

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., 4th Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
March 15, 2018

<i>Student</i> , ¹)	Case No.: 2018-0044 (Expedited)
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 3/15/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 3/9/18
("DCPS"),)	ODR Hearing Room: 112
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 sufficiently evaluated and provided an appropriate transition plan in the current Individualized Education Program (“IEP”), nor timely placed at a new nonpublic school. DCPS responded that it had properly evaluated Student and developed an appropriate transition plan, and was seeking a new placement for Student as quickly as possible.

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 2/26/18, the case was assigned to the undersigned on 2/27/18. Respondent filed a timely response on 2/27/18, which did not challenge jurisdiction. The resolution session meeting took place on 3/2/18, but the

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

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parties did not resolve the case. Pursuant to 34 C.F.R. 300.532(c), the due process hearing on disciplinary matters must be completed within 20 school days from filing, which requires the hearing to be completed by 4/3/18. Based on the date of the hearing and the requirement in the above cited section that a determination must be made within 10 school days after the hearing, the Hearing Officer Determination (“HOD”) is due by 3/23/18.

The due process hearing took place on 3/9/18, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Due to health limitations, Petitioner participated in the hearing by telephone; other family members were present in person during Petitioner’s case-in-chief.

Petitioner’s Disclosures, submitted on 3/6/18 (and corrected/revise on 3/12/18), contained documents P1 through P16, which were admitted into evidence without formal objection. Respondent’s Disclosures, submitted on 3/6/18 (and corrected/revise on 3/9/18), contained documents R1 through R18, which were admitted into evidence without objection.

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. *Sister*
2. *Educational Advocate* (qualified without objection as an expert in Special Education Programming and Placement)

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see Appendix A*):

1. *Principal of Nonpublic School* (qualified without objection as an expert in Special Education Programming and Placement)
2. *Program Monitor at Nonpublic School*

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

Issue 1: Whether DCPS denied Student a FAPE by failing to evaluate Student adequately, as Student needs a vocational evaluation in order to obtain an appropriate IEP. *Petitioner has the burden of persuasion on this issue.*

Issue 2: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for 2017/18² as the transition sections were not based on age appropriate vocational assessments, the transition goals were not appropriate and the transition plan was highly

² All dates in the format “2017/18” refer to school years.

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inadequate.³ *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 3: Whether DCPS denied Student a FAPE by failing to comply with disciplinary regulations by not identifying a school placement for Student since expulsion on 2/13/18. *Petitioner has the burden of persuasion on this issue.*

Issue 4: Whether DCPS denied Student a FAPE by making an inappropriate determination on 2/23/18 that Student's behavior which resulted in expulsion on 2/13/18 was not a manifestation of Student's disability. *Respondent has the burden of demonstrating that Student's behavior was not a manifestation of Student's disability pursuant to 5-B D.C.M.R. § 2510.16.*

The relief requested⁴ by Petitioner is:

1. A finding that DCPS denied Student a FAPE.
2. As soon as possible, and no later than 20 days from the date of this decision, DCPS shall identify an appropriate placement for Student, in conjunction with Parent and advocate. DCPS shall arrange and fund transportation for Parent to visit possible schools for Student.
3. DCPS shall convene an appropriate IEP team to determine that Student's behavior resulting in expulsion was a manifestation of Student's disability.
4. DCPS shall conduct a vocational assessment of Student.⁵
5. DCPS shall convene an IEP meeting to review the findings of the vocational assessment ordered in the previous paragraph and update Student's IEP, with heavy emphasis on an appropriate transition plan.
6. Compensatory education for any denial of FAPE relating to lack of adequate transition programming for Student during the last 2 school years is reserved until completion of the vocational assessment ordered above; no

³ At the beginning of the due process hearing, Petitioner's counsel expressly withdrew without prejudice portions of Issue 2 as it related to 2016/17 and subpart (b) (that "the IEPs were not based on a comprehensive FBA and BIP"). In addition, Petitioner's counsel expressly withdrew without prejudice the next issue (Issue 3 in the Prehearing Order), relating to DCPS denying Student a FAPE "by not fully implementing Student's IEP at Nonpublic School from March 2017 on, when Student was not provided a full-time dedicated aide."

⁴ During the prehearing conference, Petitioner's counsel expressly withdrew Petitioner's request for DCPS to facilitate Student's return on an interim basis to Nonpublic School with a one/one aide for the entire school day.

⁵ During the prehearing conference, Petitioner's counsel expressly withdrew Petitioner's request for (a) a comprehensive psychological evaluation, (b) an occupational therapy evaluation, (c) a functional behavioral assessment, and (d) an assistive technology assessment.

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compensatory education is sought in this hearing.⁶

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁷ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁸ Student is *Age, Gender* and not now attending school after being expelled on 2/14/18 from *Nonpublic School*, effective 3/1/18.⁹ Prior to *Nonpublic School*, Student attended *Prior Nonpublic School A* for many years and *Prior Nonpublic School B* for a short period, before leaving due to discipline problems.¹⁰

2. Student's disability classification is Multiple Disabilities ("MD"), with both Intellectual Disability ("ID") and Other Health Impairment ("OHI") based on *Syndrome*.¹¹ Student experiences a host of learning and behavioral difficulties due to *Syndrome*, which among other things affects behavior and emotional regulation.¹² Difficulties from *Syndrome* typically peak in adolescence or early adulthood.¹³

3. Student has had IEPs for many years; Student's current IEP (the only one at issue) is dated 1/18/18 and provided 27 hours/week of specialized instruction outside general education, with 120 minutes/month of behavioral support services ("BSS") outside general education and a full-time dedicated aide.¹⁴ Educational Advocate explained that with the dedicated aide there was no need to focus on the level of Student's BSS, which is not at

⁶ During the prehearing conference, Petitioner's counsel clarified and reserved Petitioner's request for compensatory education, and withdrew the request for an independent compensatory education evaluation.

⁷ 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.

⁸ Sister; Educational Advocate; P7-1.

⁹ P7-1; P10-1; Sister.

¹⁰ Sister; Educational Advocate.

¹¹ P7-1,10; P4-1,3; Educational Advocate.

¹² P6-7; P7-10; P4-1 (behavioral problems associated with *Syndrome*).

¹³ P2-2.

¹⁴ P7-1,12; Educational Advocate.

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issue in this case.¹⁵ Principal testified without contradiction that Nonpublic School provided 2 or more adults to be with Student all the time.¹⁶

4. A 10/19/17 Psychological Evaluation Triennial Form reported that Student has extremely low cognitive skills as measured by the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”) in 2008, with a full scale IQ of 43.¹⁷ Student is able to read only a few words; Student can identify single digit numbers, but only some 2-digit numbers.¹⁸ Student can’t count money or tie shoes; Student puts so much paper in the toilet it clogs; Student needs help with personal hygiene.¹⁹

5. IEP Transition Plan. The transition plan in Student’s IEP is particularly important given Student’s very low functioning.²⁰ Based on experience with 1000s of IEPs over the years, Principal considers Student’s transition plan to be appropriate.²¹ The Nonpublic School transition coordinator worked on the transition plan with Student.²²

6. Nonpublic School’s major emphasis was Student’s transition, so that Student could be employable.²³ Student received functional transition training every day at Nonpublic School in a Job Skills/Transitional Skills course from 1:20 to 2:00 p.m., 5 days a week in Nonpublic School’s year-round program, which included work on community and social awareness, resume building, interviewing, career interests, and hygiene.²⁴

7. On 1/9/18, Student was administered 2 vocational assessments, the Casey Life Skills Assessment and the Brigance Transition Assessment.²⁵ Respondent’s counsel committed at the beginning of the due process hearing and confirmed at the end that – without admitting any liability or wrongdoing – DCPS is willing to conduct an additional appropriate vocational assessment once Student arrives at the new school placement which is being sought.²⁶

8. On the post-secondary education and training section of the Casey, Student scored an overall 4.00 (on a 1-5 scale), with the conclusion that Student was knowledgeable about many competencies, but would benefit from a vocational training program in the future.²⁷

¹⁵ Educational Advocate.

¹⁶ Principal; Educational Advocate (Nonpublic School assigned 2 adults to Student); *see also* R18-2 (2 aides with Student all day every day).

¹⁷ P4-1,2,4.

¹⁸ P7-4,5,7; Educational Advocate.

¹⁹ Sister.

²⁰ Educational Advocate.

²¹ Principal.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ P7-20; Educational Advocate.

²⁶ Respondent’s counsel.

²⁷ P7-20.

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Educational Advocate credibly testified that the score was very high given Student's disabilities; students don't have to demonstrate their abilities on the Casey and may claim that they know things that they don't.²⁸ To address that problem, the protocol is for an evaluator who knows the test subject to override answers when students apparently overstate their knowledge or abilities; that override function apparently was not adequately performed when Student took the Casey.²⁹ On a second section of the Casey on independent living, Student scored an overall 3.03, with the conclusion that Student did not possess the necessary skills to live independently, which was not challenged by Educational Advocate (although she erroneously recalled the score as 3.3).³⁰

9. The Brigance Transition Assessment included sections on Career Interests (E-2) and Career Choices (E-3), yielding details about the form of work Student prefers and the particular types of jobs Student would like, which were in line with Student's stated preferences to work as a tow truck driver, mechanic or at a car wash.³¹ Principal considered Student's goals of being a tow truck driver or mechanic to be "aspirational" but potentially achievable if Student worked very hard; Principal considers aspirational goals to be desirable and doesn't limit kids in their goals.³² Educational Advocate's otherwise very credible testimony was slightly undermined by her testimony that the results of the Brigance were not reported in Student's IEP and not recognizing that the large paragraph in the box with the heading "Brigance Transition Assessment" (on the previous page) contained results from the Brigance.³³

10. The Post-Secondary Education and Training section of Student's Transition Plan included the transition goal of increasing knowledge of post-secondary education by identifying at least 3 post-secondary programs, with 4 hours/year of assistance from staff and access to the internet for virtual tours and transportation to and from programs.³⁴ A 2/9/18 IEP Progress Report noted that Student benefits from tours of adult day programs and attending resource fairs throughout the community (although Student was rated as having achieved no progress toward that transition goal).³⁵

11. The Employment section of Student's Transition Plan included the transition goal of Student discussing how to successfully apply for a job and applying for part-time employment, with 4 hours/year of assistance from staff and access to application samples and templates.³⁶ The 2/9/18 IEP Progress Report stated that the goal of applying for part-time employment had not been introduced and would be introduced in the fourth quarter.³⁷

²⁸ Educational Advocate.

²⁹ *Id.*

³⁰ Educational Advocate; P7-21.

³¹ P7-20,21.

³² Principal.

³³ P7-20,21.

³⁴ P7-21,22; Principal.

³⁵ R9-4.

³⁶ P7-22,23.

³⁷ R9-5.

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Student worked on jobs at Nonpublic School and wanted hands-on activity so worked in the maintenance department for 6 months.³⁸ Student had been volunteering and working in the cafeteria and doing a lot of things to help with transition.³⁹

12. The Independent Living section of Student's Transition Plan contained Student's final transition goal of continuing to work on daily living and life skills to decrease impulsive behavior, with 2 hours/year of 1-on-1 support.⁴⁰

13. Sister recalled that either the Rehabilitation Services Administration ("RSA") or the District of Columbia Department on Disability Services ("DDS") was in touch with Student some years ago.⁴¹ Student had an information session with RSA at Nonpublic School and Principal credibly stated that DDS will be in touch with Student at the appropriate time.⁴²

14. Behavior. Student is pleasant and friendly, but Student's disabilities affect progress in general education due to cognitive, behavioral and social-emotional challenges.⁴³ Student has been "extremely" physical and verbally aggressive towards others, which can lead to police intervention or psychiatric hospitalizations.⁴⁴ Student frequently displays dangerous and/or disruptive behaviors in the school and community, ranging from physical and verbal aggression to unwelcome physical touching.⁴⁵ Student has been involved in multiple incidents of physical aggression at Nonpublic School.⁴⁶ A 2/8/18 IEP Progress Report states that Student has a tendency to become both verbally and physically aggressive when extremely agitated, and during those times "loses all sense of self control" and focuses on the target.⁴⁷

15. A Functional Behavioral Assessment ("FBA") on 1/18/18 stated that Student had been recently hospitalized after being physically aggressive towards Nonpublic School staff members; Student's behavioral concerns include verbal abuse, physical aggression, and sexually inappropriate behaviors toward female staff members.⁴⁸ Student's aggression has continued for years, included threatening other students, trying to stab them with scissors, throwing chairs at people, throwing a microwave and destroying 3 computers.⁴⁹ During an FBA observation on 10/3/17, Student attacked Nonpublic School staff by throwing heavy glass at them and twice punched an uninvolved paraprofessional; during a second FBA

³⁸ Principal.

³⁹ R18-2.

⁴⁰ P7-23,24.

⁴¹ Sister.

⁴² Principal.

⁴³ P7-10; Sister (Student lovable, but can quickly get angry or upset and become physically aggressive).

⁴⁴ P7-10.

⁴⁵ P5-1.

⁴⁶ P4-1.

⁴⁷ R9-4.

⁴⁸ P6-1.

⁴⁹ P6-2; P2-1; Principal.

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observation on 1/17/18, Student repeatedly reached out with both hands to try to touch a female teacher inappropriately.⁵⁰

16. On the FBA, “close proximity” to Student was by itself considered an antecedent precursor to inappropriate touching.⁵¹ Student’s negative behaviors occur suddenly and without warning.⁵² Student sometimes goes to church with Sister and may have 5 outbursts during the outing, but no one knows why.⁵³ Student’s family and advocates did not consider it safe for Student to attend the due process hearing.⁵⁴

17. 2/9/18 Incident. On 2/9/18, Student attacked and punched a medically-fragile mild girl who Student believed had touched Student’s fruit cup; Nonpublic School’s assistant principal tried to shield the girl while Student continued to try to hit her; Student is large and it took 5 men to restrain Student and move Student away from the assistant principal and the girl as Student continued to kick and throw things.⁵⁵ Student then attacked the police, who used handcuffs to restrain Student and take Student to the hospital.⁵⁶ At the time of the incident, there were two adults walking with Student in the hallway, one of whom had her arm around Student, but even so were unable to react quickly enough to prevent Student’s attack and keep others safe.⁵⁷

18. The 2/9/18 incident was the “last straw” at Nonpublic School and Student was expelled from Nonpublic School as from previous schools.⁵⁸ Principal was clear that Student was too aggressive and volatile for Nonpublic School and could not continue at Nonpublic School whether or not the behavior was a manifestation of disability.⁵⁹ Nonpublic School was unwilling to take Student back even temporarily while another school placement was located.⁶⁰

19. Behavior by Student similar to the 2/9/18 incident had occurred previously, including a 1/23/18 incident in which Student threw a binder at Principal, cutting his hand, and then charged Principal throwing punches and screaming.⁶¹ Student had also attacked other staff members.⁶² Female staff members were not comfortable working with Student due to sexual touching, which resulted in an informal rule that they never sat with their

⁵⁰ P6-6.

⁵¹ P6-3.

⁵² Educational Advocate; Sister.

⁵³ Sister.

⁵⁴ *Id.*

⁵⁵ Principal; P9.

⁵⁶ Principal.

⁵⁷ *Id.*

⁵⁸ Educational Advocate; Principal.

⁵⁹ Principal.

⁶⁰ *Id.*

⁶¹ P8-1; Educational Advocate.

⁶² Educational Advocate.

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backs to Student.⁶³ Student's extreme behaviors occurred at home and everywhere; the behavior was out of Student's control.⁶⁴

20. A Manifestation Determination Review ("MDR") meeting was held soon after the 2/9/18 incident at which Nonpublic School staff promptly voted that the incident was not a manifestation of Student's disability, without reviewing Student's IEP.⁶⁵ Petitioner's counsel objected to both the procedure and outcome of the MDR meeting; Petitioner sought an MDR meeting with a psychologist.⁶⁶ Program Monitor stated that the team planned to come back to the table on 3/2/18, which did not occur due to school being closed because of bad weather.⁶⁷ Petitioner's counsel noted that there was no invitation for a meeting on 3/2/18; Program Monitor responded that they reached out to Petitioner directly.⁶⁸

21. Educational Advocate did not attend the MDR meeting but credibly testified that Student's behavior on 2/9/18 was a manifestation of Student's disability and that "everyone agrees" that such behavior is simply the way Student behaves.⁶⁹ The MDR decision had no impact on Student continuing at Nonpublic School and has no impact on other schools accepting Student.⁷⁰ Educational Advocate considers it important that Student's record indicate that extreme behaviors result from Student's disability so those who may work with Student in the future are prepared and can provide a safe environment.⁷¹

22. Placement in New School. The parties agree that Student is very difficult to place in a new school location; Program Monitor and her supervisor sent out referral documents to potential nonpublic schools for Student on 2/13/18, initially sending to 8 nonpublic schools who have OSSE Certificates of Approval for working with Student's disabilities; they recently adding 2 additional schools.⁷² Program Monitor followed up on the referrals; as of the due process hearing, 3 schools had rejected Student, while others had not yet responded.⁷³

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:

⁶³ Principal.

⁶⁴ Educational Advocate.

⁶⁵ R18-2,3.

⁶⁶ R18-2,3; Educational Advocate.

⁶⁷ Program Monitor; R18-3.

⁶⁸ R18-3.

⁶⁹ Educational Advocate.

⁷⁰ Principal; Program Monitor.

⁷¹ Educational Advocate.

⁷² Program Monitor; R4-1; R5-2; Educational Advocate.

⁷³ Program Monitor; R4-1; R5-1; R6-1; R7-1.

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

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

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

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Petitioner generally 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); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). Also, under District of Columbia regulations, in reviewing a decision with respect to a manifestation determination, the Hearing Officer must determine whether DCPS has demonstrated that the student's behavior was not a manifestation of the student's disability. See 5-B D.C.M.R. § 2510.16. "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 evaluate Student adequately, as Student needs a vocational evaluation in order to obtain an appropriate IEP. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden on the initial issue of whether Student's vocational evaluations were adequate. Evaluations by experts are of course central to the determination of what special education and related services are needed, including the development of appropriate transition plans within an IEP. See, e.g., *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *18 (D.D.C. 2016), quoting *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60 (D.D.C. 2011). In particular, 34 C.F.R. 300.320(b) requires "age appropriate transition assessments" related to training, education, employment and independent living skills.

Here, Nonpublic School administered 2 vocational assessments to Student on 1/9/18, the Casey Life Skills Assessment and the Brigrance Transition Assessment. On the Casey, Educational Advocate credibly testified that Student's score was remarkably high on the post-secondary education and training section, given Student's disabilities. However, that section reasonably concluded that Student would benefit from a vocational training program in the future. Further, Student scored notably lower on the independent living section of the Casey, which concluded that Student did not possess the necessary skills to live independently, which was not disputed.

As for the Brigrance Transition Assessment, sections on Career Interests and Career Choices yielded details about the form of work Student prefers and the particular types of jobs Student would like, which were in line with Student's stated preferences to work as a tow truck driver, mechanic or at a car wash. While Principal considered some of Student's goals to be a stretch, Principal considers "aspirational" goals to be acceptable and does not try to limit students in their goals.

With these recent vocational assessments yielding meaningful – even if not perfect – information and conclusions for Student's Transition Plan, this Hearing Officer does not find a violation of the IDEA nor a FAPE violation. Furthermore, at the due process hearing DCPS committed, without admitting any liability, to conduct an additional appropriate vocational assessment once Student arrives at a new school placement.

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Issue 2: *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for 2017/18 as the transition sections were not based on age appropriate vocational assessments, the transition goals were not appropriate and the transition plan was highly inadequate. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did meet her burden of establishing a prima facie case on this issue taken as a whole, but Respondent met its ultimate burden of persuasion.

The applicable legal standard for analyzing the appropriateness of an IEP is whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. See also *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013). The measure and adequacy of the IEP are determined as of the time it was offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner.⁷⁴ See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

Here, Petitioner challenges only the Transition Plan in the 1/18/18 IEP.⁷⁵ When considering the adequacy of a transition plan, the test is “whether the IEP, taken in its entirety, is reasonably calculated to enable the particular child to garner educational benefits.” *Lessard v. Wilton Lyndeborough Coop. School Dist.*, 518 F.3d 18, 30 (1st Cir. 2008) (citations omitted). Further, an IEP is not required to offer a student the “best” transition plan – but only services reasonably calculated to provide meaningful benefit. See *K.S. v. Dist. of Columbia*, 962 F. Supp. 2d 216, 220-222 (D.D.C. 2013).

Petitioner raised 3 specific concerns about Student’s Transition Plan. First, Petitioner claims that the Transition Plan was not based on sufficient vocational evaluations. As addressed in Issue 1, however, the undersigned concludes that Respondent demonstrated

⁷⁴ As an initial matter, a Hearing Officer must determine whether “the State complied with the procedures” set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, quoting *Rowley*, 458 U.S. at 206-07. No such procedural violations relating to Student’s IEP were alleged in this case.

⁷⁵ The IDEA’s transition provisions require that:

Beginning not later than the first IEP to be in effect when the student turns 16 . . . and updated annually thereafter, the IEP must include:

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 C.F.R. 300.320(b).

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that the 2 recent vocational evaluations were adequate. For those same reasons the Transition Plan is not undermined by the 1/9/18 evaluations.

Second, Petitioner asserted that the transition goals were not appropriate, but analysis of the goals leads the undersigned to the opposite conclusion. The initial transition goal on Student's IEP was to increase knowledge of post-secondary education by identifying at least 3 post-secondary programs, which seems a suitable goal for Student. The 2/9/18 IEP Progress Report noted that Student benefited from tours of adult day programs and attending resource fairs throughout the community. Student's second transition goal was to discuss how to successfully apply for a job and to apply for part-time employment, which again seems entirely suitable. Student's final transition goal was to continue working on daily living and life skills to decrease impulsive behavior, which is also an appropriate goal for Student. While additional goals or more details or allocation of more time might bolster Student's transition goals, the standard is not perfection, so the undersigned finds these goals sufficient.

Finally, Petitioner asserts that the Transition Plan was highly inadequate as a general matter, emphasizing the heightened importance of the plan given Student's very low functioning. However, the undersigned is persuaded by the expert testimony of Principal, who has worked on 1000s of IEPs over the years, who concluded that Student's Transition Plan was appropriate. Moreover, transition efforts were undertaken that exceeded what was written into the plan, for transition was Nonpublic School's major emphasis with Student so that Student could be employable. Student received functional transition training 5 days a week at Nonpublic School, covering community and social awareness, resume building, interviewing, career interests, and hygiene.

In sum, this Hearing Officer concludes that Respondent did establish that the Transition Plan in Student's recent IEP was reasonably calculated to enable Student to make appropriate progress in Student's circumstances.

Issue 3: *Whether DCPS denied Student a FAPE by failing to comply with disciplinary regulations by not identifying a school placement for Student since expulsion on 2/13/18. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of persuasion on the issue of a timely school placement.⁷⁶ The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

Here, Respondent took prompt action following the 2/9/18 incident, sending out referral documents to possible nonpublic schools for Student on 2/13/18, even though the

⁷⁶ The issue was not the appropriateness of Student's placement, so the burden does not shift to Respondent upon Petitioner establishing a prima facie case.

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formal “termination of enrollment” letter was dated 2/14/18. DCPS initially sent out referrals to 8 nonpublic schools who have OSSE Certificates of Approval for working with Student’s disabilities, and recently added 2 additional schools. The problem is that Student is very difficult to place in a new school location, as everyone agrees. DCPS followed up on the referrals, but as of the due process hearing, 3 schools had rejected Student and none of the others had responded.

Significantly, Petitioner’s counsel did not point to anything that DCPS could have done or should have done that it had not done to find a new school. When asked by the undersigned what she would suggest DCPS do, Petitioner’s counsel responded that DCPS should “think outside the box,” but offered no suggestions or solutions to which Petitioner would be willing to agree. This Hearing Officer concludes that there has been no denial of FAPE due to lack of placement in a new school location to date.

Issue 4: *Whether DCPS denied Student a FAPE by making an inappropriate determination on 2/23/18 that Student’s behavior which resulted in expulsion on 2/13/18 was not a manifestation of Student’s disability. (Respondent has the burden of demonstrating that Student’s behavior was not a manifestation of Student’s disability pursuant to 5-B D.C.M.R. § 2510.16.)*

Respondent did not meet its burden of demonstrating that Student’s behavior in the 2/9/18 incident was not a manifestation of Student’s disability.

The IDEA requires that, within 10 school days of any decision to change the placement of a child with a disability for a violation of a code of student conduct, an MDR must be conducted. 34 C.F.R. 300.530(e)(1). To conduct the MDR, the LEA, the parent, and relevant members of the child’s IEP team must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parent to determine (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (ii) if the conduct in question was the direct result of the LEA’s failure to implement the IEP. 34 C.F.R. 300.530(e)(1). If the 2/9/18 incident was a manifestation of Student’s disability, Student’s BIP (since already developed) must be reviewed and modified as necessary to address the behavior, pursuant to 34 C.F.R. 300.530(f)(1)(ii).

As described above, on 2/9/18 Student attacked and punched a medically-fragile girl who Student believed had touched Student’s fruit cup. Nonpublic School’s assistant principal tried to shield the girl while Student continued to try to hit her. Student is large so it took 5 men to restrain and move Student away from the assistant principal and the girl, as Student continued to kick and throw things. Student then attacked the police, who used handcuffs to restrain Student and take Student to a hospital.

Unfortunately, this was not a unique event, for such behavior had just occurred on 1/23/18, when Student threw a binder at Principal, cutting his hand, and then charged Principal throwing punches and screaming. Student had also attacked other staff members and students at Nonpublic School. Student’s aggression has continued over years, included

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threatening other students, trying to stab them with scissors, throwing chairs at people, throwing a microwave, and destroying 3 computers.

Significantly, Student suffers from Syndrome, which is the basis for the OHI classification. As set forth above, Syndrome causes behavioral difficulties for Student, including difficulty with behavior and emotional regulation. Student's IEP, developed just weeks prior to the 2/9/18 incident noted that Student has been "extremely" physical and verbally aggressive towards others, which could lead to police intervention or psychiatric hospitalizations. Further, comments from Nonpublic School staff in Student's IEP Progress Report the day before the incident stated that Student has a tendency to become both verbally and physically aggressive when extremely agitated, and "loses all sense of self control." Educational Advocate persuasively testified at the due process hearing that Student's extreme behaviors also occur at home and everywhere, and are out of Student's control, and that Student's behavior on 2/9/18 was a manifestation of Student's disability.

A short MDR meeting was held following the 2/9/18 incident at which Nonpublic School staff quickly concluded that the incident was not a manifestation of Student's disability, without even reviewing Student's IEP as required by 34 C.F.R. 300.530(e)(1). Petitioner's counsel objected to both the procedure and outcome of the MDR meeting and Petitioner sought the involvement of a psychologist in the MDR decision. Respondent asserted that a second meeting had been planned but could not occur due to bad weather, but notice had not been provided to Petitioner's counsel.

For purposes of this analysis, the undersigned concludes that DCPS did not meet its burden of persuasion that the 2/9/18 incident was not a manifestation of Student's disability, both because a proper analysis was not conducted by the team, including review of Student's IEP, and on the substantive conclusion of Student's conduct not being caused by, or at least having a direct and substantial relationship to, Student's disability.

However, Petitioner did not disagree with Respondent's assertion that Nonpublic School cannot be forced to re-enroll Student at Nonpublic School even though Student's behavior was a manifestation of disability. Nor did Petitioner disagree that there was any other harm suffered by Student due to the IEP team reaching the wrong conclusion at the MDR meeting, specifically including the lack of any impact on whether other schools would accept Student. Thus, Petitioner did not seek any compensatory education in this due process hearing and the undersigned sees no basis for unilaterally awarding any compensatory education based on this MDR issue, which is the only issue on which Petitioner has prevailed. Instead, the remedy that can be provided is to correct Student's record in order to ensure that there is no harm to Student in the future from the incorrect MDR decision. As Educational Advocate credibly testified, it is important that Student's record indicate that extreme behaviors are a result of Student's disability, so those who may work with Student in the future are prepared and can provide a safe environment.

Accordingly, DCPS is ordered below to reverse the MDR determination and revise all documentation in the SEDS database (and elsewhere) to indicate that Student's behavior on 2/9/18 was a manifestation of Student's disability. In addition, Student's BIP must be reviewed and modified as necessary to address the behavior at issue, pursuant to the express

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requirements of 34 C.F.R. 300.530(f)(1)(ii), even though the BIP had just been updated on 1/18/18.

ORDER

Petitioner has prevailed on Issue 4, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS is ordered within 30 days to reverse the Manifestation Determination Review decision and revise all documentation in the SEDS database and elsewhere to indicate that Student's behavior on 2/9/18 was a manifestation of Student's disability.
- (2) Within 10 school days after Student is placed in a new school location, Student's Behavior Intervention Plan shall be reviewed and modified as necessary to address Student's behavior in the 2/9/18 incident, pursuant to 34 C.F.R. 300.530(f)(1)(ii).

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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