29/20. 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 7/13/20.

The prehearing conference was held on 5/26/20 and the Prehearing Order issued on 6/5/20 addressing the anticipated use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 6/17/20 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present by videoconference for the entire hearing.

Petitioner’s Disclosures, submitted on 6/10/20, contained documents P1 through P41, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 6/10/20, contained documents R1 through R51, which were admitted into evidence without objection.²

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. *Educational Advocate* (qualified, with no position taken by Respondent, as an expert in Special Education as It Relates to IEP Programming and Placement)
3. Parent

Respondent’s counsel presented one witness in Respondent’s case (*see* Appendix A): *Principal at Public School* (qualified without objection as an expert in Administration, Education Programming and Placement)

Petitioner’s counsel did not present any rebuttal witnesses.

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

Issue 1: Whether DCPS denied Student a FAPE by failing to implement the 4/11/19 IEP from 8/2019 to 2/2020 when it (a) did not ever implement Student’s Behavior Intervention Plan (“BIP”), and/or (b) failed to provide about 305 minutes out of about 570

² Citations herein to the parties’ documents differ based on how they were numbered. References to Petitioner’s documents begin with a “P” and the exhibit number, followed by a hyphen and the page number or numbers within the exhibit. References to Respondent’s documents begin with an “R” and the exhibit number followed by a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits).

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minutes of Behavior Support Services (“BSS”) required by Student’s IEP. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to revise the 4/11/19 IEP by increasing BSS and hours of specialized instruction as of September 2019 due to lack of appropriate educational progress. (*Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to comprehensively and timely evaluate Student as of September 2019 by conducting (a) a Functional Behavior Assessment (“FBA”) and/or (b) an occupational therapy assessment. (*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. DCPS shall fund a comprehensive occupational therapy assessment of Student, including a sensory profile, and timely convene the IEP team to review the assessment report and revise Student’s IEP as needed.
3. DCPS shall provide compensatory education for any denial of FAPE, unless compensatory education is reserved until the occupational therapy assessment and any compensatory education assessment are complete.³
4. Any other just and reasonable relief.

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

With regard to any request for compensatory education awarded in this HOD, 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 is found.

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Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁴ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age*, *Gender* and in *Grade* at Public School, where Student started at the beginning of 2019/20 along with the other children in Grade.⁶

2. IEPs. Student's initial IEP was dated 4/23/18; all of Student's IEPs have been based on the classification of Multiple Disabilities ("MD"), with both Emotional Disturbance ("ED") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD").⁷ The 4/23/18 IEP provided 30 minutes/week (120 minutes/month) of specialized instruction inside general education and 120 minutes/month of BSS outside general education, along with Other Classroom Aides and Services of one-on-one instruction "as needed" and frequent breaks with a familiar teacher.⁸

3. The services provided on Student's 4/11/19 IEP were identical to Student's initial 4/23/18 IEP (with 30 minutes/week of specialized instruction inside general education and 30 minutes/week (120 minutes/month) of BSS outside general education, along with Other Classroom Aides and Services of one-on-one instruction as needed and frequent breaks with a familiar teacher).⁹ Educational Advocate considered this IEP insufficient when Student began at Public School in August 2019 and believed that Public School should have known by the end of September 2019 that Student's IEP needed to be reviewed.¹⁰ Student's 2/14/20 IEP was dramatically changed to provide 22.5 hours/week of specialized instruction outside general education and 120 minutes/month of BSS outside general education and 120 minutes/month of BSS inside general education, along with new classroom aids and services.¹¹

4. Cognitive Abilities/Academic Testing/Failure. A 2/16/18 comprehensive psychoeducational evaluation of Student included standardized intelligence testing using the

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; Principal; Educational Advocate.

⁷ P8-2; P9-2; P10-2.

⁸ P8-8.

⁹ P9-1,8.

¹⁰ Educational Advocate.

¹¹ P10-11.

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Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) that showed Student’s scores were in the Average or High Average range except for Visual Spatial ability, which was in the Low Average range; Student’s Full Scale IQ (“FSIQ”) was 104, which was the 61st percentile.¹²

5. Standardized academic testing in the 2/16/18 evaluation using the Wechsler Individual Achievement Test – Third Edition (“WIAT-III”) showed Student to have age appropriate skills in reading, writing, math and oral language, based on testing in a one-on-one setting with few distractions.¹³ The WIAT-III found every composite to be Average or High Average range.¹⁴ According to the Reading Inventory on 9/4/19, Student was 2 years below Grade in reading, but a top reader among the half dozen children in the Behavior & Education Support (“BES”) class.¹⁵ Due to work refusal and cutting class, Student was failing most or all core classes.¹⁶

6. Behavior. The Behavior Assessment System for Children, Third Edition (“BASC-3”) in the 2/16/18 evaluation found that Student had clinically significant difficulties with a variety of behaviors across settings, with significant externalizing behaviors that suggested a possible diagnosis of ADHD, oppositional defiant disorder (“ODD”), or conduct disorder; special education eligibility and classification were determined by the Multi-disciplinary Team (“MDT”).¹⁷ Student’s 4/23/18 and 4/11/19 IEPs both noted that Student engaged in behaviors that interrupted the classroom, was out of Student’s seat “constantly,” and made loud noises.¹⁸ A great deal of Student’s time was spent outside the classroom due to behaviors; Student routinely escalated until too disruptive to be in class with peers.¹⁹ Student was often out of class for entire classes, rejoining peers only for lunch or specials.²⁰ At the beginning of the school year, it takes about 4-6 weeks at Public School for children to settle in and for the school to get a good sense of the child.²¹

7. In the 4th quarter of 2018/19, Student’s negative behaviors increased and Student was more resistant to redirection; Student was able to stay in math class 40% of the time 4 out of 5 days/week; for English Language Arts (“ELA”) the corresponding figure was 50%.²² In the 2nd quarter of 2019/20, Student was able to remain in math class for 80% of the time, 2 out of 5 days/week; for ELA the figure was 80% of the time, 1 out of 5

¹² P11-2,5,12; Educational Advocate.

¹³ P11-7,12.

¹⁴ P11-2,7.

¹⁵ P16-2.

¹⁶ P35-2 (1/21/20); Educational Advocate (Student was very capable but failing due to behavior).

¹⁷ P11-12.

¹⁸ P8-3; P9-3.

¹⁹ P9-4; P8-4.

²⁰ P9-7; P8-6,7.

²¹ Principal.

²² P17-2,3,4.

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days/week.²³ Student's behaviors worsened during 2019/20, with Public School's list of referrals showing Student had 7 referrals in September, all but one of which were "minor" (refusal to follow instructions, inappropriate language, etc.); Student had 18 referrals in October, of which 6 were minor; and Student had 18 referrals in November, of which 3 were minor.²⁴ Out-of-school suspensions did not begin until December 2019.²⁵ The delay by the Public School team in taking action sooner had a great impact on Student due to failed classes and not learning.²⁶

8. BES Program. Student was not getting what was needed in November 2019, so a meeting was held by the team with the outcome that Student was moved to a self-contained BES classroom in late November 2019 on a trial basis; Student did somewhat better there and preferred to remain in the BES classroom; Parent and Public School agreed on Student remaining while they found a time for the IEP meeting and made the formal decision to place Student in the BES program.²⁷

9. BSS. At the beginning of 2019/20, Student and the school social worker had positive interactions during BSS on 9/13/19, and met 40 out of 120 minutes in September to work on identifying triggers to emotional distress and classroom avoidance, along with deep breathing and self-soothing strategies; Student was "receptive" and became tearful at one point.²⁸ BSS was next provided on 10/10/19 when Student needed multiple redirections to refrain from "excessive" profanity, but was able to engage in the activity; Student received 90 of 120 minutes of BSS in October.²⁹ In November, Student received 75 of 90 minutes (due to school closing) of BSS and was escalated upon beginning the session.³⁰

10. In August 2019, Student did not receive any of the 30 minutes of BSS due; in December 2019, Student received 60 of 90 minutes (due to school closing); and in January, Student received 75 of 75 minutes due because of Student's absences³¹ In February, Student received 210 minutes of BSS out of 180 minutes; the BSS requirement increased on 2/14/20 to 120 minutes/month inside general education and 120 minutes/month outside general education.³² In March, Student was provided 170 minutes of BSS out of 170 due to absences and school closures.³³

²³ P18-2,3.

²⁴ P15.

²⁵ P15-3.

²⁶ Parent.

²⁷ R35p155 (BES teacher called Parent to introduce herself and talk about class on 11/25/19); P36-2,3; Parent; Principal (November shift to BES); Educational Advocate.

²⁸ P26-2.

²⁹ P26-3.

³⁰ P26-5.

³¹ P26-7,9,10.

³² P26-11,12; P10-11.

³³ P26-13,14,15.

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11. BIP. There was no FBA conducted of Student until April 2020.³⁴ A 2-page BIP was developed for Student on 4/23/18, the date of the initial IEP, which focused on Student returning to class without escalating, rejoining peers, and completing any work missed.³⁵ The BIP intended to have a staff member outside the classroom to whom Student could vent in a space that would not disrupt peers; Principal testified that was being done at Public School's Skill Center, where a behavior tech had an office in the school hallway.³⁶ Teachers were to ignore Student's behavior that was "not actively disrupting" the learning of others, have Student's seat where Student could move around without disrupting others, and provide assignments missed when Student returned to class.³⁷

For rewards, the BIP suggested "choice time" on a computer or phone or in the gym; Principal testified that Public School's Positive Behavior Incentive System ("PBIS") was available to all and included school "earnings" permitting purchases in the school store or in the separate BES store, or various experiences.³⁸ As consequences, Principal wanted to focus on de-escalation of Student and not the BIP's plan to put Student in a room where Student was to sit and "be bored" until acquiescing by communication or returning to class, but did not seek to change the BIP.³⁹

12. At Public School, Student had access to noise-cancelling headphones, a "kickband" on some desks, and "wobblies" on some chairs; Student could take breaks for the Skill Center; the team decided to involve Student in the process by using behavior trackers, but they were not effective with Student who ripped them up.⁴⁰

13. FBA. Public School conducted an FBA-II dated 4/10/20 which noted that Student's behaviors significantly impacted Student's ability to access classroom instruction and complete work; Student didn't attend class, walked around and in and out of the classroom, did cartwheels in the classroom and threw tantrums.⁴¹ School interventions had yielded only "minimal" success with Student.⁴² The upsurge in behavioral difficulties occurred 2 years earlier with the sudden absence of Student's father and worsened in 2019/20.⁴³ A formal classroom observation found that Student was on task and completing work 17% of the time, was verbally aggressive 22% of the time, and was engaged in disruptive behaviors

³⁴ Principal.

³⁵ P13-2.

³⁶ P13-2; Principal.

³⁷ P13-2.

³⁸ P13-2; Principal.

³⁹ Principal; P13-2.

⁴⁰ Principal.

⁴¹ P12-2.

⁴² P12-3.

⁴³ P12-3,5,7.

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the remaining 61% of the time; the BES classroom contained 4 students and 4 adults at the time of observation (not counting the observer).⁴⁴

14. The FBA recommended a comprehensive BIP; Student being permitted to stand or kneel by desk; and Student being referred to community-based treatment to begin addressing grief/loss issues relating to father, as well as school staff consulting with providers to address treatment needs and emergent issues.⁴⁵ Educational Advocate believed that Public School should have ordered a new FBA by the end of September 2019; it was not ordered until February 2020.⁴⁶ An FBA was necessary to determine if the BIP was effective or appropriate.⁴⁷

15. Occupational Therapy Assessment/Sensory Needs. At the 2/14/20 IEP team meeting, Petitioner's counsel requested an occupational therapy evaluation with sensory profile; Public School needed to consult its occupational therapist, but did not answer by 3/9/20, which Petitioner had to follow up.⁴⁸ The school occupational therapist observed Student, but did not convey any information to Parent or the undersigned, either orally or in writing.⁴⁹ Principal testified at hearing that she saw nothing suggesting a need for an occupational therapy assessment of Student.⁵⁰

16. Occupational Therapist reviewed and testified about Student's records, but never met Student; Occupational Therapist was concerned about Student's sensory processing; she has 20 years' experience as an occupational therapist reviewing situations such as this.⁵¹ Occupational Therapist concluded that an occupational therapy assessment was warranted to rule out sensory processing and self-regulation issues.⁵² The 2/16/18 evaluation noted Student's sensory-seeking behavior and need for self-regulation, along with Student's art teacher's recognition of Student's need for controlling the environment.⁵³ Student's BES teacher believed there was a sensory seeking component to Student's acting out behavior, as Student consistently sought out physical movement, chewed on inedible items, used scissors, and put glue on hands.⁵⁴ Student's art teacher thought Student was seeking control over the environment.⁵⁵

⁴⁴ P12-2,3,7 (only one classroom observation could be conducted due to the pandemic closing schools).

⁴⁵ P12-8.

⁴⁶ Educational Advocate.

⁴⁷ *Id.*

⁴⁸ P21-5; P22-4; P38-2.

⁴⁹ Principal.

⁵⁰ *Id.*

⁵¹ Occupational Therapist.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ P12-6.

⁵⁵ *Id.*

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17. Student's 2/16/18 evaluation also noted that Student may benefit from the freedom to stand or kneel at Student's desk.⁵⁶ During the 2/16/18 evaluation, Student got in and out of the chair repeatedly; fidgeted with clothing and nearby objects, moved arms and legs while seated, and shifted positions in chair often.⁵⁷ During BSS on 2/24/20, Student took a cushion from the class couch and began using it as a punching bag.⁵⁸ On 3/27/20, BSS was provided to Student remotely and Student remained on topic but struggled to stay still and was doing cartwheels and headstands throughout the session.⁵⁹ Parent testified that Student can't sit still at home and is literally "flipping and flopping" around the house.⁶⁰ Student enjoys movement breaks, such as dancing and gymnastics.⁶¹

18. Distance Learning. Student was completing work more consistently in the last 2 weeks prior to school closing in mid-March due to the pandemic.⁶² Student did much better with distance learning than attending school in person, possibly due to being removed from distractions at school; with distance learning, Student was working with the BES teacher, was receptive to feedback, and was earning verbal praise.⁶³ Toward the end of 2019/20 during distance learning, Student had successful school behavior by being friendly and asking questions; Student was engaged and pleasant; Student had a better attitude and had shown improvement because stimuli were removed.⁶⁴ Student attended 100% of classes during the pandemic earning extra credit and an "A" in ELA.⁶⁵ Parent communication was essential for Student logging into distance learning.⁶⁶

19. Compensatory Education. Educational Advocate's Compensatory Education Proposal sought 288 hours of tutoring (8 hours/week for 36 weeks), 20 hours of counseling (1 hour/week for 20 weeks), 20 hours of mentoring (1 hour/week for 20 weeks), and 36 hours of gymnastics (1 hour/week for 36 weeks), along with an occupational therapy assessment and reservation of additional compensatory education relating to occupational therapy.⁶⁷ Educational Advocate explained that she talked with Student to see what would be beneficial and gymnastics came up as a way to benefit Student; Educational Advocate understands that the provider she is recommending, Integrity of Self Movement Arts, at 1361 H Street, NE, Washington, DC, is offering virtual/online classes during the pandemic.⁶⁸ Student's BES teacher noted that Student was "extremely athletic"; the school

⁵⁶ P11-12.

⁵⁷ P11-3,4.

⁵⁸ P26-12.

⁵⁹ P26-15.

⁶⁰ Parent.

⁶¹ P12-3.

⁶² P19-6.

⁶³ R33p145.

⁶⁴ R35p159; P25-2.

⁶⁵ P19-4.

⁶⁶ P19-5.

⁶⁷ P39-7.

⁶⁸ Educational Advocate.

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social worker stated that Student is interested in gymnastics and has a “natural skill set.”⁶⁹ Gymnastics is helpful to “burn off” extra energy so Student can improve learning and memory.⁷⁰

20. On 6/8/20, DCPS authorized the following independent services for Student which were not contingent on settlement or any other action by Petitioner: 230 hours of tutoring, 20 hours of mentoring, and 20 hours of counseling by a licensed social worker.⁷¹

Conclusions of Law

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

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

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

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

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The

⁶⁹ P21-4.

⁷⁰ Educational Advocate.

⁷¹ R45p224; R46p226; R47.

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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*, No. 17-cv-2455, 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 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 implement the 4/11/19 IEP from 8/2019 to 2/2020 when it (a) did not ever implement Student's BIP, and/or (b) failed to provide about 305 minutes out of about 570 minutes of BSS required by Student's IEP. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden on lack of implementation of the 4/23/18 BIP, but did meet her burden on the lack of BSS implementation in the early months at Public School.

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With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

(a) BIP. Petitioner first asserts a failure by DCPS to implement the 2-page 4/23/18 BIP from August 2019 to February 2020, but Principal explained the steps taken by Public School in line with the BIP, as well as additional steps relating to Student's behavior. As an initial matter, the BIP called for a staff member outside Student's classroom to whom Student could vent in a space that would not disrupt peers. Principal credibly testified that was being done in the school hallway at Public School's Skill Center, where Student could interact with a behavior tech who had an office there. Other elements of the BIP also clearly occurred, such as ignoring Student's behavior when it was not disrupting others and provided assignments missed when Student was out of class. Principal also testified about providing behavior rewards through the school store (and through a separate BES store) and experiences that Student could earn. Principal sought to focus on de-escalation of Student and understandably did not endorse the BIP's plan to put Student in a room where Student was to sit and “be bored” until acquiescing through communication or returning to class.

In addition, at Public School Student had access in the classroom to noise-cancelling headphones, a “kickband” on some desk legs, and “wobblers” on certain chairs. The team decided to involve Student in the process by using behavior trackers, but they were not effective, as Student ripped up the trackers. On balance, the undersigned is not persuaded that there was a failure to substantially implement Student's IEP based on the steps Public School took to implement the BIP. For the reasons discussed above, this asserted failure to implement the BIP would at most amount to a *de minimis* violation.

(b) Provision of BSS. Turning to BSS, Student's 4/11/19 IEP required 120 minutes/month of BSS outside general education until the 2/14/20 IEP took effect and required not only 120 minutes/month outside general education, but another 120 minutes/month inside general education as well. In calculating whether the related services minutes were provided, care must be taken to determine whether the school is responsible for minutes not provided or whether the child was absent or school holidays were involved. Specifically, in *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), the court held that related services sessions missed due to “snow days, holidays, [student's] absence from school, and the like” were not counted toward failure to implement the IEP, while *Joaquin v. Friendship Pub. Charter Sch.*, Civ. No. 14–01119, 2015 WL 5175885, at *8 (D.D.C. 2015), makes clear that services simply need to be offered to a

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student, even if the student “would not have been present to receive any” of them. *See also Letter to Balkman*, 23 IDELR 646 (OSEP 4/10/95) (does not require missed services due to student absences to be made up, but does require provider or student unavailability for school functions to be made up).

Here, based on the principles above and careful review of DCPS’s BSS service trackers for Student, it is clear that from August through December 2019, DCPS failed to provide 185 out of 450 minutes of BSS that should have been provided based on Student’s IEP. This amounts to a failure to provide 41% of the BSS needed by Student during this critical time. The picture significantly changed for the January to March 2020 period, however, when Student was provided with 30 extra minutes on top of the 425 minutes of BSS that were due, which DCPS would propose to combine with the 2019 figures for a total of 155 minutes missed out of a 2019/20 total from August to March of 975 BSS minutes. This broader calculation yields a deficit of only 16%, rather than the 41% noted above.

The undersigned is persuaded that the August to December 2019 period is most relevant for this analysis, for as discussed elsewhere in this HOD, this is the timeframe when Student most needed assistance and attention to get on the right path. Moreover, it is clear from DCPS’s service trackers that Student started off positively with BSS in September and then appears to have gone downhill in subsequent months. It was during this time of settling into the new school at the new level that Student most needed BSS and that was exactly when DCPS failed to provide it. By December, Student’s trial period in the BES program was underway with the attention and assistance that brought Student. Extra time early in 2020 could not make up for or offset the time missed in 2019 when the services might have made a significant difference to Student’s trajectory.

Based on relevant caselaw in this jurisdiction, the failure to provide 41% of services is undeniably a material deviation from Student’s IEP and a denial of FAPE. *See Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*); *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material). This Hearing Officer would also consider the broader calculation yielding a 16% deviation to be a material violation as well, but that is obviously a closer question that needs not be determined here. This denial of FAPE is addressed in the award of compensatory education below, where compensatory education is covered by 230 hours of tutoring, 20 hours of mentoring, and 20 hours of counseling already authorized by DCPS.

Issue 2: *Whether DCPS denied Student a FAPE by failing to revise the 4/11/19 IEP by increasing BSS and hours of specialized instruction as of September 2019 due to lack of appropriate educational progress. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which met its burden of persuasion as to specialized instruction, but not BSS, as discussed below. The applicable legal standard for analyzing the appropriateness of an IEP was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was “reasonably calculated to enable a child to

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make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. Here, Petitioner raises the issue of whether Public School should have realized soon after Student began attending there that changes were required in Student's IEP pursuant to 34 C.F.R. § 300.324(b) in order to achieve a FAPE. An analysis of Public School not acting to modify Student's IEP is conducted by considering the specific concerns raised by Petitioner in turn.⁷²

Behavior Support Services. "Related services" must be provided if required to assist a student with a disability in benefiting from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). The issue here is whether the 120 minutes/month of BSS provided from the start of 2019/20 until the IEP was amended on 2/14/20 was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, so that Student was able to access the curriculum to advance toward meeting Student's annual goals pursuant to 34 C.F.R. § 300.320(a)(4).

It is easy to view Student's unsuccessful beginning at Public School in 2019/20 and conclude in retrospect that Student could have benefited from more BSS, even though the issue is not to be viewed in hindsight. *Z.B.*, 888 F.3d at 524 (measure and adequacy of IEP to be determined at time offered to Student). As noted in the prior issue, Student was supposed to receive 120 minutes/month of BSS, but did not. Instead, Student missed some 185 out of the 450 minutes of BSS that should have been received through December, which the undersigned was persuaded in Issue 1 was a material deviation from full implementation of Student's IEP. In this issue, DCPS has the burden of persuasion that 120 minutes/month of BSS was sufficient for Student if it all had been provided, but DCPS failed to meet its burden.

This Hearing Officer instead concludes that not only the full 120 minutes/month was needed, but no less than 180 minutes/month should have been provided on Student's IEP prior to the further step-up to 240 minutes/month in the 4/11/20 IEP. Given the very serious impact that Student's behavior had on Student's academics and education, the undersigned views this as a substantive violation and a denial of FAPE. Just as above, this denial of FAPE is addressed in the award of compensatory education below, where compensatory education is covered by the counseling, mentoring and tutoring hours already authorized by DCPS.

Specialized Instruction. Turning to specialized instruction, Student was bright and capable, but urgently needed to have behaviors under better control. Student didn't need a bump up from 30 minutes/week of specialized instruction to a few hours/week of push-in or pull-out of general education. When the change in specialized instruction came, it followed the trial period in the BES classroom and was an increase all the way to 22.5 hours/week so

⁷² 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. Procedural violations were not specifically raised herein.

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Student could continue in the BES program beyond the trial period. With the 4-6 weeks needed for a student to settle in at Public School and the teachers to get to know the students and their capabilities, it could not be expected that Public School would have taken immediate action to move towards the BES program in September, and maybe not even in October as Public School tried to figure out how best to serve Student and address Student's needs.

Indeed, based on the experience of the undersigned, "trials" of self-contained classrooms are not usual, but was used here by late November to try to make the best of Student's challenging situation. Following the BES classroom trial, Student's team – including Parent and even Student – favored the BES program going forward as a way Student could have more success and a better educational experience. Thus, DCPS met its burden on the reasonableness of the minimal specialized instruction hours until Student could join the self-contained BES program. The undersigned finds no violation here.

Issue 3: *Whether DCPS denied Student a FAPE by failing to comprehensively and timely evaluate Student as of September 2019 by conducting (a) an FBA and/or (b) an occupational therapy assessment. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did meet her burden on the issue of assessments, for Student clearly needed an FBA to be conducted sooner than it was in February 2020, and needed an occupational therapy assessment no later than requested in February 2020.

The importance of assessing children in all areas of suspected disability was emphasized the D.C. Circuit in *Z.B.*, 888 F.3d at 518, *quoting* 20 U.S.C. § 1414(b)(3)(B). The Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments could have substantive effects by preventing the IEP team from obtaining necessary information about the student. Of course, on the other hand, the recent decision in *Jackson v. Dist. of Columbia*, CV 19-197 (DAR), 2020 WL 3318034, at *17 (D.D.C. June 2, 2020), *report and recommendation adopted*, CV 19-197 (TJK), 2020 WL 3298538, at *1 (D.D.C. June 18, 2020), noted that under the IDEA, "it is not necessary that every requested test is administered. . . ." Decisions on the areas to be assessed are to be made based on the suspected needs of the child. *Z.B.*, 888 F.3d at 518.

(a) **FBA.** Considering the FBA first, 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. Here, Student had a BIP from 4/23/18, but lacked an FBA on which the BIP should have been developed. Indeed, an FBA was not conducted for Student until 4/10/20, long after it was needed. Even if, as it claims, Public School did not receive an FBA from Prior Public Charter School at the start of 2019/20 and had to conduct an FBA itself in due course, it should have been provided fairly early in 2019/20 when Student's behaviors were worsening.

The failure to conduct an FBA in Fall 2019 and develop a thorough BIP from it caused a deprivation of substantial educational benefit to Student by not providing as much

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support as appropriate for Student's behavioral needs, which if carried out properly could have greatly assisted Student's learning and education. Thus, the undersigned determines that this is a substantive violation and a denial of FAPE pursuant to 34 C.F.R. § 300.513(a); *see also Z.B.*, 888 F.3d at 524. This denial of FAPE contributes significantly to the compensatory education awarded below, which is again covered by the services already authorized by DCPS.

(b) Occupational Therapy Assessment. As noted above, related services are to be provided if required to assist a student with a disability in benefiting from special education. *See* 34 C.F.R. § 300.34(a). It is not clear whether Student needs occupational therapy services at this point. The question here is whether an assessment should have been conducted earlier and is now required.

Occupational Therapist was persuasive about the need for an occupational therapy assessment based on her expert review of the record and specific references in the documents, even though Occupational Therapist had not seen Student. Occupational Therapist based her conclusion on the need to rule out sensory processing and self-regulation issues, as Student consistently sought out physical movement and chewed on inedible items, along with seeking control over the environment and many other possible indicators. In addition, Occupational Therapist emphasized the low average Visual Spatial result, which was notably out of line with Student's other WISC-V scores.

On the other hand, Public School's occupational therapist reportedly observed Student and didn't think Student needed an assessment, but there was no information in the record from the school occupational therapist about specifics to be able to understand – much less test – that bald assertion. Principal did testify that she didn't think an assessment was needed, but occupational therapy is admittedly not her area of expertise. Accordingly, the undersigned is persuaded that an occupational therapy assessment is necessary to ensure Student is not denied the occupational therapy services required for a FAPE.

In sum, the undersigned concludes that Petitioner did meet her burden on the issue of the need for an occupational therapy assessment, which is ordered below. As indicated in footnote 3 above, compensatory education is reserved as to any delay in receiving occupational therapy services, as an appropriate award depends on whether or not Student is found to need occupational therapy services.

Remedies

Having analyzed and resolved the issues in this case, what remains is to consider appropriate remedies that flow from the denials of FAPE. One remedy is that DCPS is ordered below to authorize a comprehensive occupational therapy assessment, including a sensory profile, and to convene an IEP team meeting to review the report promptly when completed and update Student's IEP as needed. For the rest, compensatory education is awarded to make up for the denials of FAPE found above, although this case is in an unusual posture, for DCPS has already authorized the large majority of services that Petitioner is seeking as compensatory education.

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

Here, the failure to provide all the BSS required by Student’s IEP as found in Issue 1 and the failure to increase the level of BSS needed by Student as found in Issue 2 are not remedied simply by making up hours of counseling. To restore Student to the position in which Student should be but for the denials of FAPE takes a considerable amount of tutoring, as well as mentoring and counseling. Similarly, the months-long delay in conducting an FBA impacts not only counseling and mentoring, but requires significant amounts of independent tutoring as well. However, the undersigned determines that no additional compensatory education need be awarded beyond that already authorized by DCPS, other than gymnastics as discussed below.

Educational Advocate testified that the compensatory education hours sought in her Compensatory Education Proposal would put Student in the position Student should have been but for the denials of FAPE in this case. However, the 288 hours of tutoring sought by Petitioner have been trimmed to 230 hours herein, based on Petitioner not fully prevailing in the case (especially relating to specialized instruction in Issue 2) and 230 hours being sufficient for Student in the circumstances. DCPS did authorize the entire 20 hours of mentoring and 20 hours of tutoring sought by Petitioner, which are appropriate. DCPS did not authorize gymnastics, which were sought by Petitioner, but this Hearing Officer was persuaded by the testimony of Parent and Educational Advocate to authorize 20 hours to improve learning and memory and help restore Student to the appropriate position.

These determinations by the undersigned have been carefully analyzed and specifically tailored to address Student’s unique needs as a matter of equity, as “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 18 months, although the undersigned encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without undue delay.

ORDER

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

- (1) Within 10 business days, DCPS shall authorize an IEE for a comprehensive

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occupational therapy assessment of Student, including a sensory profile, and convene Student’s IEP team within 10 business days after receiving the completed assessment report to review the report and revise Student’s IEP as needed.

- (2) Petitioner has already received authorization from DCPS for appropriate compensatory education, as discussed above, relating to tutoring (230 hours), counseling (20 hours), and mentoring (20 hours), which authorization shall be extended to 18 months from the date of this HOD. In addition, DCPS within 10 business days shall provide a letter of authorization for 20 hours of gymnastics classes (private or group, virtual or in-person) from Integrity of Self Movement Arts or a comparable provider chosen by Petitioner; all hours are to be used within 18 months. Any unused hours shall be forfeited.
- (3) A claim for compensatory education due to the future completion of the occupational therapy assessment shall be reserved for subsequent resolution.

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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