

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

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, D.C. 20002

---

<i>Student,</i> <sup>1</sup>	)	Case No.: 2017-0246
through <i>Parent,</i>	)	
<i>Petitioner,</i>	)	Date Issued: 11/25/17
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
<i>Public Charter School,</i>	)	Hearing Dates: 11/15/17 and 11/16/17
<i>Respondent.</i>	)	ODR Hearing Room: 2004
	)	

---

**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 Public Charter School did not comprehensively evaluate Student and provide appropriate IEPs. Public Charter School responded that it did adequately evaluate and Student’s IEPs were appropriate.

**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 9/7/17, the case was assigned to the undersigned on 9/8/17. Respondent filed a response on 9/19/17 (with leave from Petitioner) and did not challenge jurisdiction. The resolution session meeting took place on 9/20/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 10/7/17. A final decision in this matter must be reached no later than 45

---

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

## Hearing Officer Determination

Case No. 2017-0246

days following the end of the resolution period, as extended by a continuance of 10 days, which requires a Hearing Officer Determination (“HOD”) by 12/1/17.

The due process hearing took place on 11/15/17 and 11/16/17, and was open to the public. Petitioner was represented by *Petitioner’s counsel*. Public Charter School was represented by *Respondent’s counsel*. Petitioner was present for most of the hearing.

Petitioner’s Disclosures, submitted on 11/7/17, contained documents P1 through P28, which were admitted into evidence over a variety of objections. Respondent’s Disclosures, submitted on 11/7/17, contained documents R1 through R37, which were admitted into evidence without objection. P28 and R37 were both supplemental disclosures submitted on 11/14/17 and admitted into evidence upon agreement of the parties. Joint Disclosures were submitted by the parties on 11/7/17, containing documents J1 through J30, which were admitted into evidence (without objection).

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

1. Parent
2. *Educational Advocate* (qualified without objection as an expert in Special Education Programming)
3. *Private Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
4. *Private Psychologist* (qualified over objection as an expert in Clinical Psychology as it relates to Special Education Testing and Eligibility)

Respondent’s counsel presented 6 witnesses in Respondent’s case (*see Appendix A*):

1. *Director of Student Support* (qualified without objection as an expert in Special Education)
2. *School Social Worker* (qualified over objection as an expert in School Counseling)
3. *School Occupational Therapist* (qualified over objection as an expert in Occupational Therapy)
4. *Lead Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
5. *School Speech-Language Pathologist* (qualified over objection as an expert in Speech-Language Pathology)
6. *Special Education Teacher*

## Hearing Officer Determination

Case No. 2017-0246

The issues<sup>2</sup> to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether Respondent denied Student a FAPE by failing to comprehensively evaluate Student on a timely basis to determine the need (a) for a Behavioral Intervention Plan (“BIP”), (b) for Speech and Language services, and/or (c) to address an auditory processing disorder. *Petitioner has the burden of persuasion on this issue.*

**Issue 2:** Whether Respondent denied Student a FAPE by failing to provide appropriate IEPs, including related services, during 2015/16<sup>3</sup> and/or 2016/17, where the IEPs did not (a) include any Speech and Language goals, (b) increase behavioral support services (“BSS”), (c) modify Occupational Therapy (“OT”) goals or increase the amount of OT services, and/or (d) increase the amount of specialized instruction after 1/4/17. *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 10 business days, Respondent shall fund independent educational evaluations (“IEEs”) for: (a) a Functional Behavioral Assessment (“FBA”), followed by development of a BIP by Student’s Multi-disciplinary Team (“MDT”), and (b) an auditory processing evaluation at a fair market rate.
3. Within 20 business days, Respondent shall convene an IEP team meeting to revise Student’s IEP to provide Student with (a) 360 minutes/month of Speech and Language Services, and (b) increased behavioral support services to address Student’s frustration and inappropriate behaviors.
4. Respondent shall fund compensatory education for any denial of FAPE.
5. Any other just and appropriate relief.

---

<sup>2</sup> At the beginning of the due process hearing, Petitioner’s counsel expressly withdrew with prejudice Issue 3 in the 10/24/17 Amended Prehearing Order, which was, “Whether Respondent denied Student a FAPE by failing to provide access to Student’s educational records in response to Parent’s 3/3/17 written request, including IEP progress reports and service trackers.”

<sup>3</sup> All dates in the format “2015/16” refer to school years.

## Hearing Officer Determination

Case No. 2017-0246

### Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>4</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is Age, Gender and in Grade at Public Charter School, where Student has attended since 2015/16, following *Prior Public Charter School*.<sup>6</sup> Based on Parent's deep concerns about Student's lack of progress, Student was retained in the same grade in 2017/18 as the previous year.<sup>7</sup>

2. Student is eligible for special education and related services based on the classification of Specific Learning Disability, with an initial IEP dated 1/12/16.<sup>8</sup> A recent independent Comprehensive Psychological Evaluation dated 10/22/17 diagnosed Student with Attention Deficit Hyperactivity Disorder ("ADHD") – Predominantly Inattentive Type, along with Specific Learning Disorders in reading and writing and 2 provisional disorders; Student's MDT team had not met to review the 10/22/17 evaluation at the time of the due process hearing.<sup>9</sup>

3. Student's initial 1/12/16 IEP provided 13.5 hours/week of specialized instruction outside general education and 2.9 hours/week of support in written expression inside general education, along with 120 minutes/month of OT outside general education.<sup>10</sup> By amendment on 1/29/16, 120 minutes/month of BSS was added to Student's IEP.<sup>11</sup> Student's 1/4/17 IEP provided 18.75 hours/week of specialized instruction outside general education; related services were unchanged (120 minutes/month of both OT and BSS).<sup>12</sup> Extended School Year ("ESY") was added for the summer of 2017 by amendment on 6/23/17.<sup>13</sup> Student's next IEP meeting was held on 10/6/17 and services remained the same, except for

---

<sup>4</sup> 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.

<sup>5</sup> Parent.

<sup>6</sup> *Id.*

<sup>7</sup> R21-1; P17-1; P23-4; Director of Student Support (Public Charter School resisted retention of Student, as it does not typically retain children); Parent.

<sup>8</sup> J3-1; J6-2.

<sup>9</sup> P23-16; R6-7; Director of Student Support.

<sup>10</sup> J6-9.

<sup>11</sup> J10-12.

<sup>12</sup> J13-13.

<sup>13</sup> J16-15.

## Hearing Officer Determination

Case No. 2017-0246

dividing BSS with half inside general education and half outside general education, and adding 120 minutes/month of consultative speech-language services.<sup>14</sup>

4. A Psychological Evaluation dated 1/6/16 found that Student had a Full Scale IQ of 77 based on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”), which is in the Very Low range; Verbal Comprehension Index was 78, also in the Very Low range.<sup>15</sup> Student was functioning at an Extremely Low level on Phonological Processing and Written Language and Spelling.<sup>16</sup> In Student’s independent 10/22/17 Comprehensive Psychological Evaluation, Student’s Full Scale IQ was 79 on the WISC-V, which was stated as Borderline range; Verbal Comprehension Index was 86, which was in the Low Average range.<sup>17</sup> The Woodcock-Johnson Test of Achievement IV (“WJ-IV”) found significant deficits, as all scores were below Student’s (repeated) grade level and most were well below.<sup>18</sup>

5. Academic Concerns. Student’s primary academic challenge is reading.<sup>19</sup> As of 11/13/15, Student moved from Fountas & Pinnell level A to level B.<sup>20</sup> As of August 2017, Student read at Fountas & Pinnell level C; in early 2017/18, Student was on level D, and increased to level E by the time of the due process hearing, which was still far below grade level.<sup>21</sup> Parent believes Student has improved in reading in 2017/18.<sup>22</sup> On the Fall 2017 reading assessment, Student was at the 45<sup>th</sup> percentile or above, which was a great increase from Spring 2017.<sup>23</sup>

6. In 2015/16, Student made “No Progress” on an IEP goal during the second and third trimesters and was “not successful with phonemic awareness” because of often missing the Wilson Foundations lesson due to being tardy to school, which impacted Student’s progress in decoding; Parent said she would try to get Student to school earlier.<sup>24</sup> In 2016/17, Student had 91 “tardies” (and 9 absences, of which 7 were unexcused).<sup>25</sup> In 2017/18, Student had 23 tardies out of 61 school days; Parent testified that she thought the number this year was lower.<sup>26</sup>

7. Student’s reading may be remediated through multisensory support for reading, as is occurring with Special Education Teacher; low phonological scores may indicate that

---

<sup>14</sup> J24-14; Director of Student Support.

<sup>15</sup> J2-3; P23-4.

<sup>16</sup> J2-6,7; P23-4,5.

<sup>17</sup> P23-9.

<sup>18</sup> P23-11,12.

<sup>19</sup> Parent; Educational Advocate; Special Education Teacher.

<sup>20</sup> J3-9,10,11; J6-10.

<sup>21</sup> J22-3; J24-6; R6-3; Special Education Teacher.

<sup>22</sup> Parent.

<sup>23</sup> J24-6 (45<sup>th</sup>); R6-2 (53<sup>rd</sup>).

<sup>24</sup> J23-3; J27-11; J11-2; R3-2; R1-3 (spoke to Parent about school protocol).

<sup>25</sup> R10-2; P3-1; J23-2.

<sup>26</sup> R10-2; Parent.

## Hearing Officer Determination

Case No. 2017-0246

Student should have additional support with decoding skills, which can occur in the special education reading classroom and not necessarily through speech therapy.<sup>27</sup> Parent's advocate agrees that reading is Student's most pressing need, but believes that reading instruction should come from a speech-language pathologist.<sup>28</sup>

8. On the Fall 2017 math assessment, Student was at the 38<sup>th</sup> percentile.<sup>29</sup> Student is making adequate progress in math and is on grade level.<sup>30</sup> In writing, Student is making progress.<sup>31</sup>

9. Behavior Concerns. In a 3/3/17 parent-teacher conference, Parent asked about Student's behavior problems in the classroom and Student's teacher stated there were "no behavior problems."<sup>32</sup> Parent revealed that she worried about behavior as Student "messes" with other children and was "rough" with animals; Student's teacher was surprised as she had never observed such behavior.<sup>33</sup> Parent was concerned about Student crying and not doing work, with "crying spells that last for hours."<sup>34</sup> At a 5/18/17 MDT meeting, Parent stated her concerns that Student was starting to be a bully and about behaviors towards "little kids" and siblings, as well as Student "always" fighting.<sup>35</sup> Parent wanted to know whenever Student was walking out of class or "flipping desks."<sup>36</sup> Public Charter School responded that there have not been behavior issues with Student and the school doesn't document behaviors that the teacher can handle in class; Student may have walked out of class early in the year, but not after that.<sup>37</sup> Parent added that Student is "constantly stealing things" in class and out of school and will bribe other students, and raised concerns about low self-esteem and reluctance to go to school each morning.<sup>38</sup>

10. Parent requested an FBA on 4/25/17 in order to develop a BIP for Student's behavior issues, which Parent felt were escalating both at home and at school.<sup>39</sup> Public Charter School responded on 4/26/17 specifying the steps to be taken.<sup>40</sup> Public Charter School's Compliance Manager wrote Parent on 5/19/17 to obtain permission to conduct the FBA to determine whether a BIP should be developed.<sup>41</sup> LEA Representative emailed Petitioner's counsel on 5/20/17 asking for clarification of the need for an FBA and the behaviors to be

---

<sup>27</sup> R6-6.

<sup>28</sup> *Id.*

<sup>29</sup> J24-4; R6-2.

<sup>30</sup> Special Education Teacher.

<sup>31</sup> *Id.*

<sup>32</sup> P6-3.

<sup>33</sup> P6-3; Parent.

<sup>34</sup> J23-3,4.

<sup>35</sup> P12-6; P23-3; Parent.

<sup>36</sup> Parent; P12-2.

<sup>37</sup> P12-3.

<sup>38</sup> P12-3; Parent.

<sup>39</sup> Parent; P15-1,2.

<sup>40</sup> P15-1.

<sup>41</sup> J14-1.

## Hearing Officer Determination

Case No. 2017-0246

included, as the school team discussed that Student did not have any unaddressed behavior concerns of note.<sup>42</sup> When Public Charter School stated that there was nothing to look at with an FBA, Educational Advocate responded that they “would like to see if there are behaviors.”<sup>43</sup>

11. The FBA was conducted over a period of 6 weeks from the beginning of the school year on 8/3/17 until 9/14/17.<sup>44</sup> Educational Advocate complained that only Student’s general education teacher was interviewed for the FBA; in fact, both Student’s general education and special education teachers were interviewed, along with Parent and Student.<sup>45</sup> The FBA relied on 4 of Student’s teachers for the Motivation Assessment Scale, 2 teachers for another form, and 3 teachers for a questionnaire.<sup>46</sup> Student had no in-school or out-of-school suspensions and no incidents requiring administrative involvement in 2017/18; Student had 1 incident in each 2016/17 and 2015/16.<sup>47</sup>

12. Both Student’s general education and special education teachers reported “no behavior issues in class.”<sup>48</sup> When frustrated, Student may hang Student’s head low.<sup>49</sup> Special Education Teacher testified that sometimes Student’s head is bowed when Student is thinking.<sup>50</sup> Teachers’ interventions were successful, which included a front seat close to the teacher and praise and other verbal support and encouragement when inattentive.<sup>51</sup> The FBA included 5 classroom observations across 13 days with Student having appropriate behavior 92% of the time in the 1<sup>st</sup> observation, 96% appropriate behavior in the 2<sup>nd</sup>, 83% in the 3<sup>rd</sup>, 96% in the 4<sup>th</sup> and 100% in the final 30-minute observation during which Student was observed encouraging peers and praising them for correct answers.<sup>52</sup>

13. The FBA focused on Student putting Student’s head down, analyzing antecedents, which generally related to Student’s lack of performance or teacher redirection, and the consequences, which were generally positive feedback or a break, which was sufficient for Student to move on with the assignment.<sup>53</sup> The FBA concluded that Student was helpful to others and caring, sometimes experienced difficulties with independent work and

---

<sup>42</sup> R13-3.

<sup>43</sup> P12-4.

<sup>44</sup> J23-1; Director of Student Support.

<sup>45</sup> Educational Advocate; R28-1; J23-1.

<sup>46</sup> J23-4,5.

<sup>47</sup> J23-3; R10-2.

<sup>48</sup> J23-3.

<sup>49</sup> J23-3; Special Education Teacher; J22-3 (Student’s general education teacher remained the same in 2016/17 and 2017/18); Special Education Teacher (Student’s special education teacher changed between 2016/17 and 2017/18).

<sup>50</sup> Special Education Teacher.

<sup>51</sup> J23-2.

<sup>52</sup> J23-6.

<sup>53</sup> J23-7.

## Hearing Officer Determination

Case No. 2017-0246

disengages, but was very responsive to the behavioral interventions of being close to teachers and receiving encouragement.<sup>54</sup>

14. Public Charter School concluded that Student did not need a BIP, as there were no behaviors of concern found by the FBA that could not be addressed through BSS or by teachers in the classroom.<sup>55</sup> Special Education Teacher credibly testified that Student's behaviors do not interfere with Student's or others' learning.<sup>56</sup> The 10/22/17 Comprehensive Psychological Evaluation concluded that Student is a pleasant, polite, motivated child who easily makes friends; Student is ready to extend help and to please others, but is also sensitive and gets quickly frustrated, demotivated, disappointed and refuses to follow instructions.<sup>57</sup> As of 10/6/17, Student was one of Special Education Teacher's hardest working students, an active participant in class who responded well to teacher redirection; Student was often observed trying to help peers.<sup>58</sup> Student respects teachers, gets along well with peers and has friends.<sup>59</sup> Parent acknowledged in her testimony that apart from shutting down, there have been no negative reports about Student's behavior in 2017/18.<sup>60</sup>

15. Behavior Support Services. At the beginning of 2016/17, Student would walk out of the classroom after becoming angry or frustrated; by January 2017 Student had learned to moderate emotions.<sup>61</sup> When frustrated, irritated or agitated, Student would shut down and not complete assignments.<sup>62</sup> Parent and her advocates did not ask for increased BSS at the 5/18/17 MDT meeting or other times prior to the due process complaint.<sup>63</sup>

16. On 10/6/17 Parent acknowledged that Student's confidence had improved "slightly" and she noticed a difference; Student was more likely to push through frustrations than in the past.<sup>64</sup> Student's general education teacher stated Student was much more confident in completing work and much more likely to ask for help, a "major change" from 2016/17.<sup>65</sup> Public Charter School sought to reduce Student's BSS in the 10/6/17 IEP, but Parent objected and the IEP team compromised by changing from all 120 BSS minutes being outside general education to half inside and half outside general education.<sup>66</sup>

---

<sup>54</sup> J23-9.

<sup>55</sup> Director of Student Support; School Social Worker.

<sup>56</sup> Special Education Teacher.

<sup>57</sup> P23-16.

<sup>58</sup> R6-3.

<sup>59</sup> Special Education Teacher.

<sup>60</sup> Parent.

<sup>61</sup> J13-8; J24-9; P23-3.

<sup>62</sup> J13-8; Parent.

<sup>63</sup> P12-1; Educational Advocate.

<sup>64</sup> R6-2.

<sup>65</sup> *Id.*

<sup>66</sup> P14-8,9.

## Hearing Officer Determination

Case No. 2017-0246

17. Student's BSS service trackers for 2015/16 show that Student was consistently progressing, although there were some challenges with Student in the sessions.<sup>67</sup> This was confirmed by Student's IEP Progress Reports, which noted "some growth" in social skills and "slight growth" in coping skills.<sup>68</sup> Student's BSS service trackers for 2016/17 show that Student was progressing, although progress was inconsistent on a few days with some challenges.<sup>69</sup> Student's IEP Progress Reports confirmed general progress or no less than "minimal progress."<sup>70</sup> Student's BSS service trackers for August and September 2017 (October was not included), show that Student was consistently progressing.<sup>71</sup>

18. Speech-Language Services and Goals. Parent told Public Charter School that Student had received speech-language services at Prior Public Charter School, but the information was not in Student's records upon arriving at Public Charter School.<sup>72</sup> An initial speech-language evaluation completed on 2/5/16 at Public Charter School identified Student as having a moderate speech impairment with decreased intelligibility due to interdental /s/ production, but Student's MDT team did not find eligibility for speech-language services on 2/19/16 due to a lack of impact on Student's access to the general education curriculum.<sup>73</sup> This remained the case on 10/6/17, when Student was again found not eligible for speech-language services, as they were not warranted based on Student's standardized scores and the lack of deficits impacting Student's education.<sup>74</sup> Parent acknowledged that the absence of direct speech-language services was her only issue with the 10/6/17 IEP, as she agreed with all other services and goals at that time.<sup>75</sup>

19. Parent testified that she sometimes has difficulty understanding Student's speech.<sup>76</sup> Private Speech-Language Pathologist testified that Student had difficulty speaking clearly; Private Speech-Language Pathologist needed Student to repeat some phrases.<sup>77</sup> Clinical Psychologist testified she couldn't clearly understand Student, due to tongue placement over teeth.<sup>78</sup> Special Education Teacher reported in August 2017 that he occasionally had difficulty understanding Student, but that Student's speech-language difficulties were not impacting Student's access to the curriculum.<sup>79</sup> Student's general education teacher stated

---

<sup>67</sup> J26.

<sup>68</sup> J27-5,6,7,13,14,15.

<sup>69</sup> J29.

<sup>70</sup> J30-6,6A,15,16,17,25,26,27.

<sup>71</sup> R8-1,3.

<sup>72</sup> R4-2 (both speech and OT); J2-2; R1-3; Parent.

<sup>73</sup> J12-1; J22-1,2; Lead Speech-Language Pathologist; J11-2 (2/5/16 evaluation noted that Student had trouble producing the /s/ phoneme properly, which may have resulted from tongue weaknesses and protrusion).

<sup>74</sup> R6-5; Director of Student Support; Lead Speech-Language Pathologist.

<sup>75</sup> Parent (reviewing the auditory processing assessment may raise another issue in the future).

<sup>76</sup> Parent.

<sup>77</sup> Private Speech-Language Pathologist.

<sup>78</sup> Clinical Psychologist.

<sup>79</sup> J22-3.

## Hearing Officer Determination

Case No. 2017-0246

she did not have difficulty understanding Student; Student did not avoid speaking in class; and Student's speech-language deficits were not impacting Student's access to the curriculum.<sup>80</sup> Despite the interdental /s/, Student was about 95% intelligible in connected speech, in known and unknown contexts; when reminded of tongue placement, Student produces an accurate /s/ sound.<sup>81</sup> School Speech-Language Pathologist works with Student on making the proper sounds with tongue behind teeth.<sup>82</sup>

20. In the 2/5/16 speech-language evaluation, Student's only sound distortion occurred in producing /s/ in all contexts, giving a Word Level result of Severe impairment and Sentence Level result of Moderate impairment in the Clinical Assessment of Articulation and Phonology – 2<sup>nd</sup> Edition ("CAAP-2").<sup>83</sup> Student's Peabody Picture Vocabulary Test-4 ("PPVT") assessment of receptive (listening) vocabulary skills was Average.<sup>84</sup> Student's Comprehensive Assessment of Spoken Language ("CASL") composite was Average, and the Paragraph Comprehension test was Average.<sup>85</sup> The Oral and Written Language Scales, Second Edition ("OWLS-II") was administered to confirm Student's average language scores; the Listening Comprehension and Oral Expression were both Average.<sup>86</sup> Educational Advocate testified that the OWLS-II reading and writing scales were not administered and should have been, but had not raised concerns about that previously.<sup>87</sup> The Boehm Test of Basic Concepts, on which Student scored in the 8<sup>th</sup> percentile, measured auditory comprehension of basic perceptual and conceptual relationships.<sup>88</sup>

21. An IEE for speech-language was requested on 5/18/17.<sup>89</sup> On 5/28/17, Public Charter School confirmed that authorization would be forthcoming; the independent speech-language evaluation was authorized on 5/31/17.<sup>90</sup> Private Speech-Language Pathologist conducted the independent speech-language evaluation; Private Speech-Language Pathologist was unaware of the 2/5/16 speech-language evaluation.<sup>91</sup> Private Speech-Language Pathologist's evaluation contained a number of errors and/or exaggerations, stating that Student's speech articulation issue was "severe" with a standard score of 80, a level which was "borderline" or "marginal."<sup>92</sup> Private Speech-Language Pathologist

---

<sup>80</sup> J19-5; J22-3. Others working with Student testified that they had no trouble understanding Student: School Social Worker; School Occupational Therapist; School Speech-Language Pathologist.

<sup>81</sup> J22-5; R6-5; School Speech-Language Pathologist.

<sup>82</sup> School Speech-Language Pathologist.

<sup>83</sup> J11-3.

<sup>84</sup> J11-4.

<sup>85</sup> J11-4,5.

<sup>86</sup> J11-5.

<sup>87</sup> Educational Advocate.

<sup>88</sup> J11-6.

<sup>89</sup> P12-5.

<sup>90</sup> R18-1; J15-1.

<sup>91</sup> J17-2; Private Speech-Language Pathologist.

<sup>92</sup> J17-4; Lead Speech-Language Pathologist; School Speech-Language Pathologist; Private Speech-Language Pathologist.

## Hearing Officer Determination

Case No. 2017-0246

incorrectly asserted that 80 was 1.5 standard deviations below the mean; a 77 was required for 1.5 standard deviations.<sup>93</sup> Private Speech-Language Pathologist acknowledged making “a lot of mistakes” on the CASL-2 assessment, with at least 6 errors converting raw scores to standard scores out of a total of 11; the raw numbers were not available, so there was no way to know the actual results.<sup>94</sup>

22. Private Speech-Language Pathologist recommended that 90 minutes/week of speech-language services outside general education be added to Student’s IEP, along with goals.<sup>95</sup> Private Speech-Language Pathologist determined that Student has trouble with the /s/ phoneme, as well as /z/, /r/ blends and /th/.<sup>96</sup> Educational Advocate sought an additional 30 minutes/week of speech-language services inside general education.<sup>97</sup> With a score above 77 (less than 1.5 standard deviations), Student did not meet the criteria for speech-language services where there was no evidence of adverse educational impact, as mild weaknesses can best be served in the classroom.<sup>98</sup> Public Charter School did not have justification to add speech-language services to Student’s IEP, but Student’s MDT team agreed to proceed with another speech-language evaluation to help determine whether speech-language services were warranted.<sup>99</sup>

23. The Speech-Language Reevaluation was completed on 8/28/17 and Student was again found not eligible for speech-language services.<sup>100</sup> The reevaluation indicated that the PPVT was Average; the OWLS-II Listening Comprehension and Oral Expression were Average.<sup>101</sup> The reevaluation included classroom observation, teacher input and therapist input; Private Speech-Language Pathologist’s evaluation did not.<sup>102</sup> The 8/28/17 reevaluation concluded there was no educational need for speech-language services for Student to access the educational curriculum and make reasonable academic progress.<sup>103</sup> School Speech-Language Pathologist credibly testified that adding direct speech-language services was not Student’s least restrictive environment, as Student would not benefit from the additional services.<sup>104</sup>

---

<sup>93</sup> R37-2; Private Speech-Language Pathologist.

<sup>94</sup> R37-6; Private Speech-Language Pathologist; School Speech-Language Pathologist; Lead Speech-Language Pathologist.

<sup>95</sup> Private Speech-Language Pathologist; J17-5; R5-2; P13-2.

<sup>96</sup> J17-6.

<sup>97</sup> R5-3.

<sup>98</sup> Lead Speech-Language Pathologist; R5-2; P13-3.

<sup>99</sup> R5-3; J21-1 (Prior Written Notice (“PWN”)); P13-3.

<sup>100</sup> R6-5.

<sup>101</sup> J22-6.

<sup>102</sup> J22-7; J17; Private Speech-Language Pathologist.

<sup>103</sup> J22-7; School Speech-Language Pathologist; Lead Speech-Language Pathologist (the 8/28/17 reevaluation was appropriate).

<sup>104</sup> School Speech-Language Pathologist.

## Hearing Officer Determination

Case No. 2017-0246

24. Consultative speech-language services were added to Student's 10/6/17 IEP, along with decoding goals added by the speech-language pathologist.<sup>105</sup> School Speech-Language Pathologist credibly testified that this was appropriate and sufficient, as Student was getting direct reading/writing services through specialized instruction; School Speech-Language Pathologist collaborated with Special Education Teacher to create new reading goals based on her expertise and Private Speech-Language Pathologist's evaluation.<sup>106</sup> Student's service tracker for consultative speech-language services for October 2017 indicated progress, as Student was observed by School Speech-Language Pathologist; School Speech-Language Pathologist provided examples of cues for accurate /s/ production to the occupational therapist; and School Speech-Language Pathologist observed Student's teacher successfully prompting Student about /s/ production.<sup>107</sup>

25. Auditory Processing. On 1/12/16, the school psychologist stated that, on the speech portion of the IQ test in the Psychological Evaluation, Student showed some auditory processing issues; Student was not processing what was heard as it was intended, which was affecting Student's reading.<sup>108</sup> At that time, Student did not need an auditory processing assessment as Student had poor listening skills and was too young for an auditory processing assessment according to American Speech-Language-Hearing Association ("ASHA") guidelines (with which Private Speech-Language Pathologist does not agree) due to the variability of brain function in younger students.<sup>109</sup> Public Charter School stated that Student's team should revisit the issue and "see if we can do" a screener because this was an area of need; Public Charter School was to follow up with compliance manager and speech pathologist.<sup>110</sup> In the independent 7/19/17 speech-language evaluation, Private Speech-Language Pathologist recommended an auditory processing assessment for Student for several enumerated reasons.<sup>111</sup> Student's MDT team agreed to an auditory processing assessment in mid-August 2017 and by 8/29/17 had scheduled an appointment at Gallaudet University's Hearing & Speech Center, which according to counsel sent a report to Parent just prior to the due process hearing which was not included in the record.<sup>112</sup>

26. Additional data will be available when the auditory processing assessment is completed and reviewed.<sup>113</sup> In addition, an independent Psychological Evaluation was

---

<sup>105</sup> P14-8; R6-6.

<sup>106</sup> School Speech-Language Pathologist; R6-5.

<sup>107</sup> R9-1.

<sup>108</sup> R2-3; J2.

<sup>109</sup> Private Speech-Language Pathologist; School Speech-Language Pathologist; Lead Speech-Language Pathologist.

<sup>110</sup> R2-3.

<sup>111</sup> Private Speech-Language Pathologist; R5-2; J17-5; J19-5.

<sup>112</sup> P21-4; R5-3; R24-2; J21-1 (PWN); Administrative notice by Hearing Officer.

<sup>113</sup> P14-8.

## Hearing Officer Determination

Case No. 2017-0246

authorized by Public Charter School on 5/31/17.<sup>114</sup> Student's IEP team has agreed to meet to review both evaluations in order to make necessary changes to Student's IEP.<sup>115</sup>

27. Occupational Therapy Goals and Services. A 12/17/15 OT evaluation concluded that Student's OT deficits, especially handwriting, might impact Student's learning in reading, writing and math.<sup>116</sup> Student's IEPs have consistently included 120 minutes/month of OT services.<sup>117</sup> Parent and her advocates did not ask for increased OT services or goals at the 1/4/17 IEP meeting, the 5/18/17 MDT meeting or any other time prior to the due process complaint.<sup>118</sup>

28. In Student's 1/4/17 IEP, one of Student's OT goals was increased from writing 1-2 sentences to writing 1 paragraph; in Student's 10/6/17 IEP it was further modified to specify a 5-sentence paragraph with greater accuracy in letters and punctuation.<sup>119</sup> A second annual goal was unchanged from the 1/12/16 to 1/4/17 IEPs, as the goal was foundational and Public Charter School expected Student to be able to achieve it in the updated IEP; the goal was modified in the 10/6/17 IEP and 2 additional goals added.<sup>120</sup> Educational Advocate testified about the lack of a "time telling" goal in Student's IEP, but had never requested such a goal prior to the due process hearing.<sup>121</sup>

29. Student's OT baselines improved from 1/4/17 to 10/6/17, showing progress.<sup>122</sup> Student's OT service trackers for 2015/16 show that Student was consistently progressing, although there were various challenges during the sessions.<sup>123</sup> Student's IEP Progress Reports confirm progress in OT, with "strong improvement" in handwriting legibility and "excellent participation" in a variety of multi-step activities.<sup>124</sup> Student's OT service trackers for 2016/17 show that Student was progressing, although progress was inconsistent on many days with numerous challenges that were more serious.<sup>125</sup> Student's IEP Progress Reports indicate progress in OT with some inconsistency; Student showed improvement in work ethic, but decreased coping skills at times when frustrated, and frequent need for redirection.<sup>126</sup> After the OT challenges of 2016/17, School Occupational Therapist

---

<sup>114</sup> J15-1.

<sup>115</sup> R5-4; R6-7.

<sup>116</sup> J1-6.

<sup>117</sup> J6-9; J13-13; J24-14.

<sup>118</sup> School Occupational Therapist; P12-1; Educational Advocate.

<sup>119</sup> School Occupational Therapist; J6-8; J13-11; J24-11.

<sup>120</sup> School Occupational Therapist; J6-8; J13-11; J24-12.

<sup>121</sup> Educational Advocate.

<sup>122</sup> School Occupational Therapist; J13-12; J24-12.

<sup>123</sup> J25.

<sup>124</sup> J27-7,8,16.

<sup>125</sup> J28; School Occupational Therapist.

<sup>126</sup> J30-7,8,17,18,27,28.

## Hearing Officer Determination

Case No. 2017-0246

strategized at length about how to reach Student to improve OT services in 2017/18, which has resulted in Student participation in OT and progress this year.<sup>127</sup>

30. Parent has seen a little improvement in Student's handwriting.<sup>128</sup> Student displayed growth in 2017/18 OT sessions compared to 2016/17 due to increased compliance and motivation; School Occupational Therapist has seen Student's increased motivation in OT.<sup>129</sup> Student's OT service trackers for 2017/18 show that Student was consistently progressing.<sup>130</sup> The OT goals and services have been appropriate.<sup>131</sup>

31. IEPs; Specialized Instruction. On 1/4/17, Student's IEP team discussed increasing Student's outside general education hours to provide more support, as Student was not making as much progress as hoped.<sup>132</sup> The IEP team increased Student's specialized instruction hours and shifted them all outside general education, concluding that was appropriate and Student's least restrictive environment.<sup>133</sup> Specialized instruction hours are increased incrementally; adding too much time to Student's IEP would undermine the goal of Student being independent.<sup>134</sup> The 1/4/17 IEP contained updated present levels of performance, goals and baselines, and an additional math goal.<sup>135</sup> Based on the information available at the time, the 1/4/17 IEP was reasonably calculated to allow Student to make appropriate progress.<sup>136</sup> Student's IEP Progress Reports for reading, writing and math showed steady progress for 2015/16 and 2016/17.<sup>137</sup>

32. Parent and her advocates did not ask for increased specialized instruction at the 5/18/17 MDT meeting or at other times prior to the due process complaint.<sup>138</sup> Parent and her advocates only objected to the lack of direct speech-language services.<sup>139</sup> In concerns raised by Parent and her advocates after the 10/6/17 IEP, there was no issue about OT, specialized instruction or BSS.<sup>140</sup> By the 10/6/17 IEP, Student was making significant improvement overall.<sup>141</sup> The 10/6/17 IEP had updated present levels of performance, goals and baselines, and was reasonably calculated to allow Student to make appropriate progress.<sup>142</sup> Special Education Teacher credibly testified that the hours of specialized

---

<sup>127</sup> School Occupational Therapist.

<sup>128</sup> Parent.

<sup>129</sup> J24-10; R6-3; School Occupational Therapist.

<sup>130</sup> R7-1,3,5,6.

<sup>131</sup> School Occupational Therapist.

<sup>132</sup> Director of Student Support; School Occupational Therapist.

<sup>133</sup> R4-2,3; J6-9; J13-13.

<sup>134</sup> Director of Student Support.

<sup>135</sup> Director of Student Support; School Occupational Therapist.

<sup>136</sup> Director of Student Support.

<sup>137</sup> J27; J30.

<sup>138</sup> P12-1; Educational Advocate; Parent.

<sup>139</sup> Parent; Educational Advocate.

<sup>140</sup> R28; Educational Advocate.

<sup>141</sup> Director of Student Support.

<sup>142</sup> Director of Student Support; School Occupational Therapist.

## Hearing Officer Determination

Case No. 2017-0246

instruction on Student's IEP were appropriate and Student was making appropriate progress on IEP goals, including reading, writing and math.<sup>143</sup>

33. Loss of Credibility. In the view of the undersigned, the credibility of Educational Advocate was somewhat undermined by her intense negativity toward Public Charter School, where she responded to Public Charter School's written concerns about her making "personal" remarks by responding that her comments were "direct" but not personal; Educational Advocate went on to explain via email that her comments were "delivered in a tone with passion and fever (sic) in order to convey an expression of disdain and disappointment" due to Public Charter School failing to meet Student's needs.<sup>144</sup> Educational Advocate's credibility further suffered by quibbling over details in her testimony, such as questioning whether Student's MDT team had taken the action listed in a PWN which erroneously referred to Student's "MPT" team.<sup>145</sup>

### 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, the LEA 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

---

<sup>143</sup> Special Education Teacher.

<sup>144</sup> P21-1.

<sup>145</sup> J12-1.

## Hearing Officer Determination

Case No. 2017-0246

F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

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

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); *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 Respondent denied Student a FAPE by failing to comprehensively evaluate Student on a timely basis to determine the need (a) for a BIP, (b) for Speech and Language services, and/or (c) to address an auditory processing disorder. (Petitioner has the burden of persuasion on this issue.)*

## Hearing Officer Determination

Case No. 2017-0246

Petitioner failed to meet her burden of demonstrating that Public Charter School did not conduct appropriate evaluations and that any alleged failure resulted in substantive harm to Student.

Evaluations of children by experts are central to the determination of what special education and related services are needed for most eligible children. *See Hill v. Dist. of Columbia*, 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)). As the public agency, Public Charter School must ensure that a child is “assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 C.F.R. 300.304(c)(4).

Decisions on the areas to be assessed are to be made based on the suspected needs of the child. 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 evaluations sought by Petitioner are considered in turn.

(a) Functional Behavioral Assessment. In *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), the Court made clear that an FBA is an “educational evaluation” that comes within 34 C.F.R. 300.304(c)(4). The Court in *Long*, 780 F. Supp. 2d at 61, *quoting Harris*, 561 F. Supp. 2d at 68, further explained that an FBA is “essential” in addressing behavioral difficulties, so plays an integral role in the development of an IEP. The IDEA requires, in the case of a student whose behavior impedes the student’s own learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. 300.324(a)(2)(i).

Here, a thorough FBA was conducted over a period of 6 weeks which determined that Student’s behaviors did not impede Student’s learning or that of other students. Educational Advocate objected to the FBA based on an interview of only the general education teacher, but as clearly stated in the FBA report both Student’s general education teacher and Special Education Teacher were interviewed, along with reliance on up to 4 of Student’s teachers for various portions of the assessment. Student has never had any in-school or out-of-school suspensions at Public Charter School. Nor has Student had any other incident requiring administrative intervention during 2017/18, with only 1 incident in each 2016/17 and 2015/16. The FBA included no fewer than 5 classroom observations across 13 days with Student behaving appropriately almost all the time, as all but 1 found Student appropriate more than 90% of the time. Both Student’s general education and special education teachers reported no behavior issues in class, merely noting that when frustrated, Student may hang Student’s head down. Teachers’ interventions were

## Hearing Officer Determination

Case No. 2017-0246

successful, which included a front seat close to the teachers and praise and other verbal support and encouragement when inattentive.

Not surprisingly, Public Charter School concluded that Student did not need a BIP, as there were no behaviors of concern found by the FBA that could not be addressed through BSS or by teachers in the classroom. Special Education Teacher credibly testified that Student's behaviors did not interfere with Student's or others' learning and that Student was one of Special Education Teacher's hardest working students, was an active participant in class who respects teachers and responds well to redirection, and had friends and got along well with peers.

Nor was there undue delay, as Parent requested an FBA in late April 2017, consent was sought along with information about the desired focus of the FBA in May 2017 and then the actual assessment was begun on the first day of the new school year in early August 2017. This Hearing Officer concludes that Petitioner did not meet her burden of showing that the FBA was not adequate or timely, or that a BIP should have been developed.

(b) Speech-Language Evaluation. The dispute over speech-language services is the heart of this case and was the only area that could not be worked out between the parties at IEP meetings, as discussed further in Issue 2, below. As to whether Respondent failed to evaluate Student in the area of speech-language, there were 2 evaluations conducted by Public Charter School, on 2/5/16 and 8/28/17, plus an IEE dated 7/19/17 by the expert selected by Petitioner. While Petitioner may have concerns over the outcome of the evaluations, there was little that could be criticized about the administration of the Public Charter School evaluations. While Educational Advocate asserted that the OWLS-II reading and writing scales should have been administered, she acknowledged that no concerns had been raised previously about the scales. The undersigned was not persuaded by Petitioner's arguments that the scales were required or that any further speech-language evaluation was required. *See Parker C. through Todd v. W. Chester Area Sch. Dist.*, 2017 WL 2888573, at \*12 (E.D. Pa. July 6, 2017) ("a parent 'cannot simply argue that the evaluation was inappropriate because they disagree with its findings,'" quoting *L.S. ex rel. K.S. v. Abington Sch. Dist.*, 2007 WL 2851268, at \*12 (E.D. Pa. 2007)).

(c) Auditory Processing Testing. Finally, the school psychologist stated on 1/12/16 that the speech portion of Student's Psychological Evaluation showed some auditory processing issues which were affecting Student's reading. At that time, however, an auditory processing assessment was not appropriate for Student due to poor listening skills and being too young for an auditory processing assessment. Public Charter School stated that Student's team should revisit the issue and conduct a screener in the future. In the 7/19/17 independent speech-language evaluation, Private Speech-Language Pathologist recommended an auditory processing assessment of Student to check for Auditory Processing Disorders. Student was by then old enough, so Student's MDT team agreed to an auditory processing assessment in mid-August 2017 and scheduled an appointment at Gallaudet University's Hearing & Speech Center by 8/29/17, which apparently has resulted in a report that Parent received just before the due process hearing and is thus not in the record. Student's IEP team has agreed to meet to review the auditory processing assessment and make any necessary changes to Student's IEP.

## Hearing Officer Determination

Case No. 2017-0246

This Hearing Officer concludes that Petitioner did not meet her burden on the demand for an auditory processing assessment, as Student initially was too young for testing according to ASHA guidelines, and then Public Charter School moved forward within weeks of receiving Private Speech-Language Pathologist's subsequent recommendation.

**Issue 2:** *Whether Respondent denied Student a FAPE by failing to provide appropriate IEPs, including related services, during 2015/16 and/or 2016/17, where the IEPs did not (a) include any Speech and Language goals, (b) increase behavioral support services ("BSS"), (c) modify OT goals or increase the amount of OT services, and/or (d) increase the amount of specialized instruction after 1/4/17. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Turning to Student's IEPs, Petitioner established a prima facie case on the issue of lack of appropriate IEPs for 2015/16 and 2016/17 based on the evidence presented, shifting the burden of persuasion to Respondent. Respondent in turn met its burden of demonstrating that it did provide appropriate IEPs for Student, as it persuasively explained the decisions made on the issues in Student's IEPs.

The applicable legal standard for analyzing the appropriateness of an IEP has recently been 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. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEPs were "reasonably calculated to produce meaningful educational benefit" and to permit Student to access the educational curriculum to the extent possible. *See Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07.

The measure and adequacy of an IEP is to be determined as of the time it was provided to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEPs is analyzed by considering each specific concern raised by Petitioner in turn.<sup>146</sup> *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Speech-Language. The central issue in this case is that Student's MDT team did not find eligibility for speech-language services on 2/19/16 after Student's initial speech-language evaluation due to a lack of impact on Student's access to the general education curriculum, or on 10/6/17 after Student's speech-language reevaluation. Parent acknowledged that the absence of direct speech-language services was her only ongoing issue, as she agreed with all other services and goals in the 10/6/17 IEP.

---

<sup>146</sup> As an initial matter, a Hearing Officer must determine whether "the State complied with the procedures" set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, *quoting Rowley*, 458 U.S. at 206-07. No such procedural violations were alleged in this case.

## Hearing Officer Determination

Case No. 2017-0246

Student's 2/5/16 speech-language evaluation identified Student as having a moderate speech impairment with decreased intelligibility due to interdental /s/ production which did not, however, impact Student's education. Among the numerous witnesses in the case, there was a notable divide between Parent and her witnesses, all of whom noted difficulties understanding Student, and Respondent's witnesses who did not. The undersigned judges most credible the finding that despite the interdental /s/, Student was about 95% intelligible in connected speech, in both known and unknown contexts. Notably, when reminded of tongue placement, Student produces an accurate /s/ sound, which Student's teachers and providers are working on with Student with the consultative support of the speech-language pathologist.

The undersigned is persuaded that direct speech-language services were not needed by Student for a FAPE, thus no speech-language goals for direct service were required, although decoding goals were added by the speech-language pathologist. In the tug of war between competing evaluations, the undersigned discounts Private Speech-Language Pathologist's independent evaluation due to the errors and exaggerations described above. Even assuming *arguendo* that the Private Speech-Language Pathologist's evaluation were flawless, this Hearing Officer considers the recommendation that Student needed 90 minutes/week of direct speech-language services (which Educational Advocate sought to boost by an extra 30 minutes/week) as excessive and lacking sufficient foundation, for increasing related services does not come without difficult trade-offs. Instead, the undersigned was persuaded by the credible testimony of School Speech-Language Pathologist that adding direct speech-language services was not Student's least restrictive environment as Student would not benefit from those additional services, and the persuasive testimony of Lead Speech-Language Pathologist that mild speech-language weaknesses such as demonstrated by Student can best be served in the classroom, where Student can continue to obtain the full measure of reading and other instruction that Student urgently needs.

(b) Level of Behavior Support Services. As discussed above, Student had few behaviors of concern, but the 120 minutes/month of BSS on Student's IEPs were helpful for Student to learn to moderate emotions, with improvement over time. By 10/6/17, Student's general education teacher stated Student was much more confident in completing work and much more likely to ask for help, a "major change" from 2016/17. Student had progressed sufficiently that Public Charter School sought to reduce Student's level of BSS in the 10/6/17 IEP, although when Parent objected the team compromised by shifting half the 120 BSS minutes inside general education. Student's BSS service trackers show that Student was consistently progressing in 2015/16 and 2016/17 (as well as 2017/18), although there were some challenges with Student in the sessions. This was confirmed by Student's IEP Progress Reports. By 10/6/17, Parent acknowledged that Student's confidence had improved somewhat and that she noticed a difference. Parent and her advocates had not sought increased BSS prior to the due process complaint.

(c) Occupational Therapy Goals and Services. Student's IEPs consistently included 120 minutes/month of OT services, along with goals. In Student's 1/4/17 IEP, an OT goal was increased from writing 1-2 sentences to writing 1 paragraph, and in Student's 10/6/17 IEP it was further increased to specify a 5-sentence paragraph with greater accuracy in

## Hearing Officer Determination

Case No. 2017-0246

letters and punctuation. A second annual goal was unchanged from the 1/12/16 IEP to the 1/4/17 IEP, as Public Charter School expected Student to be able to achieve it in the updated IEP. That goal was modified in the 10/6/17 IEP and 2 additional goals added. Educational Advocate testified about the need for a “time telling” goal in Student’s IEP, but had never requested such a goal prior to the due process complaint.

As for OT services, based on Student’s OT service trackers for 2015/16 and 2016/17, Student was consistently progressing, although Student had numerous challenges during the OT sessions that had to be surmounted. Student’s IEP Progress Reports confirm progress in OT in 2015/16, with “strong improvement” in handwriting legibility and “excellent participation” in a variety of multi-step activities, while in 2016/17 Student showed improvement in work ethic, but decreased coping skills at times when frustrated, and a frequent need for redirection. In addition, Student’s OT baselines improved from 1/4/17 to 10/6/17, which demonstrated progress.

In light of Student’s OT challenges in 2016/17, School Occupational Therapist worked on how to reach Student to improve OT services, which resulted in Student’s participation in OT and progress in 2017/18. Student displayed growth in 2017/18 OT sessions due to increased compliance and motivation, demonstrating that more time had not been needed. In her testimony, Parent acknowledged seeing some improvement in Student’s handwriting. The OT goals and services have been appropriate; Parent and her advocates did not seek increased OT services or goals prior to the due process complaint.

(d) Specialized Instruction after 1/4/17. Student’s IEP team increased Student’s specialized instruction hours on 1/4/17 to provide more support, as Student was not making as much progress as desired. The IEP also shifted all specialized instruction hours outside general education, concluding that was appropriate and Student’s least restrictive environment. Student’s IEP Progress Reports for reading, writing and math showed steady progress for 2016/17. Parent and her advocates did not seek increased specialized instruction after the 1/4/17 IEP until filing the complaint in this case. Further, increasing specialized instruction too much on Student’s IEP would undermine the goal of Student being independent. Special Education Teacher credibly testified that Student was making appropriate progress on IEP goals, including reading, writing and math, and that the hours of specialized instruction on Student’s IEP were appropriate.

In sum, in considering the concerns raised by Petitioner above, the undersigned is cognizant of the fact that the analysis is not about achieving a perfect IEP, but one that is reasonably calculated to enable Student to make appropriate progress. *Andrew F.*, 137 S. Ct. at 1001. *See Hill*, 2016 WL 4506972, at \*21 (a “properly developed IEP ‘need not guarantee the best possible education or even a potential-maximizing one.’” *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015) (internal quotation marks omitted)). Further, any modifications sought were held back by Petitioner and her advocates not raising concerns with Public Charter School in a timely fashion so concerns could potentially be remedied prior to filing a due process complaint, for IDEA procedures “emphasize collaboration among parents and educators.” *Andrew F.*, 137 S. Ct. at 994. Moreover, while Student was retained and continues to need significant attention in reading, the IDEA does not guarantee any particular degree of success. *See, e.g., Holman v. Dist. of*

## Hearing Officer Determination

Case No. 2017-0246

*Columbia*, 153 F. Supp. 3d 386, 389-90 (D.D.C. 2016) (while a FAPE is required, there is no guarantee of “any particular outcome or any particular level of academic success”). Thus, this Hearing Officer concludes that, viewed as of the time they were developed, Student’s IEPs in 2015/16 and 2016/17 were reasonably calculated to enable Student to make appropriate progress in the circumstances, so there was no denial of a FAPE on Issue 2.

### **ORDER**

Petitioner has not prevailed on 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:

Counsel of Record (Appendix A, by email)  
OSSE-SPED (due.process@dc.gov)  
ODR (hearing.office@dc.gov)  
Contact.resolution@dc.gov