

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

<i>Student,</i> ¹)	Case No.: 2022-0209
through <i>Parent,</i>)	
<i>Petitioner,</i>)	Date Issued: 3/11/23
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	2/27/23 & 2/28/23
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 find Student eligible for special education soon enough and provide appropriate Individualized Education Programs ("IEPs"). 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 11/30/22, the case was assigned to the undersigned on 12/1/22. Respondent filed a response on 12/12/22 and did not challenge jurisdiction. A resolution meeting took place on 12/9/22, but the parties did not

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.

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settle the case or shorten the 30-day resolution period, which ended on 12/30/22. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 30-day continuance, which requires a Hearing Officer Determination (“HOD”) by 3/15/23.

A prehearing conference was held on 1/13/23 and the Prehearing Order was issued on 1/14/23, addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 2/27/23 and 2/28/23 and 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 2/17/23, contained documents P1 through P37, all of which were admitted into evidence without objection. Respondent’s Disclosure, also submitted on 2/17/23, contained documents R1 through R33, of which only R11, R25, R30 and R31 were offered and admitted into evidence without objection.²

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

1. *Educational Advocate* (qualified over objection as an expert in Special Education as It Relates to Initial Evaluations and IEP Programming)
2. Parent
3. Student

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

1. *Special Education Teacher*
2. *School Social Worker* (qualified without objection as an expert in School Social Work)
3. *LEA Representative* (qualified without objection as an expert in Special Education and Programming)

Petitioner’s counsel submitted no rebuttal evidence.

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.

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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 its Child Find obligations when it did not timely and comprehensively evaluate and find Student eligible for special education and related services by at least November 2020 when Student had been struggling academically; DCPS received a referral on or about 2/7/20 and Parent signed a consent to evaluate on 2/26/20, but Student was not found eligible until July 2021. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP as of (a) 8/12/21 because it did not provide (i) sufficient specialized instruction, (ii) sufficient behavioral interventions, including a Behavior Intervention Plan (“BIP”), and/or (iii) appropriate academic goals, and/or (b) 3/21/22 because it did not provide (i) sufficient specialized instruction, (ii) sufficient behavioral interventions, including a BIP, and/or (iii) appropriate academic goals, which were repeated verbatim along with present levels of performance. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall fund compensatory education for any denials of FAPE found or, in the alternative, fund a compensatory education evaluation to determine the type and amount of compensatory education to be awarded.³
3. Any other appropriate relief.

Findings of Fact

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

³ Petitioner’s counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was also encouraged to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under

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1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is Age, Gender, in Grade during 2022/23 at *Public Charter School*, after being at *Public School* for a few years.⁶ Student is a likeable young person who enjoys making others laugh, a bright student who is willing to seek and receive support.⁷ Student has received mental health treatment; Student's brother was incarcerated out of state and 3 of Student's close friends in the community have been killed in the past 2 years.⁸

2. Referral. Parent requested a special education referral for Student on 2/7/20 and gave signed consent for an initial evaluation to DCPS on 2/26/20, but nothing happened.⁹ Tele-assessments were authorized for use by DCPS in September or October 2020.¹⁰

3. Evaluation. Due to underperforming academically and Parent and counsel's request, Student's initial evaluation was a comprehensive psychological evaluation (erroneously titled a Psychological Triennial Reevaluation) on 3/24/21, which was completed on 7/8/21 to determine eligibility for special education services.¹¹ Student was retained for a second 1st grade year due to not grasping academic content; in the following years, Student's grades were constantly in flux with significant academic challenges, which persisted.¹²

4. Based on the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V"), Student's Full Scale IQ ("FSIQ") was 57, suggesting Extremely Low cognitive functioning, with Working Memory at 74 as a cognitive strength, though still considered in the Very Low range.¹³ Testing Student's adaptive functioning ruled out ID, based on the Behavior Assessment System for Children, Third Edition ("BASC-3") and Vineland Adaptive Behavior Scales – 3rd Edition ("VABS-3").¹⁴ As for socio-emotional, review of the clinical scales revealed that there were no domains where all 3 raters were in agreement on scale elevations.¹⁵

consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Parent.

⁶ Parent; P9p75.

⁷ P15p123; R25p125.

⁸ P17p138-39l; P11p106,108; P19p167.

⁹ P34p271 (Parent Contact log); P31p265; P32p267; Parent.

¹⁰ LEA Representative.

¹¹ P17p136 (Student was a child "who had been underperforming academically" so was referred for evaluation to determine Student's need for special education services),152.

¹² P17p139.

¹³ P17p140,152.

¹⁴ P17p149-51,152; Educational Advocate.

¹⁵ P17p149.

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5. Considering achievement functioning based on the Woodcock-Johnson IV (“WJ-IV”), Student was Extremely Low in Broad Reading (SS of 52), Broad Math (SS of 59) and Broad Written Language (SS of 65).¹⁶ Lack of consistent attendance was a contributing factor to fluctuating grades in 2020/21 (which was virtual).¹⁷ Student needed more support with attendance, but DCPS didn’t address it.¹⁸

6. Eligibility. A 7/12/21 Prior Written Notice (“PWN”) stated that Student qualified for special education services with the disability classification of Specific Learning Disability (“SLD”), with deficits in reading, math, written expression and emotional-social behavior that impact access to general education.¹⁹ School Social Worker acknowledged that Student’s IEP was delayed, but Student needed support and couldn’t wait, so School Social Worker began working with Student in 2020/21, prior to the IEP being completed, giving 45 minutes/week of Behavioral Support Services (“BSS”) from January 2021 through the end of the school year.²⁰

7. IEPs. Student’s initial IEP, dated 8/12/21, provided 5 hours/week of specialized instruction inside general education and 5 hours/week of specialized instruction outside general education, along with 120 minutes/month of BSS inside general education.²¹ Student’s next IEP, dated 3/31/22, again provided 5 hours/week of specialized instruction inside general education and 5 hours/week of specialized instruction outside general education, along with 120 minutes/month of BSS inside general education.²² The 3/21/22 IEP added in Other Classroom Aids and Services that Student must be provided various modalities to access grade level curriculum, such a video recordings, read aloud, pictures, etc.²³ These are the only IEPs at issue in this case; neither stated that Student’s behavior impeded learning by Student or other children.²⁴ Most of the academic goals and present levels of performance (“PLOPs”) are identical in the two IEPs.²⁵

8. Grade Levels and Grades. The 7/12/21 Analysis of Existing Data (“AED”) stated that in math, Student was 4 to 6 years behind grade; in reading, Student was more than 6 years behind.²⁶ As of the 4/25/22 AED, Student was 7 years below grade in math; Student continued to read at the Below Basic level; Student continued to write below grade level and required significant support.²⁷ In the Fall of 2022, Educational Advocate worked with

¹⁶ P17p143-47,152.

¹⁷ P17p152.

¹⁸ Educational Advocate.

¹⁹ P12p114; P16.

²⁰ School Social Worker.

²¹ P8p64,70.

²² P9p75,83.

²³ P9p83.

²⁴ P8p65; P9p76.

²⁵ P8; P9.

²⁶ P15p121-22.

²⁷ R25p124-25.

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Student on reading and math and concluded that Student was 7 or 8 years behind grade, similar to the levels other testing indicated.²⁸

9. Math. At the beginning of 2020/21, Student had “Bs” in both math and math support classes, despite being 6 years below grade; by the end of the year Student was failing math classes, despite increasing one grade level in math according to Beginning of Year (“BOY”) and End of Year (“EOY”) diagnostics.²⁹ In 2021/22, Student’s math diagnostic went from BOY at 404 to Middle of Year (“MOY”) at 398, 7 years below grade.³⁰

10. Reading. Student had “Bs” and “Cs” in ELA classes at the beginning of 2020/21, so LEA Representative testified Student was “thriving” in the inclusion setting; but the PLOPs assessment found that Student was reading Below Basic, some 7 or 8 years below grade, with a Very Low range Broad Reading score and a percentile ranking of less than 0.1% of same grade-level peers.³¹

11. Written Expression. Student’s written expression ANET assessments resulted in 45% of 100 in the Fall of 2020, but only 5% in January and 6% in March 2021.³²

12. Grades. In the 3/21/22 IEP, Student’s grades were reportedly worse in Term 2 compared to Term 1.³³ Student’s final grades in 2021/22 were mostly “Fs.”³⁴

13. Progress. An 11/12/21 PWN stated that DCPS’s analysis of data of Student’s functioning found that Student is “not making expected progress” in behavior, math, reading and written expression.³⁵ In the two terms between the 8/12/21 IEP and the 3/21/22 IEP, Student’s IEP Progress Report stated that Student was progressing on 5 goals and not progressing on 4.³⁶

14. Setting. Student’s classes at Public School contained 20-30 children, and were chaotic with many “acting out”; Student often couldn’t concentrate and was frustrated.³⁷ Student required small groupings to be less distracted and have more individual attention.³⁸

²⁸ Educational Advocate.

²⁹ P8p66.

³⁰ P25p196; P26p218.

³¹ P8p67.

³² P8p68.

³³ P9p80.

³⁴ P20p171-72.

³⁵ P14-118.

³⁶ P10p92-95 (Term 3 ended after IEP finalized).

³⁷ Parent; Student; Special Education Teacher (27-28 children in inclusive math class).

³⁸ P8p71; P9p84.

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Special Education Teacher testified that Student needed 1:1 support to stay in class, as Student was often frustrated; smaller classes would help.³⁹

15. Student performs best in small, structured classroom setting with minimal distractions.⁴⁰ Student's science teacher believed Student required a smaller setting and 1:1 support.⁴¹ Educational Advocate testified that Student needed a smaller setting and that a smaller group is not sufficient; Student needed a self-contained classroom with at least 20 hours/week of specialized instruction outside general education.⁴² School Social Worker agreed that a smaller setting was better for Student.⁴³

16. Behavior. Student's aggressive behaviors and inability to self-regulate affected Student's access to the general education curriculum.⁴⁴ Student used abusive language that typically resulted from frustration with academic tasks with which Student had difficulty.⁴⁵ Student could become aggressive, but not toward people; Student was overall perceived as a "good" child.⁴⁶ Student struggled to remain focused and present in the classroom when not interested or engaged in the lesson; St could become extremely frustrated when unable to accurately communicate thoughts.⁴⁷ Student was frequently out of class, walking the hallway and refusing to return to assigned space.⁴⁸ Student had 4 in-school suspensions.⁴⁹ Student had explosive episodes that typically occurred daily.⁵⁰

17. Student's IEP Progress Report for Term 2 of 2021/22 indicated that Student had 15 behavioral referrals in Term 1 and 20 in Term 2.⁵¹ Student's PLOPs in the 3/21/22 IEP stated that Student had 55 behavioral referrals ranging from skipping class to destroying school property and possession of a weapon.⁵²

18. Student needed an Functional Behavioral Assessment ("FBA") and Behavioral Intervention Plan ("BIP") much sooner based on Student's behaviors.⁵³ More support for Student's behaviors would improve Student's academics.⁵⁴ An FBA-II was completed on 6/1/22 and stated that Student can become frustrated in class and engage in disruptive and

³⁹ Special Education Teacher.

⁴⁰ P29p252 (BIP).

⁴¹ P19p166.

⁴² Educational Advocate.

⁴³ School Social Worker.

⁴⁴ P8-69.

⁴⁵ *Id.*

⁴⁶ P8p69; P18p160.

⁴⁷ P9p80.

⁴⁸ P15p123.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ R11p19.

⁵² P9p80; P28; P30 (scores of behavior referrals).

⁵³ Educational Advocate.

⁵⁴ Special Education Teacher.

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unsafe behaviors; Student is more likely to engage in aggressive and disruptive behaviors when not understanding the academic work provided.⁵⁵ A BIP-II dated 6/10/22 targeted disruptive behaviors and work avoidance, concluding that the function of Student's behaviors was multifaceted, but frustration related to academic challenges appeared to be the most severe.⁵⁶

19. Compensatory Education Proposal. Educational Advocate prepared a 9-page Compensatory Education Proposal, seeking 450 hours of tutoring to be provided over 3 years, along with 105 hours of counseling, to make up for the denials of FAPE asserted by Petitioner.⁵⁷ Parent was certain that Student would want extra tutoring and would buckle down and do the extra work.⁵⁸ Student testified that some tutoring, such as 2 times a week would be sufficient.⁵⁹ Based on working with Student, Special Education Teacher supported extra 1:1 tutoring in measured amounts of 1-2 sessions/week with 50-100 hours/year.⁶⁰

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

⁵⁵ P19p163.

⁵⁶ P29p250-51.

⁵⁷ P36; P36p284.

⁵⁸ Parent.

⁵⁹ Student.

⁶⁰ Special Education Teacher.

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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 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 its Child Find obligations when it did not timely and comprehensively evaluate and find Student eligible for special education and related services by at least November 2020 when Student had been struggling*

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academically; DCPS received a referral on or about 2/7/20 and Parent signed a consent to evaluate on 2/26/20, but Student was not found eligible until July 2021. (Petitioner has the burden of persuasion on this issue.)

Petitioner met her burden of persuasion on whether DCPS should have evaluated and identified Student as eligible for special education 2 years prior to the filing of the complaint. The D.C. Circuit Court emphasized in *DL v. Dist. of Columbia*, 860 F.3d 713, 717 (D.C. Cir. 2017), that Child Find is among the most important IDEA requirements, in order to identify, locate and evaluate every child in need of special education. *See* 34 C.F.R. § 300.111. Student was one of those children.

The Child Find obligations of an LEA are triggered either by awareness of the child's circumstances or by parental request. *See Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 57 (D.D.C. 2011). Here, DCPS should have been aware of Student's need for a special education evaluation through Student's circumstances, as well as parental request. An evaluation of Student was not conducted until 3/24/21 and not completed until 7/8/21, with eligibility for special education and related services determined on 7/12/21. The question here is whether based on Student's circumstances and/or Parent's requests DCPS should have evaluated Student much sooner than it did, for despite the practical challenges of the Covid-19 pandemic, the pandemic provides no excuse for not meeting the requirements of the IDEA. *See White v. Dist. of Columbia*, 20-CV-3821 (APM), 2022 WL 971330, at *6 (D.D.C. 3/31/22) ("[t]he IDEA contains no exception that would allow suspending special education services because [of] a global pandemic"). Based on the facts of this case set forth above, the undersigned concludes that DCPS's Child Find obligations were triggered at least by late November 2020, limited only by the 2-year statute of limitations. 34 C.F.R. § 300.507(a)(2); 34 C.F.R. § 300.511(e).

Here, there is no dispute that Parent requested a special education referral for Student on 2/7/20 and gave signed consent for an initial evaluation to DCPS on 2/26/20. With the March 2020 closure of DCPS in response to the pandemic, there was no way to evaluate Student for months, until tele-assessments were authorized in September or October 2020. However, Student was not evaluated then or for months that followed, until the evaluation was finally conducted on 3/24/21, with further delay until the evaluation report was completed on 7/8/21.

In addition, DCPS should have taken action based on Student's inadequate academic performance, for as the initial evaluation forthrightly stated, Student was a child who had been "underperforming" academically so was referred for evaluation to determine Student's need for special education services. Student had been retained for a second 1st grade year due to not grasping academic content, and in the following years, Student's grades were constantly in flux with significant academic challenges, which persisted until Student was finally evaluated.

In sum, this Hearing Officer concludes that Parent met her burden of persuasion, showing that DCPS did not meet its Child Find obligations to evaluate Student and determine eligibility for special education and related services based both on Student's circumstances and parental request. DCPS did not take action in a timely fashion even after

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tele-assessments were authorized. That failure directly impacted Student's education and denied Student the educational benefits to which Student was entitled, which constituted a denial of FAPE and is the basis for most of the tutoring awarded as compensatory education, below. *See* 34 C.F.R. § 300.513(a).

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP as of (a) 8/12/21 because it did not provide (i) sufficient specialized instruction, (ii) sufficient behavioral interventions, including a BIP, and/or (iii) appropriate academic goals, and/or (b) 3/21/22 because it did not provide (i) sufficient specialized instruction, (ii) sufficient behavioral interventions, including a BIP, and/or (iii) appropriate academic goals, which were repeated verbatim along with present levels of performance. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a *prima facie* case concerning Student's IEPs through testimony and documents, shifting the burden to DCPS, which failed to meet its burden of persuasion, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. As the U.S. Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* "raised the bar on what counts as an adequate education under the IDEA," requiring more than "merely some" educational benefit. *See also* *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be "reasonably calculated to produce meaningful educational benefit"). The measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at *12 (D.D.C. 2021); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEPs is analyzed by focusing on the specific concerns raised by Petitioner, which are considered in turn.⁶¹ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(i) Specialized Instruction. Student's IEPs must provide sufficient personalized instruction so that the child can benefit educationally, which in the case at hand required additional specialized instruction for the 8/12/21 IEP, and especially for the 3/21/22 IEP. *See Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing* *Rowley*, 458 U.S. at 203; *cf. Endrew F.*, 137 S. Ct. at 1000.

Here, the first IEP, dated 8/12/21, challenged by Petitioner provided for 5 hours/week of specialized instruction outside general education and another 5 hours/week of

⁶¹ 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. Certain procedural concerns are discussed herein.

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specialized instruction inside general education. However, by that time, Student was years behind academically. Student's record revealed that Student was 6 or 7 years behind in math, and even worse in reading, where Student was Below Basic, some 7 or 8 years below grade, with a percentile ranking of less than 0.1% of same grade-level peers. There was argument at the due process hearing about Student's actual academic levels and the assertion that Student was "thriving" in the inclusion setting despite reading at such a low level. However, this Hearing Officer was not persuaded by DCPS that 10 hours of specialized instruction were reasonably calculated to enable Student to make appropriate progress in the circumstances. The other challenged IEP was less than 3 terms later, dated 3/21/22. Despite Student showing no improvement and still reading at Below Basic, DCPS again provided only 5 hours/week of specialized instruction outside general education and 5 hours/week inside. With Student reading at such a low level, it is difficult to see how Student could learn in other classes without more support.

In sum, this Hearing Officer concludes that Student's level of specialized instruction in both IEPs was not reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, and to access the curriculum to advance toward meeting Student's annual goals pursuant to 34 C.F.R. § 300.320(a)(4), resulting in a denial of FAPE and an award of compensatory education, below.

(ii) Behavioral Interventions, Including a BIP. The IDEA requires in the case of a student whose behavior impedes the student's own learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports ("PBIS") and other strategies to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). Here, however, DCPS did not consider Student to be a child whose behavior impeded Student's own learning or that of others, despite the significant level of Student's behavioral challenges. Indeed, it was sufficiently clear that Student needed behavior support and couldn't wait that School Social Worker began working with Student in 2020/21, prior to Student's initial IEP being completed, providing 45 minutes/week of BSS to Student from January 2021 through the end of the school year.

At the time of the first IEP, Student's aggressive behaviors and inability to self-regulate affected Student's access to the general education curriculum. Student used abusive language that typically resulted from frustration with academic tasks with which Student had difficulty. Student could become aggressive, but not toward people, and had 4 in-school suspensions. Student had explosive episodes that typically occurred daily. Then, Student's behavior worsened by the time of the 3/21/22 IEP, as Student had 55 behavioral referrals, ranging from skipping class to destroying school property and possession of a weapon.

As a related service, BSS must be provided if required to assist a student with a disability to benefit from special education. See 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). The issue is whether as written the IEP for Student 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. Here, Student's received 120 minutes/month of BSS in the initial IEP, which could be considered a reduction from the 45 minutes/week (180 minutes/month) that Student

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received prior to the IEP. Yet more troubling is the fact that the level of BSS was not increased in the 3/21/22 IEP, despite worsening behavior.

Further, based on those behaviors, Student needed an FBA and BIP much sooner than they were provided, as more support for Student's behaviors would have improved Student's academics. An FBA completed on 6/1/22 stated that Student was more likely to engage in aggressive and disruptive behaviors when not understanding the academic work. The BIP on 6/10/22 targeted disruptive behaviors and work avoidance, and concluded that the function of Student's behaviors were multifaceted, but that frustration related to academic challenges appeared to be the most severe.

Accordingly, the undersigned concludes that DCPS failed to meet its burden of persuasion on whether there were sufficient behavioral interventions, including BSS, to enable Student to make appropriate progress in light of Student's circumstances, which is the basis for the counseling in the compensatory education award below.

(iii) Academic Goals. Finally, Petitioner challenged the academic goals in the IEPs, noting the verbatim repetition in many of the goals and PLOPS between the 2 IEPs in issue. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). Here, with Student performing many years below grade level, a close review of the goals in Student's IEPs leads the undersigned to conclude that DCPS failed to demonstrate that these goals – including repetitions – were appropriate in Student's IEPs. *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 139-40 (D.D.C. 2018) (“having respect for the expertise of school officials does not require a court to endorse conclusions about the adequacy of a student's goals that are not supported by the record”). Upon close consideration, there was modest educational harm to Student which contributes to the compensatory education below.

FAPE. In carefully considering the concerns raised above individually and as a group, the undersigned is cognizant of the fact that the analysis is not about achieving perfection. Instead, IEPs simply need to be reasonably calculated to enable Student to make appropriate progress in the circumstances. *See Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA “stops short of requiring public schools to provide the best possible education”). *See also Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015); *S.M. v. Dist. of Columbia*, CV 19-2096 (RC), 2020 WL 7230266, at *5 (D.D.C. 2020). On balance, this Hearing Officer concludes that DCPS failed to meet its burden of persuasion by a preponderance of the evidence, resulting in the Order below awarding compensatory education.

Remedies

Having analyzed and resolved the issues in this case, what remains is to consider the compensatory education necessary to make up for the denials of FAPE found above. In determining the amount of compensatory education for denials of FAPE, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of*

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Columbia, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, Educational Advocate testified that the compensatory education sought in her proposal would put Student in the position Student would have been but for the denials of FAPE. But that plan must be adjusted in accordance with the testimony in the case, along with the specific denials of FAPE actually found herein. Child Find was the primary issue, where Student should have been evaluated and found eligible in the late Fall of 2020 rather than the summer of 2021, which would have provided a large benefit to Student across many months, which is the basis for much of the tutoring award. Based on experience and careful analysis, the undersigned awards 250 hours of 1:1 academic tutoring in the Order below, which also covers the lack of sufficient specialized instruction and appropriate academic goals in the challenge to the appropriateness of the IEPs. In addition, the failure to provide the needed FBA/BIP or other behavioral interventions to Student in a timely manner is the basis for the 50 hours of counseling awarded below. These hours are awarded with the goal of restoring Student to the position in which Student would have been but for these denials of FAPE.

These determinations by the undersigned have been carefully considered and specifically tailored to address Student’s unique needs as a matter of equity, as “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 36 months, although the undersigned encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without delay.

ORDER

Petitioner has prevailed on both issues herein, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denials of FAPE found herein, within 10 business days after request by Petitioner, DCPS shall provide a letter(s) of authorization for (a) 250 hours of 1:1 academic tutoring, and (b) 50 hours of counseling, all from independent providers chosen by Petitioner; all hours are to be used within 36 months and any unused hours shall be forfeited.

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

IT IS SO ORDERED.

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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).

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