

**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
May 19, 2018

<i>Student</i> , ¹)	Case No.: 2018-0056
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 5/19/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 5/8/18, 5/9/18 & 5/10/18
("DCPS"),)	ODR Hearing Room: 111
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 comprehensively evaluated and provided Individualized Education Programs (“IEPs”) with sufficient special education services. DCPS responded that it had sufficiently assessed Student and provided appropriate IEPs as Student was making good academic progress and had few behavioral concerns.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 3/1/18, the case was assigned to the undersigned on 3/2/18. DCPS filed a response on 3/9/18 and did not challenge jurisdiction. The resolution session meeting took place on 3/9/18, but the parties neither

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

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settled the case nor terminated the 30-day resolution period, which ended on 3/31/18. 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 7-day continuance, which requires a Hearing Officer Determination (“HOD”) by 5/22/18.

The due process hearing took place on 5/8/18, 5/9/18 and 5/10/18 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in the first day of the hearing.

Petitioner’s Disclosures, submitted on 4/27/18, contained documents P1 through P48, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 5/1/18, contained documents R1 through R13, which were also admitted into evidence without objection.

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

1. *Private Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
2. *Educational Advocate* (qualified without objection as an expert in Special Education Programming and IEP Development)
3. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
4. Parent

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

1. *Social Worker at Public School* (qualified without objection as an expert in Social Work)
2. *School Occupational Therapist at Public School* (qualified without objection as an expert in Occupational Therapy)
3. *School Psychologist at Public School* (qualified without objection as an expert in School Psychology)
4. *Special Education Coordinator at Public School* (qualified without objection as an expert in Special Education Programming and Placement)

The parties stipulated during the due process hearing that they will amend Student’s IEP to (a) add back 10 hours of specialized instruction inside the general education setting, and (b) adjust and update transition plan goals in a meeting with Parent.

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

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Issue 1: Whether DCPS denied Student a FAPE by failing to timely and/or comprehensively reevaluate Student in all areas of suspected disability, specifically by (a) failing to initiate reevaluations prior to March 2017 despite the lack of evaluation data for Student, (b) failing to timely conduct an occupational therapy (“OT”) evaluation as requested by Parent, and (c) failing to conduct or fund a neurological evaluation and/or vocational evaluation recommended in independent evaluations. *Petitioner has the burden of persuasion on this issue.*

Issue 2: Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on 3/24/17, 4/11/17 and/or 2/20/18, where (a) the IEPs were not based on comprehensive evaluations, (b) many academic goals were insufficient or unattainable and lacked proper baseline data, (c) they did not contain sufficient Behavioral Support Services (“BSS”) or goals, (d) they did not provide sufficient instructional support despite lack of progress, (e) they do not include OT services, (f) they did not include appropriate transition plans, and (g) the 2/20/18 IEP does not include reading goals and inappropriately reduced hours. *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 was denied a FAPE.
2. Within 5 business days, DCPS shall revise Student’s IEP to provide for (a) revised math goals; (b) reading goals; (c) at least 5 hours/week of specialized instruction outside general education; (d) 15 hours/week of specialized instruction inside general education; (e) 60 minutes/week of BSS; and (f) placement in a program with a highly structured classroom, low student-teacher ratio and individualized attention.
3. DCPS shall conduct or fund an independent (a) neurological evaluation, and/or (b) vocational evaluation.
4. DCPS shall fund compensatory education for Student for any denial of FAPE and/or fund a compensatory education evaluation.²
5. Any other just and reasonable relief.

² Petitioner’s counsel was put on notice during 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 encouraged during the prehearing conference 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.

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Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's adoptive Parent.⁴ Student has had a significant history of both medical and academic problems, along with familial instability with abuse and neglect by Student's biological mother and multiple foster care placements prior to moving to Parent's home 3 years ago.⁵

2. Student is *Age, Gender* and now in *Grade* at Public School where Student began in 2016/17 after failing Grade-2⁶ in 2015/16 at *Public Charter School*.⁷ Student was with Student's cohort as of 3/24/17, despite not yet having completed Grade-2 math.⁸ Student took credit recovery and caught up with Grade by October 2017; Student feels Student is doing well in school.⁹

3. IEPs. Student has been eligible for special education and related services for many years.¹⁰ Student has been classified as a child with Other Health Impairment ("OHI") due to Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD").¹¹ Initial information in the record about Student's special education and related services at Public Charter School from the Analysis of Existing Data dated 4/22/16 was that Student received 5 hours/week of math inside general education, 5 hours/week of reading inside general education and 30 minutes/week of direct BSS outside general education.¹² The IEP that Student brought from Public Charter School to Public School dated 4/22/16 provided for 7.5 hours/week of math inside general education, 7.5 hours/week of reading

³ 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.

⁴ Parent.

⁵ P10-1; Parent.

⁶ The number following Grade in this format indicates the number of years below (indicated with a minus sign) or above (plus sign) Student's Grade in 2017/18. In other school years, the number of grades Student was behind is stated, with no adjustment for the repeated courses/grade in 2016/17 as Student quickly caught up with Student's cohort.

⁷ Parent.

⁸ P3-8.

⁹ Special Education Coordinator; P10-6; P12-3.

¹⁰ P10-1.

¹¹ P1-1; P3-1; P4-1; P7-1.

¹² P20-1.

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inside general education, 4 hours of specialized instruction outside general education and 30 minutes/week of direct BSS outside general education.¹³

4. At Public School, Student's 3/24/17 IEP reduced services to 5 hours/week of math inside general education, 5 hours/week of reading inside general education, and 30 minutes/month of BSS consultative services.¹⁴ That was increased by amendment in a 4/11/17 IEP to 5 hours/week of specialized instruction outside general education, 10 hours/week of specialized instruction inside general education, and 30 minutes/month of BSS consultation.¹⁵ The 10 hours/week of specialized instruction inside general education were omitted from Student's 2/20/18 IEP, which was 5 hours/week of specialized instruction outside general education and 30 minutes/month of BSS consultation.¹⁶ Finally, the 10 hours/week of specialized instruction inside general education were restored pursuant to the stipulation to which the parties agreed during the due process hearing.¹⁷

5. Cognitive and Achievement Results. Student's overall cognitive functioning is in the Average range, with an FSIQ of 91 in May 2017 and 96 in October 2017; IQs are static, so scores shouldn't change much.¹⁸ Student's achievement skills based on the WJ-IV in May 2017 found scores for Broad Reading of 95 (Average range), Broad Math of 70 (Borderline range), Broad Written Language of 94 (Average range).¹⁹ On the WIAT-III in October 2017, Basic Reading composite was 104 (Average range), Mathematics composite was 69 (Low range), and Written Expression cluster was 87 (Average range).²⁰ The 11/21/17 independent comprehensive psychological evaluation concluded that the results of both the academic and cognitive tasks in October 2017 may be an underestimation of Student's functioning, due to limited engagement and variable attention.²¹

6. Academic Challenges. As of 3/24/17, Student was working hard to raise and maintain passing grades at Public School.²² In the comprehensive psychological evaluation, teachers reported that Student worked hard and attempted to complete work.²³

¹³ P1-12.

¹⁴ P3-10.

¹⁵ P4-10.

¹⁶ P7-9.

¹⁷ See Stipulation, above.

¹⁸ P12-3; P10-7,9; School Psychologist; May 2017 data is from the 5/23/17 comprehensive psychological evaluation conducted by DCPS; October 2017 data is from the 11/21/17 independent comprehensive psychological evaluation that DCPS authorized in September 2017 along with an OT independent educational evaluation ("IEE") to resolve a due process complaint filed by Petitioner prior to this case, according to the testimony of Special Education Coordinator.

¹⁹ P12-8,9; P10-7,8.

²⁰ P10-11,12.

²¹ P10-16.

²² P3-9.

²³ P12-3.

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7. Math. Student was not doing well in math.²⁴ Based on a WJ-III in 2015/16, Student was 6 grades behind on math calculation.²⁵ Student took the MAP test in the fall of 2016 and scored a 191 in math, significantly below peers.²⁶ Student's 2/20/18 IEP noted that Student was in a self-contained Algebra II Trigonometry class, but performing math at Grade-7.²⁷ A Brigrance on 2/20/18 found that Student's math was at Grade-7 level.²⁸

8. Student's math goals in the 3/24/17 IEP appear complex ("involving the use of trigonometric ratios and the Pythagorean Theorem"), but included built in scaffolding ("reference materials") which made the goals accessible to Student; Student passed the class in 2016/17.²⁹ Math goals in the 2/20/18 IEP provided for reference materials to make them accessible to Student.³⁰ Educational Advocate agreed in her testimony that Student was making appropriate progress on goals.³¹

9. Petitioner's counsel sought basic foundational math goals at the 6/16/17 meeting, but Special Education Coordinator did not agree to update Student's IEP.³² A foundational math goal for multiplication was agreed to at the 2/20/18 meeting and added in the 2/20/18 IEP; Educational Advocate testified that subtraction, addition and division were also needed.³³ When baselines and goals were initially discussed, Petitioner and her advocates did not bring up concerns.³⁴ Educational Advocate testified that she could not remember requesting any specific change to goals that was denied.³⁵

10. Reading. As for reading, based on a WJ-III in 2015/16, Student was 3 grades behind in letter-word identification.³⁶ In the 3/1/17 Brigrance, Student's reading comprehension was 3 grades behind.³⁷ Student scored 207 on Read 180 on 8/25/16, which the teacher noted was Level 1 and below basic.³⁸

²⁴ P29-1.

²⁵ P-4.

²⁶ P3-3.

²⁷ P7-4.

²⁸ P7-13.

²⁹ Special Education Coordinator.

³⁰ P7-4,5.

³¹ Educational Advocate.

³² P5-4,5.

³³ P7-6; P8-3; Educational Advocate.

³⁴ R2-2.

³⁵ Educational Advocate.

³⁶ P1-7.

³⁷ P3-14.

³⁸ P3-6 (date corrected during hearing).

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11. Student's 8/25/16 Lexile score was 207, which was 9 grades behind.³⁹ Student's middle-of-year Lexile score in 2016/17 was 342.⁴⁰ Student's 5/31/17 Lexile score was 443, which was 8 grades behind.⁴¹ Student's 9/8/17 Lexile score was 574, which was a Grade-8 reading level (8 grades behind).⁴² Student's 1/9/18 Lexile score was 825, which was reported both as Grade-6 and Grade-5 reading level (5 or 6 grades behind).⁴³

12. Student did well in reading and writing (which was not an IEP area of concern) on the independent comprehensive psychological evaluation so needed less support.⁴⁴ On 2/20/18, Petitioner's counsel urged that Student's specialized instruction hours/week be increased to 20; the 2/20/18 IEP provided 5.⁴⁵ At the 2/20/18 meeting, Special Education Coordinator noted that Student is responding well to intervention and no longer needed specialized instruction hours for reading; if Student can make necessary progress without specialized instruction, it does not matter if scores are still below grade level.⁴⁶ A Brigance on 2/20/18 found that Student was able to read at Grade+1 and comprehend text at Grade-3.⁴⁷ On 2/20/18, School Psychologist noted that Student is growing in Read 180, but was still below grade level.⁴⁸

13. Special Education Coordinator testified that Student's reading increased by 5 grades in 18 months, and Student was progressing with general education peers even though specialized instruction in reading had been removed from Student's IEP.⁴⁹ Student's reading is below average based on national averages and grade equivalencies, which Public School does not use.⁵⁰ Parent agreed that Student has no significant deficits in reading, although Student is significantly below grade level.⁵¹

³⁹ P23-4; P3-6.

⁴⁰ P3-6 (IEP statement of 2 years' growth appears incorrect, as do baselines on P3-7 stating a current Lexile score of 302); P28-1.

⁴¹ P22-2.

⁴² P26-1; P19-4; P8-1; Educational Advocate.

⁴³ P26-1; Educational Advocate; Special Education Coordinator (explaining variability in tables).

⁴⁴ School Psychologist.

⁴⁵ P8-4.

⁴⁶ P8-3; Special Education Coordinator.

⁴⁷ P7-13.

⁴⁸ P8-1.

⁴⁹ Special Education Coordinator.

⁵⁰ Special Education Coordinator; R12-1; School Psychologist.

⁵¹ Parent.

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14. Grades. Student is receiving a lot of good grades – “As” and “Bs.”⁵² Student got a few scattered “Fs,” such as Spanish for 2017/18 term 3, but never for an entire course at Public School.⁵³ Student earned 1 credit in 2015/16, and earned 12 credits in 2016/17.⁵⁴

15. In 2016/17, Student had a Grade Point Average (“GPA”) in term 1 of 1.24 and in term 2 of 2.51.⁵⁵ Student’s grades in 2016/17 term 1 were: 0 “As”; 2 “Bs”; 2 “Cs”; 2 “Ds” and 2 “Fs.”⁵⁶ Student’s grades in 2016/17 term 2 were: 2 “As”; 3 “Bs”; 1 “C”; 1 “D”; and 1 “F.”⁵⁷ In 2016/17 term 4, Student earned an “A” in Geometry and was progressing according to the IEP Progress Report.⁵⁸

16. In 2017/18, Student had a GPA in Term 1 of 2.57 and in Term 2 of 2.84.⁵⁹ Student’s grades in 2017/18 term 1 were: 4 “As”; 1 “B”; 3 “Cs”; 1 “D”; and 1 “F.”⁶⁰ Student’s grades in 2017/18 term 2 were: 3 “As”; 3 “Bs”; and 4 “Cs.”⁶¹ In 2017/18 term 3, Student made measurable progress in a self-contained math class and received a “C” for the semester.⁶² Student is a leader among peers in math class.⁶³ Educational Advocate acknowledged that Student’s grades at Public School showed a “marked” and “significant” improvement.⁶⁴

17. Behavior. Student had few behavior concerns; Student’s IEPs noted that Student’s behavior did not impede Student’s learning or that of other children.⁶⁵ Student has had no school suspensions in recent years.⁶⁶ Student is doing well socially and has no conflicts with others that Student starts; Student was recently punched in the face, but didn’t retaliate.⁶⁷ Student has friends, but not a lot of friends, and interacts appropriately at school with both general education and special education peers.⁶⁸

⁵² Social Worker.

⁵³ Social Worker; Special Education Coordinator.

⁵⁴ Special Education Coordinator.

⁵⁵ P23-1.

⁵⁶ P23-2,3.

⁵⁷ *Id.*

⁵⁸ R13-1.

⁵⁹ P19-1.

⁶⁰ P19-2,3.

⁶¹ *Id.*

⁶² R10-2.

⁶³ Social Worker.

⁶⁴ Educational Advocate.

⁶⁵ P1-2; P3-2; P4-2; P7-3.

⁶⁶ P10-6 (Student acknowledged suspensions in the past, but none for the last 4 years); Educational Advocate (no suspensions in last 2 years); Social Worker (same).

⁶⁷ Social Worker.

⁶⁸ Clinical Psychologist; Educational Advocate (Student has friends at school); Social Worker.

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18. At the beginning of 2015/16 at Public Charter School, Student at times did not want to meet with the social worker for BSS, but became more engaged over the year.⁶⁹ The 5/23/17 comprehensive psychological evaluation noted that Student struggled with work completion at Public Charter School, but was typically on task and completed work at Public School.⁷⁰ Student struggled at Public School early in 2016/17, but made “tremendous progress” since that time and now takes responsibility.⁷¹ In 2016/17, Student often preferred to stay focused on academics so refused BSS.⁷²

19. When deciding whether to remove direct BSS in March 2017, school staff pressed for Student to be in the IEP meeting to give Student’s views; Student made clear that the preference was to not be forced out of classes.⁷³ Social emotional concerns were not affecting Student’s ability to make educational progress by the spring of 2017.⁷⁴ The 3/24/17 IEP stated that based on observation, Student had shown tremendous growth in making better choices and interacting with peers; there had been no behavior concerns during the last reporting period and the need level had diminished, so reduction in direct BSS was recommended.⁷⁵ In Student’s 3/24/17 IEP, direct BSS was replaced with 30 minutes/month of consultative BSS.⁷⁶ Direct BSS was discontinued due to Student’s emotional stability and mastering social-emotional goals.⁷⁷ Being pulled from class for BSS was stressful for Student; the better approach was to let Student seek support from Social Worker as needed.⁷⁸ Parent noted at the 6/17/17 meeting that Student’s teacher was concerned about Student’s temper tantrums.⁷⁹ Student had lots of tantrums in 2016/17, but none had been reported in 2017/18.⁸⁰ Teachers had direct access to Social Worker, if Student needed help; Student’s IEP can be adjusted any time direct BSS might need to be restored.⁸¹ Student’s 30 minutes/month of consultative BSS was sufficient for Student to progress and access Student’s education at school.⁸²

20. In May 2017, Student had “excellent” behavior and was a pleasure to have in class, although Student did get upset when told “no.”⁸³ The independent comprehensive psychological evaluation noted behavioral challenges at home but positive teacher

⁶⁹ P1-10.

⁷⁰ P12-1.

⁷¹ Social Worker.

⁷² *Id.*

⁷³ Special Education Coordinator.

⁷⁴ R2-2.

⁷⁵ P3-8.

⁷⁶ Educational Advocate.

⁷⁷ R13-6 (2016/17 term 4 IEP Progress Report).

⁷⁸ R4-2.

⁷⁹ P5-3.

⁸⁰ Parent.

⁸¹ R10-4; Social Worker.

⁸² Special Education Coordinator.

⁸³ P12-3; Social Worker (teachers stated that it was a pleasure to have Student in their classes).

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perceptions about school based behavior in May 2017.⁸⁴ Student made “immense” progress in the classroom.⁸⁵ Student has been going to talk to Social Worker very regularly since direct BSS was removed, about once or twice a month, which has proven to be very successful for Student.⁸⁶ After ending direct BSS there was no spike in problems, but Student continued to excel academically.⁸⁷ Student is not limited in talking to Social Worker by the time on Student’s IEP and can talk to Social Worker anytime.⁸⁸

21. On 2/28/18, Petitioner and her advocates sought BSS services and BSS goals to address self-esteem, dysregulation, social skills and organization.⁸⁹ The school members of the IEP team felt those elements were not impacting Student’s access to the curriculum and ability to make progress at school.⁹⁰ Student has made tremendous growth in making better choices and interacting with peers; lack of behavioral concerns was reported in Student’s 2/20/18 IEP.⁹¹ In 2017/18 term 3, Student was on track to master Emotional, Social and Behavioral Development goals for the year.⁹²

22. Student is highly emotional about Student’s biological mother.⁹³ Student had run away from home to stay with Student’s biological mother at the end of the summer of 2017 and was gone 6 weeks, missing the first few weeks of school.⁹⁴ Parent testified that about 6 weeks prior to the hearing she found “terrifying” writings (rap and poetry) by Student referring to suicide and school violence that she took to the police and to school; no action was taken and it seemed Student was simply trying to fit in with peers and make friends.⁹⁵ Social Worker testified that Student was never near the level of hurting self or others.⁹⁶

23. Student has missed very little school in recent months, with Parent estimating that Student may have missed a day in April 2018 but should have missed none in February and March.⁹⁷ Student wants to be in school.⁹⁸

24. Evaluations. Public Charter School completed a triennial evaluation of Student and an Analysis of Existing Data in March 2016; the next triennial is not due until March

⁸⁴ P12-10; P10-8.

⁸⁵ Social Worker.

⁸⁶ *Id.*

⁸⁷ Special Education Coordinator.

⁸⁸ Social Worker.

⁸⁹ P41-2.

⁹⁰ Special Education Coordinator.

⁹¹ P7-7.

⁹² R10-4.

⁹³ Social Worker.

⁹⁴ P10-4,5; Parent.

⁹⁵ Parent.

⁹⁶ Social Worker.

⁹⁷ Parent.

⁹⁸ Social Worker.

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2019.⁹⁹ Special Education Coordinator asserted that a significant amount of data was used for Student's IEP in March 2017, including an O*NET, Casey Life Skills, the NWEA-MAP, Read 180, and Brigance for math and reading.¹⁰⁰

25. Educational Advocate testified that since Public School received copies of no prior evaluations from Public Charter School, Public School was obliged to reevaluate Student immediately in 2016/17.¹⁰¹ Special Education Coordinator testified that a new psychological evaluation would have been needed for Student's 3/24/17 IEP if there was a question about Student's disability classification or there was insufficient educational data for the IEP.¹⁰²

26. OT. Student was given an OT evaluation in 2008 and received OT services; Student was discharged from services following a 2012 OT reevaluation.¹⁰³ Services were discontinued although Visual Motor Integration ("VMI") skills were low to below average.¹⁰⁴ Petitioner's counsel made a written request for an OT evaluation on 6/6/17, and asked for it to be conducted over the summer break.¹⁰⁵ Petitioner again requested OT at a 6/16/17 meeting with Public School; Special Education Coordinator did not agree to begin an OT evaluation in June, but recommended a Response to Intervention screening early in 2017/18.¹⁰⁶ In September 2017 DCPS authorized an OT IEE as part of the resolution of a due process complaint filed by Petitioner prior to this case.

27. In the 10/16/17 OT IEE, all of Student's scores on the BOT2 were in the average to above average range; Student can use gross and fine motor skills without a problem.¹⁰⁷ Student's VMI, relating to visual perception (eye) and motor (finger and hand movement) abilities was below average, which could impact classroom skills such as copying from the board, organizing materials and taking notes.¹⁰⁸ School Occupational Therapist credibly testified that Student's handwriting and math charting were up to par.¹⁰⁹ The OT IEE found areas of concern in sensory motor and sensory modulation, but School Occupational Therapist concluded that areas of concern did not impact Student's ability to access the general education curriculum.¹¹⁰ Ocular motor functioning, relating to eye scanning, did not appear to be causing any problem with Student's output.¹¹¹

⁹⁹ R2-2.

¹⁰⁰ R2-2; P3-3,6 (Brigance Educational Assessment given in March 2017).

¹⁰¹ Educational Advocate.

¹⁰² Special Education Coordinator.

¹⁰³ P11-3; P10-8,9; P9-1.

¹⁰⁴ P11-3.

¹⁰⁵ P38-1; P39-1.

¹⁰⁶ P5-1,5; Special Education Coordinator.

¹⁰⁷ P11-6; School Occupational Therapist.

¹⁰⁸ P11-7,8; Private Occupational Therapist.

¹⁰⁹ School Occupational Therapist.

¹¹⁰ P13-2; P9-1; School Occupational Therapist.

¹¹¹ School Occupational Therapist.

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28. No OT services were warranted as areas of OT concern were not impacting Student's ability to access the environment; the team did not feel Student should be pulled from class for OT services; Public School can address any concerns from the one score on the OT evaluation that was not average or above through accommodations and modifications.¹¹² Public School did agree with some of the OT accommodations recommended by Private Occupational Therapist, but rejected a few others in order to promote independence.¹¹³ OT accommodations were already on Student's IEP.¹¹⁴ School Occupational Therapist noted that the 5/23/17 comprehensive psychological evaluation did not recommend OT services.¹¹⁵

29. Neurological Evaluation. The independent comprehensive psychological evaluation recommended a neurological "consult" due to Student's seizure disorder.¹¹⁶ Clinical Psychologist testified that he recommended a neurological evaluation as a matter of "due diligence" to have "all bases covered."¹¹⁷ Student's last significant seizure was nearly 8 years ago; Student has not had any seizures while living with Parent.¹¹⁸ Student has no need for a neurological evaluation or a neuropsychological evaluation for educational purposes.¹¹⁹

30. Transition. Special Education Coordinator testified that Public School completed appropriate transition evaluations for Student; Public School offered to provide a Vocational-II evaluation, if desired by Petitioner.¹²⁰ Educational Advocate testified that the transition evaluations given were appropriate as far as they went, but that a Vocational-II assessment would definitely be sufficient.¹²¹ Student's transition plan in the 3/24/17 IEP was based on the Brigance for the education assessment, O*NET for the employment assessment, and Casey Life Skills for the independent living assessment, which were conducted on 3/1/17.¹²² Those same transition assessments were conducted on 2/20/18 for the 2/20/18 IEP.¹²³ In each area in each IEP, Student was to meet quarterly for a total of 3 hours/year with the transition coordinator.¹²⁴

31. Student's IEP progress report for 2016/17 term 2 noted that Student was progressing on transition goals.¹²⁵ Private Occupational Therapist testified that Student needed specific

¹¹² R4-2; School Occupational Therapist.

¹¹³ P9-1.

¹¹⁴ School Occupational Therapist.

¹¹⁵ P5-4.

¹¹⁶ P10-19; P42-1 (only medical record re seizure dated 3/10/08).

¹¹⁷ Clinical Psychologist.

¹¹⁸ P10-4; Parent.

¹¹⁹ School Psychologist; Special Education Coordinator.

¹²⁰ Special Education Coordinator; R4-2.

¹²¹ Educational Advocate.

¹²² P3-14; P16; P17.

¹²³ P7-13; P8-4 (confirming Brigance was in 2018).

¹²⁴ P3-15,16,17; P7-14,15,16.

¹²⁵ P31-14,15.

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independent living goals relating to money, hygiene and the like; both the 3/24/17 and 2/20/18 IEPs included detailed goals on budgeting.¹²⁶ Private Occupational Therapist lost some credibility with the undersigned by testifying that she did not know what a Vocational-II evaluation was, along with suggesting that Student needed a 2-day transition evaluation.¹²⁷ In 2017/18 term 3, Student was working toward career goals; more aspects of career and college planning were to proceed in 2018/19.¹²⁸ The parties stipulated during the due process hearing to adjust and update Student's transition plan goals.¹²⁹

32. Classification. Petitioner and her advocates asserted at the due process hearing that Student should be classified as a student with Multiple Disabilities ("MD") with the addition of Emotional Disturbance ("ED").¹³⁰ Parent and advocates emphasized a single incident in which Student was very upset by an altercation between 2 peers, although Student was not directly involved in the incident.¹³¹ Student had a romantic interest in one of them and could not be easily calmed. Student reported to Clinical Psychologist that Student used to be close to 2 peers, but they no longer spend time together due to their negative influence on behavior and mood.¹³² In 2 years at Public School there were no other incidents with peers to raise.¹³³

33. The independent comprehensive psychological evaluation recommended an ED classification for Student, but the school team disagreed at the 2/20/18 IEP meeting.¹³⁴ The independent comprehensive psychological evaluation stated that a diagnosis of Other Specified Depressive Disorder with Anxious Distress might better explain Student's underlying psychological difficulties than ADHD.¹³⁵ The independent comprehensive psychological evaluation concluded that Student's math deficits are consistent with a diagnosis of SLD with impairment in Mathematics.¹³⁶

34. School Psychologist reviewed the criteria for the relevant classifications and concluded that Student does not qualify for ED, but does qualify for MD with OHI (ADHD) and SLD.¹³⁷ Special Education Coordinator provided additional reasons why Student does not qualify for ED.¹³⁸ The school team agreed to classification of MD, with OHI and SLD.¹³⁹ Social Worker credibly testified that an ED classification does not fit Student due

¹²⁶ Private Occupational Therapist; P3-17; P7-16.

¹²⁷ Private Occupational Therapist.

¹²⁸ R10-5.

¹²⁹ See Stipulation, above.

¹³⁰ Educational Advocate; Parent.

¹³¹ P8-2; Educational Advocate; Social Worker.

¹³² P10-5.

¹³³ School Psychologist.

¹³⁴ P8-1; P10-18; Clinical Psychologist.

¹³⁵ P10-16.

¹³⁶ P10-16,18.

¹³⁷ P8-1,2; School Psychologist.

¹³⁸ P8-3.

¹³⁹ *Id.*

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to Student's ability to use coping skills and manage Student's own behavior.¹⁴⁰ Signs of ED must be exhibited over a long period of time and to a marked degree, by which Student is not ED.¹⁴¹

Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable 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

¹⁴⁰ Social Worker.

¹⁴¹ School Psychologist.

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‘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.

In addition, Respondent 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; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to timely and/or comprehensively reevaluate Student in all areas of suspected disability, specifically by (a) failing to initiate reevaluations prior to March 2017 despite the lack of evaluation data for Student, (b) failing to timely conduct an OT evaluation as requested by Parent, and (c) failing to conduct or fund a neurological evaluation and/or vocational evaluation recommended in independent evaluations. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on the issue of evaluations even though the recent *Z.B.* decision by the D.C. Court of Appeals emphasized the burden on schools to ensure that children are assessed in all areas of suspected disability. *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. § 1414(b)(3)(B).

The Court of Appeals explained in *Z.B.*, 888 F.3d at 524, that failing to conduct adequate assessments, such as a Functional Behavioral Assessment (“FBA”), was a procedural violation that could have substantive effects by preventing the IEP team from

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obtaining necessary information about the student's behaviors, leading to them being addressed in the IEP inadequately or not at all. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) ("in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable [the student] to receive educational benefits" (citation omitted)); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *18 (D.D.C. 2016); 34 C.F.R. 300.304(c)(4). The IDEA requires a reevaluation of each student with a disability at least once every three 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. 34 C.F.R. 300.303.

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). However, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Cf. James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016). The concerns raised by Petitioner are considered in turn.

(a) Lack of Reevaluations at Public School Before March 2017. Student transferred from Public Charter School to Public School at the beginning of 2016/17, bringing the 4/22/16 IEP that was developed at Public Charter School. Student's IEP was updated on 3/24/17, but without access to any of the past evaluations from Public Charter School or conducting new assessments. In the absence of Student's evaluations, Petitioner took the position that Public School was obliged to reevaluate Student immediately and asserted it was a violation of IDEA to update Student's IEP in the absence of a new battery of assessments. On the other hand, DCPS asserted that the IEP team did have access to a great deal of data, including the Brigance for math and reading, O*NET, Casey Life Skills, Lexile scores, NWAE-MAP, and Read 180. Based on this data, along with Student's grades and observations by Student's teachers, social worker and others, this Hearing Officer does not find a violation of the IDEA or that there was any harm to Student's education from lack of data when the IEP team reduced Student's special education and related services on 3/24/17.

What DCPS did not have for Student at the time of the IEP was a comprehensive psychological evaluation. When concerns about lack of evaluations were raised by counsel for Petitioner, a comprehensive psychological reevaluation was conducted by DCPS in April 2017, with a report dated 5/23/17. Petitioner also brought a prior due process complaint against DCPS on 6/26/17 which was resolved in September by DCPS authorizing comprehensive psychological and OT IEEs, along other things. Moreover, Special Education Coordinator testified that a new psychological was not needed prior to the 3/24/17 IEP unless there was a question about Student's disability classification or an insufficient quantity of educational data otherwise available for the IEP.

Petitioner did assert at the due process hearing that Student should be classified as a

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student with Multiple Disabilities with the addition of ED¹⁴², based on the recommendation of Clinical Psychologist in the 11/21/17 independent comprehensive psychological. In asserting ED, Parent and her advocates put a great deal of emphasis on a single incident that did not directly involve Student but was nonetheless very upsetting; there was an altercation between 2 peers, one of whom Student had a romantic interest in, so could not be easily calmed. Parent was also concerned by Student's tantrums in 2016/17, but testified that there had been none in 2017/18. On the other hand, School Psychologist reviewed the classification criteria and concluded that Student did not qualify for ED. Special Education Coordinator provided additional reasons why Student did not qualify for ED, while Social Worker convincingly testified that an ED classification did not fit Student due to Student's ability to use coping skills and manage Student's own behavior. ED requires characteristics exhibited over a long period of time and to a marked degree, which was clearly not the case here. However, the school team did agree to classification of Student as MD, based on OHI (due to ADHD) and a SLD in math.

Moreover, the IDEA is clear that Local Education Agencies ("LEAs") such as DCPS are not required to classify children by their disability as long as they have been found eligible to receive the special education and related services they need. *See* 20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. 300.111(d). It is a student's identified needs, not the disability category, that determines the services that must be provided to the child. 34 C.F.R. 300.320(a)(2)(i); *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (the "IDEA charges the school with the responsibility of developing an appropriate education, not with coming up with a proper label"). The undersigned thus concludes that there was no violation here based on classification or lack of evaluations by Public School prior to 3/24/17.

(b) Occupational Therapy Evaluation. Petitioner next raises concerns about requesting an OT evaluation that was not promptly conducted. Petitioner's counsel made a written request for an OT evaluation on 6/6/17, asking for it to be conducted over the summer break. Petitioner again requested OT at a 6/16/17 meeting with Public School, but Special Education Coordinator did not agree to begin an OT evaluation in June, instead

¹⁴² The IDEA regulations at 34 C.F.R. 300.8(c)(4) define ED as:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

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recommending a Response to Intervention screening early in 2017/18. As noted above, DCPS authorized an OT IEE (and other things) in September 2017 to resolve a due process complaint and the OT IEE was conducted on 10/16/17.

Student had been given an OT evaluation in 2008 and received OT services for some years, but was discharged from services following a 2012 OT reevaluation. Thus the assessment at issue was to again see whether Student needed OT services as an initial evaluation for which DCPS would have 120 days pursuant to D.C. Code § 38-2561.02(a). *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at *3 (D.D.C. 2010) (120-day period for initial evaluations does not apply to reevaluations). With the initial written request on 6/6/17, the 120 day period ended on 10/4/17, some 12 days before the OT IEE was completed, which the undersigned considers *de minimis*, especially given the fact that – once authorized – the timing of the IEE was out of DCPS’s hands. In any case, as discussed below, no OT services are required in the circumstances here, so there was no impact on Student from any delay in evaluation and thus no denial of FAPE. *See* 34 C.F.R. 300.513(a).

(c) Neurological Evaluation and Vocational Evaluation. Petitioner sought a neurological evaluation based on the recommendation in the independent comprehensive psychological evaluation for a neurological “consult” due to Student’s seizure disorder. Clinical Psychologist further explained in his testimony that he recommended a neurological evaluation out of “due diligence” in order to have “all bases covered.” Student’s last significant seizure had been nearly 8 years ago and Student had not had any seizures in the three years with Parent. Indeed, the only direct report of a seizure in the record was a single incident in 2008. In any case a neurological evaluation is a medical, not an educational, assessment, and there was no indication that Student’s seizure disorder has any impact on Student’s education, so the lack of a neurological evaluation is clearly not a denial of FAPE.

As for a vocational evaluation, Student’s transition plan in the 3/24/17 IEP was based on the results of age-appropriate transition/vocational assessments, specifically the Brigance for the education assessment, O*NET for the employment assessment, and Casey Life Skills for the independent living assessment. Those same transition assessments were conducted for the 2/20/18 IEP. The transition assessments succeeded in obtaining information about Student for the transition plans, including interests, challenges and history, so the undersigned concludes that there was no denial of a FAPE for lack of vocational evaluations. Moreover, Public School has offered in this case to provide a Vocational-II evaluation if desired by Petitioner, apart from any settlement agreement or order.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on 3/24/17, 4/11/17 and/or 2/20/18, where (a) the IEPs were not based on comprehensive evaluations, (b) many academic goals were insufficient or unattainable and lacked proper baseline data, (c) they did not contain sufficient BSS or goals, (d) they did not provide sufficient instructional support despite lack of progress, (e) they do not include OT services, (f) they did not include appropriate transition plans, and (g) the 2/20/18 IEP does not include reading goals and inappropriately reduced hours. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

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Petitioner established a prima facie case on this issue, shifting the burden to Respondent which did meet its burden of persuasion on the issue and each subpart.

The applicable legal standard for analyzing the appropriateness of the 3 IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as 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. As the U.S. Court of Appeals for the District of Columbia Circuit recently emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA” compared to the decision under review in *Z.B.* by requiring more than “merely some” educational benefits. *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, e.g., Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEPs are analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.¹⁴³ *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Comprehensive Evaluations. IEPs based on sufficient evaluations are critical, as the D.C. Court of Appeals recently emphasized, for without the requisite assessment of a student’s needs as of the time the IEPs were drafted it is not possible to determine what services were needed to provide an appropriate education. *Z.B.*, 888 F.3d at 524. However, as discussed in the issue above, DCPS did not violate the IDEA or deny Student a FAPE by failing to conduct any needed evaluations. Moreover, lack of evaluations was not the reason DCPS reduced Student’s special education services, as demonstrated by the fact that when additional evaluations were conducted Student’s services were reduced further in the subsequent 2/20/18 IEP.

(b) Academic Goals and Baselines. Petitioner primarily challenged Student’s math goals, based on concerns that they were unattainable and that Student needed basic foundational goals instead. Student’s math goals in the IEPs certainly appear complex (e.g., “involving the use of trigonometric ratios and the Pythagorean Theorem”), but included built-in scaffolding with the reference materials that made the goals appropriate and permitted Student to pass the class. A foundational math goal for multiplication was added to the 2/20/18 IEP. Goals for addition, subtraction and division were not, but based on the testimony about the appropriateness of the higher level goals, were subsumed by them. When baselines and goals were initially discussed at IEP meetings, Petitioner and her advocates did not bring up their concerns. Educational Advocate forthrightly testified that she could not remember requesting any specific change to Student’s goals that DCPS

¹⁴³ As an initial matter, a Hearing Officer must 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. No specific procedural violations were alleged in this case.

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denied.

In addition, Petitioner asserted that the goals lacked proper baseline data, but baselines are much easier to criticize than to improve for complex or sophisticated goals. There is no record of Petitioner making any attempt to suggest proper baselines, nor any indication of harm to Student from lack of baselines. *See Damarcus S.*, 190 F. Supp. 3d at 51 (parent cited no case where lack of a measurable baseline was found to be a denial of FAPE); 34 C.F.R. 300.513(a). There is no violation based on academic goals and baselines.

(c) Behavioral Support Services and Goals. Petitioner was very concerned about the shift from direct BSS of 30 minutes/week to one-quarter that much consultative BSS (30 minutes/month), which was made in the 3/24/17 IEP. But Student had few behavior concerns, with no school suspensions in years, and was doing well socially. Unlike at Public Charter School, Student was typically on task and completing work at Public School. Student had struggled at Public School early in 2016/17, with tantrums that concerned Parent, but had made tremendous progress since that time and had no tantrums in 2017/18. In 2016/17, Student often preferred to stay in class and focus on academics rather than being pulled out for direct BSS. When deciding whether to remove direct BSS from Student's IEP, school members of the IEP team pressed for Student to be part of the IEP meeting where Student made clear that a preference not to be forced out of class for BSS. The better approach was to let Student seek support from Social Worker as needed. Student has in fact been checking in with Social Worker very regularly. Teachers also had direct access to Social Worker if Student needed help. In addition, Student's IEP could be adjusted any time direct BSS might need to be restored, but it has not been needed since 3/24/17. Student's 30 minutes/month of consultative BSS has been sufficient for Student to progress and access Student's education at school, so there is no violation here.

As for BSS goals, Petitioner and her advocates were seeking goals to address self-esteem, dysregulation, social skills and organization, but the school members of the IEP team felt those elements were not impacting Student's access to the curriculum and ability to make progress at school, so there is no need for change. Student was on track to master the Emotional, Social and Behavioral Development goals for the year that Student has.

(d) Specialized Instruction. Petitioner claimed that Student's lack of progress requires additional instructional support, but the record evidence points to significant progress. Student arrived at Public School with an IEP requiring 19 hours/week of specialized instruction (combining hours inside and outside general education), which Student's 3/24/17 IEP reduced to 10 hours/week. Specialized instruction was quickly increased in the 4/11/17 IEP to 15 hours/week, but then reduced to only 5 hours/week in Student's 2/20/18 IEP. The parties stipulated during the due process hearing to restore specialized instruction to 15 hours/week (which does not impact this Hearing Officer's analysis of liability herein, but could reduce compensatory education).

However, over a time period of only 18 months at Public School, Student increased by about 5 grades in reading according to Lexile scores, which is significant progress, as Educational Advocate acknowledged. The testimony in this case was that Student continued to progress significantly in reading even when reading was not on Student's IEP.

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Student even had a 2-3 grade jump in Lexile scores between the beginning and middle of 2017/18. Student remains far below grade level according to Lexile scores, although the 2/20/18 Brigance found that Student was able to read at Grade+1 and comprehend text at Grade-3. Student is making good reading progress in general education and is catching up. What Public School is doing for Student is apparently working.

Further, Student's grades have improved significantly at Public School. Student moved from failing all but 1 course in 2015/16 at Public Charter School to not failing any courses at Public School. Although Student has received the occasional "F" as a term grade, Student is receiving many "As" and "Bs." Specifically, in 2016/17, Student's GPA increased from only 1.24 in term 1 to 2.51 in term 2. Student's grades in term 1 were: 0 "As"; 2 "Bs"; 2 "Cs"; 2 "Ds"; and 2 "Fs." In term 2, Student's grades were: 2 "As"; 3 "Bs"; 1 "C"; 1 "D"; and 1 "F." Student's report cards for 2016/17 terms 3 and 4 were not in the record, but Student earned an "A" in Geometry and was progressing, according to the IEP Progress Report. In 2017/18, Student's GPA increased to 2.57 in term 1 and then increased further in term 2 to 2.84. Student's grades in 2017/18 term 1 were: 4 "As"; 1 "B"; 3 "Cs"; 1 "D"; and 1 "F." Student's grades in term 2 were: 3 "As"; 3 "Bs"; and 4 "Cs." This demonstrates great progress, as witnesses from both sides agreed, and this Hearing Officer concurs.

One other measure of Student's improvement at Public School is that Student earned only 1 credit toward graduation in 2015/16, but earned 12 credits in 2016/17, through hard work in classes during the day and credit recovery in the evening. Thus, Student was able to catch up with Student's cohort and is now in Grade.

(e) OT Services. While the OT IEE found areas of concern, including sensory motor and sensory modulation, School Occupational Therapist credibly testified that none of the areas of concern impacted Student's ability to access the general education curriculum, and thus OT services were not warranted. Student's IEP team did not feel Student should be pulled from class for OT services, for any concerns from the one score on the OT evaluation that was not average or above could be addressed through accommodations and modifications. *See Davis v. Dist. of Columbia*, 244 F. Supp. 3d 27, 47 (D.D.C. 2017) (related services are not required if difficulties can be accommodated through in-class strategies). Public School agreed with some of the OT accommodations recommended by Private Occupational Therapist, but rejected others in order to promote Student's independence.

(f) Transition Plans. As discussed above, Student received the transitional/vocational assessments needed for the IEPs. The challenge here is to the adequacy of the transition plans¹⁴⁴, where the test is "whether the IEP, taken in its entirety,

¹⁴⁴ The IDEA's transition provisions at 34 C.F.R. 300.320(b) require that:

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

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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). Moreover, an IEP is not required to offer Student the “best” transition plan – but only services reasonably calculated to provide the student with meaningful benefit. *See K.S. v. Dist. of Columbia*, 962 F. Supp. 2d 216, 220-222 (D.D.C. 2013). Here, Private Occupational Therapist testified that Student needed specific independent living goals relating to money, hygiene and the like, although both the 3/24/17 and 2/20/18 IEPs had goals focused on budgeting, while there was no evidence of inadequate hygiene. Based on Student’s transition plan, Student was working toward career goals; more aspects of career and college planning are expected in 2018/19. Further, the parties stipulated during the due process hearing to adjust and update Student’s transition plan goals.

(g) Reading Goals/Hours in 2/20/18 IEP. Petitioner’s final challenge is to the omission of reading as an area of concern in Student’s 2/20/18 IEP, which accordingly did not include reading goals and reduced specialized instruction hours (which have since been restored by stipulation). As discussed above in the subsection on specialized instruction, Student has made dramatic progress with an increase of about 5 grades in reading in only 18 months at Public School. Student is progressing in reading with general education peers and made a 2-3 grade increase in Lexile scores between the beginning and middle of 2017/18. Student remains far below grade level according to Lexile scores but is doing much better by the 2/20/18 Brigance. By either measure, Student is making good progress and catching up. Public School should continue doing what it is doing for Student.

Consideration of FAPE. In considering the concerns above, the undersigned is cognizant that the analysis is not about achieving perfect IEPs, but IEPs reasonably calculated to enable Student to make appropriate progress. *Andrew 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 Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). Here, the undersigned has carefully reviewed each of Petitioner’s concerns with the IEPs in this case, taking into account that DCPS bears the burden of persuasion, and concludes that overall each of the 3 IEPs were reasonably calculated at the time they were developed to enable Student to make appropriate progress under the circumstances, so there is no violation of the IDEA and no denial of FAPE on this issue.

(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.

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ORDER

Petitioner has not prevailed on either of the issues in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

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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