

separate settlement with OSSE. On July 24, 2023, on Petitioner's motion opposed by DCPS, I dismissed OSSE as a respondent.

On May 8, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On May 18, 2023, the parties met for a resolution session and were unable to resolve the issues in dispute. On July 18, 2023 and July 28, 2023, I granted DCPS' and Petitioner's respective motions to extend the final decision due date in this case. My final decision is now due by September 8, 2023.

With the Guardian's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on July 24 and 27, 2023 and August 22, 2023. Guardian appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Petitioner's Counsel made an opening statement. Guardian testified and called PSYCHOLOGIST and EDUCATIONAL ADVOCATE 2 as additional witnesses. DCPS called as witnesses LEA Representative and OCCUPATIONAL THERAPIST. Petitioner's Exhibits P-5 through P-25, P-35, P-39 and P-40 were admitted into evidence. DCPS' Exhibits R-4, R-6 through R-12, R-15 through R-23, R-28, R-30, R-36 through R-44, R-48, R-50 through R-54, R-57, R-58, R-63, R-64, R-69, and R-71 through R-73 were

admitted into evidence, including Exhibits R-4, R-6 through R-9, R-21 through R-23 and R-28 admitted over Petitioner's objections. After the taking of the evidence, counsel for the respective parties made oral closing arguments. There was no request to submit written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

ISSUES AND RELIEF SOUGHT

At the first day of the due process hearing on July 24, 2023, Petitioner's Counsel clarified, on the record, the issues remaining for determination in this matter. The issues for determination are:

Whether DCPS has denied the student a FAPE by not implementing the requirements of the May 30, 2022 Individualized Education Program (IEP) during the 2022-2023 school year, including failing to provide a dedicated aide from August 29, 2022, until January 26, 2023, failing to properly or consistently implement the interventions identified in the student's Behavior Intervention Program (BIP) and failing to provide some 355 minutes of Behavioral Support Services and 440 minutes of occupational therapy (OT) services.

Whether DCPS denied the student a FAPE by developing an inappropriate IEP on or about February 2, 2023, which reduced Specialized Instruction Services, removed speech and language consultation services, reduced OT direct services, eliminated OT consultation services, reduced Behavioral Support Services, and failed to provide for a dedicated aide for school transportation.²

² In the hearing officer's May 8, 2023 prehearing order, there are typographical errors referencing alleged denials of FAPE in February and March 2022 [*sic*]. As is clear in the due process complaint, all claims against DCPS arise out of alleged denials of FAPE in the 2022-2023 school year.

Whether DCPS denied the student a FAPE by offering an inappropriate educational placement in a Specific Learning Support (SLS) classroom beginning in February 2023;

Whether DCPS denied the student a FAPE in the 2022-2023 school year by failing to provide reliable special education transportation and not adequately addressing the Guardian's March 2023 request to provide a dedicated aide for Student for school transportation.

For relief, Petitioner, by counsel, requested in closing argument that the hearing officer order DCPS to reconvene Student's multidisciplinary/IEP team to review and revise his/her IEP as appropriate, including providing for a dedicated aide for bus transportation; order DCPS to provide an appropriate educational placement for Student in an alternative therapeutic setting; order DCPS to fund compensatory education for the student for the alleged denials of FAPE and order such other and further relief as the Hearing Officer deems just and reasonable.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, resides with Guardian in the District of Columbia.

Testimony of Guardian.

2. On May 10, 2022, when Student was enrolled at PUBLIC CHARTER SCHOOL (PCS), the PCS eligibility team found Student eligible for an IEP as having an Emotional Disturbance (ED) disability. Exhibit P-13.

3. On March 28, 2022, before Student was determined eligible for special

education, PCS developed a Behavior Intervention Plan (BIP) to address challenging behaviors in school. It was reported in the BIP that frequently, due to academic or personal stressors, Student became dysregulated and aggressive, causing situations that were unsafe to the school community including physical aggression and absconding. These behaviors were more often to occur in the afternoon, during Math/Science and Spanish classes. The BIP included interventions to instruct replacement behavior, reinforcements, consequences and a crisis plan. Exhibit P-14.

4. In spring 2022, PCS referred Student for a comprehensive psychological evaluation by an independent psychologist. In her May 7, 2022 report, the psychologist reported, *inter alia*, that student had been referred to re-assess his/her current cognitive functioning, academic abilities, and social-emotional functioning. However, due to Student's unwillingness to engage in the assessment process, only his/her social-emotional functioning could be re-assessed. Previous testing in 2019 indicated that Student's Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) cognitive performance fell within the Low Average range (FSIQ - 88). The 2019 testing indicated that Student's educational achievement score was comparable to his/her cognitive performance. Procedures designed to assess Student's social and emotional functioning revealed a child who struggled to effectively cope with feelings along with an inability to identify and express emotions in a healthy manner, leading to severe and recurrent temper outbursts. Student's social emotional functioning was characterized by feelings of sadness and pessimism. His/her inability to adequately identify and

express emotions in a healthy manner made him/her vulnerable to depressive symptoms. Therefore, a diagnosis of Disruptive Mood Dysregulation Disorder was given. Student's inability to cope with his/her feelings lead to socially inappropriate behaviors, which included actively defying adults' rules, often losing his/her temper, blaming others for his/her actions, as well as, presenting as easily annoyed and angry. The degree to which Student demonstrated such behaviors warranted an additional diagnosis of Oppositional Defiant Disorder, Severe. The psychologist recommended, *inter alia*, that due to Student's significant difficulty coping appropriately with stressors, it was highly recommended that he/she be educated in an environment that is small in class size with a 2-to-1 teacher ratio in a therapeutic environment. Exhibit R-33.

5. On May 31, 2022, the PCS IEP team developed Student's initial IEP. The IEP team reported that Student struggled to effectively cope with his/her feelings as well as had an inability to identify and express emotions in a healthy manner, leading to severe and recurrent temper outbursts. Student's inability to cope with his/her feelings led to socially inappropriate behaviors, which included actively defying adults' rules, often losing his/her temper, blaming others for his/her actions, as well as, presenting as easily annoyed and angry. For communication, the IEP team reported that Student could express his/her needs and desires verbally, yet at times, presented him/herself as selectively mute, refusing to respond to peers and adults. For Behavior Intervention needs, the IEP team reported that Student demonstrated impulsive behavior that lead ■■■ to move away from the group or the supervising adult. He/she had difficulty

controlling his/her emotions and impulses, resulting in a highly fluctuating mood. Student's fluctuating mood had led to verbal and physical aggression, causing unsafe behavior and an unsafe environment. Student benefitted from additional supports to attend to and to analyze his/her environment in order to maintain safe behavior. Student required frequent reminders and practice of what safe and controlled behavior looks and sounds like. Exhibit P-10.

6. In the initial IEP, the PCS team identified Mathematics, Reading, Written Expression, Emotional/Social/Behavioral Development and Motor Skills/Physical Development as IEP areas of concern for Student. For special education and related services, the May 31, 2022 PCS IEP provided for the following services:

Special Education Services

Specialized Instruction	Outside General Education	16 hours per week
Specialized Instruction	In General Education	8 hours per week

Related Services

Behavioral Support Services	Outside General Education	30 minutes per week
Occupational Therapy	Outside General Education	45 minutes per week
Behavioral Support Services ³	Outside General Education	30 minutes per week

Consultation Services

Speech-Language Therapy	60 minutes per month
Occupational Therapy	15 minutes per month

³ The PCS IEP provision for Behavioral Support Services appears to be duplicated. This may have been a typographical error.

The May 31, 2022 IEP provided, among other things, that Student required the support of a dedicated aide for 8 hours per day in the general education setting and also required special education transportation services. The PCS IEP team did not follow the independent psychologist's recommendation that Student be educated in a small class-size setting in a therapeutic environment. Exhibit P-10.

7. In its May 31, 2022 justification for a dedicated aide, PCS wrote that Student had difficulty controlling his/her emotions and impulses, resulting in a highly fluctuating mood. His/her fluctuating mood often led to socially inappropriate behaviors. These behaviors had included verbal altercations with peers and teachers, physical aggression, refusal to comply with directions and instructions, and classroom elopement. Student's ED impacted his/her ability to manage his/her personal safety and that of others. Student's ED had a negative impact on his/her temperament, severely impacting his/her ability to remain engaged and complete grade level tasks. His/her disability required him/her to need added instructional/educational support to access the curriculum. Exhibit P-34.

8. For the 2022-2023 school year, Guardian enrolled Student in CITY SCHOOL, a DCPS public school. City School staff decided to adopt and implement Student's May 31, 2022 IEP from PCS. Testimony of LEA Representative.

9. Because of staffing shortages, City School was unable to obtain a dedicated aide for Student from the start of the 2022-2023 school year until on or about January 26, 2023. Testimony of LEA Representative.

10. When Student started at City School, he/she had a difficult transition period. Student had a tendency to shut down and go “selectively mute,” when he/she would not talk to anyone. Testimony of LEA Representative. In October 2022, City School’s Restorative Justice Coordinator attempted to convene a meeting with Guardian to discuss Student’s behaviors. Exhibit P-28.

11. On December 8, 2022, City School convened a multidisciplinary team (MDT) meeting to discuss Student’s transition to City School. Guardian, Petitioner’s Counsel and EDUCATIONAL ADVOCATE 1 attended the meeting. School staff reported that there were positive steps of improvement in Student’s behavior and Student was trending in the right direction. Guardian stated that Student’s transition still needed some improvement and his/her performance in academics still needed improvement and that Student’s improvement was a lot better than when he/she began at the school. Guardian added that she felt that Student needed more improvement in getting along with teachers and his/her academics and behavior were not doing too good, but was a little better than before going to City School. LEA Representative proposed developing a BIP for Student since he/she did not have a dedicated aide yet. Exhibit P-27.

12. On December 13, 2022, City School scheduled an annual IEP meeting for Student to be held on February 2, 2023. Exhibit P-26.

13. Student’s dedicated aide was assigned, and began working with Student on January 26, 2023. Exhibit P-30.

14. On January 27, 2023, SCHOOL SOCIAL WORKER completed a lengthy

Functional Behavioral Assessment, Level II (FBA-II) for Student. School Social Worker reported, *inter alia*, that Student had a history of poor social skill development and mood dysregulation. While these behaviors could be severe and acute, the duration of these behaviors occurred on an intermittent basis. At the beginning of the 2022-2023 school year, Student exhibited selectively mute behavior. As the school year progressed, Student displayed more verbal communicative behaviors in interactions with school staff and peers. Although Student's class attendance had improved, class elopement and skipping continued to be significant behavioral issues. Student at times became easily frustrated within the school setting, which continued to have a negative impact on his/her school engagement and academic performance. School Social Worker concluded that although Student had demonstrated improvement in his/her behavior at that juncture in the school year, he/she continued to exhibit behavioral problems within the school environment which negatively impacted his/her ability to realize his/her full academic potential. Because Student tended to use maladaptive coping styles when faced with social, emotional, and academic challenges, the targeted behaviors affected Student's ability to access the general education on a consistent basis. Exhibit R-54.

15. City School convened Student's annual IEP review meeting on February 2, 2023. Guardian, Student, Petitioner's Counsel and an educational advocate attended the meeting. Mathematics, Reading, Written Expression, Emotional/Social/Behavioral Development and Motor Skills/Physical Development were identified as IEP areas of concern. It was reported in the IEP that for the first term, Student had F's in Math

Resource and in Science. For special education and related services, the February 2, 2023 City School IEP provided for the following services:

Special Education Services

Specialized Instruction	Outside General Education	10 hours per week
Specialized Instruction	In General Education	8 hours per week

Related Services

Behavioral Support Services	Outside General Education	120 minutes per month
Occupational Therapy	Outside General Education	30 minutes per month

Consultation Services

Occupational Therapy	15 minutes per month
----------------------	----------------------

The February 2, 2023 City School IEP provided, among other things, that Student required the support of a dedicated aide for 8 hours per day in the general education setting and that Student required special education transportation services. Exhibit P-11.

16. As of March 2, 2023, the February 2, 2023 IEP had not been finalized by DCPS. Exhibit R-63. The IEP was uploaded to DCPS' Special Education Data System (SEDS) on March 10, 2023. Exhibit P-11.

17. On March 17, 2023, Petitioner's Counsel wrote LEA Representative by email to request that Student be considered for placement in a Behavior and Education Support (BES) classroom with a dedicated aide. Exhibit P-32. City School convened an IEP team meeting on April 13, 2023, which Educational Advocate 2 attended. At the

April 13, 2023 meeting the Guardian's representatives requested the BES setting for Student. School staff agreed with a self-contained setting for Student but supported the SLS setting, not the BES setting. Educational Advocate 2 responded that the Guardian would not object to a full-time SLS setting for Student. Testimony of Educational Advocate 2.

18. On or about April 14, 2023, Student's February 2, 2023 IEP, as finalized on March 10, 2023, was changed to provide for 20 hours per week of Specialized Instruction outside general education. Exhibit P-12. On June 9, 2023, City School issued a Prior Written Notice (PWN) to the Guardian notifying her that DCPS proposed to change Student's placement from the General Education/Inclusion setting to a SLS self-contained classroom setting. Exhibit R-12.

19. At the due process hearing, LEA Representative initially testified on cross-examination that Student was placed in the SLS program in April 2023. This was consistent with Educational Advocate 2's testimony. Later in her testimony, LEA Representative stated that the IEP team decided at the February 2, 2023 IEP meeting that Student's placement would be changed to the SLS classroom, but this change in placement was stymied because Student refused the classroom change, and Student was allowed to continue with his/her prior general education placement with pull-out for special education classes. This latter testimony is contrary to the documentary record, including the February 2, 2023 IEP document, as finalized on March 10, 2023, and the June 9, 2023 PWN to the Guardian. Based on the preponderance of the evidence, I find

that Student's educational placement was not changed to the SLS classroom until the April 13, 2023 MDT meeting.

20. Student's IEP for the 2022-2023 school year provided for 45 minutes per week of OT related services until the February 2, 2023 IEP was finalized in March 2023. The February 2, 2023 reduced OT services to 30 minutes per month. Educational Advocate 2 testified that from her review of records, Student had not received 450 minutes of IEP OT services over the school year, but Educational Advocate 2 acknowledged that she relied on OT service tracker records that ended on March 31, 2023. Testimony of Educational Advocate 2, Exhibit P-37. The behavior trackers considered by Educational Advocate 2 were incomplete. See Exhibits R-63, R-71. Occupational Therapist testified that she fully implemented Student's IEP OT services. I found Occupational Therapist to be a credible witness.

21. Student's IEP for the 2022-2023 school year provided for 30 minutes per week of Behavioral Support Services (BSS) until the February 2, 2023 IEP was finalized in March 2023. The February 2, 2023 IEP specified 120 minutes per month of BSS. Educational Advocate 2 testified that from her review of records, Student had not received 355 minutes of IEP BSS services over the school year, but Educational Advocate 2 acknowledged that she relied on BSS service tracker records that ended on March 28, 2023. Testimony of Educational Advocate 2, Exhibit P-36. The behavior trackers considered by Educational Advocate 2 were incomplete. See Exhibit R-63.

22. Student's May 31, 2022 PCS IEP and February 2, 2023 DCPS IEP both

provided that Student required special education transportation services to and from school. Neither IEP provided for Student to have a dedicated aide on the school bus. On March 17, 2023, Petitioner's Counsel wrote LEA Representative by email to request that a dedicated aide be assigned to accompany Student on the bus, due to the child's ongoing struggles during transportation to and from the school. Exhibit P-33. Over the school year, Student had incidents on the school bus, including refusal to put on the seat belt, Student's unhappiness with the bus route and a personality clash with the bus attendant. The bus driver and attendant did not think Student required a dedicated aide on the bus. Testimony of LEA Representative. The parent's request for an aide on the bus was discussed at the April 13, 2023 IEP team meeting but the school representatives did not add a bus aide requirement to Student's IEP. Testimony of Educational Advocate 2.

23. In March 2023, Psychologist conducted a Psychological Diagnostic Evaluation of Student. In her Amended Report, Psychologist diagnosed Student with Autism Spectrum Disorder - Level 1 (Requiring Support) and with Attention-Deficit Hyperactivity Disorder – Combined Type. Psychologist recommended, *inter alia*, that Student be placed in a small, highly-structured, autism-specific, special education environment. Exhibit P-9, Testimony of Psychologist. Psychologist's evaluation report was not provided to DCPS until shortly before the due process hearing. Testimony of

LEA Representative.⁴

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Guardian in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

⁴ Because Psychologist's report was not available to the February 2, 2023 or April 13, 2023 IEP teams, DCPS cannot be faulted for not considering Psychologist's report and recommendations in developing Student's IEPs and educational placements. *See, e.g., A.B. by Holmes-Ramsey v. District of Columbia*, No. CV 10-1283 (ABJ/JMF), 2012 WL 13041578, at *8 (D.D.C. Feb. 14, 2012) ("[T]he adequacy or appropriateness of an IEP is evaluated based on the information available to the IEP team at the time of its formulation."), *report and recommendation adopted*, 2012 WL 13041526 (D.D.C. Mar. 7, 2012).

ANALYSIS

I.

Whether DCPS denied Student a FAPE by not implementing the requirements of the May 30, 2022 IEP during the 2022-2023 school year, including failing to provide a dedicated aide from August 29, 2022, until January 26, 2023, failing to properly or consistently implement the interventions identified in the student's BIP and failing to provide some 355 minutes of Behavioral Support Services and 440 minutes of occupational therapy (OT) services.

For her first issue, Petitioner alleges that DCPS failed to fully implement requirements of Student's May 31, 2022 PCS IEP, after Student moved from PCS to City School in fall 2022, and the requirements of the City School February 2, 2023 IEP. Specifically, Petitioner alleges that DCPS did not timely provide a dedicated aide for Student, did not implement the PCS Behavior Intervention Plan (BIP) and did not fully implement IEP provisions for Behavioral Support Services (BSS) and OT services. The Petitioner has the burden of proof on these claims. For the reasons explained below, I find that Petitioner established that DCPS failed to provide a dedicated aide for Student until late January 2023, but that Petitioner otherwise did not meet her burden of persuasion that DCPS failed to implement the IEPs.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A school district "must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a

student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party “must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). “Generally, in analyzing whether a student was deprived of an educational benefit, ‘courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.’ “ *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144.

Student's May 31, 2022 PCS IEP, adopted by DCPS when Student enrolled in City School, provided that Student required a dedicated aide for 8 hours per day. The IEP identified Student's significant behavior challenges, including verbal and physical aggression, which caused unsafe behavior and an unsafe environment for Student, peers and staff. It was established at the due process hearing that because of staffing shortages, City School was unable to obtain a dedicated aide for Student from the start of the 2022-2023 school year until January 26, 2023. I find that DCPS' not providing a dedicated aide for Student over a period of almost six months was a failure to implement a significant provision of Student's May 31, 2022 IEP. This was a denial of FAPE.

Petitioner's allegation that City School failed to provide a substantial or significant proportion of Student's IEP Behavioral Support or OT services was not sufficiently substantiated. With regard to OT services, Occupational Therapist testified

credibly that she fully implemented the OT services required by Student's IEPs.

Petitioner's only evidence on DCPS' alleged failure to provide OT or BSS services was the testimony of Educational Advocate 2, which was based on the witness' review of records. Educational Advocate 2 acknowledged in her testimony that the records she reviewed did not include all of the service trackers for Student – either for BSS or for OT. Therefore, I did not find her testimony to be sufficiently probative. I conclude that Petitioner has not met her burden of persuasion that DCPS failed to implement Student's IEP provisions for BSS or OT related services.

Petitioner also contends that DCPS failed to implement with fidelity Student's Behavior Intervention Plan developed by PCS on March 28, 2022. The PCS BIP was developed before Student was determined eligible for special education and before his/her initial IEP was developed. The PCS BIP was not a provision of Student's IEP which DCPS was required to implement to provide a FAPE.

II.

Whether DCPS denied the student a FAPE by developing an inappropriate IEP on or about February 2, 2023, which reduced Specialized Instruction Services, removed speech and language consultation services, reduced OT direct services, eliminated OT consultation services, reduced Behavioral Support Services, and failed to provide for a dedicated aide for school transportation.

The City School IEP team met on February 2, 2023 to conduct an annual review of Student's PCS IEP, adopted by DCPS when Student enrolled in City School in fall 2022. The evidentiary record of what happened at that meeting is not at all clear. It

appears that the Guardian requested that Student be placed in a therapeutic nonpublic school and there was also discussion about moving Student to a DCPS BES or SLS program in a self-contained classroom. However the resulting IEP, which was not finalized until March 10, 2023, kept Student in the general education setting, except for 10 hours per week of Specialized Instruction outside of general education.

Petitioner contends that the February 2, 2023 IEP was inappropriate because it reduced Student's outside of general education Specialized Instruction from 16 hours to 10 hours per week; ended speech and language consultation services; reduced OT direct services and eliminated OT consultation services; reduced Behavioral Support Services and did not provide for a dedicated aide for school transportation.

LEA Representative testified that the 10 hours per week of special education was a typographical error and that the IEP team's intent was to place Student in the SLS program for 20 hours per week. However, this account was not supported by the preponderance of the evidence at the hearing. In any case, in assessing whether a school district offered a FAPE, a hearing officer generally must limit his consideration to the terms of the IEP itself. *See, e.g., N.W. v. District of Columbia*, 253 F. Supp. 3d 5, 14 (D.D.C.) (citing *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007)).

In *Middleton, supra*, Judge Contreras explained how a court or a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part

inquiry: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

Middleton at 128. Petitioner has not alleged a procedural violation in the development of the February 2, 2023 IEP, so I turn to the second, substantive, prong of the *Rowley* inquiry.

In *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, (D.D.C. Mar. 8, 2022), U.S. District Judge Beryl Howell explained the IDEA’s FAPE requirement:

A “free and appropriate public education,” or “FAPE,” is delivered by local education authorities through a uniquely tailored “ ‘individualized education program,’ “ or “IEP.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 993-994 (2017); *see also* 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). To be IDEA-compliant, an IEP must reflect “careful consideration of the child’s individual circumstances” and be “reasonably calculated to enable the child to receive educational benefits,” *Endrew F.*, 137 S. Ct. at 994, 996 (cleaned up), “even as it stops short of requiring public schools to provide the best possible education for the individual child,” *Z.B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018). . . . Moreover, it is “imperative that, to ‘the maximum extent appropriate,’ public schools provide students with disabilities an education in the ‘least restrictive environment,’ “ *id.* at 528 (*quoting* 20 U.S.C. § 1412(a)(5)(A)), which, as recently emphasized by the Supreme Court, “requires that children with disabilities receive education in the regular classroom whenever possible,” *Endrew F.*, 137 S. Ct. at 999. An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP “denies the child an appropriate education.” *Z.B.*, 888 F.3d at 519.

A.D., 2022 WL 683570 at *1. “[A]n IEP’s adequacy thus ‘turns on the unique

circumstances of the child for whom it was created,’ and a reviewing court should defer to school authorities when they ‘offer a cogent and responsive explanation’ showing that an IEP ‘is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances.’” *A.D.* at *7, quoting *Endrew F.*, *supra*, 137 S. Ct. at 1001-02.

I agree with Petitioner that the February 2, 2023 IEP provision, reducing specialized instruction, outside of general education, from 16 hours to 10 hours per week, was not reasonably calculated to enable Student to make appropriate progress. This is clear from the testimony of DCPS’ expert, LEA Representative, who claimed that the IEP team’s intent was for Student to have 20 hours per week of special education in a more restrictive SLS program classroom. Even if the IEP’s provision for 10 hours per week of Specialized Instruction outside of general education were a typographical error, as LEA Representative maintained, it is notable that DCPS did not “correct” the IEP until April 14, 2023. I conclude that DCPS has not provided a “cogent and responsive” explanation for the February 2, 2023 IEP’s provision for 10 hours per week of Specialized Instruction outside of general education.

Petitioner offered no evidence on the alleged inappropriateness of the February 2, 2023 IEP team’s decision to end speech and language consultation services for Student. I find that Petitioner did not establish a *prima facie* case on this claim.

The IEP team’s decision to reduce OT direct services and to eliminate OT consultation services in the February 2, 2023 IEP was explained by Occupational Therapist in her testimony. According to Occupational Therapist, Student had basically

met his/her OT goals at that juncture and was scoring “100 percent across the board” with handwriting concerns. Occupational Therapist’s testimony was not rebutted by Petitioner and I found her justification for reducing Student’s OT services to 30 minutes per month for direct services credible. *See A.G., supra* at 12. (Supreme Court’s reasonableness standard in *Endrew F.* incorporates deference to school officials due to their subject matter expertise and judgment.)

Behavioral Support Services (BSS) in the February 2, 2023 IEP were reduced to 30 minutes per week. Educational Advocate 2 opined that reducing Student’s BSS was not warranted because Student had the multiple emotional disorders reported in the 2022 psychological evaluation. However, Educational Advocate 2 did not qualify as a behavioral support expert and she had never observed Student in the school setting. LEA Representative testified that the team at City School had not observed the kind of behavioral outbursts which Student reportedly exhibited at PCS in the 2021-2022 school year. Mother also testified that Student’s behavior had improved at City School. In light of Student’s reported improved behavior at City School, and also taking account of the April 2023 IEP team decision to place Student in a small, self-contained, SLS classroom with a dedicated aide, I find that DCPS has established the appropriateness of the IEP team’s decision to reduce Student’s Behavioral Support Services in the February 2, 2023 IEP.

III.

Whether DCPS denied the student a FAPE by offering an inappropriate

educational placement in a Specific Learning Support (SLS) classroom beginning in February 2023.

I have found that the City School IEP team did not change Student's educational placement from the general education setting to the SLS classroom until the April 13, 2023 IEP team meeting. It appears that Petitioner does not disagree with the decision to place Student in a more restrictive special classroom setting, but preferred a nonpublic therapeutic setting or a Behavior and Education Support (BES) classroom. Petitioner's expert, Educational Advocate 2, testified that at the April 13, 2023 IEP meeting, she requested that Student be placed in a DCPS BES classroom, but stated that the Guardian would not object to a full-time SLS classroom. DCPS' expert, LEA Representative, testified it was more appropriate to keep Student in a small classroom setting where behavior was not the primary focus, because there would be less distractions for Student in that setting. As to the appropriate small classroom program for Student – that is, between the SLS and BES program options – I found LEA Representative's opinion more persuasive. She has worked very closely with Student in the school environment and is familiar with both programs at City School. *See, e.g., D.C. Int'l Charter Sch. v. Lemus*, No. 21-CV-0223 (RCL), 2023 WL 2645985, at *15 (D.D.C. Mar. 27, 2023) (Educators' testimony is due "some deference.") Educational Advocate 2 did not observe Student in the classroom or evaluate the child and her testimony was based largely on a records review. I conclude that DCPS has met its burden of persuasion that the April 13, 2023 IEP team's decision to place Student in a DCPS SLS

program was appropriate.

Petitioner did not request a dedicated aide for Student for school transportation until March 2023. The request was discussed at the April 13, 2023 IEP team meeting. I consider that claim next.

IV.

Whether DCPS denied Student a FAPE in the 2022-2023 school year by failing to provide reliable special education transportation and not adequately addressing the Guardian's March 2023 request to provide a dedicated aide for Student for school transportation.

The May 31, 2022 PCS IEP and February 2, 2023 City School IEP both provided that Student required special education transportation. Petitioner alleges in her complaint that school transportation for Student has been generally unreliable in the 2022-2023 school year. In addition, on March 17, 2023, Petitioner's Counsel wrote LEA Representative by email to request that a dedicated aide be assigned to accompany Student on the bus, due to the child's ongoing struggles during transportation to and from the school.

OSSE's Division of Student Transportation (OSSE DOT) is responsible for providing special education transportation services to students with disabilities when transportation is appropriately identified and documented on an IEP as a related service. *See Special Education Transportation Policy* (OSSE, Nov. 6, 2013). With regard to the reliability of special education transportation services, a parent may seek redress from OSSE. In this case, Petitioner originally named OSSE as a co-respondent

in her complaint and, before the hearing, reached a separate settlement agreement with that agency. Therefore, I dismiss Petitioner's claim against DCPS for failure to provide "reliable" special education transportation.

Petitioner's request for a dedicated aide for Student on the OSSE school bus was discussed at the April 13, 2023 IEP team meeting, but the IEP team did not revise Student's IEP to provide for a dedicated bus aide. In her testimony at the due process hearing, Educational Advocate 2 opined that Student needed a dedicated aide on the bus because he/she exhibits severe behavior difficulties. DCPS' witness, LEA Representative testified that there had been several behavior incidents for Student on the school bus, including one occasion when the police had to be called because Student would not put on his/her seat belt. However, neither the bus driver and nor the bus attendant thought that Student required a dedicated aide for school transportation. LEA Representative had spoken with both the bus driver and the bus attendant regarding Student's behavior on the bus and she opined at the hearing that Student did not require a dedicated aide on the school bus. I found her opinion on this issue more credible than that of Educational Advocate 2, who had not spoken with the bus staff. I find that DCPS has met its burden of persuasion that at the April 13, 2023 IEP meeting, the IEP team appropriately decided that Student did not require a dedicated aide for school transportation as an IEP related service.

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by not

providing a dedicated aide from the start of the 2022-2023 school year until late January 2023 and by providing for only 10 hours outside-of-general-education special education in the February 2, 2023 IEP. For relief in this case, Petitioner's Counsel requested in closing argument that the hearing officer order DCPS to reconvene Student's multidisciplinary/IEP team to review and revise his/her IEP as appropriate, including providing for a dedicated aide for bus transportation and order DCPS to provide an appropriate educational placement for Student in an alternative therapeutic setting and award Student compensatory education.

DCPS has already revised Student's IEP to provide for full-time placement in an SLS program classroom. In this determination, I have found that the placement decision and the IEP team's decision not to provide a dedicated aide on the school bus were appropriate. Therefore, the remaining relief to be considered for Student in this case is compensatory education.

When a hearing officer finds a denial of FAPE he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education. . . . [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Educational Advocate 2 wrote that Student's cognitive and educational

achievement scores fell within the Average range. However, he/she is a student who struggles to effectively cope with feelings along with an inability to identify and express emotion in a healthy manner. Educational Advocate 2 wrote that, as a result of the alleged denials of FAPE, Student had failing grades and was not making adequate academic and behavioral progress. *See Exhibit P-38.*

With respect to the denials of FAPE established at the hearing, Educational Advocate 2 assumed that Student missed having a dedicated aide in school for 18 weeks and was not placed in an appropriate SLS or BES program classroom for 3 months. She recommended for compensatory education that Student be awarded 360 hours of academic tutoring, 36 hours of counseling and 36 hours of OT therapy. DCPS' witness, LEA Representative, agreed that Student would benefit from academic tutoring. Petitioner did not establish at the hearing that DCPS failed to implement Student's IEP OT or Behavioral Support Services. Therefore, I find that an appropriate compensatory education award would be 360 hours of academic tutoring.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. As compensatory education for the denials of FAPE found in this decision, DCPS shall, within 21 business days of the date of this decision, issue funding authorization for Guardian to obtain 360 hours of individual academic tutoring for Student;

2. DCPS shall ensure that, within 30 school days of the date of this decision, Student's IEP team convenes to review the June 1, 2023 Psychological Diagnostic Evaluation of Student (Exhibit P-9) and revises Student's IEP as appropriate and
3. All other relief requested by the Petitioner herein is denied.

Date: September 1, 2023

s/ Peter B. Vaden
Peter B. Vaden, 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).

cc: Counsel of Record
Office of Dispute Resolution.