

**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
June 04, 2019

<i>Student</i> , ¹)	Case No.: 2019-0085
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 6/4/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 5/20/19 & 5/23/19
("DCPS"),)	ODR Hearing Room: 423
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student had not been provided an appropriate Individualized Education Program ("IEP") and was insufficiently evaluated. DCPS responded that the IEP and initial evaluation were appropriate.

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 3/22/19, the case was assigned to the undersigned on 3/25/19. Respondent filed a response on 4/11/19, which did not challenge jurisdiction. The 30-day resolution period ended on 4/21/19. A final decision in

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

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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 6/5/19.

The due process hearing took place on 5/20/19 and 5/23/19 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. By agreement of the parties, Petitioner participated by telephone and only during her testimony.

Petitioner’s Disclosures, submitted on 5/13/19, contained documents P1 through P34, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 5/13/19, contained documents R1 through R86, which were admitted into evidence except for (a) R18, R42 and R44p145-152,² which were withdrawn by Respondent, and (b) R62, to which Petitioner’s objection was sustained. Numerous other pages (largely listed in Petitioner’s objections) are being redacted for the record post-hearing due to disclosure of another student’s name.

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

1. *Educational Advocate A* (qualified as an expert in Psychology and Neuropsychology, with no position taken by DCPS)
2. *Educational Advocate B* (qualified as an expert in Special Education Programming and Placement, with no position taken by DCPS)
3. Parent

Respondent’s counsel presented 5 witnesses in Respondent’s case, all from *Public School* (*see* Appendix A):

1. *School Social Worker* (qualified without objection as an expert in School Social Work)
2. *Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
3. *School Psychologist* (qualified without objection as an expert in School Psychology)

² References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages, separated by commas). By contrast, Respondent’s documents are consecutively page numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the page number(s), omitting any leading zeros.

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4. *Special Education Teacher* (qualified over objection as an expert in Special Education)
5. *LEA Representative* (qualified without objection as an expert in Special Education Programming)

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 on or after 3/8/19, due to lack of (a) appropriate goals, services and supports, (b) assistive technology, (c) transportation services, and/or (d) appropriate consideration of data concerning Extended School Year (“ESY”) services. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to conduct a comprehensive initial evaluation of Student when it did not (a) conduct an adaptive assessment in light of Student’s low cognitive functioning, (b) assess Student’s executive functioning deficits, and/or (c) conduct an assistive technology evaluation. *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 business days, DCPS shall amend Student’s IEP to provide for (a) transportation as a related service, (b) goals and services to address Attention Deficit Hyperactivity Disorder (“ADHD”) characteristics, (c) revised academic goals, (d) assistive technology, and (e) additional supports and services to enable Student to access the curriculum in all courses.
3. DCPS shall provide ESY and/or fund independent tutoring and occupational therapy services for the summer of 2019.
4. DCPS shall conduct (a) an adaptive assessment, (b) a BRIEF or other instrument to address Student’s executive functioning deficits, and/or (c) an assistive technology evaluation.
5. DCPS shall provide compensatory education for any denials of FAPE.³

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 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 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

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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.⁵ Student is *Age*, *Gender* and in *Grade* at Public School, where Student began in 9/2018.⁶ Student is a "good kid" with no behavioral problems who is eager to learn and receive instruction.⁷

2. IEP. Student's initial IEP (the only IEP in issue) was developed on 3/14/19 with special education eligibility based on an Other Health Impairment ("OHI") disability due to ADHD or Attention Deficit Disorder ("ADD").⁸ Student's IEP provides 5 hours/week of specialized instruction inside general education and 8 hours/week of specialized instruction outside general education, along with 120 minutes/month of occupational therapy.⁹ The IEP does not provide for transportation or ESY.¹⁰ Public School staff explained that Student would receive ELA services in social studies and science, as they relate to reading and writing.¹¹

3. Cognitive. Based on the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V") conducted as part of School Psychologist's 1/14/19 psychological evaluation, Student's Full Scale IQ ("FSIQ") was in the Very Low range (standard score ("SS")=68), Student's processing speed index is in the Very Low range and verbal comprehension,

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 should be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is 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 P1-1; Parent.

⁷ School Social Worker; Special Education Teacher.

⁸ P1-1; P5-1 (eligibility); P11-17 (Student medically diagnosed with ADHD).

⁹ P1-11.

¹⁰ P1-14.

¹¹ R71p656.

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visual spatial, and fluid reasoning indices are in the Low range.¹² School Psychologist concluded that Student's academic performance is more or less congruent with cognitive ability.¹³

4. Academics. Student is 5 years behind Grade in math; iReady diagnostics at beginning-of-year and middle-of-year 2018/19 showed a full-grade increase in that period to 4 years behind Grade.¹⁴ Student's Woodcock-Johnson IV ("WJ-IV") score in the math composite was in the Very Low range (SS=67).¹⁵ Student is 5 years behind Grade in reading and comprehension, based on a Reading Inventory assessment in 2018/19.¹⁶ Student's WJ-IV score in the reading composite was in the Low range (SS=78).¹⁷ Student is 4 years behind Grade in written expression; Student's WJ-IV score in the written expression composite was in the Low range (SS=75).¹⁸

5. Student received grades of "F" in nearly all substantive courses in 2018/19, which teachers credit to excessive absences and very late tardies.¹⁹ In science, world geography & cultures, language arts, and math, Student received all "Fs" in Term 1, Term 2, and Term 3 (except for a "D" in science); Student did much better in health/PE, music and art.²⁰

6. Goals. Educational Advocate B criticized an IEP math goal relating to long division at Student's Grade level; Special Education Teacher asserted that it was "absolutely appropriate" because working on long division would practice and reinforce Student's multiplication and subtraction skills at the same time.²¹ Special Education Teacher also considered Student's second math goal of solving for a variable to be "appropriate and attainable" within the full calendar year the IEP would be in effect.²² LEA Representative explained that the first reading goal was on an "independent" level, meaning Student's reading level; Educational Advocate B criticized the second reading goal of reading passages with teacher-selected words as likely to cause Student frustration and confusion.²³ Educational Advocate B criticized Student's writing goal for requiring a 4-paragraph essay given Student's reading level; the baseline stated that Student can now develop a single paragraph.²⁴

¹² P11-1,5,17.

¹³ P11-17.

¹⁴ P1-3; R71p653.

¹⁵ P1-3; P11-16 (also Very Low on the Wechsler Individual Achievement Test ("WIAT")).

¹⁶ P1-4.

¹⁷ P1-5; P11-16 (also Low on the WIAT).

¹⁸ P1-6,7; P11-16 (also Low on the WIAT).

¹⁹ P8-1.

²⁰ R83p687,688.

²¹ Educational Advocate B; Special Education Teacher; P1-3.

²² Special Education Teacher; P1-4.

²³ LEA Representative; Educational Advocate B; P1-5.

²⁴ Educational Advocate B; P1-8.

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7. Parent's advocates urged that the IEP goals should be attainable.²⁵ Educational Advocate B testified that she expected behavior support goals to be included in the IEP; Student does not need to be acting out to have behavioral support services ("BSS") on the IEP.²⁶ School Psychologist explained that BSS was not needed on Student's IEP in the absence of depression, anxiety, aggression or behavioral concerns.²⁷ The goals on Student's IEP were what Student needed for an effective education plan.²⁸ Petitioner's counsel did not seek the addition of goals to address ADHD concerns until after the IEP was finalized.²⁹

8. Services/Supports. School Psychologist noted that the Other Classroom Aids and Services in Student's IEP directly addressed ADHD concerns, with movement breaks between assignments and varied seating in the classroom; Special Education Teacher testified that the classroom accommodations and assessment accommodations were appropriate in Student's IEP.³⁰ The team discussed and agreed with the accommodations for Student.³¹ School Social Worker agreed with the programming for Student, including instruction, setting and accommodations to support Student.³²

9. ESY. Public School staff recommended summer school for Student instead of ESY, based on the fact that Student had missed half or two-thirds of the school year with absences and very late tardies but still was able to make progress; school staff calculated that Student has been present for only 43 full days of school out of 127 school days (as of 3/14/19), but had not demonstrated any regression on critical skills.³³ OSSE policy on ESY requires reliance on at least 3 months of progress monitoring data from the current school year, which demonstrates progress towards or away from achievement of a specified IEP goal, or any relevant data for those (like Student) recently determined eligible for special education.³⁴

10. LEA Representative concluded that Public School had sufficient data for determining that no ESY was needed for Student.³⁵ Student is able to retain information; Student has not shown regression over school breaks.³⁶ As noted, Student has not shown regression, but some growth, despite missing half the school year.³⁷ Parent's advocates were concerned about the lack of special education services at summer school.³⁸ Students in

²⁵ P4-2.

²⁶ Educational Advocate B.

²⁷ School Psychologist.

²⁸ *Id.*

²⁹ R71; P2; P4; P25-1,2.

³⁰ School Psychologist; Special Education Teacher; P1-11,13.

³¹ School Social Worker; P1-11.

³² School Social Worker.

³³ R71p656; P24-1; P4-2.

³⁴ P29-3; Educational Advocate B.

³⁵ LEA Representative.

³⁶ Special Education Teacher.

³⁷ LEA Representative.

³⁸ P4-2.

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summer school receive support and are taught at their level; general education teachers are trained to keep children like Student in mind.³⁹ Student has been retained in Student's current grade for 2019/20.⁴⁰

11. Behavior. Student has no problematic behaviors at issue; Student received 16 demerits and 648 merits in 2018/19, as of 1/14/19.⁴¹

12. Absences. Student is "chronically absent and tardy," so misses key math, reading and writing concepts and opportunities to reinforce math, reading and writing skills.⁴² Student had a "very high" number of absences and late-in-the-day tardies both in 2018/19 and in previous school years.⁴³ Student's IEP Progress Report dated 4/10/19 noted that Student is "often not available" for learning due to absences.⁴⁴ Student missed the 76th day of school in 2018/19 on the first day of the due process hearing, 5/20/19.⁴⁵

13. Student is available for learning when present at school.⁴⁶ The IEP team found that Student made progress in math and reading, despite only being available for about a third of the school days.⁴⁷ Public School raised concerns about absences early in the school year.⁴⁸ Parent responded to a text message from staff on 11/1/18 stating that Student was missed and asking if all was OK by saying, "Yes and u don't have to keep contacting me everytime [Student] not in school."⁴⁹

14. Parent attempted to dispute the number of absences, asserting that many absences were actually for doctor's appointments and that the school's record-keeping was inaccurate; Parent explained that she had been in the hospital and sick a lot, which impacted Student since she did not trust Student to go to school without her.⁵⁰ Petitioner's counsel wrote on 2/12/19 that the "vast majority" of Student's absences were due to medical issues or illness, mentioning Student's evaluations by a medical provider and discussing Parent's hospitalizations; School Social Worker noted that there was no evidence supporting the vast majority of absences being the result of Student's issues.⁵¹ The Public School system for

³⁹ Special Education Teacher.

⁴⁰ R78p674; LEA Representative.

⁴¹ School Social Worker; P1-2; P11-2; P11-16 (BASC indicates few behavioral concerns).

⁴² P1-3,5,7; R74 (attendance list); R75; R76; R77.

⁴³ P8-1 (2/12/19 PWN on eligibility).

⁴⁴ R36p102.

⁴⁵ Special Education Teacher.

⁴⁶ School Social Worker.

⁴⁷ R71p653.

⁴⁸ P18-2 ("severe absences" impacting Student by 10/31/18).

⁴⁹ R44p142 (sic).

⁵⁰ Parent; P18-1 (Student not excused because Parent was sick).

⁵¹ R55p430; School Social Worker.

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recording merits and demerits includes the date of data entry, not the date of the behavior, so does not confirm when Student was at school.⁵²

15. Transportation to School. The address with which Parent enrolled Student is 3 blocks from school, but Student was rarely seen walking to school by staff who greet students in front of the school.⁵³ Parent told school staff that Student lived less than a 5-minute walk to school.⁵⁴ At times, Parent and Student have stayed with other family members who lived further from Public School.⁵⁵ Parent does not permit Student to go anywhere by self, due to not paying attention.⁵⁶ Parent sought transportation to school for Student based on OSSE Criteria 2, due to her belief that Student was not safe crossing streets and cannot find the way and would get lost even walking the same few blocks to school.⁵⁷ Special Education Teacher offered to walk Student to school, but was rebuffed by Parent.⁵⁸

16. School staff has a very different understanding of Student's capabilities; Public School staff believes that Student does not need constant adult supervision based on observation on field trips and in the community; Student is able to take Uber or Lyft regularly without adult supervision, which often requires crossing the street, and sometimes took public transportation.⁵⁹ On a field trip to the zoo (1 of 7 or 8 field trips this year), 22 children had only 2 adults supervising (Special Education Teacher and another) and Student could get food, look at exhibits, go to the bathroom, etc.⁶⁰ Student leaves school with younger sibling every day who Student is responsible for getting home safely; Student has the ability to cross streets and get home at the end of the day without greater risk of harm than peers.⁶¹

17. Student's IEP team worked through Student's eligibility for Structured Transportation Support and concluded that Student did not qualify for transportation, as Student did not need constant adult supervision, did not have a documented deficit in assessing risk or a history of dangerous behavior, among other factors.⁶² Student is able to navigate public spaces and Special Education Teacher had no safety concerns for Student.⁶³ Student is independent in the school building and able to independently transition among classes and activities throughout the school and outside school.⁶⁴ The Conner's scale

⁵² LEA Representative; P21.

⁵³ R71p654; School Psychologist.

⁵⁴ R44p141.

⁵⁵ Parent; Educational Advocate B.

⁵⁶ Parent.

⁵⁷ Parent; Educational Advocate B; P4-1,3; P22-6.

⁵⁸ Special Education Teacher.

⁵⁹ P4-3; P23-1; R50p409; School Social Worker; Special Education Teacher.

⁶⁰ Special Education Teacher.

⁶¹ School Psychologist.

⁶² R71p657; P23-1.

⁶³ Special Education Teacher.

⁶⁴ P23-1.

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indicated that Student was elevated (teacher) or very elevated (Parent) on inattention; School Psychologist testified that this had little relevance to Student crossing the street, as inattention in class differs from attention needed to cross a street.⁶⁵

18. Assistive Technology. Educational Advocate B testified that assistive technology should be considered due to Student's ADHD and low academic functioning; various assistive technology products are designed for children with ADHD, such as time management with built in timers and buzzers, and other products to address reading and writing.⁶⁶ LEA Representative testified that Public School had sufficient data based on its 1/2019 psychological evaluation not to need an assistive technology evaluation.⁶⁷ Student's IEP stated that Student does not require assistive technology.⁶⁸ LEA Representative unpersuasively testified that Student was being provided assistive technology because Student's IEP called for lined paper, graphic organizers and sentence starters.⁶⁹

19. An OSSE document encouraging assistive technology states that it can be used to aid in the areas of reading, written composition, learning/studying/organizing; Educational Advocate B credibly testified that the OSSE list should also include math.⁷⁰ The OSSE document emphasizes assistive technology as a possible solution for written composition, if a child has difficulty composing written work, and for reading comprehension, if the child has trouble understanding what is read or difficulty paying attention to the assigned reading.⁷¹ Educational Advocate B explained that assistive technology supports are faded over time so children do not become overly dependent on the technology.⁷²

20. Adaptive Assessment. Parent's advocates sought additional adaptive testing based on Student's low cognitive scores; Public School responded that adaptive functioning was sufficiently covered in the Behavior Assessment System for Children, Third Edition ("BASC-3") and that Student was too high functioning to qualify as having an Intellectual Disability ("ID").⁷³ The 2/12/19 Prior Written Notice ("PWN") on eligibility noted that Student does not qualify for ID because Student's adaptive skills were in the Average range and Student performed in the Average to Low Average ranges on numerous cognitive and academic areas.⁷⁴ School Psychologist testified that the Average ratings in social skills in particular in the BASC disqualified Student from an ID classification.⁷⁵ In the CELF-5, Student's core language score and receptive language index were both in the Average range;

⁶⁵ P11-13; School Psychologist.

⁶⁶ Educational Advocate B.

⁶⁷ LEA Representative.

⁶⁸ P1-2.

⁶⁹ LEA Representative; P1-11.

⁷⁰ P30-5; Educational Advocate B.

⁷¹ P30-18,20.

⁷² Educational Advocate B.

⁷³ P6-2.

⁷⁴ P8-1; P8-2 (does not qualify as ID).

⁷⁵ School Psychologist; P11-10 (BASC adaptive skills almost all Average, including social skills).

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Speech-Language Pathologist credibly testified that children with ID would be at least 1 standard deviation below the mean.⁷⁶ An independent psychological evaluation in 3/2019 repeated the WISC within a month, so was invalid due to the “practice effect.”⁷⁷ The practice effect increase in FSIQ from 68 to 81 was greater than would be seen in a child with ID.⁷⁸ A further adaptive assessment is not needed to program for Student or to determine disability classification; Student has no adaptive deficits that would qualify for ID.⁷⁹

21. Executive Functioning. Educational Advocate A testified that more testing of executive functioning was needed for determining ID; the Conner’s scale indicated that Student was very elevated on executive functioning.⁸⁰ No further assessment of executive functioning is needed, as Student is clearly eligible for OHI and not ID.⁸¹ LEA Representative testified that no further adaptive or executive functioning testing was required based on the results of both psychological evaluations.⁸²

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

⁷⁶ R16p30,33; Speech-Language Pathologist.

⁷⁷ Educational Advocate A; School Psychologist.

⁷⁸ School Psychologist.

⁷⁹ *Id.*

⁸⁰ Educational Advocate A; P6-2; P11-13.

⁸¹ School Psychologist.

⁸² LEA Representative.

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of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

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

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori 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 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.

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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 IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was “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.*, 190 F. Supp. 3d at 51 (IEP must be “reasonably calculated to produce meaningful educational benefit”).

The measure and adequacy of the IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving a perfect IEP, but one reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (the 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). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.⁸³ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

As an initial matter, it should be noted that Student’s absences from school are not directly at issue, but have a significant impact on other issues in the case. At the heart of Student’s attendance problem is Parent’s understanding of her child as being incapable of navigating the world safely without getting lost or run over by traffic, despite Student’s double-digit age. The school’s experience of Student is very different. School personnel are convinced that Student is no more at risk than others Student’s age, and that the problem is simply Parent’s excessive concern which results in Parent not allowing Student to go to school much of the time.

(a) Goals, Services and Supports. The due process complaint first challenged Student’s IEP for failing to contain appropriate goals, services and supports. But a close review of the IEP convinces the undersigned that there was no violation here, as perfection

⁸³ 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 alleged in this matter.

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is not the standard. *See N.S.*, 709 F. Supp. 2d at 68 (IDEA requires IEP to include measurable annual goals). Petitioner challenged specific goals in Student's IEP, but Public School convincingly responded that the first math goal was appropriate because working on long division would practice and reinforce Student's multiplication and subtraction skills at the same time, while Student's second math goal on solving for a variable was considered appropriate and attainable within the year the IEP would be in effect.

Public School explained that the first reading goal was on an "independent" level, meaning Student's reading level, while the second reading goal of reading passages with teacher-selected words should permit teachers to determine the appropriate level of challenge for Student. Petitioner criticized Student's writing goal of a 4-paragraph essay as being unattainable, but Student can now develop a single paragraph (according to the baseline), so appears to be in the range of a challenging goal as encouraged by *Endrew F.* Parent's advocates expected behavior support goals to be included in the IEP, but School Psychologist persuasively explained that BSS was not needed in Student's IEP in the absence of depression, anxiety, aggression or behavioral concerns. Further, concerns about goals to address ADHD were not raised until after the IEP was finalized. In sum, the undersigned determines that the goals on Student's IEP were what Student needed for an effective education plan.

As for other supports and services, School Psychologist emphasized that the Other Classroom Aids and Services in Student's IEP did directly address ADHD concerns, with movement breaks between assignments and varied seating in the classroom. As Special Education Teacher explained, the classroom accommodations and assessment accommodations were appropriate in the IEP, which the team discussed and agreed with for Student. Overall, the programming for Student, including instruction, setting and accommodations, were sufficient to support Student.

(b) Assistive Technology. As discussed in Issue 2, below, the undersigned is persuaded that an assistive technology evaluation is necessary and appropriate to determine whether assistive technology is needed, given Student's ADHD and low academic functioning, where student is many years behind in reading, writing and math. However, the undersigned is not persuaded that any particular types of assistive technology are required prior to assessment, nor that there is any lack of assistive technology for Student that currently would rise to the level of a denial of FAPE.

(c) Transportation Services. As noted above, Student's lack of attendance at school has been a tremendous problem, but requiring formal transportation services must be based on more than Parent's subjective view of Student's capabilities. Here, Student apparently has been living just 3 blocks from school for much of the school year, but unable to get to school much or most of that time. Parent refuses to let Student go anywhere without an adult despite Student's age, based on her fear that Student may get lost or be unable to safely cross a street. Parent has even refused the offer of school staff to stop by and walk Student to school.

From working with Student, Public School staff has a very different understanding of Student's capabilities and does not believe that Student needs constant adult supervision

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based on staff's observation of Student on field trips and in the community, the fact that Student is able to take Uber or Lyft often without adult supervision, and sometimes takes public transportation. Indeed, staff noted that Student leaves school every day with a younger sibling who Student is responsible for getting home safely. The IEP team worked through Student's eligibility for Structured Transportation Support and concluded that Student did not qualify for transportation, which the undersigned finds persuasive based on the credible and thorough evidence presented by Public School.

(d) ESY Data. Public School staff recommended summer school for Student instead of ESY for the upcoming summer, based on available evidence from 2018/19 and the fact that Student missed a significant portion of the school year due to extensive absences and very late tardies, but still was able to make progress rather than regressing. The undersigned concurs that Public School had sufficient data for determining that ESY was not needed as Student was able to retain information and had not shown regression over school breaks. Parent's advocates were understandably concerned about the lack of special education services in summer school, but Public School staff explained that students in summer school are taught at their level, as general education teachers are trained to keep children like Student in mind.

Whether the concerns above are considered individually or as a whole, this Hearing Officer concludes that the IEP was reasonably calculated to enable Student to make appropriate progress in Student's circumstances.

Issue 2: *Whether DCPS denied Student a FAPE by failing to conduct a comprehensive initial evaluation of Student when it did not (a) conduct an adaptive assessment in light of Student's low cognitive functioning, (b) assess Student's executive functioning deficits, and/or (c) conduct an assistive technology evaluation. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on the issue of the assessments of Student only as to the need for an assistive technology assessment.

The importance of assessing children in all areas of suspected disability was emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d at 518, *quoting* 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.301. The Appellate 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 v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) ("in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable [the student] to receive educational benefits" (citation omitted)); *Hill*, 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

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Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006); *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016). The specific assessments sought by Petitioner are considered in turn.

(a) Adaptive Assessment. While Petitioner sought additional adaptive testing due to Student's low cognitive scores, Public School staff persuasively responded that adaptive functioning was sufficiently covered in the BASC and that Student was too high functioning to qualify for ID. Specifically, Public School experts explained that Student does not qualify for ID because Student's adaptive skills were in the Average range and Student performed in the Average to Low Average ranges on numerous cognitive and academic areas. School Psychologist clearly testified that the Average ratings in social skills in particular in the BASC disqualified Student from ID classification. This was confirmed by the CELF-5, in which Student's core language score and receptive language index were both in the Average range, while children with ID would be at least 1 standard deviation below the mean. Student has no adaptive deficits that would qualify for ID and the undersigned finds no violation here.

(b) Executive Functioning. Petitioner also sought more testing of executive functioning in order to determine ID, although the Conner's scale indicated that Student was very elevated on executive functioning and Student's disability classification had been determined to be OHI, with ADD or ADHD. Accordingly, the undersigned is persuaded by the clear testimony of School Psychologist that no further assessment of executive functioning was needed as Student was plainly eligible for OHI and not ID, which was supported by the results of both psychological evaluations. In short, neither further testing of executive functioning nor a further adaptive assessment was needed to program for Student or to determine disability classification.

(c) Assistive Technology Assessment. Finally, as set forth above, the undersigned is persuaded that an assistive technology evaluation is appropriate to determine whether assistive technology is needed by Student at this point, given Student's ADHD and low academic functioning in reading, writing and math. While an assistive technology assessment is not required unless something indicates it is needed, OSSE's documentation encourages assistive technology to aid in the areas of reading, written composition, and learning/studying/organizing; Educational Advocate B credibly testified that the list should include math as well. The OSSE document emphasizes assistive technology as helpful for written composition, if a child has difficulty composing written work, and for reading comprehension, if the child has trouble understanding what is read or difficulty paying attention to the assigned reading. Various assistive technology products are designed for children with ADHD, such as time management with built in timers/buzzers, and other products addressing reading, writing and math, which may be helpful for Student.

Public School staff asserted that they had sufficient data based on the 1/2019 psychological evaluation not to need an assistive technology assessment, but the undersigned was decidedly not persuaded by Public School's assertions that lined paper, graphic organizers and sentence starters were all the assistive technology that Student needed. While a large measure of Student's deficits may be due to lack of school attendance, Student – who is reportedly eager to learn – is not responsible for Parent's

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decisions not to allow Student to go to school and needs assistive technology if beneficial to address or minimize deficits.

In sum, this Hearing Officer is not persuaded that further adaptive or executive functioning testing is needed, but does order DCPS below to promptly fund or conduct an assistive technology assessment, for the inclusion of assistive technology on Student's IEP might have caused Student's education to be different and thus affected Student's substantive rights. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at *4,5 (D.D.C. 2010). Prior to the assessment, however, it is unclear whether any compensatory education is due, so compensatory education based on assistive technology is reserved as a possible future claim.

ORDER

Petitioner has prevailed on the need for a single assessment, as set forth above. Accordingly, **it is hereby ordered that:**

1. Within 10 business days, DCPS shall fund an independent assistive technology assessment or itself begin to conduct the assessment, at DCPS's option.
2. A possible claim for compensatory education based on the assessment ordered herein, and any resulting impact on the services needed by Student, is reserved for a future proceeding if not informally resolved by the parties.

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)

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Contact.resolution@dc.gov