

**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
March 18, 2023

<i>Student</i> , ¹)	Case No.: 2022-0213
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 3/18/23
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	3/13/23 & 3/14/23
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 provide an appropriate placement, fully implement Student's Individualized Education Program ("IEP"), and reevaluate Student as needed. 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 12/8/22, the case was assigned to the undersigned on 12/9/22. Respondent filed a response on 12/20/22 and did not challenge jurisdiction. A resolution meeting took place on 1/6/23, 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 1/7/23. 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 35-day continuance, which requires a Hearing Officer Determination (“HOD”) by 3/28/23.

A prehearing conference was held on 1/17/23 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 due process hearing took place on 3/13/23 and 3/14/23 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 3/6/23, contained documents P1 through P45, all of which were admitted into evidence over limited objections. Respondent’s Disclosure, also submitted on 3/6/23, contained documents R1 through R45, all of which were admitted into evidence over certain objections.²

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Occupational Therapist* (qualified over objection as an expert in Occupational Therapy and Physical Disabilities)
2. *Private Speech Language Pathologist* (qualified without objection as an expert in Speech Language Pathology)
3. Parent
4. *Educational Advocate* (qualified without objection as an expert in Special Education and IEP Programming)

Respondent’s counsel presented 5 witnesses in Respondent’s case (*see* Appendix A):

1. *LEA Representative* at Prior School (qualified without objection as an expert in Special Education)
2. *School Speech Language Pathologist* (qualified without objection as an expert in Speech Language Pathology)
3. *Principal*

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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4. *Assistant Principal* in 2021/22 (qualified without objection as an expert in Special Education)
5. *School Psychologist* (qualified without objection as an expert in School Psychology)

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 provide an appropriate placement during 2021/22³ when Student (a) needed a Specific Learning Support ("SLS") classroom rather than a Behavior & Education Support ("BES") classroom, (b) should have been placed with other students rather than alone, and/or (c) needed physical needs met with access to the entire school. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to implement the 5/25/21 IEP by not providing a dedicated aide from October 2021 until mid-January 2022, missing about 350 hours of support. (*Petitioner has the burden of persuasion on this issue.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to comprehensively reevaluate Student in the areas of (a) speech-language pathology ("SLP"), (b) physical therapy ("PT"), and/or (c) occupational therapy ("OT"), in each of which Student was last evaluated in 2018. (*Petitioner has the burden of persuasion on this issue.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall timely conduct or timely fund (a) a comprehensive physical therapy evaluation, (2) a comprehensive speech-language evaluation, and (3) a comprehensive occupational therapy evaluation.
3. DCPS shall convene the IEP team to review the results of all evaluations completed and revise Student's IEP as appropriate within 15 business days after completion of the evaluations.
4. DCPS shall fund compensatory education for any denials of FAPE and ensure that compensatory education providers are paid in a timely manner.⁴

³ All dates in the format "2021/22" refer to school years.

⁴ With regard to any request for compensatory education to be awarded in the HOD, Petitioner's counsel was put on notice at the prehearing conference that, at the due process hearing, Petitioner must introduce evidence supporting the requested compensatory

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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 Fact⁵ are as follows:

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age, Gender, in Grade* during 2022/23 at *Current School*, after being at *Prior School* for 2 years.⁷ Student was born prematurely, with 2 club feet, and had 3 surgeries in Student's first years; there were concerns that Student would not walk, but is able to with a leg brace and crutches, and Student sometimes uses a wheelchair.⁸ Student is very social with friends and is kind and respectful to teachers and other students.⁹

2. Student's 5/2/21 comprehensive psychological reevaluation explained that Student's history of academic frustration, poor retention, and low adaptive skills had a significant impact on behavior, including noncompliance and verbal aggression, which impacted Student's ability to manage emotions in difficult situations.¹⁰ Conners 3rd Edition ("Conners 3") scores indicated poor executive functioning in the school setting; observations and scores on the Adaptive Behavior Assessment System 3rd Edition ("ABAS-3") indicated low adaptive skills in functional academics and health and safety.¹¹ Based on overall evaluation results and school-based observations and assessments, Student was performing below expectations and appeared to meet the criteria for Intellectual Disability ("ID").¹² Cognitively, Student's General Intellectual Ability ("GIA") on the Woodcock-Johnson IV Tests of Cognitive Ability ("WJ-IV COG") was 50 with deficits in auditory

education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁵ 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.

⁶ Parent.

⁷ Parent; P26p372.

⁸ P34p500; P24p339.

⁹ P40p614; R1p6.

¹⁰ P34p524.

¹¹ *Id.*

¹² *Id.*

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processing and memory skills; Student's academic evaluation showed relative strength in math and deficits in reading, with low performance observed both in person and in the virtual setting.¹³

3. IEPs. Student's 5/25/21 annual IEP provided for 26.25 hours/week of specialized instruction outside general education, 120 minutes/month of SLP outside general education, 180 minutes/month of Behavioral Support Services ("BSS") outside general education, and 27 hours/week with a dedicated aide outside general education.¹⁴ Student's 1/21/22 annual IEP added 60 minutes/month of adapted physical education outside general education, and repeated 26.25 hours/week of specialized instruction outside general education, 120 minutes/month of SLP outside general education, 180 minutes/month of BSS outside general education, and 27 hours/week with a dedicated aide outside general education.¹⁵ Student's 6/24/22 annual IEP reduced specialized instruction outside general education to 20 hours/week, and repeated 60 minutes/month of adapted physical education outside general education, 120 minutes/month of SLP outside general education, 180 minutes/month of BSS outside general education, and 27 hours/week with a dedicated aide outside general education, and added 15 minutes/month of SLP consultation.¹⁶

4. Disability Classification and Program. A 5/6/21 Prior Written Notice ("PWN") noted that DCPS proposed to change Student's disability classification to ID from Multiple Disabilities ("MD"), with both Emotional Disturbance ("ED") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"); DCPS also proposed an Independence & Learning Support ("ILS") program rather than BES, based on the recent psychological evaluation, but no change was made so Parent could retain an educational lawyer.¹⁷ Student's 5/25/21 IEP (document created on 6/16/21) stated that Student's disability classification was ID.¹⁸ A 6/16/21 PWN stated that the team determined that Student's disability category was ID; Parent disagreed and requested that the evaluation be revisited in the Fall when Student had been observed 3 months in person.¹⁹

5. Parent had been told on 5/5/21 that BES was not the right program for Student; Parent sought to minimize changing schools.²⁰ Asked how Student ended up in BES, Parent stated that she sued DCPS to get Student into the BES program.²¹ On 6/14/21, Parent's counsel confirmed that Parent wanted Student to remain in the BES program in 2021/22.²² A 7/2/21 PWN noted ID as Student's category and the potential harm of keeping Student in

¹³ P34p524; P39p587.

¹⁴ P20p301.

¹⁵ P24p341.

¹⁶ P26p372,387.

¹⁷ P19p288; P18p264; LEA Representative.

¹⁸ P20p291.

¹⁹ P21p315.

²⁰ R2p11.

²¹ Parent; Assistant Principal; R3p19.

²² R34p248; Parent; Educational Advocate (Parent requested that Student remain in the BES classroom for 2021/22).

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a BES placement, as Student's behaviors were related to academic frustration rather than an emotional disability.²³ On 5/2/22, Parent's new advocate asked about the need for BES and LEA Representative explained that it had been brought up with Parent at the end of 2020/21 and the beginning of 2021/22, but Parent's previous attorney wanted to wait to make a change from BES until assessments were completed to review the disability classification.²⁴ School staff made BES work for Student in 2021/22, but in higher grades it would not be appropriate; LEA Representative suggested SLS.²⁵

6. According to a 6/27/22 PWN, DCPS again proposed ID, but Parent and her advocates disagreed; Parent did agree with an SLS program, in which the team placed Student, but Parent disagreed about the particular school for "personal reasons."²⁶ Student's entire team, including Parent, wanted to keep Student on a diploma track.²⁷ LEA Representative credibly testified that Student's IEP needs could be met in the BES classroom; BES was "not inappropriate" in 2021/22.²⁸

7. Seclusion. Student was the only child enrolled in the BES program in 2021/22 at Prior School as of 2/1/22 and Parent was aware of that fact; Student's program was adjusted to avoid seclusion while meeting Student's IEP requirements.²⁹ Two other children may have joined the BES classroom later in 2021/22.³⁰ The school modified Student's program to locate Student to be with peers.³¹ Principal gave the order to DCPS staff early in 2021/22 to ensure Student was not in seclusion and it would have been insubordination if Principal's order had not been carried out; Principal clearly asserted that seclusion was unacceptable for any student.³² According to Principal's 2/1/22 email, Student's schedule began with 3 hours of self-contained classes and activities in the BES classroom, followed by lunch and recess with general education peers, and then a little over 2 hours of inner core subjects with general education peers and social studies and science with general education peers.³³ Just over half of Student's day was with general education peers, while the remainder was self-contained with the BES special education teacher.³⁴

8. Access to Building. Student's initial assigned classroom was in a "portable" unit outside the school building, but Student was promptly reassigned to a room inside the school building.³⁵ Principal explained that Student's classroom had been inside the building

²³ P23p324; LEA Representative.

²⁴ R19p139.

²⁵ R19p139; LEA Representative.

²⁶ R30p203; P28p410; R26p182-83; LEA Representative.

²⁷ P28p410; R30p203; Parent.

²⁸ LEA Representative.

²⁹ P41p621.

³⁰ Assistant Principal.

³¹ R13p72.

³² P41p620; Principal.

³³ P41p621.

³⁴ *Id.*

³⁵ Principal; Parent.

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since 2021.³⁶ Principal focused right away on access by Student to the school building and had a lift installed early in 2021/22 as an emergency request to give access to all areas needed by Student.³⁷ The lift provided Student access to the library, art, music, the multipurpose room, as well as physical education (“PE”) (Principal thought), counselors’ offices and main offices; the building was rearranged to meet the needs of Student (and others).³⁸ The school made modifications to ensure Student could access PE class.³⁹ Occupational Therapist testified that Student got to PE class.⁴⁰ PE classes were on Student’s floor or the multipurpose room or outside.⁴¹ Student’s teacher noted Student’s inability to access PE; Student was briefly interviewed and reported that Student both did and did not enjoy PE, suggesting participation.⁴²

9. Dedicated Aide. Student’s dedicated aide had resigned as of 10/14/21 and Student did not have a dedicated aide until about 1/14/22, due to a shortage of dedicated aides, despite Prior School’s efforts.⁴³ As of 11/22/21, the dedicated aide and the educational aide had quit, leaving a lead teacher and a behavior aide in the BES classroom.⁴⁴ When the dedicated aide was not present, the behavior tech and the special education teacher were always in the BES classroom and acted as the dedicated aide, for they could do what the dedicated aide did, so there was no educational harm to Student.⁴⁵ Principal provided a candid photograph showing Student in a general education classroom with no indication of any adult acting as dedicated aide for Student.⁴⁶

10. Evaluations. Triennial reevaluations routinely update psychological evaluations, but updated SLP, OT and PT evaluations are not required if the team feels they are not necessary, which was the case here.⁴⁷ SLP, OT and PT evaluations were not requested by Parent or her advocates.⁴⁸ Parent’s counsel listed all of Parent’s concerns on 6/14/21, which did not include conducting SLP, OT or PT reevaluations.⁴⁹

11. Speech Language Pathology. Student last received an SLP evaluation in 2018; SLP reevaluation in 2021 would have been appropriate according to Private Speech Language Pathologist due to change in Student’s fluency and the passage of time.⁵⁰ School Speech

³⁶ R13p70 (3/9/22).

³⁷ Principal.

³⁸ *Id.*

³⁹ R13p69 (3/9/22).

⁴⁰ Occupational Therapist.

⁴¹ Principal.

⁴² P36p537-38 (12/7/21).

⁴³ R37p268-70; LEA Representative; Principal; Assistant Principal.

⁴⁴ P40p614.

⁴⁵ Assistant Principal.

⁴⁶ R40p292.

⁴⁷ LEA Representative.

⁴⁸ School Psychologist.

⁴⁹ R34p248.

⁵⁰ Private Speech Language Pathologist.

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Language Pathologist hadn't seen disfluencies and didn't need an evaluation to check; School Speech Language Pathologist worked with Student so knew how Student was doing without an evaluation.⁵¹ Evaluations put pressure on students and it would be detrimental to unnecessarily stress Student.⁵² Student was receiving 120 minutes/month of direct SLP services; Private Speech Language Pathologist could not tell if that was appropriate without a new evaluation.⁵³ School Speech Language Pathologist noted that conducting a new SLP evaluation might show sufficient progress that Student might have services reduced or be exited altogether from SLP.⁵⁴ As of 6/11/21, Student was doing really well in SLP sessions.⁵⁵ Student had not regressed on speech goals.⁵⁶

12. Physical Therapy. Student last received a PT evaluation in 2018; Student was not receiving PT services during the period at issue.⁵⁷ When Student came back to school after the pandemic, the physical therapist did an observation and didn't think a PT evaluation was needed; Student was able to maneuver around the classroom and school.⁵⁸ Occupational Therapist testified that accessing the school building was not enough; the psychological evaluation raised red flags for Occupational Therapist so she sought a PT reevaluation.⁵⁹ LEA Representative testified more credibly that after the PT observation a PT evaluation was not requested and was not needed.⁶⁰

13. Occupational Therapy. Student last received an OT evaluation in 2018; Student was not receiving OT services in the relevant timeframe.⁶¹ The 5/2/21 comprehensive psychological reevaluation recommended an OT consultation.⁶² Following the OT screener, School Psychologist relied on the occupational therapist who concluded that further evaluation was not needed, although Occupational Therapist would have recommended an OT evaluation.⁶³ The OT observation of Student was discussed and the school team reasonably concluded that no OT evaluation was needed.⁶⁴

14. Compensatory Education. Educational Advocate provided a compensatory education proposal to remedy what she believed were denials of FAPE, proposing 360 hours of tutoring, 36 hours of play therapy, evaluations and IEP revisions, summer camp, and

⁵¹ School Speech Language Pathologist.

⁵² *Id.*

⁵³ Private Speech Language Pathologist.

⁵⁴ School Speech Language Pathologist.

⁵⁵ R3p17; School Speech Language Pathologist (doing well and making progress).

⁵⁶ R35p262.

⁵⁷ Occupational Therapist; LEA Representative; P26.

⁵⁸ R26p184; P21p315; LEA Representative.

⁵⁹ Occupational Therapist.

⁶⁰ LEA Representative.

⁶¹ Occupational Therapist; P26.

⁶² P34p524.

⁶³ School Psychologist; Occupational Therapist.

⁶⁴ LEA Representative; R3p20.

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transportation, along with reservation of additional compensatory education following the outcome of evaluations.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 P43p636-37.

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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 provide an appropriate placement during 2021/22 when Student (a) needed a Specific Learning Support classroom rather than a Behavior & Education Support classroom, (b) should have been placed with other students rather than alone, and/or (c) needed physical needs met with access to the entire school. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did establish a *prima facie* case through documents and testimony, but Respondent met its burden of persuasion on this issue. The IDEA requires “school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student’s IEP.” *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018), *citing O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP”). For the reasons set forth below, the undersigned concludes that Prior School afforded Student the opportunity to make appropriate progress in Student’s particular circumstances. *See N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), *quoting James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

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(a) Need for SLS Rather than BES Classroom. All appear to belatedly agree that the BES program was not optimal for Student in 2021/22. Student had academic frustration, not the sort of behaviors seen in the BES classroom, especially as Student would be moving into higher grades at Current School. Yet, when the school team encouraged consideration of a program other than BES, Parent and her advocates had insisted on continuing with BES.

With Student the only child in the BES classroom, however, many of the concerns about the inappropriateness of being in a BES classroom, with children who had serious behaviors and may have been older and bigger, simply did not apply in 2021/22 as they might in 2022/23. This case is of course focused on the situation in 2021/22. Also, the undersigned would expect that the special education teacher focusing 1:1 on Student would have tailored both content and approach to give Student what was needed, even if it differed from what would have been provided to a full class of BES students.

Importantly, the issue here is not whether BES or SLS (or ILS) was the optimum program for Student in 2021/22, but whether the program provided was sufficient to provide FAPE. DCPS asserted that BES was not the best program, but that it was sufficient to achieve FAPE and was “not inappropriate.” School staff made BES work for Student in 2021/22, although in higher grades it would not be appropriate. LEA Representative credibly testified that Student’s IEP needs were met in the BES classroom in 2021/22.

For these reasons, the undersigned is persuaded that there was no denial of FAPE by keeping Student in the BES program in 2021/22.

(b) Seclusion. Student was the only child assigned to the BES classroom in 2021/22 (at least for most of the year) and Prior School’s Principal immediately recognized that as a problem and took remedial steps. Principal asserted that seclusion was unacceptable for any student, and the school modified Student’s program so that Student could be with peers. Specifically, Principal was clear that Student’s BES classroom should not be in a portable unit outside the main school building. Further, Student needed a schedule that would keep Student with other children, and Student’s class schedule was adjusted so that just over half of Student’s day was with general education peers, while the remainder was self-contained with the BES special education teacher and behavior tech. The undersigned is persuaded that Student’s program was appropriately adjusted to avoid seclusion of Student.

(c) Access to School Building. Student relied on crutches or a wheelchair for mobility at school, which Principal recognized would require improved access to the school building. Changes were made in the school building on an urgent basis, including installation of a lift so that Student could access all needed parts of the building. The building was also rearranged to meet the needs of Student and others. While there was contradictory evidence about Student’s ability to access PE in particular, the undersigned is persuaded that the school made needed modifications to ensure Student could access classrooms along with other areas of the building needed for Student’s education and safety.

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

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perfection. Instead, placement simply need to be reasonably calculated to enable Student to make appropriate progress in the circumstances. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519. On balance, this Hearing Officer concludes that Student's placement in 2021/22 met the required standard and was appropriate for Student.

Issue 2: *Whether DCPS denied Student a FAPE by failing to implement the 5/25/21 IEP by not providing a dedicated aide from October 2021 until mid-January 2022, missing about 350 hours of support. (Petitioner has the burden of persuasion on this issue.)*

Petitioner meet her burden of persuasion in part on her IEP implementation claim. 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).

Student's IEP required a dedicated aide 27 hours/week, which covered the school day apart from lunch and recess. Student's dedicated aide was in place in 2021/22 until resigning on about 10/14/21. DCPS had a shortage of dedicated aides, so a formal replacement did not begin until about 1/14/22. In the meantime, however, Student had a special education teacher and a behavior tech all the time in the BES classroom, where Student was the only child during the 3 months when Student was without a dedicated aide. While Petitioner asserted that lack of a dedicated aide in the BES classroom was a failure of IEP implementation, DCPS convincingly asserted that the other BES staff were able to step in for the dedicated aide and did provide the 1:1 services needed by Student in the absence of the dedicated aide.

But that is not the end of the story, for Student was only in the BES classroom 3 hours/day and was with general education peers the remainder of the day. There was no assertion by DCPS that the adults from the BES classroom or anyone else was acting as dedicated aide for Student in the afternoons when Student was in the general education setting.

Thus, the undersigned finds no implementation violation for the 3 hours/day when Student was in the self-contained BES classroom receiving 1:1 attention not from a single dedicated aide, but from both a special education teacher and a behavior tech who stepped in to assist in the dedicated aide role. But there is no evidence that Student was receiving that type of dedicated aide support the rest of the school day. So on a weekly basis, Student was only receiving 15 of the 27 hours/week on Student's IEP for a dedicated aide, and the undersigned concludes that the remaining 12 hours/week of dedicated aide services were not

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de minimis, but a clear violation of the IDEA, and result in the award of compensatory education below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to comprehensively reevaluate Student in the areas of (a) speech-language pathology, (b) physical therapy, and/or (c) occupational therapy, in each of which Student was last evaluated in 2018. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this issue. The IDEA requires reevaluation of each student with a disability at least once every 3 years, or sooner if the student's parent or teacher requests a reevaluation, or if DCPS determines that the needs of the student warrant reevaluation. *See* 34 C.F.R. § 300.303. In considering a reevaluation, 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, the school team saw no need for updated SLT, PT or OT evaluations. Nor were the evaluations requested at the time by Parent or her advocates. Indeed, Parent's counsel listed all of Parent's concerns on 6/14/21, which did not include conducting SLP, PT or OT evaluations. Little – if any – more is needed, but specifics on these evaluations follow.

(a) Speech-Language Pathology. Student last received an SLP evaluation in 2018 and was receiving SLP services, but School Speech Language Pathologist explained that an SLP reevaluation was not needed in 2021 or since because Student was doing so well and making progress. Private Speech Language Pathologist asserted that an SLP reevaluation would have been appropriate due to change in Student's fluency and the passage of time. However, School Speech Language Pathologist persuasively testified that she had not seen disfluencies and doesn't need an evaluation to check, since School Speech Language Pathologist worked with Student and knew how Student was doing. School Speech Language Pathologist noted that evaluations put pressure on students, and there was no reason to unnecessarily stress Student. Student was doing really well in SLP sessions, so conducting an SLP reevaluation might reveal sufficient progress that Student might have services reduced or even ended. The undersigned concludes there is no need for an SLP reevaluation here.

(b) Physical Therapy. Student last received a PT evaluation in 2018, as there was no PT reevaluation when considering Student's eligibility in 2021. Nor was Student

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receiving PT services. When Student came back to school after the pandemic, the physical therapist did an observation and concluded a PT reevaluation was not needed, for Student was able to maneuver around the classroom and school. Occupational Therapist claimed that the psychological evaluation raised red flags, but LEA Representative testified more credibly that a PT evaluation was not requested and was not needed. The undersigned concurs that there is no need for a PT reevaluation.

(c) Occupational Therapy. Finally, Student last received an OT evaluation in 2018, and Student was not receiving OT services. The 5/2/21 comprehensive psychological reevaluation recommended an OT consultation. Following the OT screener, the school occupational therapist concluded that further evaluation was not needed. While Occupational Therapist would have recommended an OT evaluation based on red flags in the 2021 reevaluation, the undersigned is persuaded by the school team focusing on the OT observation of Student and concluding that no OT evaluation was needed.

Remedy

Having analyzed and resolved the issues in this case, what remains is to consider the compensatory education necessary to make up for the denial 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 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). Further, with a failure to implement claim, as here, Petitioner need not even show that there was educational harm to Student. *James*, 194 F. Supp. 3d at 139.

Here, Educational Advocate testified that the compensatory education sought in her detailed plan would put Student in the position Student would have been but for the denials of FAPE. But that plan must be adjusted significantly to match the denial of FAPE actually found herein, which was limited to lack of a required dedicated aide for 12 hours/week for 3 months. Based on experience and careful analysis, the undersigned awards 150 hours of 1:1 academic tutoring in the Order below. This determination by the undersigned has been specifically tailored to address Student’s unique needs as a matter of equity, as “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 18 months to avoid administrative burdens on Respondent, 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

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Petitioner has prevailed on a portion of the second issue, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denial of FAPE found herein, within 10 business days after request by Petitioner, DCPS shall provide a letter of authorization for 150 hours of 1:1 academic tutoring from an independent provider chosen by Petitioner; all hours are to be used within 18 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.

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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