

**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

<i>Student</i> , ¹)	Case No.: 2021-0112
through <i>Parents</i> ,)	
<i>Petitioners</i> ,)	Date Issued: 11/1/21
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	10/19/21, 10/20/21 & 10/21/21
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, Student’s Parents, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to DCPS’s failure to comprehensively and timely evaluate, develop appropriate IEPs, or meet its Child Find obligations. DCPS responded that Student’s evaluations and IEPs were appropriate, and that Student only needed support through a Section 504 plan as Student performed at grade level.

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 8/5/21, the case was assigned to the undersigned on 8/6/21. Respondent filed a response on 8/16/21, and did not challenge

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics. Personal pronouns and other terms that would indicate Student’s gender are omitted.

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jurisdiction. A resolution meeting took place on 8/20/21, but the parties neither settled the case nor shortened the 30-day resolution period, which ended on 9/4/21. 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 continuance of 14 days, which requires a Hearing Officer Determination (“HOD”) by 11/2/21.

A prehearing conference was held on 9/17/21 and a Prehearing Order was issued that same day addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 10/19/21, 10/20/21 and 10/21/21 and was open to the public. Five observers attended at least portions of the hearing. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. *Petitioner* participated in the entire hearing; both Petitioners were present for much of the hearing. Vietnamese interpreters were present throughout the hearing in case of language questions from Petitioners.

Documents and Witnesses

Petitioners’ Disclosures, first submitted on 10/12/21 and corrected on 10/13/21 and 10/19/21, contained documents P1 through P102, which were all admitted into evidence without objection. Respondent’s Disclosures, submitted on 10/12/21, contained documents R1 through R100, which were all admitted into evidence without objection.²

Petitioners’ counsel presented 5 witnesses in Petitioners’ case-in-chief (*see* Appendix A):

1. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
2. *Parent*
3. *Educational Consultant* (qualified without objection as an expert in Special Education)
4. *BCBA* (Board Certified Behavior Analyst; qualified without objection as an expert in Applied Behavior Analysis (“ABA”))
5. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)

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

² Citations herein to Petitioners’ documents are indicated by a “P” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted, while Respondent’s documents are indicated in the same manner beginning with an “R.”

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1. *School Psychologist A* (qualified without objection as an expert in School Psychology)
2. *School Psychologist B* (qualified without objection as an expert in School Psychology)
3. *Educator* (qualified without objection as an expert in Special Education)
4. *Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
5. *Assistive Technology Expert* (qualified without objection as an expert in Assistive Technology)

Petitioners' counsel recalled Parent for rebuttal testimony.

Issues and Relief Requested

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

Issue 1: Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student, when speech-language and assistive technology evaluations should have been conducted based on the 9/28/20 comprehensive psychological evaluation and other indicators, but were not completed until April 2021. (*Petitioners have the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 3/3/21 and/or 5/12/21, or thereafter, due to the IEP (a) not being based on updated evaluations/data, (b) not providing appropriate classroom aids and services, (c) not providing an appropriate level of services by pulling Student out of general education for all core academic courses, (d) lacking an adaptive functioning area of concern, and/or (e) not providing Applied Behavior Analysis (“ABA”) services. (*Respondent has the burden of persuasion, if Petitioners establish a prima facie case.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to initially evaluate, determine eligibility, develop an IEP, and/or make services available, beginning on 10/10/19 or thereafter pursuant to its Child Find obligations, as it discontinued services until January 2021 when it found Student eligible under the disability classifications of Autism Spectrum Disorder (“ASD”) and Other Health Impairment (“OHI”), even though DCPS developed a Section 504 plan for Student on 10/30/19 based on ASD and Attention Deficit Hyperactivity Disorder (“ADHD”) disability categories; Student suffered academically and social-emotionally due to severe behaviors at school. (*Petitioners have the burden of persuasion on this issue.*)

The relief requested by Petitioners is:

1. A finding that Student has been denied a FAPE.

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2. DCPS shall develop an appropriate IEP for Student, including (a) up to 15 hours/week of specialized instruction outside general education, (b) an adaptive area of concern, (c) a dedicated aide, and/or (d) ABA therapy.
3. DCPS shall provide compensatory education for any denials of FAPE.³
4. Any other just and reasonable relief to ensure that Student receives a FAPE, including special education, transportation, and other related services.

Findings of Fact

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

1. Background. Student is a resident of the District of Columbia; Petitioners are Student's Parents.⁵ Student was born in Vietnam and came to the U.S. with Parents and sibling in August 2016.⁶ Student is *Age, Gender* and in *Grade* at *Public School*, where Student began in 2017/18.⁷ Student is viewed by teachers and staff at Public School as "friendly, helpful, sociable, kind to other students, very honest, good sense of humor, kind to adults, a hard worker, like by peers and artistic."⁸

2. Disabilities. Student received an initial psychological evaluation in the U.S. on 11/10/16, which noted that early childhood providers diagnosed Student with ADHD and that Student demonstrated some characteristics of Asperger's Syndrome.⁹ The 2016 evaluation concluded that since Student had "demonstrated characteristics related to ADHD

³ With regard to any request for compensatory education to be awarded in this HOD, Petitioners' counsel was put on notice at the prehearing conference that Petitioners 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 to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Parent.

⁶ P16p179.

⁷ P16p179,180; Parent; All dates in the format "2017/18" refer to school years.

⁸ P22p289,288.

⁹ P7p68,69.

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and autism spectrum disorder,” there should be monitoring for additional symptoms.¹⁰ An 11/3/16 speech-language evaluation and an 11/9/16 occupational therapy evaluation both noted Student’s diagnosis in Vietnam of ADHD with suspected Asperger’s disorder as well.¹¹

3. On 3/18/19, Student had a psychological evaluation at *Large Health Provider’s* Autism Spectrum Clinic that diagnosed Student with ADHD and ASD, which Parent shared with Public School, as she did all relevant documents concerning Student.¹² Student received comprehensive private services for ASD and ADHD, with in-home ABA treatment and private occupational therapy.¹³ Student was prescribed several medications to address hyperactivity and impulsivity which were discontinued in November 2019 due to an increase in aggression that was medication-related.¹⁴

4. An Analysis of Existing Data (“AED”) meeting was held on 9/3/19 to determine assessments needed to ascertain whether Student had a disability; the team noted the diagnosis of ADHD through Large Health Provider, but not ASD, and decided on the need for psycho-educational and speech-language evaluations.¹⁵ School Psychologist A conducted a 10/9/19 psychological evaluation for DCPS in which ADHD rating scales identified Very Elevated concerns for both inattentive and hyperactive-impulsive symptoms of ADHD across settings.¹⁶ Responses from Student’s Parents and teacher also yielded an At-Risk score on Atypicality which assesses immature and odd behaviors typically associated with Autism.¹⁷ The 10/9/19 psychological evaluation noted that Student’s ADHD and executive functioning symptoms “appear to impact [Student’s] educational performance in the school setting” although Student had the potential to learn at an average rate.¹⁸

5. School Psychologist A concluded that Student did not qualify for special education based on Specific Learning Disability (“SLD”) or OHI due to ADHD, but School Psychologist A did not make any conclusions about whether Student met special education requirements as a student with Autism or an Emotional Disturbance.¹⁹ An eligibility meeting was held on 10/10/19 in which Developmental Delay (“DD”), OHI and SLD were considered and the team concluded that Student did not meet the criteria for any disability and accessed grade-level academics even with significant symptoms of ADHD.²⁰ The team

¹⁰ P7p75.

¹¹ P5p43,50; P6p53,63.

¹² P8p77,79,88; P17p198; Parent.

¹³ P16p179,188; P12p113.

¹⁴ P16p179,188.

¹⁵ P76p947,948,949; R1p9 (9/4/19 PWN to proceed with evaluation).

¹⁶ P16p183; P12p115.

¹⁷ P16p183.

¹⁸ P16p183; P12p136 (significant symptoms related to ADHD impacted Student’s social and behavioral function at school).

¹⁹ P16p183; P12p135.

²⁰ P77p952,954; R49p451,453.

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made only passing mention of “diagnosis of ASD (sort of?) from outside” (sic) and concluded – based on DD, OHI and SLD – that Student does not have a disability.²¹ The IEP team concluded in a 10/10/19 Prior Written Notice (“PWN”) that Student was no longer eligible for special education and related services, but might be eligible for a Section 504²² plan; Student’s IEP ended on 10/15/19 and DCPS shifted Student to a Section 504 plan.²³ Autism was the primary factor driving Student’s difficulties at school, but DCPS missed what made Student eligible.²⁴

6. Clinical Psychologist’s 9/28/20 independent psychological evaluation diagnosed Student with: ASD; ADHD, Combined Presentation, Severe; and Generalized Anxiety Disorder.²⁵ Student’s severe ADHD symptoms, anxiety and “profound” adaptive and social deficits make Student unavailable for learning at times.²⁶ Student has made academic progress thus far based on High Average intelligence and well-developed basic academic skills, but academic demands increase in higher grades.²⁷ DCPS’s 12/5/20 occupational therapy evaluation concluded that Student’s sensory challenges and executive functioning deficits limit Student’s ability to complete classroom activities at the rate of peers; Student requires more adult support and scaffolding to complete work and stay on task, and to complete grade level work requires additional time, frequent breaks, sensory supports, and adult check-ins for organization and planning.²⁸

7. On 1/27/21, Student was again found eligible for special education and related services based on the classification of Multiple Disabilities (“MD”), with both ASD and OHI due to ADHD; Student’s disabilities impacted participation in the general education curriculum in Academics-Mathematics, Academic-Reading, and Academic-Written Expression, among others.²⁹ The IEP team rejected an increase of specialized instruction in the 2021 IEPs from 5 to 15 hours/week based on Student’s academic progress.³⁰ School Psychologist B emphasized that 5 hours/week of specialized instruction was Student’s least restrictive environment (“LRE”) and additional pull-out could cause regression; remaining mostly inside general education was better for Student’s social skills.³¹

8. IEPs/Section 504 Plans. Student first received special education services through an IEP for Developmental Delay after evaluation in October 2016; Student’s initial IEP on 11/17/16 provided for 7.5 hours/week of specialized instruction inside general education, 2 hours/month of speech-language services inside general education, and 2 hours/month of

²¹ P77p954.

²² Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794.

²³ R1p11; P16p179,180; P12p112,136.

²⁴ Clinical Psychologist.

²⁵ P16p179,188.

²⁶ P16p188.

²⁷ P16p188; Clinical Psychologist.

²⁸ P18p221.

²⁹ P40p556-57; R1p15 (1/28/21 PWN with addition of ASD).

³⁰ R1p21-22.

³¹ School Psychologist B.

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Behavioral Support Services (“BSS”) outside general education.³² The 11/17/16 IEP contained Adaptive/Daily Living Skills as an area of concern with goals, but no academic areas of concern.³³ Student’s IEP was amended on 10/24/17 to add academic areas of concern and omit Adaptive/Daily Living Skills, and provided 4 hours/week of specialized instruction inside general education, 2 hours/month of speech-language services inside general education, 2 hours/month of BSS outside general education, and 2 hours/month of BSS inside general education.³⁴

9. Student’s next IEP dated 10/16/18 provided 2 hours/week of specialized instruction inside general education, 2 hours/month of BSS outside general education, 2 hours/month of BSS inside general education, and 30 minutes/month of speech-language consultation.³⁵ The IEP review on 10/16/18 found that Student was on grade-level in academics, although comprehension was affected by behavior; reading could be removed as an area of concern as Student was above grade-level; specialized instruction could be reduced; Student did not require an IEP paraprofessional.³⁶

10. On 10/30/19, Student was provided a Section 504 plan in place of an IEP, based on the disabilities ADHD and ASD; the plan provided numerous accommodations, as well as 4 hours/month of BSS, and 30 minutes/month of occupational therapy consultation.³⁷ Student’s 12/7/20 Section 504 plan provided numerous accommodations along with 4 hours/month of BSS, and 1 hour/month of occupational therapy services.³⁸

11. Student again received an IEP on 3/3/21, which for the first time included assistive technology and again included Adaptive/Daily Living Skills as an area of concern.³⁹ The 3/3/21 IEP provided 5 hours/week of specialized instruction outside general education, 2 hours/month of BSS outside general education, 2 hours/month of BSS inside general education, and 1 hour/month of occupational therapy outside general education, along with a larger number of classroom aids and services.⁴⁰ Student’s IEP was amended on 5/12/21 to provide more focus on assistive technology, increase occupational therapy from 1 to 2 hours/month outside general education, and add 2 hours/month of speech-language services outside general education, along with 30 minutes/month of speech-language consultation, based on new assistive technology and speech-language evaluations, among other things.⁴¹

³² P16p179-80; P25p348.

³³ P25p343; P16p180.

³⁴ P27p356,358-61,365.

³⁵ P28p370,378.

³⁶ P75p943,944.

³⁷ P29p384-88.

³⁸ P30p395-402.

³⁹ P31p408-10,418-20.

⁴⁰ P31p428; School Psychologist B (most classroom aids and services were from Student’s Section 504 plan).

⁴¹ P32p434,437,458; R1p23.

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12. Distance Learning. Student was provided distance learning due to the pandemic beginning in March 2020.⁴² In February 2021, Student returned in person to a Public School “CARES+” classroom staffed by 1-2 teachers in person, with virtual instruction from Student’s general education and special education staff.⁴³

13. Cognitive Abilities. In DCPS’s 10/9/19 psychological evaluation, Student earned a solidly Average Full Scale IQ (“FSIQ”) in the 58th percentile on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”), but the difference between index and subtest scores was significantly variable, with subtests ranging from the 9th to 95th percentiles, which is often observed in children with ADHD.⁴⁴ This reduces the value of the FSIQ as an overall estimate of cognitive potential; the Nonverbal Index, in which Student was at the 82nd percentile, is a better summary estimate of Student’s potential and is a reliable estimate of intellectual ability for children with autism.⁴⁵

14. Academics. DCPS’s 10/9/19 psychological evaluation analyzed Student’s academic skills with the Woodcock-Johnson IV (“WJ-IV”) and found Average to Superior scores in reading, writing and math, with no evidence of learning disabilities.⁴⁶ Student’s Reading Inventory score on 9/12/19 was Lexile 183, which was Below Basic at the 16th percentile.⁴⁷ Student received report cards in which virtually every grade improved over the school year from Basic to Proficient in both 2018/19 and 2019/20.⁴⁸ Student’s 2019/20 teacher reported that Student was doing well academically, but at times had “great difficulty” focusing on the academic task at hand and needed frequent reminders and redirection to get on task; Student needs prompting and support when overwhelmed.⁴⁹

15. Behavior. Student has maladaptive behaviors in school and at home, including physical aggression/physical contact (hitting, kicking, punching, biting), inappropriate touching, non-compliance, elopement from instructional area, use of profanity, and property destruction, including throwing chairs.⁵⁰ Student’s behaviors can be “very intense”; Student talked of self-hate, self-harm and property destruction.⁵¹ Target behavior was most likely during whole group instruction; elopement occurred a few times a week when Student would leave the large group to hide; Student is more successful in individual and small group settings.⁵² Student’s behaviors continued during distance learning, with increased

⁴² P16p180.

⁴³ P20p256; P22p286.

⁴⁴ P16p182.

⁴⁵ P16p183.

⁴⁶ P16p183; P12p125; *see also* P11p109-10.

⁴⁷ P42p590.

⁴⁸ P46p615; P47p620.

⁴⁹ P12p116.

⁵⁰ P22p286,289.

⁵¹ P22p289.

⁵² P22p289,297.

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cursing, aggression, and biting at home, along with touching mother and sibling inappropriately.⁵³

16. Student has made verbal threats, including “I’ll kill you,” and tried to elope.⁵⁴ On 10/3/19 Student touched a peer inappropriately, resulting in a sexual abuse allegation; police were contacted on 10/10/19 when Student exposed self to peers in the restroom; on 1/20/20, Student hit and cursed a classmate.⁵⁵ According to BCBA, Student’s inappropriate actions have never been sexual, but reflected hyperactivity and poor awareness of boundaries.⁵⁶

17. On 3/15/21, at the start of a small group, Student said, “I want to kill myself.”⁵⁷ On 3/16/21 Student wrote 3 extreme ways of hurting self, including stabbing.⁵⁸ The principal emailed Parent that Student threatened to bring a gun to school.⁵⁹ Public School developed an Individual Student Crisis Response Plan on 3/16/21 and 3/19/21, based on suicidal ideation and fighting/physical aggression; daily behavior trackers were implemented.⁶⁰ Public School also conducted a thorough Functional Behavioral Assessment, Level II (“FBA-II”) for Student dated 4/23/21, followed by Behavioral Intervention Plans, Level II (“BIP-II”) on 5/14/21 and 5/26/21.⁶¹

18. Behavioral Consequences. Student has “significant challenges” with initiating and sustaining attention, inhibiting impulsive responses, sustaining working memory, planning and organizing environment/materials, learning problems, and executive function concerns, which impact educational performance in the school setting, although Student has the potential to learn at an average rate and displays average skills.⁶² When Student is upset, Student is not available for learning.⁶³

19. The Conners 3rd Edition-Short Form (“Conners 3S”) results were consistent with other data indicating that Student’s inattention, impulsivity, and hyperactivity interfere with academic and social functioning; Learning Problems (struggles with reading, spelling, and/or math; difficulty remembering concepts) were rated by both Parent and teacher as

⁵³ P66p814,815 (“I hate my mother”); P68p858 (3/16/21 aggressive behaviors toward sibling and peer); Occupational Therapist.

⁵⁴ P16p181; BCBA; Parent.

⁵⁵ P16p180; P49p630 (sexual abuse allegation made to Child and Family Services Agency (“CFSA”) hotline); P91p997-98 (investigation of inappropriate touching); P50p633 (Student touched another peer on the rear); P88p990 (exposed self in bathroom and tried to get peers to look).

⁵⁶ P16p180-81; BCBA.

⁵⁷ P51p638.

⁵⁸ P52p642-43.

⁵⁹ Parent.

⁶⁰ P54p652-57; P55.

⁶¹ P22p286-311, P23p313-23, P24p325-39.

⁶² P12p134.

⁶³ Clinical Psychologist.

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High Average.⁶⁴ The BASC-3 Target Behaviors for Intervention include Academic Behavior Issues in which Parent noted “Disrupts other children’s activities (Almost always)” and the rating teacher listed the same category stating it happened often.⁶⁵ Parent and teacher ratings on the BRIEF-2 revealed consistent At-Risk or Clinically Significant concerns across home and school settings with difficulty resisting impulses and considering consequences before acting, which is likely to “highly” impact the ability to complete school tasks and demonstrate learning of grade level material.⁶⁶

20. The eligibility team on 10/10/19 was concerned about social interaction skills in a whole group setting, as Student often reacts impulsively when agitated and behaves aggressively towards peers.⁶⁷ Without access to special education and related services, Student engaged in behaviors that general education teachers could not manage; as a result the police were called to the school twice during the fall of 2019 to manage Student and one of the incidents led to a protective services investigation of Parents.⁶⁸ During School Psychologist A’s classroom observation on 10/9/19, there were 24 children present with one adult and Student was noted as hyperactive, restless, inconsistently followed teacher directions, unfocused, off-task most of the observation, distracted others verbally, excited, and fidgety.⁶⁹ Student needed frequent redirection and repetition of directions.⁷⁰

21. Speech-Language. An AED meeting was held on 9/3/19 to determine any assessments needed, which included a speech-language evaluation.⁷¹ Student’s speech-language skills were reevaluated by DCPS on 9/24/19 as part of its triennial review; Speech-Language Pathologist concluded that Student demonstrated age-appropriate language skills necessary for academic success and communicative functioning, so the IEP team should determine that further speech-language services were not needed.⁷² Specifically, Student demonstrated age-appropriate voice, fluency, and hearing skills and had increased performance ability compared to the 2016 evaluation.⁷³ Student’s performance on the WJ-IV Tests of Oral Language in Clinical Psychologist’s 9/28/20 independent psychological evaluation were consistent with performance on the 2019 speech-language reevaluation, with current scores revealing mild to moderate deficits in expressive language skills, while receptive language skills appeared sufficiently well-developed to comprehend instruction.⁷⁴

⁶⁴ P12p129,130; Educator.

⁶⁵ P12p127,128.

⁶⁶ P12p132.

⁶⁷ P16p180.

⁶⁸ P16p188-89.

⁶⁹ P12p117-18.

⁷⁰ P12p118.

⁷¹ P76p947,948,949; R1p9 (9/4/19 PWN to proceed with evaluation).

⁷² R44p389,398; P16p183-84; P10p97,106; P21p267.

⁷³ P10p106.

⁷⁴ P16p184,191.

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22. Clinical Psychologist recommended on 9/28/20 that Student be reconsidered for speech-language services to address social and pragmatic language deficits.⁷⁵ An 11/12/20 AED concluded that no speech-language evaluation was required, for no additional information was needed to conclude Student continued not to require school-based speech-language services.⁷⁶ On 3/3/21, the IEP team proposed another speech-language evaluation.⁷⁷ A 4/21/21 speech-language evaluation was conducted remotely by Speech-Language Pathologist.⁷⁸ Pragmatic language skills were Student's most notable area of weakness as shown by the Test of Pragmatic Language, Second Edition ("TOPL-2") and scores from the Clinical Evaluation of Language Fundamentals-5 ("CELF-5"), which may negatively impact Student's ability to access grade level content.⁷⁹ Speech-Language Pathologist determined that Student qualified for services and recommended 2 hours/month of direct services for pragmatic and social language in the 5/12/21 IEP.⁸⁰

23. Assistive Technology. An IEP team can decide on assistive technology supports without an assessment and must consider assistive technology annually; an assistive technology assessment should be used when more information is needed.⁸¹ Assistive technology can help with transitions and moving between tasks, and can assist with pragmatic language.⁸² Following Clinical Psychologist's 9/28/20 recommendation for an assistive technology assessment, on 3/3/21 the IEP team proposed an assistive technology assessment to determine Student's needs.⁸³ DCPS's assistive technology report found that Student did not consistently use language when frustrated and during social situations, and would benefit from assistive technology supports to reduce frustration in challenging academic tasks, which included reading and writing, to increase organization and attention to task, and to provide alternative methods of expression when frustrated.⁸⁴

24. The assistive technology assessment was conducted on 4/2/21 and 4/6/21 by Assistive Technology Expert; Student had access to a Microsoft Tablet and low to high tech assistive technology, which included checklists, graphic organizers, speech-to-text, and text-to-speech, which the team reported were effective; Parent indicated interest in trialing Augmentative and Alternative Communication ("AAC") applications.⁸⁵ Based on the assistive technology assessment, the assistive technology section of Student's 5/12/21 IEP was enhanced by adding dictation, digital graphic organizers, editing tools, timers; high tech

⁷⁵ P16p189; Clinical Psychologist.

⁷⁶ P78p956,959; R1p13-14 (11/17/20 PWN); Speech-Language Pathologist (no need for speech-language evaluation in late 2020); School Psychologist B (same).

⁷⁷ Speech-Language Pathologist; R1p19.

⁷⁸ P21p265,266 (virtual testing sessions are a non-standardized method of evaluation).

⁷⁹ P21p284.

⁸⁰ P79p961,962; P83p974; Educational Consultant (2 hours/month of speech-language in 5/12/21 IEP were sufficient).

⁸¹ Assistive Technology Expert.

⁸² *Id.*

⁸³ R1p19; P79p962; P16p188-89.

⁸⁴ P20p261.

⁸⁵ P20p256,260; Assistive Technology Expert.

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dynamic display was being trialed to support Student’s use of social language and to support behavior.⁸⁶ The completed assistive technology assessment revealed that Student needed assistive technology for both academics and social-emotional needs.⁸⁷

25. Classroom Aids and Services. Petitioners raised concerns in late February 2021 with the IEP being developed for Student and asserted the need for access to a “cool down zone” or “chill space” in or near Student’s classroom to be able to take breaks when overstimulated or upset,⁸⁸ crisis intervention services to be integrated at school, access to an individual bathroom throughout the school day due to adaptive skill deficits and anxiety about toilet issues,⁸⁹ and a school-based social skills group; Educational Consultant – among others – credibly endorsed these concerns.⁹⁰

26. Adaptive/Daily Living Skills. The IEP team determined on 10/10/19 that there were no concerns about Student’s Adaptive/Daily Living Skills; that area of concern was included in Student’s 2021 IEPs.⁹¹ Student lacks the adaptive and social skills to form and maintain appropriate relationships with others.⁹² Student’s impulsive, inappropriate, and at times aggressive behaviors “severely” impede Student’s adaptive functioning across environments; severe distractibility, hyperactivity, and impulsivity profoundly interfere with Student’s daily functioning.⁹³ Student has very poor daily living skills; Student insisted on removing pants and underwear when using the bathroom, but was afraid to close the bathroom door.⁹⁴ Parents were working with an ABA therapist and an occupational therapist to teach Student how to go to the bathroom properly, including how to wipe.⁹⁵ Public School at times let Student use the teachers’ bathroom.⁹⁶

27. An IEP without adaptive goals would be of concern; Student needs additional adaptive/daily living goals, including those related to using the bathroom properly and other basic functions.⁹⁷ As for a dedicated aide, Clinical Psychologist recommended that Student be provided a 1:1 special education aide at home during distance learning, but the data did

⁸⁶ P32p437; P31p410.

⁸⁷ Educational Consultant.

⁸⁸ P16p189; Occupational Therapist; BCBA; School Psychologist B (Student needs cool down and breaks).

⁸⁹ P16p189; Clinical Psychologist (needs separate bathroom for hygiene; has fear of ghosts).

⁹⁰ R77p714-15; Educational Consultant; Clinical Psychologist (social skills group important); BCBA (needs social skills group at school).

⁹¹ P16p180; P32p445; P31p418.

⁹² P16p188.

⁹³ *Id.*

⁹⁴ P16p181; P78p957 (11/12/20, cannot close bathroom door); P79p962 (in 2021, afraid of ghosts so can’t close bathroom door).

⁹⁵ P88p988.

⁹⁶ *Id.*

⁹⁷ Occupational Therapist.

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not support the need for an IEP paraprofessional; DCPS was willing to consider future data.⁹⁸

28. ABA and Other Services. Student had an ABA therapist since March 2020 to work with Student 1:1; Student received 39 hours/month of 1:1 in-home ABA services, along with 22 hours/month of social skills groups, and 8 hours/month of family therapy; Parent needed to sit with Student during live virtual lessons for Student to be able to understand what was needed, and then Parent worked with Student on independent work.⁹⁹ Student also received occupational therapy 1-3 times per week to improve emotional regulation and impulsivity, sensory seeking behaviors, and independence with daily life skills, such as toileting.¹⁰⁰

29. With ABA, Student “vastly improved” in the home setting; BCBA recommended 15 hours/week of direct ABA therapy, but Student only had time for 9 hours/week.¹⁰¹ Parent asserted that Student needed ABA at school due to severe behavior issues.¹⁰² DCPS was aware of role of ABA and BCBA in Student’s care and development, but didn’t consider ABA necessary for a FAPE or as a related service within DCPS.¹⁰³ ABA is an approved medical service that is funded through insurance (with Parents’ co-pay).¹⁰⁴

30. Compensatory Education. Educational Consultant forthrightly testified that her Compensatory Education Proposal would put Student in the place Student would have been but for the denials of FAPE alleged in this case.¹⁰⁵ Educational Consultant’s proposal recommended 100 hours of counseling, 100 hours of mentoring, 200 hours of private speech-language services, 300 hours of ABA therapy, payment for a summer program for 2022, a dedicated aide, and reimbursement for the last 2 years of occupational therapy and ABA therapy.¹⁰⁶ Educational Consultant sought 2 years for Student to use all services authorized.¹⁰⁷

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:

⁹⁸ P16p189; R1p22; Educator (Student does not need a dedicated aide to access the curriculum).

⁹⁹ P78p956-57; P16p181; R1p13; School Psychologist B.

¹⁰⁰ P16p181.

¹⁰¹ BCBA; P13p168.

¹⁰² Parent; P79p963.

¹⁰³ R1p19,22,23.

¹⁰⁴ BCBA.

¹⁰⁵ Educational Consultant.

¹⁰⁶ P98p1048; Educational Consultant.

¹⁰⁷ P98p1048.

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

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

Once a child who may need special education services is identified and found eligible, 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 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, the local education agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the

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extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455 (CKK), 2018 WL 4623572, at *3 (D.D.C. 2018).

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

Petitioners carry 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 Petitioners establish 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 comprehensively evaluate Student, when speech-language and assistive technology evaluations should have been conducted based on the 9/28/20 comprehensive psychological evaluation and other indicators, but were not completed until April 2021. (Petitioners have the burden of persuasion on this issue.)*

Petitioners prevail on this first issue as to assistive technology, but not speech-language, for the reasons set forth below. The importance of assessing children in all areas of suspected disability was emphasized in *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 D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *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)); 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 the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. § 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student's parents, identify what additional data, if any, are needed to determine the educational needs of the student. 34 C.F.R. § 300.305(a).

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Speech-Language. Student had a rather complicated history of speech-language services at Public School. Student received 2 hours/month of speech-language services on the 11/17/16 and 10/24/17 IEPs, which was reduced to 30 minutes/month of consultation on the 10/16/18 IEP. Student was referred for comprehensive testing at the beginning of 2019/20 and was dismissed from speech-language services after a 9/24/19 speech-language evaluation based on Student's average functioning abilities. On 9/28/20, Clinical Psychologist recommended that Student be reconsidered for speech-language services to address social and pragmatic language deficits. However, Speech-Language Pathologist and the 11/12/20 AED concluded that no further speech-language evaluation was required at that time, as no additional information was needed then to determine that Student continued not to require school-based speech-language services.

However, just months later the IEP team on 3/3/21 proposed another speech-language evaluation, which Speech-Language Pathologist conducted remotely on 4/21/21, and resulted in Speech-Language Pathologist again recommending 2 hours/month of speech-language services for pragmatic and social language, which the team added. Based on this focus on Student's speech-language needs and Speech-Language Pathologist's credible testimony, the undersigned is not persuaded that the IEP team erred in its AED decisions or in not conducting another speech-language evaluation in the window between 9/28/20 and 4/21/21.

Assistive Technology. Assistive technology was not included on Student's IEP until 3/3/21, at the same time the IEP team proposed an assistive technology assessment to determine Student's needs, as Clinical Psychologist had recommended on 9/28/20. The assistive technology assessment was completed on 4/6/21 by Assistive Technology Expert and found that Student would benefit from assistive technology supports to reduce frustration in challenging academic tasks, which included reading and writing, to increase organization and attention to task, and to provide alternative methods of expression when frustrated. The benefit of the assistive technology assessment can be seen in the more robust assistive technology section of Student's 5/12/21 amended IEP compared to the 3/3/21 IEP which was enhanced by adding dictation, digital graphic organizers, editing tools, and timers. In addition, a high tech dynamic display was being trialed to support Student's use of social language and to support behavior.

The undersigned thus concludes that DCPS committed a procedural violation at a minimum, *Z.B.*, 888 F.3d at 524, by not proceeding with an assistive technology assessment shortly after Clinical Psychologist's 9/28/20 recommendation. 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). Here, the undersigned is persuaded that the delay of 5 or 6 months reduced Student's educational benefit, through the lack of assistive technology to reduce Student's frustration in academic tasks, to increase Student's organization and attention to tasks, and to provide Student alternative methods of expression when frustrated. Further, if the trialing had begun earlier, it might have provided benefits to Student more

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quickly. This denial of FAPE contributes modestly to the compensatory education awarded below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 3/3/21 and/or 5/12/21, or thereafter, due to the IEP (a) not being based on updated evaluations/data, (b) not providing appropriate classroom aids and services, (c) not providing an appropriate level of services by pulling Student out of general education for all core academic courses, (d) lacking an adaptive functioning area of concern, and/or (e) not providing ABA services. (Respondent has the burden of persuasion, if Petitioners establish a prima facie case.)*

Petitioners did establish a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which met its burden of persuasion on all aspects of the issue, except for specified classroom aids and services and adaptive functioning.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the U.S. Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at *12 (D.D.C. 5/18/21); *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 the specific concerns raised by Petitioners, which are considered in turn.¹⁰⁸ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Updated Evaluations/Data. Petitioners first assert that Student’s 2021 IEPs are not appropriate due to not being based on updated evaluations and data. The need for evaluation is the thrust of Issue 1, which has been resolved above and the outcome remains the same here. It would be duplicative to reiterate and inappropriate to permit double recovery as to the delay in assistive technology. Further, there was no complaint about the timing of Student’s triennial reevaluation for which School Psychologist A conducted a psychological evaluation dated 10/9/19. Nor was the data issue ignored by DCPS, as the IEP team conducted AEDs on 9/3/19 and 11/12/20. Petitioners also contributed to the analysis of Student with Clinical Psychologist’s independent psychological evaluation on

¹⁰⁸ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. Limited procedural violations were raised and are discussed herein.

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9/28/20, which School Psychologist B carefully review in her report on the independent educational evaluation (“IEE”), and which impacted Student’s IEP. DCPS prevails on subpart (a).

(b) Classroom Aids and Services. Next, classroom aids and services have increased on Student’s recent IEPs, as the 3/3/21 IEP contained more than previously (with many classroom accommodations rolled over from the Section 504 plans), and the 5/12/21 amended IEP added additional assistive technology elements (e.g., dictation, editing tools, graphic organizers, text-to-speech, timers) following the assistive technology assessment. However, Student does need additional support on the IEP, whether added as classroom aids and services on the IEP services page or in the Adaptive/Daily Living Skills area of concern (or elsewhere), as discussed in subsection (d) below.

(c) Specialized Instruction. Petitioners’ next concern is that DCPS did not provide an appropriate level of services by pulling Student out of general education for all core academic courses. This assertion directly challenges DCPS’s position that Student has been doing well academically, which is discussed in Issue 3, below, in the context of whether Student needed any specialized instruction at all. It is sufficient here to note that based on Student’s academic progress the IEP team rejected an increase of specialized instruction in early 2021 from 5 to 15 hours/week. School Psychologist B persuasively emphasized that 5 hours/week of specialized instruction was Student’s least restrictive environment (LRE), the principle by which to the maximum extent possible, children with disabilities are to be educated with children who are nondisabled. 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). DCPS prevails on this subpart, for the undersigned is persuaded by School Psychologist B’s testimony that significant additional pull-out could cause regression and that remaining largely inside general education was better for Student’s social skills.

(d) Adaptive Functioning Area of Concern. Petitioners next raise concerns about the lack of an adaptive functioning area of concern, although the 3/3/21 IEP and 5/12/21 amended IEP both contain an Adaptive/Daily Living Skills area of concern. This is important, for Clinical Psychologist’s independent psychological evaluation found that Student’s “profound” adaptive and social deficits, along with severe ADHD symptoms and anxiety, could make Student unavailable for learning. Clinical Psychologist further explained that Student’s impulsive, inappropriate, and sometimes aggressive behaviors “severely” impeded Student’s adaptive functioning across environments, and that Student’s severe distractibility, hyperactivity, and impulsivity profoundly interfered with daily functioning. Further, Student has very poor daily living skills as a practical matter, leading to various difficulties at school involving the police and an investigation of Parents.

Thus, the undersigned is persuaded that based on the serious issues Student faces and the impact on Student’s school life – including academics – that the IEPs were not reasonably calculated for Student to make appropriate progress in the circumstances. Here, as in *Long*, 780 F. Supp. 2d at 61, “[i]n light of [student’s] obvious behavioral issues, it is important to note that ‘the IDEA . . . recognizes that the quality of a child’s education is inextricably linked to that child’s behavior,’” quoting *Harris v. Dist. of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C. 2008). Based on the evidence in this case, this Hearing Officer

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concludes that would have been reasonable and what Student needs to make appropriate progress includes (a) access to a “cool down zone” or “chill space” by Student’s classroom to be able to take breaks when overstimulated or upset, (b) crisis intervention services to be integrated at Public School, (c) access to an individual bathroom throughout the school day due to adaptive skill deficits and anxiety about toilet issues, although the need for an individual bathroom may decline over time, and (d) a school-based social skills group. As noted above, these particulars may overlap with classroom aids and services, or may be included in other portions of Student’s IEP, but DCPS is ordered below to convene an IEP team meeting within 30 days of this HOD to incorporate these items into Student’s IEP.

(e) ABA Therapy. Finally, due to Student’s ASD, Petitioners emphasized the need to include ABA therapy in the IEP, based on Student’s intensive ABA therapy at home, in which 15 hours/week were recommended and Student actually received 9 hours/week. BCBA credibly testified that Student had “vastly improved” in the home setting due to ABA therapy. However, with that progress and Student’s return to school, the undersigned was persuaded by DCPS that Student did not need ABA therapy included as a related service on Student’s 3/3/21 and 5/12/21 IEPs to provide a FAPE, even though ABA served Student well at home. Further, in a system that views 1 hour/week of BSS to be a high level of services, it would be extremely difficult to provide 9 hours/week of ABA at school as Student had been receiving, much less the 15 hours/week that BCBA viewed as needed by Student. Accordingly, the undersigned is convinced by DCPS that ABA therapy did not need to be included as a related service on Student’s IEPs in order for Student to benefit from special education. 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984).

In sum, when considering all of Petitioners’ concerns about the 2021 IEPs, the undersigned is cognizant of the fact that the analysis is not about achieving perfection, but merely an IEP reasonably calculated to enable Student to make appropriate progress in the circumstances. *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 Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). On balance, this Hearing Officer concludes that DCPS met its burden of persuasion by a preponderance of the evidence on subparts (a), (c) and (e), but not on (b) and (d). This results in the Order below requiring specified elements to be added to Student’s current IEP and contributes significantly to the compensatory education awarded below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to initially evaluate, determine eligibility, develop an IEP, and/or make services available, beginning on 10/10/19 or thereafter pursuant to its Child Find obligations, as it discontinued services until January 2021 when it found Student eligible under the disability classifications of ASD and OHI, even though DCPS developed a Section 504 plan for Student on 10/30/19 based on ASD and ADHD disability categories; Student suffered academically and social-emotionally due to severe behaviors at school. (Petitioners have the burden of persuasion on this issue.)*

Petitioners met their burden of persuasion on whether DCPS should have continued to provide an IEP for Student in October 2019, rather than shifting to a Section 504 plan at

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that time. The D.C. Circuit Court emphasized in *DL v. Dist. of Columbia*, 860 F.3d 713, 717 (D.C. Cir. 2017), that Child Find is among the most important IDEA requirements, in order to include every child in need of special education. *See* 34 C.F.R. § 300.111.

The heart of this issue is whether Student needed specialized instruction after 10/15/19, or whether DCPS was correct that Student only had behavioral issues and could access the general education curriculum. Here, Student was in no danger of not being “found,” as Student had several IEPs at Public School, including an IEP with the end date of 10/15/19. However, in October 2019, DCPS reevaluated Student and did not develop another IEP, deciding instead that Student was qualified for a Section 504 plan which was developed some 2 weeks later on 10/30/19. Notably, DCPS’s evaluation of Student entirely failed to consider ASD as a basis for special education, even though Student’s records repeatedly mentioned Autism and ASD. As Clinical Psychologist persuasively stated, Autism was the primary factor driving Student’s difficulties at school, yet DCPS missed what made Student eligible. Moreover, just weeks after DCPS – without considering ASD – concluded that Student no longer needed an IEP, DCPS found Student eligible for a Section 504 plan based on ASD, along with ADHD. Clearly, DCPS should have analyzed Student’s ASD when considering whether to continue with an IEP in October 2019, and considered Student’s need for specialized instruction through the lens of Autism.

DCPS is quite correct that to be eligible under the IDEA as a “child with a disability” as defined in 34 C.F.R. § 300.8, Student must not only have autism (or another listed condition), but “by reason thereof” need special education and related services.¹⁰⁹ “Special education” is defined in turn in 34 C.F.R. § 300.39(a) as “specially designed instruction” to meet the unique needs of a child with a disability. *See Q.C-C. v. Dist. of Columbia*, 164 F. Supp. 3d 35, 51 (D.D.C. 2016). Further, “specially designed instruction” means adapting “the content, methodology, or delivery of instruction” to address the unique needs of the child to ensure access to the general curriculum, so the child can meet educational standards. 34 C.F.R. § 300.39(b)(3). *See Leggett v. Dist. of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015).

Here, the evidence is clear that Student is bright, with a solidly average FSIQ in the 58th percentile compared to peers, and a Nonverbal Index at the 82nd percentile, which is a better estimate of Student’s intellectual ability as a child with autism. Student’s academic skills were tested with the WJ-IV and found to be Average to Superior in reading, writing and math, with no evidence of learning disabilities. In school, Student received essentially uniform grades that improved steadily over the school year from Basic to Proficient in both 2018/19 and 2019/20, all of which leads DCPS to claim that Student does not need specialized instruction. However, the undersigned does not give full weight to the uniform improvement of Student’s grades in early years at Public School and notes that the IDEA regulations expressly provide that “advancing from grade to grade” is not sufficient to

¹⁰⁹ A child who meets one of the disability classifications under the IDEA who solely is in need of behavioral intervention or a related service and does not require special education services, does not qualify as a child with a disability under the IDEA. 34 C.F.R. § 300.8(a)(2)(i).

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exclude a student from Child Find. 34 C.F.R. § 300.111(c)(1). However, the undersigned does give weight to Parent's testimony about extensive efforts to support Student's academics, despite the challenges Student faced, which may have masked Student's need for specialized instruction.

Moreover, Student's 2019/20 teacher reported that Student was doing well academically, but at times had great difficulty focusing on the academic task at hand and needed frequent reminders and redirection to get on task, as well as prompting and support when feeling overwhelmed. Student's evaluations revealed Conners 3S results that were consistent with other data indicating that Student's inattention, impulsivity, and hyperactivity interfered with academic and social functioning. Student's BRIEF-2 revealed consistent At-Risk or Clinically Significant concerns across both home and school settings with difficulty resisting impulses and considering consequences before acting, which were likely to highly impact the ability to complete school tasks and learn grade level material. As shown by the TOPL-2 and the CELF-5, pragmatic language skills were Student's most notable area of weakness in speech-language, which may negatively impact Student's ability to access grade level content. Although Student reportedly had the potential to learn at an average rate, even DCPS's 10/9/19 psychological evaluation noted that Student's ADHD and executive functioning symptoms "appear to impact [Student's] educational performance in the school setting," without even considering ASD.

Nor can Student's serious behaviors be overlooked in this analysis, which include physical aggression (hitting, kicking, punching, biting), inappropriate touching, non-compliance, elopement, use of profanity, and property destruction. Student's verbal threats include "I'll kill you"; Student touched a peer inappropriately, resulting in a sexual abuse allegation; and police were contacted when Student exposed self to peers in the restroom. Since returning to Public School this calendar year, Student said, "I want to kill myself," wrote about 3 extreme ways of hurting self, including stabbing, and threatened to bring a gun to school.

Public School developed an Individual Student Crisis Response Plan based on Student's suicidal ideation and other behavior, and conducted a thorough FBA-II followed by two BIP-IIs in April and May 2021, which should help Student at school going forward. As Clinical Psychologist articulated, without access to special education and related services, Student engaged in behaviors that general education teachers at Public School could not manage, resulting in the police being called to the school twice during the fall of 2019 to manage Student, as well as a protective services investigation of Parents.

Based on Student's assessments and extreme behavior – and the failure to even consider ASD – there seems little doubt to this Hearing Officer that the content, methodology, and/or delivery of instruction needed to be adapted for Student. 34 C.F.R. § 300.39(b)(3). That is to say, Student continued to need specialized instruction during the period when DCPS shifted Student to Section 504 plans. *See Long*, 780 F. Supp. 2d at 61 ("the quality of a child's education is inextricably linked to that child's behavior"). Accordingly, this Hearing Officer concludes that Student should have continued to be

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eligible for special education with an IEP in October 2019, rather than shifted to a Section 504 plan.¹¹⁰

This conclusion is confirmed by *Letter to Anonymous*, 110 LRP 52277 (OSEP 1/13/10), in which the U.S. Department of Education's Office of Special Education Programs stated that "the IDEA and its regulations do provide protections for students with high cognition and disabilities" and provided helpful examples that plainly apply to Student's situation:

[A] child with high cognition and ADHD could be considered to have an "other health impairment," and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate. Likewise, a child with Asperger's Syndrome could be considered under the disability category of autism and the individualized evaluation would address the special education and related services needs in the affective areas, social skills and classroom behavior, as appropriate.

See also Indep. Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 1082 (8th Cir. 2020) ("[t]he IDEA guarantees disabled students access to [an education], no matter their innate intelligence"), *cert. denied sub nom. Indep. Sch. Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, 20-905, 2021 WL 4507624 (U.S. Oct. 4, 2021).

Failing to consider ASD as a disability when considering special education in October 2019, as well as not giving sufficient weight to Student's assessments discussed above or intense behaviors, is more than a procedural matter, for such failures kept Student from receiving specialized instruction and thus deprived Student of educational benefit. 34 C.F.R. § 300.513(a)(iii). This contributes significantly to the compensatory education award below to restore Student to the position in which Student would have been but for the denial of FAPE based on the specialized instruction that Student should have received between 10/15/19 and 3/3/21. Specialized instruction on Student's IEPs prior to the Section 504 plans declined from 7.5 hours/week to 4 hours/week to 2 hours/week, while the IEPs following the Section 504 plans provided 5 hours/week. Student did have Section 504 plans in place for all but 15 days between the end of Student's IEP and the beginning of the Section 504 plan in October 2019. Although lacking specialized instruction, the Section 504 plans did contain related services and significant classroom accommodations.

Remedies

Having analyzed and resolved the issues in this case, what remains is to consider appropriate remedies that will compensate for the denials of FAPE. The first remedy is that

¹¹⁰ Providing a Section 504 plan does not suffice for a student who is entitled to an IEP. "[T]he requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a broad anti-discrimination statute." *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 696 n. 5 (6th Cir. 2003) (*citing Muller v. Comm. on Special Educ.*, 145 F.3d 95, 100 n.2 (2d Cir. 1998)).

Hearing Officer Determination

Case No. 2021-0112

DCPS is ordered below to revise Student's IEP by providing (a) access to a "cool down zone" or "chill space" by Student's classroom for Student to be able to take breaks when overstimulated or upset, (b) a school-based social skills group, (c) crisis intervention services to be integrated at Public School, and (d) access to an individual bathroom at school which may be used throughout the school day if Student wishes, although the need for an individual bathroom may decline over time. DCPS is ordered below to convene an IEP team meeting within 30 days of this HOD to include these elements in Student's IEP, which as noted above may be added in the Adaptive/Daily Living Skills area of concern, added to classroom aids and services, or added to other portions of Student's IEP as appropriate.

Further, compensatory education is awarded to make up for the denials of FAPE found above. In determining the amount of compensatory education due for the denials of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, DCPS failed to provide specialized instruction needed by Student, along with other things, which are remedied by providing an option for academic tutoring, along with counseling and mentoring, which should help restore Student to the position in which Student would have been but for the denials of FAPE. Parents, with their advisors, can determine which services provide the most significant benefits for Student.

Educational Advocate testified that the compensatory education hours and elements sought in her Compensatory Education Proposal would put Student in the position Student would have been but for the denials of FAPE in this case. However, Educational Advocate's proposal needed to be adjusted significantly as it was based on finding denials of FAPE for all claims alleged, while the undersigned has found denials of FAPE only on some of the claims, resulting in a reduction in the amount of compensatory education needed. Thus, based on the experience and judgment of the undersigned, the Order below awards 100 hours of counseling, 100 hours of mentoring, and a total of 50 hours that can be allocated by Parents (with input by their advisors) between academic tutoring, additional counseling and/or additional mentoring.

These determinations by the undersigned have been carefully considered and specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 2 years to avoid administrative burdens on Respondent, although the undersigned encourages Parents to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without undue delay.

Hearing Officer Determination

Case No. 2021-0112

ORDER

Petitioners have prevailed in much of the case, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 30 days, DCPS shall convene an IEP team meeting to revise Student’s IEP by providing (a) access to a “cool down zone” or “chill space” in or near Student’s classroom, (b) a school-based social skills group, (c) crisis intervention services integrated at school, and (d) access to an individual bathroom at school which may be used throughout the school day.
- (2) As compensatory education for the denials of FAPE found herein, within 10 business days after request by Petitioners, DCPS shall provide a letter(s) of authorization for (a) 100 hours of counseling, (b) 100 hours of mentoring, and (c) a total of 50 hours that can be allocated by Petitioners between academic tutoring, additional counseling, and/or additional mentoring, all from independent providers chosen by Petitioners; all hours are to be used within 24 months and any unused hours shall be forfeited.

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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