

**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 09, 2023

<i>Student</i> , ¹)	Case No.: 2023-0016
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 6/9/23
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	5/30/23, 5/31/23 & 6/6/23
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 DCPS's failure to implement Student's Individualized Education Program ("IEP"), and evaluate Student as needed. Despite authorizing some independent services, DCPS responded that there were no IDEA violations or denials 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 A30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 2/2/23, the case was assigned to the undersigned on 2/3/23. Respondent filed a response on 2/14/23 and did not challenge jurisdiction. A resolution meeting took place on 2/15/23, but the parties did not settle the

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics. Personal pronouns and other terms that would indicate Student's gender are omitted.

Hearing Officer Determination

Case No. 2023-0016

case or shorten the 30-day resolution period, which ended on 3/4/23. 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 6/17/23.

A prehearing conference was held on 3/22/23 and the Prehearing Order was issued that same day, addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The scheduled due process hearing on 4/10/23 and 4/11/23 was postponed on 4/10/23 due to the illness of Petitioner’s counsel and rescheduled; it occurred on 5/30/23, 5/31/23 and 6/6/23. The hearing was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in the hearing.

Documents and Witnesses

Petitioner’s Disclosure, submitted on 4/3/23, contained documents P1 through P34, all of which were admitted into evidence without objection. Respondent’s Disclosure, also submitted on 4/3/23, contained documents R1 through R28, all of which were admitted into evidence without objection.²

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

1. *Private Occupational Therapist* (qualified over objection as an expert in Occupational Therapy and Assistive Technology)
2. Parent
3. *Educational Advocate* (qualified over objection as an expert in IEP Programming and Evaluations)

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

1. *School Occupational Therapist* (qualified without objection as an expert in School-Based Occupational Therapy)
2. *Special Education Teacher* (qualified without objection as an expert in Special Education Programming)
3. *Physical Therapist* (qualified without objection as an expert in School-Based Physical Therapy)

² Citations herein to the parties’ documents are identical except that Petitioner’s documents begin with a “P,” while Respondent’s documents begin with an “R,” followed by the exhibit number and then a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits), with any leading zeros omitted.

Hearing Officer Determination

Case No. 2023-0016

4. *Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)

Petitioner's counsel submitted no rebuttal evidence.

Issues and Relief Requested

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

Issue 1: Whether DCPS denied Student a FAPE by failing to implement Student's IEP from 8/29/22 to 1/26/23 by providing (a) 25.5 hours/week of specialized instruction, (b) 4 hours/month of speech-language services, (c) 4 hours/month of occupational therapy, and (d) introduction of all goals, when DCPS lost Student's IEP and was instead implementing another child's IEP for Student. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student by providing (a) assistive technology and (b) physical therapy evaluations, as well as completing other evaluations when Student began at Public School in 2022/23³ after *other schooling*. (*Petitioner has the burden of persuasion on this issue.*)

Relief Requested by Petitioner

1. A finding that Student has been denied a FAPE.
2. DCPS shall conduct and review comprehensive (a) assistive technology and (b) physical therapy evaluations in a timely manner.
3. DCPS shall convene the IEP team to review the results of the evaluations in the prior paragraph and revise Student's IEP as appropriate in a timely manner.
4. DCPS shall fund compensatory education for any denials of FAPE.
5. Any other just and reasonable relief.

Findings of Fact

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

³ All dates in the format "2022/23" refer to school years.

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.

Hearing Officer Determination

Case No. 2023-0016

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age*, *Gender*, and in *Grade* during 2022/23 at *Public School*, after being schooled outside DCPS since 2019.⁶ Student is a happy, kind child.⁷

2. Student is non-verbal, but often makes vocalizations, points and is proficient with a high-tech Augmentative and Alternative Communication ("AAC") device.⁸ Student is very motivated to complete work to obtain a chosen reward, often earning time using an iPad.⁹ Student seeks out adults and their electronics; Parent suggested that Student is "addicted" to the iPad.¹⁰ Student performs well below grade level in reading, math and writing.¹¹

3. IEPs. When Student enrolled in Public School in 2022/23, Student's most recent IEP was dated 4/12/19 (the "2019 IEP") which classified Student with the disability of Autism Spectrum Disorder ("ASD") and provided 25.5 hours/week of specialized instruction, 4 hours/month of speech-language services, and 4 hours/month of occupational therapy, all outside general education, along with 30 minutes/month of physical therapy consultation services.¹²

4. A child with the same first and last names as Student (but a different middle name), who was born in the same month of the same year as Student, and had the same disability classification (ASD) as Student, received an IEP dated 7/7/22 that provided 28 hours/week of specialized instruction, 4 hours/month of speech-language services, and 4 hours/month of occupational therapy, all outside general education.¹³ The other child's last eligibility meeting was 3/15/22.¹⁴ The other child's 7/7/22 IEP (the "2022 IEP") inexplicably included Student's local and universal identification numbers, as well as the name of Student's mother, and noted that the other child was trialing a high-tech speech generating device.¹⁵

5. An IEP was developed at Public School for Student on 1/12/23 (the "2023 IEP") which provided 25.5 hours/week of specialized instruction, 4 hours/month of speech-language services, and 4 hours/month of occupational therapy, all outside general education, and noted that Student was using a high-tech speech generating AAC device.¹⁶

6. Return to DCPS; Confusion over IEP. Before Student began 2022/23 at Public School, Parent emailed LEA Representative on 8/8/22 noting that Student's last IEP had

⁵ Parent.

⁶ Parent; P4p40-41.

⁷ P10p149.

⁸ P5p58.

⁹ R10p105-06.

¹⁰ P5p62.

¹¹ P5p73.

¹² P8p100,117.

¹³ P9p123,134; P8p100.

¹⁴ P9p123.

¹⁵ P9p123; P8p100.

¹⁶ P10p155.

Hearing Officer Determination

Case No. 2023-0016

been 2 years earlier, and that due to Student's schooling outside DCPS from 2019, she was not sure where Student stood on testing; Parent had been told that school staff would re-evaluate Student.¹⁷

7. On 8/11/22, Parent sought to email LEA Representative a "more recent" IEP for Student; LEA Representative responded that Parent had sent the last eligibility determination instead of the IEP and that LEA Representative would try to get Student's most current IEP from another source.¹⁸

8. On 9/17/22, after back-to-school night, Parent emailed LEA Representative asking about the effort to get Student's latest IEP and how the evaluation process is completed.¹⁹ LEA Representative responded on 9/19/22 with the 7/7/22 IEP that was in the records and asked Parent to review it.²⁰ Parent responded on 9/19/22 that the IEP was not for her child; LEA Representative asked if Parent had a copy of Student's IEP.²¹

9. On 10/24/22, DCPS's counsel acknowledged that there was an issue with Student's records in SEDS and that OSSE had been notified on 9/8/22; OSSE opened an investigation into Student's records and as of 10/21/22 the issue was still being investigated.²² On 10/25/22, Parent's counsel offered DCPS a few documents that Parent was able to provide, including Student's 2019 IEP.²³

10. Public School treated the 7/7/22 IEP as Student's IEP from near the beginning of 2022/23 through the fall.²⁴ School staff testified that at the start of the school year they had no reason to think the 2022 IEP was not Student's or that it was wrong.²⁵ Public School provided Student with 25.5 hours/week of specialized instruction outside general education (the maximum at Public School) in a CES classroom, and 4 hours/week of occupational therapy outside general education.²⁶ All occupational therapy hours due during the period at issue were provided to Student or otherwise accounted for due to holidays, Student's unavailability, and the like.²⁷

11. Student made progress in 2022/23 and is engaging with work and attending to tasks; Student doesn't get up and move to screens in the room, and works with the token board.²⁸

¹⁷ P17p185.

¹⁸ P18p189-90.

¹⁹ P19p194.

²⁰ *Id.*

²¹ P19p193-94.

²² P27p219.

²³ P27p218.

²⁴ R7p76 (IEP not available on 9/2/22 to provide occupational therapy services, but services provided on 9/6/22).

²⁵ School Occupational Therapist; Special Education Teacher.

²⁶ Special Education Teacher; School Occupational Therapist; R10p109.

²⁷ Special Education Teacher; School Occupational Therapist.

²⁸ Special Education Teacher.

Hearing Officer Determination

Case No. 2023-0016

Student has made progress on academic concerns, focusing on comprehension in reading and counting quantities in math.²⁹ Student was working on appropriate skills beyond those in the 2022 IEP.³⁰

12. Suitability of Goals in 7/7/22 IEP. Special Education Teacher credibly testified that he spends the early weeks of each school year getting to know the needs and limitations of the children in his CES classroom; it is common for children to have regressed or progressed since development of their IEPs; Special Education Teacher tailors his teaching to the needs of each student.³¹ Student was in a CES classroom totaling 7 student (which dropped to 6 during the year), with a teacher and 2 aides.³²

13. The first math goal in the 7/7/22 IEP focused on identifying numbers from 1-20; Educational Advocate testified that Student also had deficits with numbers, while Special Education Teacher plainly stated that the goal was not appropriate as Student had already mastered it and was able to do much more, so Special Education Teacher worked on more suitable goals with Student.³³ The other math goal in the 2022 IEP on completing a learning task was found appropriate by Special Education Teacher, while Educational Advocate didn't know if it was helpful.³⁴

14. The first reading goal in the 2022 IEP was to identify letters of the alphabet, about which Educational Advocate testified that Student had no deficit now but he did not know if there was a deficit at the beginning of 2022/23; Special Education Teacher was clear that the goal was not appropriate, so he had moved Student on to comprehension.³⁵ The other reading goal in the 2022 IEP was to listen to a story and show print concepts by turning pages and following prompts; Educational Advocate did not know if there were deficits at the beginning of 2022/23, while Special Education Teacher was clear that the goal was proper.³⁶

15. The single adaptive/daily living goal on attending to work without tantrum behaviors was considered inappropriate by Educational Advocate who testified there was no issue with tantrums, while Special Education Teacher found the goal appropriate based on Parent's concern about tantrums at home.³⁷ The single motor skills/physical development (occupational therapy) goal of developing improved visual motor and fine motor skills was found appropriate by School Occupational Therapist and matched what School

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ P9p126; Educational Advocate; Special Education Teacher.

³⁴ P9p127; Educational Advocate; Special Education Teacher.

³⁵ P9p128; Educational Advocate; Special Education Teacher.

³⁶ *Id.*

³⁷ P9p129; Educational Advocate; Special Education Teacher.

Hearing Officer Determination

Case No. 2023-0016

Occupational Therapist saw in Student in person.³⁸ The goals and skills on which Student was working at the beginning of 2022/23 were appropriate.³⁹

16. In the IEP Progress Report dated 11/16/22, several goals from the 2022 IEP were listed as mastered.⁴⁰ In the IEP Progress Report dated 2/1/23 for Reporting Period 2, new academic goals and daily living goals had been added which were just introduced; speech-language was not introduced due to lack of a speech-language pathologist; Student was progressing on other goals.⁴¹ The occupational therapy goals were somewhat general, but applied to specifically fit Student.⁴²

17. Evaluations. Students are not evaluated upon first coming to a school, as school staff needs to work with the student and talk with team and parent before moving forward with evaluations.⁴³ Upon returning to DCPS, Student needed to be observed to determine baselines.⁴⁴ From the beginning of 2022/23, Public School used informal classroom assessment and formal assessments such as iReady, along with observations, to determine Student's needs.⁴⁵ Observations over the first 3 months of 2022/23 provided insight into Student's particular activities of daily living ("ADL") needs.⁴⁶

18. Parent made a formal request through counsel on 10/4/22 for comprehensive evaluations, seeking comprehensive psychological, speech-language, occupational therapy, physical therapy and assistive technology evaluations.⁴⁷ An Analysis of Existing Data ("AED") was conducted by Public School on 12/1/22 and Student's team agreed to conduct a comprehensive psychological, speech-language, and occupational therapy evaluations; the reports were not available until after the 1/12/23 IEP was finalized.⁴⁸ A comprehensive psychological re-evaluation of Student was completed on 1/31/23 and determined that Student continued to meet the criteria for ASD, and the data suggested that Student met the criteria for moderate Intellectual Disability ("ID") as well.⁴⁹ An occupational therapy re-evaluation of Student at Public School was concluded on 1/17/23.⁵⁰ A speech-language re-evaluation was completed on 2/13/23; Student continued to present with severe delays in global communication skills.⁵¹

³⁸ School Occupational Therapist.

³⁹ Special Education Teacher.

⁴⁰ R5.

⁴¹ R6p68-74.

⁴² School Occupational Therapist; R5p68,73.

⁴³ School Occupational Therapist.

⁴⁴ Educational Advocate.

⁴⁵ P14p70-73.

⁴⁶ R9p100.

⁴⁷ P25p213; P26p215; P5p58.

⁴⁸ Educational Advocate.

⁴⁹ P5p58,74.

⁵⁰ P4p40.

⁵¹ P6p76; P6p83.

Hearing Officer Determination

Case No. 2023-0016

19. Speech-Language. Public School did not have a speech-language pathologist assigned for 2022/23.⁵² On 3/21/23, DCPS authorized 30 hours of independent speech-language services for Student, to make up for the lack of a speech-language pathologist at Public School and Student's missed services from September through February in 2022/23.⁵³ Both Petitioner's and DCPS's experts testified that the 30 hours of speech-language services was more than sufficient to make up for missed speech-language services in 2022/23; Educational Advocate sought 20 hours of speech-language services in his Compensatory Education Proposal.⁵⁴ In the absence of a speech-language pathologist, Student was well placed for communication needs in the CES classroom.⁵⁵

20. Physical Therapy. Parent was nervous about Student using the many stairs at Public School because Student doesn't look down and sometimes falls when walking down the street.⁵⁶ Student could physically go up and down stairs without assistance, but typically held the hand of a staff member.⁵⁷ The AED meeting agreed to proceed with a physical therapy screener and then determine whether a full physical therapy evaluation was needed.⁵⁸ Physical Therapist conducted the screening and determined that a physical therapy evaluation was not needed, as Student could safely navigate the school building and classroom, including the stairs up and down using handrails without falling.⁵⁹ Student had full control of body, could walk unassisted, and is able to access the environment, so does not need a full physical therapy evaluation.⁶⁰

21. Assistive Technology. Educational Advocate asserted that an assistive technology evaluation is standard practice for non-verbal children even with AAC devices, while Private Occupational Therapist testified that an assistive technology evaluation was needed to determine whether Student's AAC device obtained through medical insurance could be fully used in school and to see what else might be appropriate for Student.⁶¹ Speech-Language Pathologist conducted a speech-language evaluation first, after which it would be determined whether an assistive technology evaluation was warranted.⁶² Student is very good at communicating with the AAC device, so didn't need an assistive technology evaluation, while Student's teacher needed no more training to assist Student with the device.⁶³ Shifting to a new AAC device could confuse Student.⁶⁴ Low-tech assistive

⁵² P6p78.

⁵³ R14p153; R16p157.

⁵⁴ Educational Advocate; P31p245.

⁵⁵ Speech-Language Pathologist.

⁵⁶ Parent.

⁵⁷ P14p174.

⁵⁸ P29p235.

⁵⁹ Physical Therapist; Special Education Teacher; School Occupational Therapist.

⁶⁰ Physical Therapist.

⁶¹ Educational Advocate; Private Occupational Therapist.

⁶² P29p233; Special Education Teacher.

⁶³ Speech-Language Pathologist; Special Education Teacher; School Occupational Therapist (saw no need for an assistive technology evaluation).

⁶⁴ Speech-Language Pathologist.

Hearing Officer Determination

Case No. 2023-0016

technology was also being used with Student in the classroom, including sentence starters, behavior charts, token board, and icons throughout the classroom; no assistive technology evaluation was needed for high or low-tech assistive technology.⁶⁵

Conclusions of Law

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

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

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

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

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

⁶⁵ *Id.*

Hearing Officer Determination

Case No. 2023-0016

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

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

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

Issue 1: *Whether DCPS denied Student a FAPE by failing to implement Student’s IEP from 8/29/22 to 1/26/23 by providing (a) 25.5 hours/week of specialized instruction, (b) 4 hours/month of speech-language services, (c) 4 hours/month of occupational therapy, and (d) introduction of all goals, when DCPS lost Student’s IEP and was instead implementing another child’s IEP for Student. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of persuasion on her IEP implementation claim in this highly unusual case. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student’s IEP. *See Middleton*, 312 F. Supp. 3d at 144; *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson*, 962 F. Supp. 2d at 268, *quoting Catalan 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).

Hearing Officer Determination

Case No. 2023-0016

Here, Student enrolled in Public School at the beginning of 2022/23, after being schooled outside DCPS since 2019, and Public School mistakenly implemented the IEP of another child as Student's IEP. Remarkably, that child had the same first and last names as Student, was born in the same month and year, had the same disability classification, and needed nearly identical services. Student's own education records were not available due to errors made within SEDS, the special education database maintained by OSSE, but Student's last IEP (before leaving DCPS) was dated 4/12/19. So at the beginning of 2022/23 Student did not have a current IEP and a new IEP was not developed until 1/12/23. Because of confusing Student with the other child, however, Public School began providing services that Student actually needed from the other child's current IEP dated 7/7/22.

The other child's 7/7/22 IEP was very similar to the new IEP developed for Student on 1/12/23 and, for that matter, was very similar to the last IEP Student had in 2019. Thus, for purposes of determining what special education services should have been provided in 2022/23 until Student's IEP was developed, the services in Student's new IEP were essentially applied retroactively to the beginning of the year, with 25.5 hours/week of specialized instruction, 4 hours/month of speech-language services, and 4 hours/month of occupational therapy, to which the undersigned concurs as an exercise of equity jurisdiction. *See Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016) ("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'"), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). These service hours were what Public School sought to provide to Student due to the confusion with the other child's IEP and largely did so. Public School provided 25.5 hours/week of specialized instruction (not 28), based on the maximum possible at Public School; 4 hours/month of occupational therapy, with all hours accounted for; and would have provided 4 hours/month of speech-language services if Public School had a speech-language pathologist available, so provided Parent authorization for independent speech-language services.

While a stopped analog clock may randomly be correct, the services here were not so random as Student and the other child were both classified as ASD and needed maximum services, so their IEPs were understandably similar. This is, of course, not the process contemplated by the IDEA, for the first initial in "IEP" is "individualized." *See* 34 C.F.R. 300.320(a)(2); *Endrew F.*, 137 S. Ct. at 994 (IEP requires "careful consideration of the child's individual circumstances"). Here, the other child's IEP can in no way be considered individualized for Student until experienced teachers began working with Student and began adjusting, modifying, and enhancing the services and goals for Student.

Implementing IEP services is about more than the hours, for the goals need to be appropriate as well. Special Education Teacher credibly explained that he spends the early weeks of each school year getting to know the needs and limitations of the children in his CES classroom, for it is common for children to have regressed – or sometimes progressed – since development of their IEPs. Like all good teachers, Special Education Teacher tailors his teaching to the needs of each student, which is both more possible and more important in the CES classroom. Student was in a class of 7 students, with not only a teacher but 2 aides, allowing for much individual and small group attention.

Hearing Officer Determination

Case No. 2023-0016

Special Education Teacher had been with Student over the months of 2022/23 at issue, so was much more knowledgeable and more credible than Educational Advocate in assessing how the goals of the 2022 IEP fit Student in the first term of the year, before several of Student's goals were modified for the second term to better fit Student. In short, the 2022 IEP goals were either appropriate or Special Education Teacher was able to move on to work with Student on other skills. As a result, Student made progress on academic concerns, focusing on comprehension in reading and counting quantities in math.

For all these reasons, the undersigned finds no implementation violation here, despite the unusual circumstances.

Issue 2: *Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student by providing (a) assistive technology and (b) physical therapy evaluations, as well as completing other evaluations when Student began at Public School in 2022/23 after other schooling. (Petitioner has the burden of persuasion on this issue.)*

Petitioner also failed to meet her burden of persuasion on this issue. The importance of assessing students in all areas of suspected disability was emphasized in *Z.B.*, 888 F.3d at 518, *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *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)); 34 C.F.R. § 300.304(c)(4). In considering a re-evaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student’s parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a).

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; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). Indeed, evaluations of children by experts are central to the determination of what special education and related services are needed for most eligible children. *See Z.B.*, 888 F.3d at 518; *Hill v. Dist. of Columbia*, No. 14-cv-1893, 2016 WL 4506972, at *18 (D.D.C. 2016) (“evaluation’s primary role is to contribute to the development of a sound IEP,” *quoting Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60 (D.D.C. 2011)).

Here, Student re-enrolled in DCPS in 2022/23 without any current evaluations. As discussed above, Public School was confused by the 7/7/22 IEP of the other child with the nearly identical name and situation. The other child’s last eligibility meeting was on 3/15/22, indicating to Public School that there was no need for prompt re-evaluation of Student. Indeed, credible witnesses testified that they had no reason to believe that evaluations were needed by Student due to the current 2022 IEP for the other child. Further, in the best of circumstances children are not evaluated when first arriving at a new school,

Hearing Officer Determination

Case No. 2023-0016

as school staff needs to work with them and talk with teams and parents before moving forward with evaluations. Observations over the first 3 months of 2022/23 provided insight into Student's particular ADL needs, among other things.

The situation for Student began to clarify over the first months of 2022/23. Parent made a request through counsel in early October for comprehensive evaluations, seeking comprehensive psychological, speech-language, occupational therapy, physical therapy, and assistive technology evaluations. Then an AED meeting was convened on 12/1/22 and the team agreed to conduct the comprehensive psychological, speech-language, and occupational therapy, but not to a full physical therapy or assistive technology, which are at issue below. Thus, the undersigned does not find violation due to delay in evaluations. In any case, delays in evaluations are only procedural violations unless there is a substantive impact on Student, which has not been shown here due to the fact that the services provided closely matched Student's needs. *Z.B.*, 888 F.3d at 524.

As for the remaining evaluation issues in question, the school team saw no need for assistive technology or full physical therapy evaluations, as set forth next.

(a) Assistive Technology. Petitioner's experts testified that assistive technology evaluations are standard practice for non-verbal children and tried to raise concerns about the usefulness of Student's current high-tech AAC device. However, the undersigned was persuaded by Public School's experts who have extensive experience with assistive technology and explained that Student is very good at communicating with the AAC device and that Student's teachers needed no more training to assist with the device. Shifting to or adding a new AAC device could confuse Student. Low-tech assistive technology was also being used with Student in the classroom, so the undersigned agrees that no evaluation is needed for either high or low-tech assistive technology.

(b) Physical Therapy. While Parent was particularly concerned about Student's safety on stairs at school, the AED meeting agreed to proceed with a physical therapy screener and then determine whether a full physical therapy evaluation was needed. The screening determined that Student could safely navigate the school building and classroom, including the stairs up and down using handrails without falling. Since Student had full control of body and is able to access the environment, the undersigned concurs that Student does not need a full physical therapy evaluation.

ORDER

Petitioner has not prevailed on either issue in this case. Accordingly, **it is hereby ordered** that any and all 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

Hearing Officer Determination

Case No. 2023-0016

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)

ODR (hearing.office@dc.gov)