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OSSE
Office of Dispute Resolution
October 26, 2019

Confidential

Parent on Behalf of Student, Petitioner, ¹ v. District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”), Respondent. Case # 2019-0167 Date Issued: October 26, 2019	HEARING OFFICER’S DETERMINATION Hearing Dates: October 10, 2019, October 11, 2019, October 21, 2019. Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on the following days: October 10, 2019, and October 11, 2019, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20002, in Hearing Room 112 and on October 21, 2019, in Hearing Room 111.

BACKGROUND AND PROCEDURAL HISTORY:

The student (“Student”) resides in the District of Columbia with Student’s mother (“Petitioner”) and is currently enrolled in a non-public special education day school (“School A”). District of Columbia Public Schools (“DCPS”) is Student’s location education agency (“LEA”). Student has been identified by DCPS as a student eligible for special education services under the classification of Autism Spectrum Disorder (“ASD”). Student is age ____ and in grade ____.² Student is placed and funded at School A by DCPS and began attending School A around early May 2018.

On June 28, 2019, Petitioner filed the current due process complaint asserting that DCPS denied Student a free appropriate public education (“FAPE”) by, inter alia, developing an inappropriate individualized educational program (“IEP”) on May 29, 2018, and on April 23, 2019.

Relief sought:

Petitioner seeks as relief that DCPS be ordered to convene the IEP team to develop an appropriate IEP that provides Student with appropriate hours of related services, transition services, and behavioral support services (“BSS”), a safety plan, an appropriate functional behavior assessment (“FBA”) and behavior intervention plan (“BIP”), an appropriate school and disability classification references throughout the IEP; that DCPS fund placement and transportation to a public or non-public school that can provide Student with educational benefit; conduct a comprehensive vocational evaluation; fund compensatory education or that compensatory education be reserved until the required evaluations and conducted, including a compensatory education evaluation.

LEA Response to the Complaint:

The LEA filed a response to the complaint on July 8, 2019. In its response DCPS stated the following: DCPS asserts the Student has not been denied a FAPE and the complaint should be dismissed with prejudice. The Student is currently enrolled and attending School A, a therapeutic day school for school year (“SY”) 2019-2020. DCPS denies it failed to provide an appropriate IEP. Student’s IEP for the 2017-2018 school year, dated May 29, 2018, were reasonably calculated to enable Student to make progress appropriate considering Student’s circumstances.

² Student’s age and grade are identified in Appendix B

DCPS denies it failed to provide the Student an appropriate educational placement. On April 13, 2018, at the Petitioner's request, DCPS placed the Student at School A. At the time of the placement, School A could implement Student's IEP. School A is Petitioner's school of choice. Based on the related service reports, at School A Student has been receiving all services identified in Student's IEP.

DCPS denies it failed to timely and appropriately update/modify the Student's BIP during SY 2018-2019. Student's IEP identified the Student's behavioral impediments. A BIP as well as other strategies are in place to address the Student's behavior.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on August 7, 2019. The complaint was not resolved and the parties did not mutually agree to shorten the thirty (30) day resolution period. The 45-day period began on July 28, 2019, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on September 11, 2019. The parties were not available on the first hearing date offered, September 3, 2019, and filed a motion to continue/extend the HOD due date to accommodate the change in hearing date(s). That motion was granted and the HOD was due on September 27, 2019. The parties appeared for hearing on September 18, 2019, and Petitioner was not prepared to proceed. Petitioner filed a motion to continue/extend the HOD due date to accommodate new hearing dates of October 10, 2019, and October 11, 2019. The motion was granted, extending the HOD due date to October 19, 2019.

The hearing was held on October 10, 2019, and October 11, 2019. However, Respondent was not able to complete its case on October 11, 2019, and Respondent filed a motion to continue, that was granted and the HOD due date was extended to October 26, 2019. The hearing concluded on October 21, 2019, and the parties submitted written closing arguments on October 22, 2019.

A pre-hearing conference in this matter was held on August 12, 2019. The undersigned hearing officer, ("Hearing Officer") issued a pre-hearing order ("PHO") on August 23, 2019, outlining, inter alia, the issues to be adjudicated at the hearing.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP because: (a) Student's May 29, 2018, IEP (i) lacked a necessary dedicated aide in school and on transportation to school, and/or (ii) lacked an appropriate transition plan with appropriate data or goals or based on an appropriate assessment, and/or (iii) lacked a disability classification of ASD and programming appropriate to that classification.

³ During the hearing the parties agreed that these were the issues to be adjudicated.

2. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP/Placement/location or service because Student's April 23, 2019, IEP (a) failed to provide appropriate: (i) BSS, and/or (ii) OT and/or (ii) speech and language services, and/or (b) failed to provide appropriate adaptive goals, and/or (c) failed to provide social skills group, and/or (d) failed to place Student in an appropriate program in light of Student's inability to make progress at School A, and/or (e) lacked an appropriate transition plan with appropriate data or goals or based on an appropriate assessment.
3. Whether DCPS denied Student a FAPE by failing to timely and appropriately update/modify Student's BIP from August of 2018 until April of 2019.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 167, DCPS Exhibits 1 through 56) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

SUMMARY OF DECISION:

Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's May 29, 2018, and April 29, 2019, IEPs were appropriate. Petitioner sustained the burden of persuasion as to Student's BIP. The Hearing Officer granted Petitioner compensatory education.

FINDINGS OF FACT:⁶

1. Student resides in the District of Columbia with Petitioner and is currently enrolled in School A. DCPS is Student's LEA. Student is eligible for special education services under the classification of ASD. Student is placed and funded at School A by DCPS and began attending School A around early May 2018. Prior to attending School A, Student attended a DCPS middle school ("School B"). While at School B, Student's disability classification was Intellectual Disability ("ID"). (Petitioner's testimony, Petitioner's Exhibit 11, Petitioner's Exhibit 9-1, Respondent's Exhibits 3 pg. 35, 24 pg.159)

⁴ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁵ Petitioner presented four witnesses: (1) Student's parent, Petitioner (2) Student's Therapist, (3) Petitioner's Educational Advocate, and (4) an ABA Therapist. DCPS presented seven witnesses: (1) DCPS LEA Representative-Monitoring Specialist for School A, (2) School A Speech Language Pathologist, (3) Student's Special Education Teacher, (4) School A Transition Specialist, (5) School A Occupational Therapist, (6) an ABA Therapist, and (7) School A's Psychologist.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

2. At School B, Student had an IEP that was developed on January 24, 2018. The IEP noted Student's ID disability classification and prescribed the following services: 23 hours of specialized instruction per week outside general education and the following related services outside general education: 120 minutes per month of BSS, 120 minutes per month of speech language pathology ("SLP") and 60 minutes per year of occupational therapy ("OT") consult services. (Petitioner's Exhibit 9-1, 9-13)
3. School B developed a BIP for Student dated January 24, 2018. The BIP identified the following behavior as impeding Student's learning: "[Student is having difficulty exhibiting socially appropriate attention-seeking behavior such as having extreme meltdowns and keeping [Student's] hands to [self]." The behavior was resulting in Student having incomplete work assignments, classroom disruptions, discipline referrals, calls to parent, suspension from school and time spent out of the classroom as result of these behavior. The BIP identified replacement behaviors that Student was to display instead of the targeted behaviors and included strategies for the school staff to use to address Student's behaviors and rewards for Student exhibiting replacement behaviors. (Respondent's Exhibit 56)
4. After Student began attending School A, DCPS and School A conducted a thirty-day review meeting on May 29, 2018. Petitioner and Student participated in the meeting. School A had completed an academic assessment (Woodcock Johnson IV) that indicated Student was operating academically approximately 7 years below Student's then current age. The team determined at that time that Student's current ID disability classification which had been last determined on April 27, 2016, continued to be correct. The team reviewed Student's IEP goals, determined that Student had made some progress and that the goals continued to be appropriate. The team noted that since Student had been attending School A, Student had been in School A's behavioral crisis center once, and had been able to grasp the concepts related to School A's behavioral point system. (Petitioner's Exhibit 39, Respondent's Exhibit 3 pgs. 33, 34, 35)
5. Petitioner requested that Student be provided a dedicated aide while Student was attending School B, but the request was declined. Petitioner visited School A prior to Student attending, and it was Petitioner's school of choice for Student and she believed that School A could implement Student's IEP. Because Student was making a fresh new start at School A and she did not request a dedicated aide for Student initially. (Petitioner's testimony)
6. Based on Petitioner's concerns about Student's behavior at School B, School A agreed to conduct an FBA. The team agreed that at that time there was no need to modify Student's BIP, but the BIP would be updated based on the results of the FBA when it was conducted. The team agreed to change Student's OT consult services to 120 minutes per month of direct OT services. The team determined that Student did not require a dedicated aide. The team also reviewed and agreed to Student being provided transportation services to and from School A. The transition specialist reviewed her transition report with the IEP team and the team reviewed Student's transition plan that had been based on a May 25,

2018, vocational assessment and student interview. The team determined Student was in need of extended school year (“ESY”). Finally the team agreed to reconvene early the following school year to review whether Student should remain on diploma graduation track. Petitioner signed the consent form for the FBA to be conducted. (Petitioner’s Exhibit 47, Respondent’s Exhibits 3 pgs. 35, 36, 37, 38, 5 pg. 41)

7. DCPS and School A developed an IEP for Student dated May 29, 2018, that included the ID disability classification, academic goals in the areas of math, reading, written expression, adaptive/daily living skills, communication/speech language, emotional, social and behavioral development, motor skills, physical development, and prescribed 28.5 hours of specialized instruction per week and 120 minutes per month each of BSS, SLP, and OT, all outside general education. (Respondent’s Exhibit 2)
8. The IEP included a post-secondary transition plan that noted several assessments that had been relied upon to develop the plan, including an educational assessment and independent living assessment, both conducted in January 2018, and an employment assessment conducted in May 2018. The plan included a transition goal of Student participating in vocational skills training post high school, and that Student, with the assistance of the transition specialist, would complete a learning styles inventory by the next annual IEP meeting to determine appropriate classroom support and to assist Student in identifying realistic post-secondary education and training options. Per the team’s decision during the May 29, 2018, meeting the IEP did not include the services of a dedicated aide. (Respondent’s Exhibit 2)
9. During the fourth quarter of SY 2017-2018 Student earned passing grades in all areas. Student made progress in academic IEP goals. Student made some progress in daily living skills goals. Student did not make progress in communication goals and the social, emotional and behavioral development goals were just being introduced. (Respondent’s Exhibit 34 pg. 253, Petitioner’s Exhibit 100)
10. In August 2018 DCPS conducted an FBA to gain an understanding of Student’s problem behaviors. The identified behaviors were Student “Being out of seat, Social skills, Off task, Withdrawal, Hyperactivity, Minding other’s business.” These behaviors occurred in all settings. The FBA noted that Student struggled with staying on task and fidgeting. “[Student] will perservate on various things and has a hard time focusing on presenting task. [Student] struggles when [Student] is corrected and will apologize profusely regarding what was corrected. The duration of the behavior can be 1 -10 minutes of perserverating or fidgety behaviors.” The FBA noted that Student thrived on attention, struggled with working independently and the problem behaviors occurred when there was overstimulation. The FBA noted that the team should develop more positive peer interactions through peer therapy sessions. There was no new BIP developed for Student following the FBA until April 2019. (Respondent’s Exhibit 38 pgs. 296, 297, 298, 299, Respondent’s Exhibit 39)
11. During the first quarter of SY 2018-2019 Student made progress in academic IEP goals. Student’s daily living goals were just being introduced; the communication goals were just

being introduced by a new provider who noted that Student's progression was impacted by Student's inflexible thinking. Student made progress with emotional, social and behavioral development goals, OT and transition goals. During the first quarter, Student's report card grades were above average. (Respondent's Exhibits 29, 34 pg. 254)

12. During the second quarter of SY 2018-2019, Student made inconsistent progress in academic and communication IEP goals. Student showed regression in emotional, social and behavioral development goals, and in transition/daily living skills with regard to demonstrating acceptable social skills. Student's second quarter report card, however, showed above average grades. (Respondent's Exhibits 30, 34 pg. 254)
13. In preparation for Student triennial evaluation, DCPS conducted a psychological reevaluation dated March 26, 2019. The evaluator noted that School A team expressed concerns that Student's current and historical profile was suggestive of ASD and some of Student's reported behaviors were difficulty with change, preoccupation and perseverating on topics and ideas, displaying defiance and becoming physical. The evaluator reviewed Student's prior evaluations and conducted assessments including assessments for ASD. Based upon the evaluation data, the psychologist concluded Student met the criteria for ASD. (Respondent's Exhibit 37)
14. DCPS developed an evaluation summary report and on March 28, 2019, convened an eligibility meeting at School A. Petitioner participated in the meeting. The team determined Student was eligible for special education and related services with the ASD disability classification. The team also determined that Student would be provided a dedicated aide in school and on bus transportation because of safety concerns. DCPS amended Student's IEP accordingly with an updated amended IEP dated April 11, 2019. (Respondent's Exhibits 16, 17, 19, 20, 21)
15. The Student's current IEP is dated April 23, 2019, includes the ASD disability classification, prescribes 27.75 hours per week of specialized instruction, 30 minutes per week ("mpw") of BSS, 60 mpw of SLP, 45 mpw of OT and 30 mpw of BSS consultative services. The IEP includes a post-secondary transition plan that was based on a learning styles inventory and employment assessment conducted in March 2019 by the School A transition specialist. Student's transition goal remained the same as in the previous IEP. The IEP includes a dedicated aide in school and on the bus, and includes ESY. (Respondent's Exhibit 24)
16. Student's IEP transition goals were based on an interview of Student and three sound assessments including the Casey Life Skills assessment and the Career Interest Program from Printice Hall and a learning style assessment. The interview and the assessments along with things the specialist wanted Student to gain were used to generate the transition goal. Student is slated to have another career assessment since entering Student's current grade. (Witness 7's testimony)
17. Student's IEP indicates that Student's behaviors interfere with Student's learning and that of other students. The IEP states " . . . [Student] exhibits behaviors in the classroom that

serve as a distraction to [self] and others. [Student] generally responds to the school-wide Behavior Management/Level System where [Student] earns points for positive behaviors, and loses points when those behaviors are not demonstrated. . .” [Student] engages in aggressive behavior which is exhibited by [Student’s] forceful touching of staff and lack of understanding of personal space. In order to address these behaviors a BIP is in place along with other alternative strategies...” (Respondent’s Exhibit 24)

18. School A updated Student’s BIP on April 23, 2019. The BIP includes replacement behaviors of Student respectfully making requests, accepting feedback from staff, working independently and postponing Student’s need for attention. The BIP lists tasks for staff to provide Student for support of positive behaviors and rewards and reinforcements consistent with the School A behavior point system. (Respondent’s Exhibit 39)
19. In conferring with other related service providers the team agreed to place in in social skills group to work on pragmatic goals. Student’s tolerance to the therapy was limited and Student’s School A psychologist kept Student’s individual therapy services the same but added consultation services. The psychologist prepared Student April 2019 BIP in consultation with teachers and other related service providers. Prior to that, the providers were using the previous BIP that identified and address the same behaviors. Generally School A updates a BIP at a Student’ annual IEP review meeting to change names of staff members who implement the plan and to assess what rewards at the school motivate the student making the BIP correspond closely with the School A point and reward system. (Witness 10’s testimony)
20. Petitioner’s educational advocate testified as an expert witness and participated in Student’s annual IEP review meeting at School A on April 23, 2019. At the April 23, 2019, meeting the team discussed social skills group being added to IEP, a safety plan, the BIP was revised. A transition report was provided at the meeting. The advocate raised concerns whether the transition plan was comprehensive enough, but offered no changes to any of Student’s IEP goals. No program changes to Student’s IEP with the change in disability classification. The advocate opined that Student’s IEP reading goals are not appropriate given Student’s reading level and asked for more adaptive goals based on the recent evaluation, but the team did not add more adaptive goals. The advocate did not ask for any specific adaptive goals during the meeting, however. (Witness 2’s testimony)
21. During the third and fourth quarter of SY 2018-2019 Student made progress in IEP academic goals, in communication goals, and in transition goals, but no progress in the emotional, social and behavioral development goals, no progress in OT goals, and regressed in daily living skills goals due to due behavioral difficulties. Despite behavioral difficulties Student had above average report card grades. (Respondent’s Exhibit 32, 33, 34)
22. Student attended ESY at School A during summer 2019. Student attended 20 days of the 6-week program. Student made minimal academic progress during ESY due to time out of the classroom and inability to complete assignments due to behaviors that made it

difficult from Student to remain in the classroom. Student was able to comply with expectations the majority of the time during ESY. However, Student had incidents during ESY of being out of location and demonstrating unsafe behaviors both in school and on the school bus during transport to and/or from school. (Petitioner's Exhibit 94)

23. Once the dedicated aide was added to Student's IEP the aide helped Student with academics and behavior. The aide takes Student out of the classroom as needed to assist with Student's behavior and to support Student's learning. The aide is right next to Student the entire day. Student still needs to make greater progress more, but in terms of being able express feeling, Student has made some strides and expressed frustration more verbally now than physically. (Witness 6's testimony)
24. School A's SLP provides Student individual and group SLP services. Student can initiate and sustain a conversation. At School A Student regularly meets with a group of three students with the SLP provider and engages in role play and other activities to support in social and communication skill development. (Witness 5's testimony)
25. Student has recently begun to receive additional behavior therapy by an out of school provider. This therapist assists Student in reducing repetitive behaviors, understanding social situations and reducing combative and destructive behaviors when dealing with stressful situations. The therapist believes that if Student has sufficient support and direction Student is able to apply coping skills, but lacks communication skills to interact with others. However, the therapist believes, based on her limited interaction with Student, that talk therapy has not been sufficient in addressing Student's behavior and recommends Applied Behavior Analysis ("ABA") to improve Student's social skills of 2 hours per week. (Witness 1's testimony)
26. Petitioner receives calls from the School A's behavior support team with updates that Student had to be placed in containment area to deescalate and that sometimes Student was restrained because of aggressive behaviors. Sometimes school staff would ask if Student could come home as a stress reliever, and on occasion would be suspended. Now that Student has been provided the dedicated aide, Petitioner expects that the aide will help to reduce Student's aggression and get Student focused on learning. However, despite having the dedicated aide, Student has had difficulty on the school bus that resulted in one incident when police were called because of Student's unsafe behavior on the bus. Petitioner believes Student requires more BSS services and ABA therapy to assist in addressing Student's behaviors. (Petitioner's testimony)
27. Petitioner presented a witness qualified as an expert in ABA. After a review of Student's records that witness opined that believed ABA should have been put in Student's IEP when it was first developed at School A. The witness recommended that Student be in an ABA classroom with a ABA specialist 10% of the time or have a 1 to 1 ABA trained aide. (Witness 3's testimony)
28. Respondent also presented an expert witness in ABA who reviewed Student records and conducted a classroom observation of Student. The witness opined that in ABA, the

reinforcement depends on the unique needs of the child and not all students with ASD require ABA therapy. She also points out that IEP goals for ASD students will not specifically be written measure a student's abilities on ABA techniques. (Witness 9's testimony)

29. Petitioner presented a compensatory education proposal that sought to compensate Student for all alleged violations in Petitioner's complaint. The proposal requested that Student be provide single transport/private transportation to and from school, 200 hours of tutoring in written expression, math and reading and 500 hours of ABA therapy at school along with a change in placement to a non-public therapeutic school that can provide Student ABA therapy. (Petitioner's Exhibit 130)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a Hearing Officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner carried the burden of production and held the burden of persuasion on issue # 3. Respondent held the burden of persuasion on issues #1 and #2 after Petitioner established a prima facie case on issue #1 and #2.⁷

⁷ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP because: (a) Student’s May 29, 2018, IEP (i) lacked a necessary dedicated aide in school and on transportation to school, and/or (ii) lacked an appropriate transition plan with appropriate data or goals or based on an appropriate assessment, and/or (iii) lacked a disability classification of ASD and programming appropriate to that classification.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student’s May 29, 2018, IEP was reasonably calculated to enable Student to make progress appropriate, in light of the Student’s circumstances.

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”).

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have “complied with the procedures set forth in the Act.” *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

“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).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created and ask if it was reasonably calculated, at that time, to enable the student to receive educational benefits.”

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate, in light of Student's individual circumstances.

In *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate, in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious, in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, what the IEP offered was reasonably calculated to enable the specific student's progress....” “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

The evidence in the case demonstrates that during start of SY 2018-2019 Student attended School B, a DCPS school. At Petitioner's requested DCPS place and fund Student at Petitioner's school of choice, School A, near the beginning of May 2018. Although the evidence indicates that Petitioner requested that Student be provided a dedicated aide while Student was attending School B, Petitioner acknowledges that with Student moving to a more restrictive non-public special education day school, she was no longer insistent that Student be provided a dedicated aide. The evidence demonstrates that during Student's first month at School A, Student had few behavioral difficulties and at the time DCPS and School A developed Student's IEP on May 29 2019, there was no apparent need for Student to have a dedicated aide. The reasonableness of the IEP must be viewed at the time it was created. At that time, based upon the evidence, the Hearing Officer concludes that there is insufficient evidence that Student's May 29, 2018, IEP was inappropriate because it did not include a dedicate aide either in school on the school bus.

Petitioner also asserts that Student's May 29, 2018, IEP was inappropriate because it lacked an appropriate transition plan with appropriate data or goals or based on an appropriate assessment. However, the evidence demonstrates that the transition program in this IEP was reasonably developed.

The IEP included a post-secondary transition plan that was based on sound assessments, including an educational assessment and independent living assessment, both conducted in January 2018, and an employment assessment conducted in May 2018. The plan included a transition goal of Student participating in vocational skills training post high school, and that Student, with the assistance of the transition specialist, would complete a learning styles inventory by the next annual IEP meeting to determine appropriate classroom support and to assist Student in identifying realistic post-secondary education and training options. School A's transition specialist credibly testified about the assessments that were conducted.

Although Petitioner's expert witness testified that the transition goals were insufficient, her testimony was less persuasive than the DCPS witness who had conducted assessments of Student and actually worked with Student on transition goals. Although that specialist acknowledged there were additional assessments that were to be conducted with Student, there was insufficient evidence from which the Hearing Officer could conclude that the IEP's transition plan, including the transition goal was inappropriate at that stage of Student's academic career and with Student having just entered School A. Consequently, the Hearing Officer concludes that there was insufficient evidence that Student's May 29, 2018, IEP was inappropriate because it did not include an appropriate transition plan.

Finally, Petitioner asserts that Student's May 29, 2018, IEP was inappropriate because it did not include an ASD disability classification and appropriate programming for that disability classification. The evidence demonstrates that until Student attended School A, there was no expressed basis for Student to be evaluated for a change in disability classification. There was scant evidence presented that Student displayed behaviors when Student entered School A that would have warranted immediate evaluation to determine a change in disability classification. Thus, it was reasonable at the time School A conducted Student's 30-day review and updated Student's IEP on May 29, 2018, for School A to continue the ID disability classification.

Over time in working with Student and observing behaviors, by the time Student was slated for triennial evaluation in early 2019, the School A staff raised concerns that Student was exhibiting behaviors consistent with ASD. At that time evaluations were ordered that confirmed the ASD classification. There is insufficient evidence that in the first month of Student attending School A, when the May 29, 2018, IEP was developed, that behaviors were evident to put School A and DCPS on notice Student warranted an evaluation to determine the ASD classification. Consequently, the Hearing Officer concludes that there was insufficient evidence that Student's May 29, 2018, IEP was inappropriate because it did not include an ASD disability classification or programming for that disability. The Hearing Officer concludes that Student's May 29, 2018, IEP was reasonably calculated to enable Student to make progress appropriate, in light of the Student's circumstances at the time it was developed and Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP/Placement/location or service because Student's April 23, 2019, IEP (a) failed to provide appropriate: (i) BSS, and/or (ii) OT and/or (ii) speech and language services, and/or (b) failed to provide appropriate adaptive goals, and/or (c) failed to provide social skills group, and/or (d) failed to place Student in an appropriate program in light of Student's inability to make progress at School A, and/or (e) lacked an appropriate transition plan with appropriate data or goals or based on an appropriate assessment.

Conclusion: Respondent sustained the burden of persuasion be a preponderance of the evidence that Student's April 23, 2019, IEP was reasonably calculated to enable Student to make progress appropriate, in light of the Student's circumstances.

The evidence regarding Student's April 23, 2019, IEP reflects that DCPS and School A conducted a triennial evaluations and as result changed Student's disability classification and updated Student's IEP. The School A psychologist concluded and credibly testified that Student's tolerance to therapy was limited and consequently she kept Student's individual BSS services the same, but added consultation services. The School A SLP and OT providers both credibly testified that the level of OT and SLP services that were in Student's IEP were appropriate. In addition, the SLP provider testified that she provides Student social skill training in group SLP therapy.

Likewise, the School A transition specialist credibly testified that she conducted updated assessments of Student in preparing Student transition plan and presented her transition report to the team when the IEP was developed. Although Student's transition goal did not change, the evidence demonstrates and the IEP noted that Student was be reassessed and the goal was to be updated later.

Although Petitioner's educational advocate offered testimony about the transition and the adaptive goals, there was no indication that at the April 23, 2019, meeting the advocate proposed any additional goals, any changes to the goals, although she participated in the meeting. Also, the advocate, although qualified as an expert witness, did not have the particularized expertise in either OT, SLP or transition plans that any way made her testimony more convincing than DCPS' witnesses. The Hearing Officer found the DCPS witnesses more credible and more persuasive because of their particularized expertise and their work with Student in their disciplines.

Although Petitioner asserts that Student's April 23, 2019, IEP/Placement and location of service at School A, was inappropriate, the evidence demonstrates that during SY 2018-2019, Student make some progress relative to IEP goals and was able to achieve above average grades despite Student's limited academic and cognitive abilities. There was no evidence presented that the Student's grades were not a credible measure of Student's progress at School A.

Undoubtedly, Student continues to have behavioral challenges at School A, and the evidence demonstrates that at the time that Petitioner filed this due process complaint Student was making some degree of progress behaviorally and academically since being provided a dedicated aide. There is evidence that Petitioner continued received calls from School A staff about Student's behavior, but Petitioner acknowledged that there has been some improvement since the dedicated aide was assigned.

Based upon the evidence adduced, the Hearing Officer concludes that Student's April 23, 2019, IEP was reasonably calculated to enable Student to make progress appropriate, in light of the Student's circumstances and Respondent sustained the burden of persuasion by the preponderance of the evidence that Student's April 23, 2019, IEP and placement at School A were appropriate when the IEP was developed.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to timely and appropriately update/modify Student's BIP from August of 2018 until April of 2019.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue. The Hearing Officer concludes Student was denied a FAPE because School A failed to timely update Student's BIP.

As Respondent aptly points out in its closing argument, neither the IDEA nor its implementing regulations set a timeline for a revision of a student's BIP. *T.M. v. District of Columbia*, 75 F.Supp.3d 233, 246 (D.D.C., 2014). With regard to a behavior intervention plan, the IDEA only explicitly requires a BIP when there is a disciplinary change in placement. *See* 20 USC 1415(k); *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 25 (1st Cir. 2008).

Additionally, Respondent DCPS does not dispute that it has an obligation to consider the use of positive behavioral interventions and supports and other strategies to address a student's behavior. 34 CFR 300.324(a)(2)(i).

When the IEP team met in May 2018, based on Petitioner's concerns about Student's behavior at School B, School A agreed to conduct an FBA. The team agreed that at that time there was no need to modify Student's BIP, but the BIP would be updated based on the results of the FBA when it was conducted.

However, the evidence indicates clearly that in August 2018, DCPS conducted an FBA to gain an understanding of Student's problem behaviors. The identified behaviors were Student "Being out of seat, Social skills, Off task, Withdrawal, Hyperactivity, Minding other's business." These behaviors occurred in all settings. The FBA noted that Student thrived on attention, struggled with working independently and the problem behaviors occurred when there was overstimulation. Despite the updated FBA, DCPS failed to develop an updated BIP once the FBA was conducted, as the team had agreed to do at the May 2018, IEP meeting. Although Respondent asserts that the behaviors that were identified in the updated FBA were the same as the behaviors Student had been displaying, there is no indication that a team reviewed the FBA and Student behavior data to determine if a revised BIP was warranted at that time.

The evidence demonstrates that after the FBA was conducted, Student continued to display the problematic behaviors and the resulting consequences, includes being out of the classroom and thus unavailable for learning, being suspended from school, and Petitioner continued to receive from phone calls about Student's behavior. This continued apparently unabated until Student was provided a dedicated aid in 2019.

Although Student's behaviors were similar or even the same, the behaviors continued. Even though the school-wide behavior system was in place, because there is a possibility that additional behavioral interventions could have been considered and implemented that might have reduced Student's problematic behaviors immediately after the FBA was conducted in August 2018, the Hearing Officer concludes that DCPS' failure to timely update Student's BIP after the August 2018 FBA was conducted likely impacted Student ability to remain in the classroom, receive instruction and gain greater educational benefit. Consequently, the Hearing Officer concludes that DCPS's failure to timely update Student's BIP was a denial of a FAPE.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner has requested as compensatory education that Student be provided 500 hours of ABA therapy, 200 hours of tutoring and private transportation, in addition to a new school placement. There was no evidence presented that supported a change in school placement. In addition, the proposed compensatory education Petitioner seeks far exceeds the violation and harm that Hearing Officer has determined in the decision.

Nonetheless, there was sufficient evidence presented that Student might benefit from the ABA therapy that was recommended. However, there was insufficient basis to conclude that the amount of therapy requested has an reasonable relationship to the denial of FAPE determined. However, it would be unreasonable for the Hearing Officer to grant no relief when a denial of FAPE has been determined. Consequently, the Hearing Officer grants Petitioner 150 hours of independent counseling or behavioral support services at the OSSE prescribed rate as compensatory education to be used by Petitioner with a provider of her choice consistent with DCPS vendor guidelines.

ORDER: ⁸

⁸ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

1. DCPS shall, within ten (10) business days of the issuance of this order, authorize and fund 150 hours of independent counseling or behavioral support services at the OSSE prescribed rate to be used by Petitioner with a provider of her choice consistent with DCPS vendor guidelines.
2. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: October 26, 2019

Copies to: Counsel for Petitioner
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Appendix A
In the MATTER of [REDACTED]

Case # 2019-0167

INDEX OF EXHIBITS