

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

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Background

Subject Matter Jurisdiction

Procedural History

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

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settle the case or shorten the 30-day resolution period, which ended on 9/9/22. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 40-day continuance, which requires a Hearing Officer Determination (“HOD”) by 12/3/22.

A prehearing conference was held on 10/26/22 and an Amended Prehearing Order was issued on 10/31/22, addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 11/16/22 and 11/17/22 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was not present for much of the hearing.

Documents and Witnesses

Petitioner’s Disclosure, dated 11/8/22 and submitted on 11/9/22 due to a technical delay to which Respondent did not object, contained documents P1 through P42, which were all admitted into evidence without objection. Respondent’s Disclosure, submitted on 11/8/22, contained documents R1 through R33, which were all admitted into evidence without objection.²

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

1. *Educational Advocate* (qualified without objection as an expert in Special Education, Including IEP Programming)
2. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy and Assistive Technology)
3. Parent

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

1. *Special Education Teacher* (qualified without objection as an expert in Special Education Programming)
2. *Psychologist* (qualified without objection as an expert in School-Based Psychology)

² Citations herein to Petitioner’s 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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3. *Program Coordinator, Board Certified Behavior Analyst (“BCBA”)* (qualified without objection as an expert in Applied Behavior Analysis (“ABA”) and Special Education Programming)

Petitioner’s counsel presented no rebuttal evidence.

Issues and Relief Requested

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

Issue 1: Whether during the 2020 triennial evaluation DCPS denied Student a FAPE by failing to conduct the following evaluations in a timely manner: (a) comprehensive psychological; (b) assistive technology; (c) speech-language; and/or (d) occupational therapy. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on or about 12/4/20 and/or 11/17/21, due in each to: (a) absence of an “Adaptive” area of concern; (b) lack of assistive technology; (c) inappropriate goals and baselines; and (d) failure to adequately address Student’s behaviors and/or safety needs and/or provide for a dedicated aide. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall fund or conduct the following evaluations: (a) comprehensive psychological; (b) speech-language; (c) occupational therapy; and (d) assistive technology.
3. DCPS shall reconvene the IEP team to review the results of the evaluations in the prior paragraph and amend Student’s IEP to include: (a) appropriate speech-language and occupational therapy goals and baselines; (b) assistive technology; (c) an “Adaptive” area of concern with appropriate goals and baselines; (d) a daily communication log; and (e) a dedicated aide and/or safety plan.
4. DCPS shall fund or provide compensatory education for any denial of FAPE.³

³ So far as Petitioner’s request for compensatory education depends on the findings of assessments that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student’s assessments and a determination of eligibility for additional special education and related services.

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

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5. Any other just and reasonable relief.

Findings of Fact

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

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age*, *Gender*, in *Grade* during 2022/23 at *Current School* after being at *Public School* in previous school years.⁶ BCBA reported that Student was "a joy" to have in school, is affectionate, loves books, and was brave to twice participate in a spelling bee with an audience.⁷

2. Schooling. Student has been in a full-time Communication and Education Support ("CES") classroom since beginning school and, according to the 11/30/2020 triennial psychological evaluation, continued to need a full-time CES program to address complex communication needs.⁸ In the years at issue, Student was in a CES class of 8, with 3 adults.⁹ In the CES classroom, Student received instruction and support with communication, behavior, social and academic needs.¹⁰

3. Due to the pandemic, 2020/21 was virtual the entire year, rather than in person; Student participated only about 15 days in online virtual learning during 2020/21, despite calls, texts, and emails to Parent.¹¹ Special Education Teacher dropped off a packet at home for Student; Parent received an initial occupational therapy packet via email and, during the 4th quarter of 2020/21, the occupational therapist dropped off packets of occupational therapy and speech worksheets/materials to Student's home; Parent did not return any

Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

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 Parent; Educational Advocate.

⁷ P11p103; BCBA.

⁸ P9p84,94.

⁹ Special Education Teacher.

¹⁰ P20p225; P21p238.

¹¹ R3p31; P32p303-04; P33pp308; P34p312; P35p316-17; P32p306; Educational Advocate.

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completed worksheets.¹² Lack of attendance has been Student's main problem.¹³ Special Education Teacher had daily office hours, from 1:00pm to 4:00pm, but neither Student nor Parent showed up, despite Special Education Teacher reaching out to Parent.¹⁴ Parent had technical connection issues, so the school swapped out equipment, but Student still didn't attend.¹⁵

4. Student adjusted well in person in 2021/22 after returning from virtual schooling in 2020/21; Student came back, adjusted, was happy and working.¹⁶ Student was making progress when in school.¹⁷ Special Education Teacher had no behavior concerns at all about Student.¹⁸ But Parent felt Student was unsafe at Public School and took Student out of school in November or December 2021 after several incidents.¹⁹ In 2022/23 in Student's Current School, Student has missed 30 of 48 school days thus far.²⁰

5. IEPs. Student's initial IEP on 12/29/14 provided 20.5 hours/week of specialized instruction outside general education, 2 hours/month of speech-language services outside general education, 2 hours/month of speech-language services inside general education, and 2 hours/month of occupational therapy outside general education.²¹ Student's 12/4/20 and 11/17/21 IEPs, the IEPs at issue herein, both provided 26 hours/week of specialized instruction outside general education, 4 hours/month of speech-language services outside general education, and 2 hours/month of occupational therapy outside general education.²²

6. Disability Classification. A triennial evaluation of Student was completed on 11/27/17 which noted that Student met the disability classification of Autism Spectrum Disorder, based on a 2014 psychoeducational evaluation, and continued to meet the criteria in 2017.²³ The 2020 triennial evaluation found that Student continued to meet the autism criteria, which has been the disability classification on all IEPs.²⁴

¹² Educational Advocate; R3p31; P35p317,319.

¹³ Special Education Teacher.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ P11p103; Special Education Teacher.

¹⁷ P11p103.

¹⁸ Special Education Teacher.

¹⁹ Parent; P10p96 (Parent); P10p100; P37p324 (Student was not present in term 2, 11/8/21-1/26/22).

²⁰ Educational Advocate.

²¹ P12p107,115.

²² P20p224; P21p237.

²³ P7p55,58.

²⁴ P9p94; P12p107; P20p216; P21p229.

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7. Cognitive Ability. The 2017 triennial evaluation found Student's cognitive ability to be in the Poor range, with a percentile rank of 2, based on Test of Nonverbal Intelligence – Fourth Edition (“TONI-4”) results.²⁵

8. Academics. As for academic functioning, the 2017 triennial evaluation found Student's overall reading scores to be in the Average range (SS=100), Broad Written Language in the Average range (SS=91), and Broad Mathematics in the Deficient range (SS=50), all based on the Woodcock-Johnson IV (“WJ-IV”) Tests of Achievement.²⁶ The 2020 triennial evaluation review of records and data revealed that Student was 3 years below Grade in math.²⁷ In reading, Student was 2 years below Grade.²⁸ Student is able to read grade level text, but does not understand the text when read by self, so requires texts be read or reread aloud to Student.²⁹

9. Evaluations. An Analysis of Existing Data (“AED”) was completed on 11/17/20 and found that only a psychological evaluation was needed, which was sufficient for eligibility and determination of speech-language and occupational therapy services; the speech-language pathologist and occupational therapist attended the AED.³⁰ No testing was done in Student's 2020 triennial evaluation, which was largely limited to a records review of evaluations in 2017 and 2014.³¹ Psychologist stated in 2020 that no further formal assessments were warranted.³² The 2020 evaluation stated that Student made significant progress but continued to need support in communication, adaptive skills and independent academic tasks.³³ Student was not a good candidate for virtual teleassessments, which do not permit any assistance by parent or others on site with the child; scores would not be reflective of true academic capabilities.³⁴ Educational advocate testified that when Student returned to in person schooling, Student should have been evaluated; no evaluations were conducted.³⁵

10. Parent did not raise any concerns about the 11/17/21 IEP except the lack of speech-language and occupational therapy evaluations; assistive technology and psychological evaluations were not requested during the IEP meeting or in later meetings in 2021/22.³⁶ In 2022, Student's team was “eager” to complete updated evaluations when Student attended

²⁵ P7p57.

²⁶ P7p57-58,61.

²⁷ P9p90; P20p218; R3p28 (AED noted Student significantly behind grade level).

²⁸ P20p219.

²⁹ P20p226; P21p239; R3p28 (can read fluently, with comprehension difficulties); Psychologist.

³⁰ Special Education Teacher; Psychologist; R3p27.

³¹ P9; P9p85-90; Educational Advocate.

³² Psychologist; P9p83.

³³ P9p93; Psychologist.

³⁴ P9p90; Psychologist.

³⁵ Educational Advocate.

³⁶ Special Education Teacher.

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school.³⁷ A 6/24/22 Prior Written Notice (“PWN”) stated that speech-language and occupational therapy evaluations were to be conducted.³⁸

11. Speech-Language Evaluation. An initial speech-language assessment was completed on 12/23/14, when Student was very young, finding deficits; speech-language services were included in Student’s IEPs.³⁹ After referral by Student’s team, DCPS sought to conduct a speech-language evaluation in the summer of 2022, but was only able to complete a speech-language data review evaluation dated 8/7/22.⁴⁰ Parent was contacted 8 times and scheduled the evaluation twice, but both were cancelled by Parent (the second time because Parent thought Student would not wake up until 3:00pm when the evaluation was scheduled for 1:00pm).⁴¹ The 2022 speech-language evaluation recommends that when Student attends school, Student should receive an updated speech-language evaluation.⁴²

12. Occupational Therapy Evaluation. An occupational therapy evaluation was completed on 12/23/14, finding deficits; occupational therapy services were included in Student’s IEPs.⁴³ DCPS sought to conduct an occupational therapy evaluation in the summer of 2022, but was only able to complete a data review evaluation dated 8/8/22, due to the unavailability of Student.⁴⁴ Parent cancelled two occupational therapy evaluations.⁴⁵ The occupational therapist stated that Student’s impulsivity improved dramatically in the last year.⁴⁶

13. Adaptive Concerns. The 2020 triennial evaluation stated that Student is able to take care of daily needs, such as dressing, feeding, and hygiene needs; Student is able to navigate hallways at school and vocalize concerns in 2-3 word utterances.⁴⁷ Parent reported in the 2022 occupational therapy evaluation that Student is able to complete most self-care skills, such as dressing and feeding self.⁴⁸ Parent reported during the 2020 AED that Student takes care of daily needs independently, apart from tying shoes and requesting items desired.⁴⁹ Student did not need an Adaptive area of concern on the 12/4/20 or 11/17/21 IEPs; Student was making progress and engaging with peers when present.⁵⁰

³⁷ R18p147.

³⁸ R8p45.

³⁹ P5p30,36; P12p115; P13p128; P20p224; P21p237.

⁴⁰ P10p95.

⁴¹ P10p96-97.

⁴² P10p100.

⁴³ P6p39,49; P12p115; P13p128; P20p224; P21p237.

⁴⁴ P11p102,103.

⁴⁵ P11p105.

⁴⁶ P10p99.

⁴⁷ P9p88.

⁴⁸ P11p103-04.

⁴⁹ R3p29.

⁵⁰ Special Education Teacher; Psychologist (able to take care of self).

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14. An Adaptive area of concern was included in Student's IEPs prior to the 12/4/20 and 11/17/21 IEPs; the Adaptive sections included a great deal about academics, for there were no separate academic areas of concern in the prior IEPs.⁵¹ Student was progressing on Adaptive goals in Terms 1, 2 and 3 of 2019/20, prior to the pandemic.⁵² The 12/4/20 IEP stated that Student presents with functional self-care skills and does not require assistance to complete self-care tasks in school.⁵³ The 11/17/21 IEP stated that Student can perform toileting tasks independently, is able to use utensils independently and is able to ask for assistance when needed; Student is able to transition in the classroom and building alongside peers with ease.⁵⁴

15. Assistive Technology. The 12/4/20 and 11/17/21 IEPs state that Student's IEP team was not considering use of assistive technology.⁵⁵ Student's accommodations in the IEPs included visuals, touchpoints and manipulatives.⁵⁶ There were no signs that Student needed assistive technology, based on Student's abilities.⁵⁷ No one, including Parent, brought concerns about a need for assistive technology to Student's team.⁵⁸ The 2020 triennial evaluation concluded that Student would benefit from Applied Behavior Analysis ("ABA") and assistive technology to increase communication, socialization and academic abilities, referring to the low-tech assistive technology Student was receiving, not a high-tech communications device.⁵⁹ Occupational Therapist testified generally that assistive technology assessment is necessary to obtain technology to assist Student's communication.⁶⁰

16. Goals and Baselines. The IEP goals were appropriate even when repeated, based on present levels from Student's previous teacher who knew Student better than Special Education Teacher from when Student was attending prior to the pandemic; with the goals, Student could make academic progress, if present.⁶¹ The goals and baselines in the 12/4/20 and 11/17/21 IEPs were appropriate based on review by the undersigned.⁶²

17. Behavior. The 12/4/20 and 11/17/21 IEPs affirmed that Student's behavior impeded Student's learning (or that of other children).⁶³ There was no safety plan during 2020/21, which was virtual and students were not in the building.⁶⁴ During the transition back to in

⁵¹ See, e.g., P18p190; P19p204.

⁵² P28p279-80; P29p285-86; P30p291-92; P31p297.

⁵³ P20p222.

⁵⁴ P21p236.

⁵⁵ P20p217; P21p230.

⁵⁶ P20p226; P21p239; Special Education Teacher.

⁵⁷ Special Education Teacher.

⁵⁸ *Id.*

⁵⁹ P9p94; Psychologist.

⁶⁰ Occupational Therapist.

⁶¹ Special Education Teacher; R10p64.

⁶² P20p218-23.

⁶³ P20p217; P21p230.

⁶⁴ Educational Advocate; Special Education Teacher.

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person school in 2021/22, the team implemented positive behavior supports, including token economy, first/then, behavior momentum, strategic seating, and visual schedules.⁶⁵

18. A thorough Behavior Snapshot of Student was developed with ABC (Antecedent, Behavior, Consequence) data collected.⁶⁶ Upon return to school in 2021/22, Student did not have many problem behaviors that were unmanageable and made progress with functional communication.⁶⁷ Verbal outbursts and physical aggression were not observed in Student's return to in person learning from August-December 2021.⁶⁸ Student did have challenging behaviors of pica (eating items not meant for consumption) and cutting own hair, although easily redirected.⁶⁹

19. Student had a total of 3 pica incidents (chewing back of pencil and eraser off, chewing strips of paper, attempting to bite a marker; all were spit out and none ingested) within 1 week in November 2021, and cutting patches of own hair once (or twice, according to Parent); Student had used school scissors safely many times.⁷⁰ The Behavior Snapshot analyzed the function of the behavior, replacement behavior, and antecedent and consequence interventions, along with strategies to support Student.⁷¹ A dedicated aide was not needed by Student, who was easily redirected, based on a small number of incidents, which were the first times Special Education Teacher had seen any negative behaviors by Student.⁷²

20. Parent was unhappy with Student cutting off patches of hair and that Student came home without coat; the lost coat was found, but Parent did not respond to Special Education Teacher's news.⁷³ Parent also asserted that Student was locked in a utility closet with another student and the school was locked down searching for the children (prior to the pandemic), while staff stated that the children were in an unlocked closet for a short time playing with gym equipment; school lock down to search for Student "didn't occur."⁷⁴ Parent stated that Student had fallen and hit head more than once, causing worry; BCBA was confident she would have heard about anything serious and had not.⁷⁵ Parent testified about other incidents of teachers pinching or squeezing Student; also, Student lost backpack and coat "all the time" on the bus and at school, which happened "every school year."⁷⁶

⁶⁵ P38p328.

⁶⁶ P38p328-30.

⁶⁷ P36p323.

⁶⁸ P38p328,329; BCBA.

⁶⁹ P38p329; PP38p341 (picture from Parent of patches of missing hair); BCBA.

⁷⁰ P38p330; Parent; Special Education Teacher; BCBA.

⁷¹ P38p330-39.

⁷² Special Education Teacher; BCBA (no need for dedicated aide after 4 isolated incidents).

⁷³ R16p130.

⁷⁴ Parent; BCBA.

⁷⁵ *Id.*

⁷⁶ Parent.

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Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

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

In addition, the local education agency ("LEA") must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at

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1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455 (CKK), 2018 WL 4623572, at *3 (D.D.C. 2018).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue 1: *Whether during the 2020 triennial evaluation DCPS denied Student a FAPE by failing to conduct the following evaluations in a timely manner: (a) comprehensive psychological; (b) assistive technology; (c) speech-language; and/or (d) occupational therapy. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this issue. The importance of assessing students in all areas of suspected disability was emphasized in *Z.B.*, 888 F.3d at 518, *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 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 whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a); *James*, 194 F. Supp. 3d at 143.

This was carried out in the 11/17/20 AED in which Student’s team determined that only the triennial psychological evaluation was needed, which was sufficient both for

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eligibility and for determination of speech-language and occupational therapy services, according to credible testimony by Psychologist and Special Education Teacher, even though the 2020 psychological evaluation was largely a records review and could not include any testing of Student. Moreover, the 2020 triennial occurred in the middle of the virtual school year, 2020/21, but Psychologist was clear that Student was not a good candidate for virtual teleassessment, which does not permit any assistance by parent or others present with the child. Indeed, Student was not participating in virtual classes that year even with all the assistance Parent (and possibly others) could provide.

Issue 1 challenges only the 2020 triennial and need not go beyond the November 2020 evaluation to be resolved. However, Educational Advocate asserted at the due process hearing that Student should have been evaluated upon return to in person schooling, but that did not happen. Student returned to in person schooling at the beginning of 2021/22, but DCPS asserted that it needed to get to know Student before contemplating assessments. But by the time it got to that point, Parent refused to let Student go to school based on her safety concerns, discussed below.

It is also notable that Parent did raise concerns about the lack of speech-language and occupational therapy evaluations during the 11/17/21 IEP meeting. Nor were assistive technology or comprehensive psychological evaluations requested during the 11/17/21 IEP meeting or in later meetings in 2021/22. In the Spring of 2022, Student's team was "eager" to complete updated evaluations when Student attended school. DCPS's 6/24/22 PWN stated that speech-language and occupational therapy evaluations were to be conducted. DCPS sought to conduct speech-language and occupational therapy evaluations in the summer of 2022, but was only able to complete data review evaluations because Parent did not make Student available for testing.

As for assistive technology, Special Education Teacher directly asserted that there were no signs that Student needed assistive technology and that no one, including Parent, had brought concerns about a need for assistive technology to Student's team. Indeed, the 12/4/20 and 11/17/21 IEPs state that Student's IEP team was not considering use of assistive technology. Petitioner's expert sought an assistive technology assessment at the due process hearing, but was not involved earlier in the case and did not explain what type of technology could assist Student's communication. The 2020 evaluation did conclude that Student would benefit from assistive technology, but its author, Psychologist, testified that she was referring to the low-tech assistive technology that Student was already receiving via Student's IEP.

The undersigned concludes that there was no denial of FAPE due to the 2020 triennial evaluation of Student and that any failure to assess Student further was merely a procedural violation, as it did not impact Student's disability classification or the special education services to be provided to Student. Nonetheless, given the extremely long time since Student's related services evaluations in particular, this Hearing Officer encourages updated assessments as soon as feasible.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on or about 12/4/20 and/or 11/17/21, due in each to: (a) absence of an*

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“Adaptive” area of concern; (b) lack of assistive technology; (c) inappropriate goals and baselines; and (d) failure to adequately address Student’s behaviors and/or safety needs and/or provide for a dedicated aide. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)

With one exception, Petitioner established a *prima facie* case concerning deficiencies in Student’s IEPs through expert testimony and documents, shifting the burden to DCPS, which met its burden of persuasion as discussed below. However, Petitioner did not establish a *prima facie* case as to goals and baselines, as there was an insufficient explanation of inappropriate goals or baselines in the challenged IEPs. More is required than bare assertions. *See, e.g., St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 527, 113 S. Ct. 2742, 2758, 125 L. Ed. 2d 407 (1993) (a *prima facie* case requires enough evidence to raise an issue for the trier of fact).

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the U.S. Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at *12 (D.D.C. 2021); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEPs is analyzed by focusing on the specific concerns raised by Petitioner, which are considered in turn.⁷⁷ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) No Adaptive Area of Concern. The IEPs at issue do not contain an Adaptive area of concern, although Student’s earlier IEPs did (while the earlier Adaptive sections took the place of academic areas of concern). However, Parent reported in both the 2020 AED and the 2020 triennial evaluation that Student took care of daily needs independently, such as dressing and feeding self. Indeed, the only specific concern was that Student could not tie shoes. Psychologist also noted in the 2020 evaluation that Student was able to take care of daily needs, such as dressing, feeding, and hygiene needs; was able to navigate school hallways; and could vocalize concerns in brief utterances. Psychologist and Special Education Teacher credibly testified that Student was making progress and engaging with peers when present and did not need an Adaptive area of concern on the 12/4/20 or 11/17/21 IEPs. This Hearing Officer concurs.

⁷⁷ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Certain procedural concerns are discussed herein.

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(b) Lack of Assistive Technology. As noted in Issue 1 above, nothing suggested that an assistive technology assessment was needed, and in the absence of an assessment there was no reason for assistive technology to be expressly included on Student's IEPs. In fact, the 12/4/20 and 11/17/21 IEPs state that Student's IEP team was not considering use of assistive technology. While there was low-tech assistive technology included in the accommodations included in Student's IEP, including visuals, touchpoints and manipulatives, Petitioner failed to raise any assistive technology that she believed Student needed. The undersigned is persuaded by DCPS that there was not any assistive technology that needed to be included on Student's IEP in order to provide a FAPE.

(c) Inappropriate Goals and Baselines. Petitioner did not point out specific goals or baselines as being inappropriate, so did not make out a *prima facie* case, which resolves this sub-issue. However, to be clear, the IEP goals were appropriate even if partially repeated, based on present levels from Student's previous teacher. See 34 C.F.R. § 300.320(a)(2),(3). Due to the practicalities of drafting goals with suitable baselines, the bar is not high. See *Hill v. Dist. of Columbia*, 14-CV-1893, 2016 WL 4506972, at *22 (D.D.C. 2016) (a broad reading score was a sufficient reading baseline without even saying whether student was able to read independently, for "IEP baselines need not be so detailed"). Student could make academic progress with the goals, if Student was present. Close review by the undersigned leads to the conclusion that the challenged goals and baselines in the IEPs at issue are appropriate.

(d) Student's Behavior. The IDEA requires in the case of a student whose behavior impedes the student's own learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports ("PBIS") and other strategies to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). Here, the 12/4/20 and 11/17/21 IEPs did state that Student's behavior impeded Student's learning or that of other children. There was no safety plan during 2020/21, which was virtual and students were not in the building, so there was no need, especially as Student did not participate in virtual learning.

Moreover, upon return to school in person in 2021/22, Student did not have many problem behaviors and, in particular, no longer had the verbal outbursts and physical aggression that had previously been a problem. Nonetheless, during the transition back to in person school in 2021/22, the team implemented positive behavior supports, including token economy, first/then, and behavior momentum, among others.

Public School developed a thorough Behavior Snapshot for Student, and collected ABC (Antecedent, Behavior, Consequence) data as Student had new challenging behaviors of pica (eating items not meant for consumption) and cutting Student's own hair. Specifically, Student had 3 pica incidents within a week in November 2021, although the pencil, paper and marker involved were spit out and not ingested. Shortly thereafter, Student cut off patches of Student's own hair, but did not actually hurt self and had safely used school scissors many times. The Behavior Snapshot analyzed the function of the behavior, replacement behavior, and antecedent and consequence interventions, along with supportive strategies.

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Special Education Teacher and BCBA plainly testified that a dedicated aide was not needed by Student, who was easily redirected, based on the small number of incidents, which were the first times Special Education Teacher had seen any negative behaviors by Student. *See, e.g., Rowley*, 458 U.S. at 203 (dedicated aide required if necessary “to permit the child to benefit educationally from [the IEP personalized] instruction”). Parent raised other concerns from various school years, but BCBA was credible in stating that she would have been aware of any serious incidents involving Student. The school team was clear that Student simply needed to be present to benefit educationally and there was no need for a dedicated aide to benefit from instruction.

The undersigned concludes that Student’s behavior was adequately addressed by Public School and there was no need for a dedicated aide, for the reasons discussed above.

FAPE. In carefully considering the concerns raised above individually and as a group, the undersigned is cognizant of the fact that the analysis is not about achieving perfection. Instead, an IEP simply needs to be reasonably calculated to enable Student to make appropriate progress in the circumstances. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA “stops short of requiring public schools to provide the best possible education”). On balance, this Hearing Officer concludes that the IEPs at issue meet the required standard and were appropriate for Student.

ORDER

Petitioner has not prevailed on any claim in this case. Accordingly, 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).

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