

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

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

OSSE
Office of Dispute Resolution
October 16, 2023

<i>Student</i> , ¹)	Case No.: 2023-0086
through <i>Parents</i> ,)	
<i>Petitioners</i> ,)	Date Issued: 10/16/23
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	8/15/23, 8/29/23 & 9/11/23
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 provide an appropriate Individualized Education Program ("IEP") and placement and/or location of services prior to 2022/23.² DCPS responded that the IEP was appropriate, that Student's least restrictive environment remained a separate day school with behavioral support services, and that Petitioners failed to take advantage of the offer of FAPE.

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 A30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

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.

² All dates in the format "2022/23" refer to school years.

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Procedural History

Following the filing of the due process complaint on 5/12/23, the case was assigned to the undersigned on 5/15/23. Respondent filed a timely response on 5/24/23 and did not challenge jurisdiction. A resolution meeting took place on 5/31/23, but the parties neither settled the case nor shortened the 30-day resolution period, which ended on 6/11/23. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by 50-day and 40-day continuances, which require a Hearing Officer Determination (“HOD”) by 10/24/23.

A prehearing conference was held on 7/24/23 and the 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 8/15/23, 8/29/23, and 9/11/23 and was closed to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. Parent participated in the entire hearing.

Documents and Witnesses

Petitioners’ Disclosure, submitted on 7/26/23 and amended on 7/27/23, contained documents P1 through P68, all of which were admitted into evidence over various objections. Respondent’s Disclosure, submitted on 7/26/23 and amended on 7/27/23, contained documents R1 through R12 and were admitted without objection.³ Petitioners filed a Supplemental Disclosure solely for rebuttal on 9/1/23 containing documents P69 through P78, all of which were admitted into evidence over objection.

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

1. *Therapist* (qualified without objection as an expert in Therapy and Counseling)
2. Parent
3. *Associate School Head* of Upper School (qualified without objection as an expert in Private School Administration)

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

1. *Social Worker* (qualified without objection as an expert in Social Work and Behavior Support Services)

³ Citations herein to the parties’ documents are identical except that Petitioners’ documents begin with a “P,” while Respondent’s documents begin with an “R,” followed by the exhibit number and then a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits), with any leading zeros omitted.

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2. *Nonpublic Monitoring Specialist* (qualified without objection as an expert in Special Education and Private School Placement)
3. *LEA Representative* (qualified without objection as an expert in Special Education Programming and Placement)

Petitioners' counsel recalled Parent as the only rebuttal witness.

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 provide an appropriate IEP on 5/12/22, where:

(a) almost no part of the IEP was updated, including present levels, baselines, impact statements, LRE section, other classroom aids and services, and/or related service hours;

(b) the IEP offered too much behavioral support service ("BSS"), contradicting professionals providing current services, given Student's success without any BSS, unnecessarily removing Student from the classroom, failing to collect data DCPS said it needed, and/or not updating the BSS section with information learned about Student's present levels; and/or

(c) the IEP lacked a description of the type of program Student needed to receive FAPE, leaving Student vulnerable to placement in an inappropriate educational program and/or school unable to meet Student's needs, although the IEP team knew Student's personal triggers, behavioral distractions, and extreme school anxiety, but failed to indicate anything about Student's placement needs, despite Student's success in a non-therapeutic setting. (*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to offer placement or location of services prior to 2022/23, justifying placement at Nonpublic School for 2022/23, given Student's profile and specific anxieties and triggers, as Student would have been significantly harmed academically and socially-emotionally by any mid-year transfer to any school or program. (*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*)

The relief requested by Petitioners is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall reimburse Parents for any costs they paid out of pocket for application fees, deposits, tuition, related services, and transportation for Nonpublic School during the 2022/23 school year.
3. Any other relief that is just and equitable.

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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 is *Age, Gender, in Grade* at Nonpublic School.⁶ Student is charming and intelligent, functioning at or above grade level.⁷

2. IEP Update. Student's 5/12/22 IEP at issue in this case listed Student's disability classification as Emotional Disturbance, indicated that Student's behavior impeded Student's learning or that of other children, and provided 29 hours/week of specialized instruction outside general education, 240 minutes/month of BSS outside general education, and 60 minutes/month of BSS consultation.⁸ Student's 5/12/22 IEP included a page titled Least Restrictive Environment (LRE) which noted that Student required a separate day school 29 hours/week and BSS 240 minutes/month to address social-emotional needs; no other LRE explanation was provided.⁹

3. Student's 5/12/22 IEP contained no or little new data; it appeared there had been no progress and that Student was still in crisis; LEA Representative confirmed in the IEP meeting that the draft IEP contained no updates; Social Worker did not have updated information for the draft IEP; Parent was disappointed that there were no updates in Student's IEP.¹⁰ Educational Advocate noted at the 5/12/22 IEP meeting that there was no updated information in the draft IEP; Parent stated that she was "uncomfortable" with the lack of updated information in the IEP draft because Student had changed a lot in the last year, which needed to be reflected in the IEP.¹¹ The 5/12/22 IEP contained the same present levels of academic achievement and functional performance ("PLOPs") and data as the 2021 IEP.¹²

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 P4p77; Parent.

⁷ P46p705; R5p100.

⁸ R4p73-74,90.

⁹ P4p95.

¹⁰ Parent; P5p104; R5p99; R4p100.

¹¹ R5p99.

¹² Social Worker.

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4. The IEP team requested updated data from Nonpublic School the day before the IEP meeting, but it was not provided before the 2022 IEP was finalized; a 45-minute educational observation of Student at Nonpublic School on 5/19/22 was conducted by LEA Representative and minimally included in the PLOPs.¹³ The final 2022 IEP had very few updates.¹⁴ No IEP amendment was made after May 2022, although BSS was reduced from 240 to 120 minutes/month.¹⁵

5. BSS/Therapy. Therapist began working with Student in January 2021 to assist Student transitioning from a residential center back to school; no one else was providing therapy to Student at that time.¹⁶ Therapist was providing about 180 minutes/week in the beginning after residential treatment, but reduced services as Student gained skills, from 180 minutes/week (3 sessions/week), to 2 sessions/week, to once a week, to periodically for maintenance, all provided virtually.¹⁷ By May 2022, Student was well adjusted and doing well with family; there had been no hospitalizations or suicide attempts since the residential center; Therapist met with Student once or twice a month.¹⁸ Student was doing well at Nonpublic School without any BSS.¹⁹

6. Social Worker would not remove BSS from Student's IEP due to lack of updated behavior information to support less service, so requested progress summaries from Therapist.²⁰ Around 5/23/22, Therapist discussed with Social Worker whether Student should be receiving support in school or how much; BSS was reduced from 240 to 120 minutes/month based on "clinical consultation," without other notes.²¹ Therapist sent her December 2021 report to Social Worker.²² Social Worker reduced BSS in the final IEP from 240 to 120 minutes/month based on Therapist's report; Parent was willing to facilitate DCPS obtaining written progress summaries, if needed.²³

7. The 5/12/22 IEP's Positive Behavior Interventions and Supports ("PBIS") Consideration paragraph concluded by stating that Student required BSS in the school environment to support social-emotional needs as well as ensuring continuity of care; the Emotional, Social, and Behavioral Development area of concern in the IEP noted that Student would benefit from BSS to address anxious and depressive symptoms that impeded Student's ability to fully attend to general education.²⁴ DCPS relied on the 5/10/21

¹³ P4p102; LEA Representative.

¹⁴ Parent.

¹⁵ Social Worker.

¹⁶ Therapist.

¹⁷ Therapist; P46p705.

¹⁸ Therapist; P9p125.

¹⁹ Social Worker.

²⁰ R5p100.

²¹ Social Worker; Therapist; P9p123.

²² P9p125-27; Social Worker; Therapist; P8p115.

²³ Social Worker; P7p113.

²⁴ R4p74,82; P4p78.

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comprehensive psychological evaluation as the latest available, which indicated that Student would benefit from BSS.²⁵

8. Student did not need in-school therapy, which would disrupt work with Therapist, risk therapeutic burnout, feel like regression because Student had received no in-school therapy since residential treatment, and was not needed due to stabilization of behaviors and mental state.²⁶ In-school therapy would only be needed if placement was not appropriate and school was an aggressive environment.²⁷ Student's draft 6/13/23 IEP noted a reduction of BSS to only 60 minutes/month of direct services and 60 minutes/month of consultation, explaining that receiving BSS in school could result in an adverse impact on Student's social-emotional functioning.²⁸

9. Nonpublic School. Nonpublic School is not a general education school or a special education school, but a specialty school serving kids who are all very capable, at or above grade level.²⁹ Nonpublic School doesn't deal with "behavior" students, but focuses on students with learning challenges or anxiety; 99% of Nonpublic School's students go on to college.³⁰ Nonpublic School is doing very well with Student and learning challenges; Nonpublic School finds the term "special education" to be stigmatizing so doesn't use it; nor does Nonpublic School implement IEPs but had a Student Learning Profile for each student.³¹ Nonpublic School, Parent and Educational Advocate never indicated that Nonpublic School implemented Student's IEPs.³²

10. Student thrived at Nonpublic School and grades "skyrocketed" as peers were positive and sober; Student was recognized for strengths and became a dance captain, engaged in theater and rock-climbing, and worked on college prep, including SAT/ACT prep, aiming for top national schools; Student was placed in honors and AP classes at Nonpublic School.³³ Nonpublic School is a good fit for Student; all students there are college bound and just like Student.³⁴ It would be "awful" to pull Student out mid-year.³⁵

11. Placement/Location of Services. Parent acted immediately when she found out that emails and letters from special education schools were legitimate and not marketing ploys; Parent and Student took the interviews seriously.³⁶ The lack of updated information in Student's 5/12/22 IEP was harmful for Student as it caused those reviewing the IEP to think

²⁵ Social Worker; P44.

²⁶ P46p707; Therapist; Parent.

²⁷ Parent.

²⁸ P48p718,727,730.

²⁹ Parent; Associate School Head (Nonpublic School is not a general education school).

³⁰ Associate School Head.

³¹ Associate School Head; P57p814-16.

³² Social Worker.

³³ P46p706; Therapist.

³⁴ Parent.

³⁵ *Id.*

³⁶ P21p240-41; Parent.

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that Student was in great need of services that actually were not needed by Student and would be harmful.³⁷ LEA Representative agreed to put needed information into the IEP, but failed to do so.³⁸ Trade School was the only school that accepted Student.³⁹

12. Petitioners' counsel submitted a unilateral placement notice for Student on 8/12/22, stating that the IEP was not properly updated and did not describe or provide for Student's then-current needs, insisted on in-school therapy that would be detrimental and likely harm Student's mental health, and needed to explain the kind of placement that the IEP team knew Student needed, including college prep/honors/AP classes to compete for admission to a good university, and not a program with behavioral distractions, including aggressive and externalizing behaviors which were triggers for Student's extreme school anxiety.⁴⁰ Nor had DCPS found or assigned any school for Student at that time or until well after 2022/23 began.⁴¹

13. Trade School. On 10/3/22, Student was given a location of services letter (dated 9/21/22) and assigned to Trade School; no information about the school was provided; Parent sent an email to LEA Representative who responded that Parent should "just enroll" Student.⁴² Parent didn't hear anything from Trade School, so reached out on 12/15/22.⁴³ Trade School was a vocational school with no AP or honors classes; students other than freshmen were in vocational classes, either cosmetology, barbering or carpentry.⁴⁴

14. Trade School did not understand why Student was referred to it if Student did not have behavioral issues.⁴⁵ Nonpublic Monitoring Specialist disagreed that students were in a "deep hole" at Trade School, stating that some students at Trade School were at grade level.⁴⁶ Nonpublic Monitoring Specialist unpersuasively asserted that Trade School "definitely" could have implemented Student's IEP; some students were aggressive at Trade School.⁴⁷ Trade School closed after 2022/23, so another placement/location of services would have been required for Student.⁴⁸ Transition from Nonpublic School to Trade School – or any other school – would have been difficult for Student due to the good fit and good friends at Nonpublic School; Student had anxiety around social interactions.⁴⁹ Therapist "strongly recommended" that Student continue at Nonpublic School to avoid possible

³⁷ Parent.

³⁸ Social Worker.

³⁹ Parent; P29.

⁴⁰ P30p302-03.

⁴¹ P30p303; Parent.

⁴² P68p866; Parent; R5Bp103-04.

⁴³ Parent; P26p283.

⁴⁴ Social Worker; Nonpublic Monitoring Specialist.

⁴⁵ Parent; P27pp286.

⁴⁶ Nonpublic Monitoring Specialist.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Therapist.

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regression.⁵⁰ DCPS was not collaborative in developing Student's IEP in May 2022 or in looking for an appropriate school for Student.⁵¹

15. Credibility. LEA Representative harmed her credibility by asserting that her request was "timely," when she sought Nonpublic School data on 5/11/22, one day before the IEP meeting.⁵² In the communications log, LEA Representative noted that Parent had made "no response" even when Parent responded within 20 minutes.⁵³ (Nor did DCPS's communications log contain all emails about the case.⁵⁴)

16. Parent (and Petitioners' counsel) did not know who was behind referrals of Student to special education schools, but LEA Representative failed to answer Parent's question and then asserted that Parent was not acting collaboratively.⁵⁵ LEA Representative asserted that Parent was not a collaborative partner for not bringing data to the table when it was not Parent's responsibility to do so.⁵⁶ LEA Representative criticized Parent for not extending the 6/1/22 IEP deadline, although Parent sought other meeting dates between 5/12/22 and 6/1/22, which DCPS did not offer.⁵⁷

17. LEA Representative failed to change Common Core standards in Student's IEP to remove algebra, which Student did not need, but sought to blame the failure on computer error.⁵⁸ In discussing whether Trade School would be a triggering environment for Student, LEA Representative asserted that anyone could be triggered anywhere by anything.⁵⁹

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").

⁵⁰ P46p707.

⁵¹ Parent.

⁵² R5p98-99; LEA Representative; Parent.

⁵³ LEA Representative; R10p144-48.

⁵⁴ LEA Representative.

⁵⁵ LEA Representative; Parent; P17p211.

⁵⁶ LEA Representative; P15p141.

⁵⁷ LEA Representative; Parent; P5p105.

⁵⁸ LEA Representative.

⁵⁹ *Id.*

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“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(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 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*

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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).

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 5/12/22, where:*

(a) *almost no part of the IEP was updated, including present levels, baselines, impact statements, LRE section, other classroom aids and services, and/or related service hours;*
(b) *the IEP offered too much BSS, contradicting professionals providing current services, given Student's success without any BSS, unnecessarily removing Student from the classroom, failing to collect data DCPS said it needed, and/or not updating the BSS section with information learned about Student's present levels; and/or*
(c) *the IEP lacked a description of the type of program Student needed to receive FAPE, leaving Student vulnerable to placement in an inappropriate educational program and/or school unable to meet Student's needs, although the IEP team knew Student's personal triggers, behavioral distractions, and extreme school anxiety, but failed to indicate anything about Student's placement needs, despite Student's success in a non-therapeutic setting. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners established a *prima facie* case concerning Student's IEP through testimony and documents, shifting the burden to DCPS, which failed to meet its burden of persuasion.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was "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 IEP is analyzed by focusing on the specific concerns raised by

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Petitioners, which are considered in turn.⁶⁰ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Failure to Update IEP. To start, Petitioners allege that DCPS failed in various ways to update Student's IEP as required by 34 C.F.R. §§ 300.324(b)(1)(i),(ii), 300.324(b)(2), which mandate that DCPS must review Student's IEP not less than annually to address information about Student, anticipated needs, and other matters. *See Z. B. v. Dist. of Columbia*, 888 F.3d 515, 523-525 (D.C. Cir. 2018). Specifically, among other things, the IDEA requires statements of present levels of academic achievement and functional performance (PLOPs) in IEPs pursuant to 34 C.F.R. § 300.320(a)(1). Also, while the IDEA does not expressly require "baselines" in IEPs, it does require a description of how progress toward meeting a student's IEP goals will be measured, in 34 C.F.R. § 300.320(a)(3).

Here, DCPS plainly acknowledged that the May 2022 IEP had not been updated, which DCPS unsuccessfully sought to blame on Nonpublic School and Parent, even though DCPS's request for data from Nonpublic School was made only one day before the IEP meeting. There was a 45-minute observation of Student at Nonpublic School that was minimally included in the PLOPs, but the undersigned does not find that single observation to be sufficient to make up for the data collection that should have been performed. The consequence of not including updated data in Student's IEP was that the IEP looked like there had been no progress and that Student was still in crisis. That was far from the case, as the testimony from both parties made clear. Student had changed a lot in the last year, which needed to be reflected in the IEP, but was not, which is a procedural violation that has a substantive effect and is a denial of FAPE. 34 C.F.R. § 300.513(a)(i) impeded the child's right to a FAPE, and (a)(iii) caused a deprivation of educational benefit).

(b) BSS. Next, Petitioners allege that Student's IEP provided for too much BSS in school, which is contrary to the usual dispute over whether sufficient services have been included in an IEP. "Related services" must be provided if required to assist a student with a disability to benefit from special education. *See* 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). The concern about related services raised here is whether 240 minutes/month (60 minutes/week) in the IEP for Student was "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. *See also Z.B.*, 888 F.3d at 517; *Damarcus S.*, 190 F. Supp. 3d at 51.

Here, Parents asserted that the IEP contained a level of BSS that was not only not needed by Student, but was likely to be harmful to Student. This is not a question of whether any therapy was needed by Student, for Therapist began working extensively with Student in January 2021 to help Student transition from a residential center back to home and school. Therapist was the only therapist providing services to Student then, which gradually declined as Student gained skills, from 180 minutes/week – about triple what

⁶⁰ 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. Procedural concerns are discussed herein.

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DCPS proposed – down to only periodic sessions once or twice a month for maintenance. Nor was the issue simply about quantity. By May 2022, Student was well-adjusted and doing well with family. Notably, there had been no hospitalizations or suicide attempts since Student had left the residential center. 34 C.F.R. § 300.513(a)(i),(iii).

In sum, this Hearing Officer concludes that in-school BSS was not needed to enable Student to benefit from special education, which is the legal standard. Student's behaviors and mental state were stabilized and BSS actually presented a possibility of harm from therapeutic burnout and disruption of Student's ongoing therapeutic relationship with Therapist. DCPS's insistence on high levels of BSS also contributes to the denial of FAPE. 34 C.F.R. § 300.513(a)(i),(iii).

(c) LRE/Description of Programming. Parents' final challenge to the IEP is based on the requirement that they are entitled to "a description of specialized instruction and services that the child will receive." *Endrew F.*, 137 S. Ct. at 1000. The court in *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 121 (D.D.C. 2018), citing *Brown* (below) explained that "[c]ourts in this jurisdiction have concluded that an IEP Team is required to discuss a student's specific 'Least Restrictive Environment' ('LRE') and that the IEP is required to include at least a brief description of the child's LRE." The decision in *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 27 n.2 (D.D.C. 2016), found a student's IEP legally deficient when it merely stated the hours per week of specialized instruction and behavioral support, but omitted a sufficient description of student's LRE and placement. The court in *Brown*, at 25, further explained that "the IEP must be 'specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate'" (quoting *N.S.*, 709 F. Supp. 2d at 70). See also *Jones v. Dist. of Columbia*, No. 17-1437, 2019 WL 532671, at *1 n.1 (D.D.C. 2019); 34 C.F.R. § 300.320(a)(5),(7).

Here, Student's 5/12/22 IEP included an LRE that provided no more explanation than Student required a separate day school for 29 hours/week and BSS for 240 minutes/month, both of which were to address Student's social-emotional needs. No further LRE explanation was provided although significantly more was needed to explain the kind of placement that the IEP team knew Student needed, including college prep/honors/AP classes to compete for admission to college, and not a program with behavioral distractions, including aggressive and externalizing behaviors which were triggers for Student's extreme school anxiety. This also contributes to the denial of FAPE. 34 C.F.R. § 300.513(a)(i),(iii).

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, IEPs simply need to be reasonably calculated to enable Student to make appropriate progress in the circumstances. See *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"). See also *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015); *S.M. v. Dist. of Columbia*, CV 19-2096 (RC), 2020 WL 7230266, at *5 (D.D.C. 2020). On balance, this Hearing Officer concludes that DCPS failed its burden of persuasion by a preponderance of the evidence on Issue 1.

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Issue 2: *Whether DCPS denied Student a FAPE by failing to offer placement or location of services prior to 2022/23, justifying placement at Nonpublic School for 2022/23, given Student's profile and specific anxieties and triggers, as Student would have been significantly harmed academically and socially-emotionally by any mid-year transfer to any school or program. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners also established a *prima facie* case on this issue through testimony and documents, shifting the burden to DCPS, which failed to meet its burden of persuasion. Petitioners prevail on this issue as DCPS only offered a school after the school year began, and it was not appropriate for Student. The IDEA requires "school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton*, 312 F. Supp. 3d at 143, citing *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). See also *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS "must place the student in a setting that is capable of fulfilling the student's IEP").

Here, Student was given a location of services letter on 10/3/22 and assigned to Trade School without Parent receiving any information, although Parent found out it was a trade school with no college prep, much less AP or honors classes. Students other than freshmen were in vocational classes, divided between cosmetology, barbering and carpentry. While some students at Trade School were at grade level, many were not. Some students at Trade School were aggressive, while Student was known to have severe school anxiety triggered by aggressive students. Nor did senior staff at Trade School understand why Student had been assigned to Trade School. Therapist "strongly recommended" that Student continue at Nonpublic School to avoid a difficult transition and possible regression. The undersigned concurs that DCPS denied Student a FAPE by failing to offer placement or a location of services prior to 2022/23, justifying Student's placement at Nonpublic School for 2022/23.

Remedy

As concluded above, DCPS failed to provide an appropriate IEP and placement during 2022/23 that were reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, which was a denial of FAPE that results in reimbursement for Student's unilateral placement for 2022/23, as discussed next.

As the remedy for the denial of FAPE concerning Student's IEP and placement, Petitioners seek reimbursement for their payments to Nonpublic School for 2022/23, since a suitable public or nonpublic school was not available. Judge Colleen Kollar-Kotelly confirmed in *A.T.*, 2021 WL 1978792, at *3 (D.D.C. 5/18/21), that "[i]f no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school," quoting *Dist. of Columbia v. Vinyard*, 901 F. Supp. 2d 77, 80-81 (D.D.C. 2012) (Kollar-Kotelly, J.). See also *Montuori*, 2018 WL 4623572, at *3; *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (if a public school program were available to enable student to receive educational benefits, DCPS would not need to consider nonpublic placement).

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Under the IDEA, however, parents who unilaterally place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993), *quoting Burlington*, 471 U.S. at 374. The Court of Appeals explained in *Leggett v. Dist. of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015), that,

As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement – that is, the parents did not otherwise act “unreasonabl[y].”

Here, the first prong of *Leggett* is met due to the denial of FAPE by DCPS failing to provide Student an appropriate IEP and placement, as discussed at length above.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student, which Petitioners demonstrated by showing both the fit and how well Student did since arriving at Nonpublic School. Considering whether placement is proper, under *Endrew F.*, 137 S. Ct. at 1001, the question is whether Parents’ unilateral private placement was reasonably calculated to enable Student to make appropriate progress given Student’s circumstances. *Cf. Leggett*, 793 F.3d at 71, *quoting Rowley*, 458 U.S. at 207, 102 S. Ct. 3034. *See also Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994); *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008).

With an appropriate cohort of positive and sober peers at Nonpublic School, Student thrived at Nonpublic School and Student’s grades skyrocketed, while strengths were recognized. Student was placed in honors and AP classes and worked on college prep, including SAT/ACT prep, aiming for top colleges. Student also became a dance captain and engaged in theater and rock-climbing. In sharp contrast with Trade School, Nonpublic School was a good fit for Student. Nonpublic School provided meaningful educational benefit and Student made progress appropriate in Student’s circumstances. For these reasons, this Hearing Officer concludes that Nonpublic School is proper and appropriate for Student, so the second prong is satisfied. *See* 34 C.F.R. § 300.148.

The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioners acted unreasonably. Here, Parent diligently sought to understand the options available for Student and tried to interact reasonably with DCPS at each step, despite clarity that Nonpublic School was what Student needed and that shifting to Trade School in the middle of the school year would be very detrimental. While interactions with DCPS were sometimes challenging, Parent tried to do what DCPS requested and upon careful consideration by the undersigned, did not act unreasonably. The third prong is satisfied.

Accordingly, this Hearing Officer concludes that Parents should be reimbursed for Student’s tuition, related services, application fees, deposits, and transportation at Nonpublic School for the entirety of 2022/23.

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ORDER

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

Within 30 days, upon receipt of documentation of payment by Petitioners, DCPS shall reimburse Petitioners for costs they paid out of pocket for Student's application fees, deposits, tuition, related services, and transportation for Nonpublic School during the 2022/23 school year.

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:

Counsel of Record (Appendix A, by email)
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