

**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

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2021-0073
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 9/4/21
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates (using Microsoft Teams):
("DCPS"),	)	8/25/21 & 8/26/21
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to DCPS’s failure to provide appropriate and timely IEPs and placement. DCPS responded that Student’s IEPs and placement were appropriate, for among other things a child on the autism spectrum does not necessarily require a separate autism program.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

**Procedural History**

Following the filing of the due process complaint on 5/28/21, the case was assigned to the undersigned on 6/1/21. Respondent filed a response on 6/10/21, and did not challenge jurisdiction. Petitioner filed a motion on 7/9/21 for leave to amend the due process

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<sup>1</sup> 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.

## Hearing Officer Determination

Case No. 2021-0073

complaint, which was granted by the undersigned on 7/15/21. The amended complaint was deemed filed as of 7/15/21. Respondent filed a response to the amended due process complaint on 7/19/21, and did not challenge jurisdiction. Resolution meetings took place on 6/11/21 and 8/6/21, but did not settle the case or shorten the 30-day resolution period, which ended on 8/14/21. A final decision in this matter must be reached no later than 45 days following the end of the resolution period for the amended complaint, which requires a Hearing Officer Determination (“HOD”) by 9/28/21.

Prehearing conferences were held on 7/7/21 and 8/4/21 and the Prehearing Order was issued on 8/4/21 addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 8/25/21 and 8/26/21 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated throughout most of the hearing.

### Documents and Witnesses

Petitioner’s Disclosures, submitted on 8/17/21, contained documents P1 through P39, which were all admitted into evidence over objections to various documents. Respondent’s Disclosures, submitted on 8/18/21, contained documents R1 through R30, of which R1-R4, R10-R11, R16-R19, R21, R23, R26 and R30 were offered and admitted into evidence over objections to certain documents; objections to documents not moved into evidence were denied as moot.<sup>2</sup>

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

1. *Private Occupational Therapist* (qualified over objection as an expert in Occupational Therapy)
2. *Psychologist* (qualified without objection as an expert in Psychology with Respect to Evaluating Students with Special Needs)
3. Parent
4. *Educational Consultant* (qualified over objection as an expert in Special Education Programming, IEP Development, and Placement, with an Emphasis in Working with Students with Autism)

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

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

## Hearing Officer Determination

Case No. 2021-0073

1. *LEA Representative at Public School* (qualified over objection as an expert in Special Education with Respect to IEP Development and Implementation)
2. *School Occupational Therapist* (qualified over objection as an expert in Occupational Therapy)
3. *Resolution Specialist*
4. *Academic Supports Manager* (qualified over objection as an expert in Special Education Programming and Placement)

Petitioner's counsel did not submit any rebuttal evidence.

### **Issues and Relief Requested**

The issue to be determined in this Hearing Officer Determination is:

**Issue:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP, placement and/or location of services ("LOS") (1) on 5/20/21, when it refused to revise Student's program based on new evaluative data that found Student's disability classification to include autism and substantial programming revisions were warranted, and/or (2) on or after 6/24/21, when the IEP (a) did not contain behavior support services ("BSS") goals or services, (b) did not contain direct occupational therapy ("OT") services, (c) did not contain extended school year ("ESY") specifics and appropriate goals, (d) failed to include assistive technology ("AT") training, (e) failed to include a social skills group for 30-40 minutes/week, and/or (f) failed to describe Student's least restrictive environment ("LRE") and/or placement, and its proposal for a Specific Learning Supports ("SLS") program as opposed to a Communication & Education Support ("CES") or other program specifically for students with autism was inappropriate. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall revise Student's IEP to provide: (a) revised academic goals; (b) direct and consultative BSS; (c) a social skills group for 30-40 minutes/week; (d) 120 minutes/month of direct OT; (e) placement in a CES or other program specifically designed for students with autism; and (f) AT training.
3. DCPS shall provide a suitable placement and LOS designed for students with autism which can provide not less than 25 hours/week of specialized instruction outside general education, and/or fund a private placement with transportation.
4. DCPS shall provide compensatory education for any denial of FAPE.<sup>3</sup>

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<sup>3</sup> Petitioner's counsel was put on notice at the prehearing conferences that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory

## Hearing Officer Determination

Case No. 2021-0073

5. Any other just and reasonable relief.

### Findings of Fact

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

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age*, *Gender* and in *Grade* at Public School, where Student began in 2017/18.<sup>6</sup> Student is viewed by evaluators at "bright, compliant, and friendly" and "delightful," although Student often cries if doesn't receive what Student wants.<sup>7</sup>

2. Student's 12/18/20 Comprehensive Psychological Evaluation and Autism Screening concluded that Student met both the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5") and the IDEA criteria for classification of Autism Spectrum Disorder ("ASD").<sup>8</sup> ASD was Student's "most appropriate educational disability classification," although Student continued to meet criteria for Specific Learning Disability ("SLD") with impairment in Reading, Written Expression, and Math.<sup>9</sup> Student was classified as a child with an SLD before that primary classification was changed to ASD on 6/24/21.<sup>10</sup> Student requires substantial supports at home and school to function at true ability.<sup>11</sup> As of late 2020, Student was receiving specialized instruction along with Applied Behavior Analysis ("ABA") therapy, OT and Speech-Language Pathology ("SLP").<sup>12</sup>

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education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

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

<sup>5</sup> Parent.

<sup>6</sup> Parent; P6p68. All dates in the format "2017/18" refer to school years.

<sup>7</sup> P4p48; P7p96; P6p82.

<sup>8</sup> P6p82.

<sup>9</sup> P6p82-83.

<sup>10</sup> P6p65; P16p170.

<sup>11</sup> P6p81.

<sup>12</sup> P6p65,80.

## Hearing Officer Determination

Case No. 2021-0073

Witnesses for both Petitioner and DCPS testified that Student was at about the “middle” of the autism spectrum; Student has language and expresses wants and needs.<sup>13</sup>

3. Student has had an IEP since October 2017.<sup>14</sup> Student’s 10/18/18 IEP provided for 5 hours/week of specialized instruction outside general education, 180 minutes/month of SLP outside general education, and 30 minutes/month of BSS consultation.<sup>15</sup> Student’s 12/2/19 IEP made no change in services.<sup>16</sup> A 7/13/20 HOD in the prior due process case between the parties required an increase of Student’s specialized instruction to 10 hours/week, with 5 hours inside general education and 5 hours outside; Student’s IEP was amended on 8/24/20 to make the specialized instruction change, along with increasing SLP to 240 minutes/month.<sup>17</sup> Student’s 11/5/20 IEP continued the same service levels, except the BSS consultation was omitted.<sup>18</sup> Student’s final IEP was developed on 6/24/21, the last day of 2020/21, and provided for 25 hours/week of specialized instruction outside general education, 240 minutes/month of SLP outside general education, and 30 minutes/month of OT consultation.<sup>19</sup>

4. Cognitive Abilities. Student’s Full Scale IQ (“FSIQ”) was in the Very Low range with a standard score of 70, according to the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”); a prior evaluation had different FSIQ scores, which were not statistically significant.<sup>20</sup> Student requires substantial support in accessing the general education curriculum.<sup>21</sup>

5. Academics. Student’s grades at Public School for 2020/21 were generally Basic or better for academic subjects, apart from Below Basic in Math.<sup>22</sup> Based on the Woodcock-Johnson IV Tests of Achievement (“WJ-IV ACH”), Student’s academic skills were substantially below age expectation.<sup>23</sup> Student’s Broad Achievement was in the Low range, with Low performance across Broad Reading, Broad Math, Broad Written Language, and other measures.<sup>24</sup>

6. Student’s computer-based iReady math diagnostic on 9/22/20 indicated that Student was 3 years below grade, while on 6/10/21 the diagnostic indicated that Student was 2 years below grade, showing about a year’s growth from Beginning of Year (“BOY”) to End of

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<sup>13</sup> Educational Consultant; LEA Representative.

<sup>14</sup> P6p68.

<sup>15</sup> P9p102,109.

<sup>16</sup> P10p114,119.

<sup>17</sup> P29p290; P11p124,131.

<sup>18</sup> P12p137,146.

<sup>19</sup> P16p170,188.

<sup>20</sup> P6p71,80,87.

<sup>21</sup> P6p80.

<sup>22</sup> R10p45.

<sup>23</sup> P6p83.

<sup>24</sup> P6p81,88.

## Hearing Officer Determination

Case No. 2021-0073

Year (“EOY”).<sup>25</sup> Student’s computer-based Reading Inventory assessment measures reading comprehension and indicated on 5/13/21 that Student was 3 years below grade; Student increased from 1<sup>st</sup> to 3<sup>rd</sup> percentile rank from BOY to EOY.<sup>26</sup> LEA Representative noted that computer-based assessments are low because they do not provide necessary accommodations for Student; LEA Representative did not know what level Student would be on with accommodations.<sup>27</sup>

7. Behavior. The comprehensive psychological evaluation noted that Student’s special education teacher did not report any behavior concerns, but Student was inattentive on nonpreferred topics; Parent had “minimal concerns” regarding Student’s behavior at home.<sup>28</sup> Student has persistent deficits in social communication and social interactions.<sup>29</sup>

8. Timing of Meetings. The 7/13/20 HOD ordered DCPS to conduct or fund 4 specified assessments: comprehensive psychological, AT, speech-language, and OT; the HOD further required that “an IEP meeting shall be held to review these assessments” within 30 days of completion.<sup>30</sup> The speech-language assessment was the last one completed and was forwarded to DCPS on 4/27/21; an IEP team meeting to review the assessments was held on 5/20/21.<sup>31</sup> The HOD did not specify the timing for updating Student’s IEP based on the assessments.<sup>32</sup>

9. Petitioner’s advocates urged that the 5/20/21 meeting should not only review the independent educational evaluations (“IEEs”), but also determine eligibility and modify Student’s IEP; the DCPS team believed that an Analysis of Existing Data (“AED”) must determine if anything else was required before determining eligibility and modifying the IEP at a later meeting.<sup>33</sup> Student’s case manager sent Parent reminders of an “AED meeting” to be held on 5/20/21.<sup>34</sup> The IEP team was not prepared to determine eligibility at the 5/20/21 meeting.<sup>35</sup>

10. In the AED discussion on 5/20/21, Petitioner’s counsel asked about conducting more adaptive testing; the IEE comprehensive psychological could have included what Petitioner’s counsel thought Student needed.<sup>36</sup> The AED added an additional assessment for the school psychologist, with the date to reconvene to determine eligibility and update

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<sup>25</sup> P19p211; P16p173.

<sup>26</sup> P16p177; P21p238; LEA Representative.

<sup>27</sup> LEA Representative; P16p177.

<sup>28</sup> P6p69,75.

<sup>29</sup> P6p81.

<sup>30</sup> P29p290.

<sup>31</sup> P25p249; Resolution Specialist.

<sup>32</sup> P29p290-91.

<sup>33</sup> Educational Consultant; P13p152-53 (notes by Educational Consultant); R3p10 (purpose is AED meeting); LEA Representative.

<sup>34</sup> R30p180.

<sup>35</sup> LEA Representative.

<sup>36</sup> P13p156.

## Hearing Officer Determination

Case No. 2021-0073

Student's IEP set (over objection at the delay) for 6/24/21; the IEP could have been updated sooner if the IEEs had been completed sooner by the evaluators that Petitioner chose.<sup>37</sup>

11. Behavior Support Services. Petitioner sought BSS as a direct related service; DCPS disagreed and did not add behavioral goals on 6/24/21 because Student "doesn't have behaviors" and data didn't show a need for BSS.<sup>38</sup> The comprehensive psychological evaluation recommended the Multi-disciplinary Team ("MDT") consider weekly BSS to promote social skills development and adaptive skills in the general education setting, among many other recommendations.<sup>39</sup> Educational Consultant admitted during cross-examination that she was wrong in her testimony that a social skills group was not included in Student's 6/24/21 IEP, and the group would likely be more than 10 minutes per meeting.<sup>40</sup> A social skills group 1-2 times a week was included in the 6/24/21 IEP's Other Classroom Aids and Services.<sup>41</sup> Working on social skills with Student outside BSS would allow the group to include neurotypical students and operate at various times in a range of ways at the direction of the special education teacher.<sup>42</sup> Instead of BSS, the team planned to rely on teachers to work on certain goals and supports, which allowed more work with Student across the day; Student's specialized instruction was increased from 10 to 25 hours/week to give special education teachers and staff more time to work with Student.<sup>43</sup>

12. Direct Occupational Therapy. Based on the Bruininks-Oseretsky Test of Motor Proficiency Second Edition ("BOT-2"), Student's 10/5/20 OT assessment found that certain skills of Student were below average, but that Student had integrated skills that allowed Student to be successful with writing tasks and managing classroom materials; Student did struggle to maintain attention.<sup>44</sup> The OT assessment found Student's handwriting skills to be within age norms.<sup>45</sup> The 8/27/20 AT assessment confirmed that Student's writing legibility was "adequate."<sup>46</sup>

13. The OT assessment made a range of recommendations for Student, including various classroom accommodations, but did not recommend direct OT services.<sup>47</sup> Private Occupational Therapist testified that 120 minutes/month of direct services were needed, but that not recommending services in her report and discussing the hours needed with the MDT was her usual practice.<sup>48</sup> Private Occupational Therapist did not attend the review of

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<sup>37</sup> P13p157.

<sup>38</sup> P17p203 (Educational Consultant notes); LEA Representative.

<sup>39</sup> P6p84.

<sup>40</sup> Educational Consultant.

<sup>41</sup> P16p188.

<sup>42</sup> LEA Representative.

<sup>43</sup> *Id.*

<sup>44</sup> P5p58,61.

<sup>45</sup> P5p62.

<sup>46</sup> P4p40,46.

<sup>47</sup> P5p62; Private Occupational Therapist.

<sup>48</sup> Private Occupational Therapist.

## Hearing Officer Determination

Case No. 2021-0073

Student's OT assessment to offer any recommendations there.<sup>49</sup> The OT assessment was reviewed at the 5/20/21 meeting and numerous recommendations were made, but Petitioner's advocates did not seek direct OT services.<sup>50</sup> Educational Consultant did seek direct OT services in the 6/24/21 meeting; DCPS responded that being below average in some areas doesn't require direct services.<sup>51</sup> Student's education was not impacted, apart from attention.<sup>52</sup> A few minutes/week of direct OT services were not appropriate to help Student's attention, as Student needed to focus on attention in all classes throughout the day.<sup>53</sup> OT consultation helps Student's teachers emphasize what Student needs on an ongoing basis.<sup>54</sup>

14. Student's special education teacher observed Student in Reading and saw Student preoccupied with surroundings (siblings, T.V. and eating); Student is easily distracted but most attentive when things are not going on in the background, such as T.V.<sup>55</sup> Parent acknowledged distractions, but noted Student was more engaged and comfortable with virtual learning.<sup>56</sup> Parent testified that she sat next to Student almost all the time during virtual classes in order to keep Student on track; during in-person school Parent also observed Student just sitting without focus in class.<sup>57</sup> Student preferred the chat option in MS Teams over speaking.<sup>58</sup> On Student's 5/19/21 grade card, Student's teacher noted that Student had not been logging in to virtual school consistently; Parent was encouraged to make sure Student attended class daily.<sup>59</sup> In Student's 6/24/21 IEP, attention and attending were included as annual goals for Adaptive/Daily Living Skills, along with skills to address Student's anxiety and withdrawal from the school environment; attention to complete an assignment was covered by the annual goal for Motor Skills/Physical Development.<sup>60</sup>

15. Assistive Technology Training. AT was not added to Student's IEP until 11/5/20, and then repeated on the 6/24/21 IEP; the AT considerations focused on low tech support and did not include a laptop or other device; Petitioner did not seek high tech AT options for Student.<sup>61</sup> Support and instruction were given by the teacher in the classroom as needed for the AT used by Student.<sup>62</sup> Student's AT assessment recommended ongoing AT training and

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<sup>49</sup> *Id.*

<sup>50</sup> P13p156.

<sup>51</sup> P17p204.

<sup>52</sup> School Occupational Therapist.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> P13p154,156.

<sup>56</sup> R4p13.

<sup>57</sup> Parent.

<sup>58</sup> P13p154.

<sup>59</sup> P22p240.

<sup>60</sup> LEA Representative (classroom teacher implementing goals can work on skills more often); P16p182,187; R16p138; School Occupational Therapist.

<sup>61</sup> LEA Representative; P12p137,138; P13p155 (the AT on Student's IEP was all low tech and there was no software); P16p170,172.

<sup>62</sup> LEA Representative.



## Hearing Officer Determination

Case No. 2021-0073

orientation to AT software, websites, and other useful things, along with training of teachers, but these were not included in Student's IEP.<sup>63</sup> As for text-to-speech and vocabulary supports, LEA Representative explained that they were embedded throughout DCPS instruction and on school devices.<sup>64</sup>

16. Extended School Year. ESY helps students retain skills over the summer that are essential to their progress, so they are ready to begin school in the fall.<sup>65</sup> Student's 6/24/21 IEP provided ESY for the first time, which was difficult for Student as it was the first time back to school since the beginning of the pandemic.<sup>66</sup> The 6/24/21 IEP increased Student's ESY services to 4 hours/day, up from 90 minutes/day in the draft; ESY was 4 days/week for 4 weeks.<sup>67</sup> Student had issues with attendance; Student missed 1-1/2 to 2 weeks of the 4 weeks of ESY; Student progressed in some goals, while others were not introduced.<sup>68</sup> Student didn't want to be in ESY in 2021 and was mad and cried a lot.<sup>69</sup> Student wasn't comfortable and had a difficult time transitioning after more than a year not attending in-person school.<sup>70</sup> Academic Supports Manager noted that it is the function of special education teachers to help with transition; in ESY everything was new for all students, none of whom had been attending DCPS in-person.<sup>71</sup>

17. Petitioner objected to ESY math goals being based on Grade level or one year below Grade, as Student's math skills were 3 years below Grade; LEA Representative viewed it a "disservice" to students not to expose them to their proper grade levels.<sup>72</sup> Students are placed in a class – not a program – for ESY, as the instruction is individualized and all children in ESY are in special education.<sup>73</sup> There are no autism programs in ESY and children with autism are not placed together; the make-up of an ESY class depends on a host of factors, including appropriate social-emotional peer groups, cognitive levels, background of the teacher, and students' IEP goals.<sup>74</sup> The setting for ESY is not an extension of the academic year.<sup>75</sup> Three DCPS communication specialists were site leaders during ESY focusing on students with autism at the school Student attended for ESY; they pushed into classes and helped students access their education.<sup>76</sup>

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<sup>63</sup> Educational Consultant; P4p53.

<sup>64</sup> P13p155.

<sup>65</sup> P35p329; Academic Supports Manager.

<sup>66</sup> Parent; P16p192; P12p150.

<sup>67</sup> Academic Supports Manager; P17p206; P26p252.

<sup>68</sup> R11p49-55; Academic Supports Manager; Parent.

<sup>69</sup> Parent; Educational Consultant (tantrums before and after ESY).

<sup>70</sup> Parent.

<sup>71</sup> Academic Supports Manager.

<sup>72</sup> P16p195-96; P17p204; Parent; Educational Consultant; LEA Representative.

<sup>73</sup> Academic Supports Manager; P17p205.

<sup>74</sup> Academic Supports Manager.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

## Hearing Officer Determination

Case No. 2021-0073

18. Applied Behavior Analysis. Every student with autism doesn't need ABA or all aspects of ABA.<sup>77</sup> The recommendations in the comprehensive psychological evaluation did not suggest ABA for Student; Psychologist thought Student would benefit from ABA.<sup>78</sup> DCPS used Educational Consultant's 6/23/21 email listing questions and concerns with Student's draft IEP to guide finalization on 6/24/21; Educational Consultant acknowledged that she did not include any concerns about ABA in her email or ask for ABA at the June meeting.<sup>79</sup>

19. Least Restrictive Environment/Placement. The LRE page in Student's 6/24/21 IEP stated that 25 hours/week of specialized instruction were needed to minimize distractions through a small group or 1:1 instruction, which was identical to the statement in the prior IEP explaining 5 hours/week of specialized instruction.<sup>80</sup> DCPS asserted that a self-contained program cannot be specified on the IEP because there is no space for it; Student's IEP is designed to target ASD.<sup>81</sup> Petitioner's advocates asserted that Student needs a program like CES to address autism, while DCPS recommended SLS for a smaller setting focusing on academics, as Student is higher-functioning than typical CES students, who are mostly non-verbal, unlike Student; SLS supports students with a specific learning disability or other disability where behavior is not the primary impediment.<sup>82</sup> CES focuses on life skills for students who require ABA and are generally on a certificate track, while SLS focuses on academics and generally results in graduation with a high school diploma.<sup>83</sup> Petitioner hoped to keep Student in Public School, where a CES program is available, while DCPS sent an LOS letter dated 8/4/21 to Parent assigning Student to *Proposed Public School*, where an SLS program is available.<sup>84</sup> LEA Representative estimated that Student in Grade would be right in the middle of the SLS class.<sup>85</sup> Academic Supports Manager concurred that it would not be appropriate to place Student in a CES classroom, as it would be an "overcorrection" and could cause regression by Student.<sup>86</sup>

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<sup>77</sup> Educational Consultant.

<sup>78</sup> P6p83-86; Psychologist.

<sup>79</sup> P27p254-55; Educational Consultant.

<sup>80</sup> P16p189; P12p146.

<sup>81</sup> P17p205.

<sup>82</sup> P17p205; P35p329; R1p2; LEA Representative.

<sup>83</sup> LEA Representative; P18p208; P35p329; P34p308,309; P36p338-39; R1p2. DCPS has established the necessary course work that students must successfully complete to earn a regular high school diploma, which is known as the "diploma track." See 5A D.C.M.R. § 2203.2. DCPS has also established an alternative for special needs students to receive an IEP Certificate of Completion, known as the "certificate track," instead of a regular high school diploma. See 5A D.C.M.R. § 2203.8.

<sup>84</sup> Parent; P38p350; P39p352-53.

<sup>85</sup> LEA Representative.

<sup>86</sup> Academic Supports Manager.

## Hearing Officer Determination

Case No. 2021-0073

20. Credibility. This Hearing Officer found that DCPS's witnesses were generally more credible and their testimony more reliable than Petitioner's witnesses throughout the course of the hearing.

### Conclusions of Law

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

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

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

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

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

In addition, the local education agency ("LEA") must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are

## Hearing Officer Determination

Case No. 2021-0073

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* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3.

**Issue:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP, placement and/or LOS (1) on 5/20/21, when it refused to revise Student's program based on new evaluative data that found Student's disability classification to include autism and substantial programming revisions were warranted, and/or (2) on or after 6/24/21, when the IEP (a) did not contain BSS goals or services, (b) did not contain direct OT services, (c) did not contain ESY specifics and appropriate goals, (d) failed to include AT training, (e) failed to include a social skills group for 30-40 minutes/week, and/or (f) failed to describe Student's LRE and/or placement, and its proposal for a SLS program as opposed to a CES or other program specifically for students with autism was inappropriate. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

Petitioner established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which met its burden of persuasion on all aspects of the issue, except for the final element of LRE/placement which was a procedural violation, but not a denial of FAPE.

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

## Hearing Officer Determination

Case No. 2021-0073

of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Andrew 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 IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at \*12 (D.D.C. 5/18/21); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEPs is analyzed by considering the specific concerns raised by Petitioner, which are considered in turn.<sup>87</sup> *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(1) Claim re 5/20/21. Petitioner first asserts that DCPS denied Student a FAPE by failing to provide an appropriate IEP, placement and/or LOS on 5/20/21 by refusing to update Student's IEP then. At that time Student had the 11/5/20 IEP in place which provided 5 hours/week of specialized instruction outside general education and 5 hours inside, based on the requirement of the 7/13/20 HOD. The persuasive testimony from DCPS was that it was necessary to first review the 4 IEEs ordered by the HOD and then proceed with the AED process before determining Student's ASD eligibility and revising Student's IEP.

The 7/13/20 HOD expressly required that the independent assessments be reviewed within 30 days of completion, which was accomplished with the 5/20/21 meeting, for the final assessment was forwarded to DCPS on 4/27/21. The HOD did not specify the timing for updating Student's IEP based on the assessments. Petitioner's advocates urged that the 5/20/21 meeting not only review the IEEs but also determine eligibility and modify Student's IEP. However, DCPS correctly noted that the IDEA first requires an AED to determine if other data was needed before determining eligibility and modifying Student's IEP. *See* 34 C.F.R. § 300.305(a). Here the AED did determine that an additional assessment was needed by the school psychologist. Thus, the IEP team was not able to determine eligibility and update the IEP at the 5/20/21 meeting.

In short, the undersigned finds there was no IDEA violation by not determining eligibility and revising Student's IEP on 5/20/21. Further, DCPS persuasively asserted that even if a new IEP could have been developed on 5/20/21, it would have made little, if any, practical difference to Student as the end of the school year was so close. After the IEP was finalized, DCPS would have had to determine a location of service. Then Student would have had to transition into a new program with new teachers that was not in-person anyway, which would have done little to aid Student's transition to in-person schooling. Thus, even

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<sup>87</sup> A Hearing Officer must also determine whether "the State complied with the procedures" set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. Limited procedural violations were raised and are discussed herein.

## Hearing Officer Determination

Case No. 2021-0073

if there were a procedural violation based on the 5/20/21 meeting, there would not have been substantive harm or a denial of FAPE.

(2) Challenge to 6/24/21 IEP. Petitioner's more significant challenge is to various aspects of Student's revised IEP on 6/24/21. However, as LEA Representative clearly explained, DCPS worked diligently to address the concerns raised by Petitioner's counsel and Educational Consultant and either made the changes sought in Student's IEP or had reasonable explanations for why the DCPS team viewed the situation differently, as set forth below.

(a) Behavior Support Services. BSS is a "related service" that 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 issue is whether, in the absence of the related services sought, Student's IEP was still reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, and to access the curriculum to advance toward meeting Student's annual goals pursuant to 34 C.F.R. § 300.320(a)(4). *See Damarcus S.*, 190 F. Supp. 3d 35; *A.M.*, 933 F. Supp. 2d at 204. Related services, as with any other service in an IEP, are determined on an individual basis by the student's IEP team. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46663.

BSS goals and services were not included in Student's 6/24/21 IEP because the team found it more appropriate to rely on Student's special education teachers and staff to work with Student throughout the day rather than to distract Student from a self-contained program. The specialized instruction in Student's new IEP was significantly increased – from 10 to 25 hours/week all outside general education – which provided much more time for Student to work with special education teachers/staff. As noted below, Petitioner asserted that the social skills group should be conducted as part of BSS, but the group was expressly set out in the 6/24/21 IEP's Other Classroom Aids and Services section and intended to be implemented by the special education teacher, rather than a BSS provider. Similarly, other goals were to be met by the special education teachers/staff, rather than included in BSS. These included attention to complete an assignment under the goal for Motor Skills/Physical Development, and attention and attending under Adaptive/Daily Living Skills, along with skills to address Student's anxiety and withdrawal from the school environment. The undersigned concludes that DCPS met its burden here, despite the absence of BSS.

(b) Occupational Therapy. OT is also a related service that comes within the legal framework set forth above. The issue is whether Student's IEP with only OT consultation and no direct OT services was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, so that Student was able to access the curriculum to advance toward meeting Student's annual goals. As noted above, related services are determined on an individual basis by the student's IEP team.

The independent OT evaluation did find certain areas to be Below Average, but that does not automatically mean that direct services were required. Student had adequate handwriting and integrated skills that allowed success in writing tasks and managing

## Hearing Officer Determination

Case No. 2021-0073

classroom materials, although Student did struggle to maintain attention. Private Occupational Therapist made a range of recommendations for Student in her OT assessment, including various classroom accommodations, but did not recommend direct OT services. Private Occupational Therapist testified that not recommending services in her report was her usual practice, even though she did not attend the review of Student's OT assessment to offer any recommendations there either. The OT assessment was reviewed at the 5/20/21 meeting and numerous recommendations were made, but Petitioner's advocates did not seek direct OT services.

Relying on the more cogent recommendation of School Occupational Therapist, Student's team concluded that direct OT was not necessary as a result of any impact on Student's education, and instead included 30 minutes/month of OT consultation in order to help Student's teachers work on attention issues that Student needed to have addressed throughout the day. The undersigned agrees with the team's conclusion that it was not necessary to add direct OT services for Student in order to provide FAPE.

(c) Extended School Year. ESY is necessary to provide FAPE under 34 C.F.R. § 300.106(a) when the benefits a disabled child gains during a regular school year will be "significantly jeopardized" if the child is not provided with an educational program during the summer months. *Johnson v. Dist. of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012), quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002); see also *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008) (adopting standard from *MM*). The point of ESY is not to provide additional resources or to maximize programming, but to provide FAPE.

Here, Petitioner asserts that Student's 6/24/21 IEP did not contain ESY "specifics" or appropriate goals. Petitioner objected to ESY math goals being based on Grade level or one year below Grade, when Student's math skills were 3 years below Grade, but DCPS argued that it would be a disservice not to expose children to their proper grade levels. More persuasively, ESY is conducted entirely in small groups with individualized instruction, which would step down goals to a level meaningful for Student. Student's IEP Progress Report for ESY indicated that Student was progressing, although there were goals that were not introduced since Student attended only about half of ESY.

As for Petitioner's concerns about ESY specifics, there are no autism programs in ESY and children with autism are not placed together, for the make-up of an ESY class depends on a range of factors. Notably, at the school Student attended for ESY in 2021, 3 DCPS communication specialists were site leaders during ESY in order to focus on students with autism there and help them access their education.

For these reasons, this Hearing Officer concludes that DCPS met its burden of persuasion and was reasonable in selecting ESY goals and providing other specifics necessary for Student to benefit from ESY in 2021 and receive FAPE.

(d) Assistive Technology Training. Petitioner does not assert that Student's IEP failed to include appropriate AT, but merely that it failed to provide training on the AT that was included. This is essentially a failure to implement claim, asserting that DCPS failed to

## Hearing Officer Determination

Case No. 2021-0073

provide necessary AT to Student due to lack of training. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007).

Here, Student's AT was comprised of low tech support and did not include a laptop or other electronic device on Student's IEP. Nor did Petitioner seek any high tech AT options for Student or assert that any requests for high tech AT had been denied. Support and instruction were given by the teacher in the classroom as needed for the actual AT used by Student. Thus, the undersigned concludes that there was no failure to provide AT or AT training, and no violation of the IDEA.

(e) Social Skills Group. All agree that Student had social needs and would benefit from a social skills group. As noted above, one issue was whether the group needed to be offered as BSS, and the undersigned held it did not. Another was whether the group was expressly included in Student's 6/24/21 IEP, which it clearly was. The remaining issue here is whether more specificity was required in Student's IEP or whether it was adequate – or even desirable – to leave the details up to Student's teacher by including general language in the IEP. Indeed, working on social skills with Student outside BSS would allow the group to include neurotypical students and to operate at different times of the day in various ways at the direction of the special education teacher. Petitioner emphasized the needed duration of 30-45 minutes/week, while the IEP required the group to meet once or twice a week, which was likely to be at least 30 minutes/week. The undersigned finds no IDEA violation or denial of FAPE by permitting Public School the latitude to conduct the social skills group as determined appropriate by the special education teacher implementing it.

(f) LRE and Placement. Petitioner's final challenge in this case is whether DCPS adequately discussed Student's LRE/placement and included the requisite detail about Student's LRE/placement in the 6/24/21 IEP. Petitioner specifically objected to DCPS's proposal of an SLS program, as opposed to a CES or other program that is autism specific. Parents are entitled to “a description of specialized instruction and services that the child will receive.” *Andrew F.*, 137 S. Ct. at 1000. The court in *Middleton*, 312 F. Supp. 3d at 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. *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, the LRE page of the challenged IEP included little more than the hours per week of specialized instruction and related services, as in *Brown*, rather than a more



## Hearing Officer Determination

Case No. 2021-0073

thorough description of the services Student required for a FAPE and explanation about the self-contained program the team determined best. Assertions by DCPS that its own IEP form does not provide space for such information to be included are unpersuasive. The nominal LRE explanation that Student would benefit from 25 hours/week based on the need for small group or 1:1 instruction was unchanged from the explanation for 5 hours/week in the prior IEP, despite the five-fold increase in services. Thus, this Hearing Officer concludes that the minimal statements concerning LRE/placement in Student's IEP do not meet the required legal standard and are a procedural violation, but that does not amount to an automatic denial of FAPE.

The next question is whether a failure to set forth Student's LRE and placement with more clarity amounts to a substantive violation under 34 C.F.R. § 300.513(a) by significantly impeding Parent's opportunity to participate in decision-making regarding a FAPE, by impeding Student's right to a FAPE, or by depriving Student of educational benefit. *See Brown*, 179 F. Supp. 3d at 25-26. Here, Parent was well-represented legally and did not lack understanding of the special education services and specific setting that DCPS was proposing for Student in the challenged IEP. Parent's team was able to advocate strongly for the setting believed best for Student. Nor did Petitioner's counsel articulate any substantive harm from this claim during the due process hearing. Accordingly, this Hearing Officer concludes that the failure to include a more detailed description of Student's LRE/placement in the challenged IEP had no impact on Parent's participation in decision-making or on Student's education or right to a FAPE, and thus was not a substantive violation or a denial of FAPE.

The final question is whether DCPS is correct that Student is best served by a self-contained SLS program rather than the self-contained CES or other autism-specific program urged by Petitioner. DCPS recommended SLS for its focus on academics, which generally results in graduation with a high school diploma. Student is higher-functioning than typical CES students, who are mostly non-verbal, unlike Student. SLS supports students with a specific learning disability (SLD) or other disability where behavior is not the primary impediment, which also fits Student well. By contrast, CES focuses on life skills for students who require ABA and are generally on a certificate track. While both sides viewed Student as being near the middle of the autism spectrum, the undersigned was persuaded by the informed views of LEA Representative and Academic Supports Manager who each concluded that SLS would be the proper program for Student and that it would be a grave mistake to place Student in the CES program and foreclose future options for Student.

Conclusion. In considering all of Petitioner's concerns above, the undersigned is cognizant of the fact that the analysis is not about achieving perfection, but merely an IEP and placement reasonably calculated to enable Student to make appropriate progress in the circumstances. *Andrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA "stops short of requiring public schools to provide the best possible education"). *See also Hill v. Dist. of Columbia*, No. 14-cv-1893 (GMH), 2016 WL 4506972, at \*21 (D.D.C. 2016), quoting *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). On balance, this Hearing Officer concludes that DCPS met its burden of persuasion by a preponderance of the evidence for Student's IEP was reasonably calculated to enable Student to make appropriate progress in Student's circumstances.

**Hearing Officer Determination**

Case No. 2021-0073

**ORDER**

Petitioner did not prevail on any part of the issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

**IT IS SO ORDERED.**

Dated in Caption

*/s/ Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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

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