

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

<i>Student,</i> <sup>1</sup>	)	Case No.: 2023-0056
through <i>Parent,</i>	)	
<i>Petitioner,</i>	)	Date Issued: 9/9/23
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates (using Microsoft Teams):
(“DCPS”),	)	8/30/23 & 8/31/23
Respondent.	)	
	)	

## 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 conduct needed assessments, provide appropriate Individualized Education Programs ("IEPs"), and a suitable placement. DCPS responded that there were no IDEA violations or denials of FAPE.

## Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter A30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

## Procedural History

Following the filing of the due process complaint on 3/31/23, the case was assigned to the undersigned on 4/2/23. Respondent filed a response on 4/11/23. Petitioner filed a motion to amend along with an amended complaint on 6/9/23, which was granted by the

<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.

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undersigned on 6/13/23, restarting the timelines. Respondent filed an amended response on 6/16/23 and did not challenge jurisdiction apart from asserting that Hearing Officers lack jurisdiction to determine the need for a safety transfer. A resolution meeting took place on 4/11/23; the parties did not settle the case or shorten the new 30-day resolution period, which ended on 7/9/23. A final decision in this matter must be reached no later than 45 days following the end of the new resolution period, as extended by an agreed upon 20-day continuance, which requires a Hearing Officer Determination (“HOD”) by 9/12/23.

Prehearing conferences were held on 6/6/23 and 8/15/23 and an Amended Prehearing Order was issued on 8/15/23, addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 8/30/23 and 8/31/23 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in much of the hearing.

### **Documents and Witnesses**

Petitioner’s Disclosure, submitted on 8/23/23, contained documents P1 through P57, all of which were admitted over various objections, except for P40 and P41, which were withdrawn by Petitioner. Respondent’s Amended Disclosure, also submitted on 8/23/23, contained documents R1 through R43, of which R3-R10, R15-R17, and R23-R43 were offered and admitted into evidence over various objection.<sup>2</sup>

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Educational Advocate* (qualified over objection as an expert in Special Education and IEP Development)
2. Parent

Respondent’s counsel presented 6 witnesses in Respondent’s case (*see* Appendix A):

1. *School Social Worker* (qualified without objection as an expert in School Social Work)
2. *Director* of Student Placement Office
3. *Public School Teacher* (qualified without objection as an expert in Special Education)

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<sup>2</sup> Citations herein to the parties’ documents are identical except that Petitioner’s documents begin with a “P,” while Respondent’s documents begin with an “R,” followed by the exhibit number and then a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits), with any leading zeros omitted.

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4. *School Psychologist* (qualified without objection as an expert in School Psychology)
5. *Prior Public School Teacher* (qualified without objection as an expert in Special Education)
6. *LEA Representative* (qualified without objection as an expert in Special Education)

Petitioner's counsel submitted no rebuttal evidence.

### **Issues and Relief Requested**

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

**Issue 1:** Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on 6/23/21, 10/8/21, 4/22/22, 5/23/22, 5/25/22, and/or 4/5/23 by (a) not providing sufficient behavior interventions and no behavior intervention plan, (b) not being based on sufficient evaluative data, and/or (c) for the 5/23/22, 5/25/22, and 4/5/23 IEPs, not providing at least 20 hours/week of specialized instruction outside general education. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

**Issue 2:** Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student by conducting (a) a psychological evaluation by June 2021 which included cognitive functioning and teacher and Parent input on the BASC-3, and/or (b) a functional behavior assessment II ("FBA-II") by November 2021. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 3:** Whether DCPS denied Student a FAPE by failing to provide an appropriate placement and/or location of services as of January 2023 due to safety and/or behavior concerns. (*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. [WITHDRAWN<sup>3</sup>]
3. DCPS shall convene an IEP team meeting to review the evaluations in the previous paragraph and revise Student's IEP as appropriate, including development of an appropriate behavior intervention plan ("BIP").

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<sup>3</sup> At the beginning of the due process hearing, Petitioner withdrew with prejudice her requested relief in paragraph 2 that, "DCPS shall timely conduct or fund a comprehensive psychological evaluation, including cognitive and social/emotional/behavioral functioning."

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4. DCPS shall amend Student's IEP to increase specialized instruction to at least 20 hours/week outside general education (full-time), and provide Student an appropriate placement and/or location of services with Parent's input, and/or fund placement in a nonpublic school.
5. DCPS shall fund compensatory education for any denials of FAPE.<sup>4</sup>
6. 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>5</sup> are as follows:

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>6</sup> Student is *Age, Gender*, and was in *Grade* during 2022/23<sup>7</sup> at *Public School*, following *Prior Public School*.<sup>8</sup> Student is very social, with friends among older students.<sup>9</sup>

2. IEPs. Student's initial IEP was dated 6/23/21 and based on the disability classification of Other Health Impairment ("OHI") (due to Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD")), as with all IEPs herein); the initial IEP provided a total of 3.5 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education, along with

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<sup>4</sup> Petitioner's counsel was put on notice in the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondents were to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

<sup>5</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>6</sup> Parent.

<sup>7</sup> All dates in the format "2022/23" refer to school years.

<sup>8</sup> Parent.

<sup>9</sup> School Social Worker.

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120 minutes/month of Behavioral Support Services (“BSS”) outside general education; there was no disagreement over the service hours provided.<sup>10</sup>

3. Student’s next IEP was dated 10/8/21 and provided a total of 5.5 hours/week of specialized instruction outside general education and 4.5 hours/week of specialized instruction inside general education, along with 120 minutes/month of BSS outside general education; Petitioner did not object to service levels.<sup>11</sup> Student’s IEP was amended on 4/22/22 to add Extended School Year (“ESY”), which was the only change.<sup>12</sup>

4. Student’s next IEP was dated 5/23/22 and provided a total of 5.5 hours/week of specialized instruction outside general education and 4.5 hours/week of specialized instruction inside general education, along with 120 minutes/month of BSS outside general education.<sup>13</sup> Student’s IEP was amended on 5/25/22 to add other classroom aids and supplements that can benefit Student’s behavior.<sup>14</sup>

5. Student’s final IEP at issue was dated 4/5/23 and provided 3 hours/week of specialized instruction outside general education and a total of 5.75 hours/week of specialized instruction inside general education, along with 120 minutes/month of BSS outside general education.<sup>15</sup>

The IEPs supported Student in general education.<sup>16</sup> In 2021/22, Student’s IEP was appropriate to help Student access general education; there were no “red flags” indicating a BIP was required.<sup>17</sup> When Student arrived at Public School, a 30-day review of Student’s IEP was conducted on 9/22/22 and concluded that the IEP was the best educational plan for Student and no changes were needed.<sup>18</sup>

6. Behavior/Safety. Student’s IEPs noted that Student’s behavior impeded Student’s learning and that of other children.<sup>19</sup> Prior Public School utilized positive behavioral interventions and supports (“PBIS”) as a whole school incentive for increasing positive behavior; in addition, Student was recommended for 120 minutes/month of BSS outside general education.<sup>20</sup> The Public School IEP on 4/5/23 also noted that Student’s behavior

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<sup>10</sup> P3p34,42; Prior Public School Teacher.

<sup>11</sup> P4p47,58; Prior Public School Teacher.

<sup>12</sup> P5p64; Prior Public School Teacher.

<sup>13</sup> P6p83,95.

<sup>14</sup> P7p103.

<sup>15</sup> P8p123,138.

<sup>16</sup> Prior Public School Teacher.

<sup>17</sup> *Id.*

<sup>18</sup> R4p9.

<sup>19</sup> P3p35.

<sup>20</sup> P3p35 (6/23/21); P4p48 (10/8/21); P6p84 (5/23/22).

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impeded Student's learning and that of other children, noting that a BIP was developed in 2023 and BSS continued at 120 minutes/month.<sup>21</sup>

7. An FBA-I was conducted at Prior Public School on 5/27/21 to address off-task behaviors and falling asleep at school; reference at the end of the document to next develop a BIP was standardized language on the form.<sup>22</sup> A BIP could not be implemented in 2021/22 during virtual schooling.<sup>23</sup> Student did not need a BIP in 2021/22.<sup>24</sup> The BIP and safety plan showed what was already known.<sup>25</sup> An FBA-II was completed on 1/27/23 focusing on off-task behaviors and skipping class, the latter of which was only for 3 minutes twice a day.<sup>26</sup> A BIP-II for Student was developed on 2/8/23 by School Social Worker.<sup>27</sup>

8. Student was suspended for sexual harassment in late 2022 and twice for fighting in early 2023.<sup>28</sup> Student fell down 5-6 steps; Student may have been pushed.<sup>29</sup> Student was stabbed with a pencil.<sup>30</sup> An Individual Student Safety Plan was developed for Student on 11/3/21, due to high risk of suicide and hearing voices encouraging self harm.<sup>31</sup> Another Individual Student Safety Plan was developed for Student on 1/4/23 based on suicidal ideation and self-harm.<sup>32</sup> A Safety Plan meeting occurred on 1/17/23.<sup>33</sup> Student's fights were not due to Student's disability.<sup>34</sup>

9. Transfers. There are several types of DCPS transfers, including involuntary transfers, victim transfers, immediate transfers, discretionary transfer by the Chancellor, and transfers in extenuating circumstances; no transfers are available to students with IEPs when the school does not think a transfer is needed.<sup>35</sup> In this case there was no safety transfer request at issue.<sup>36</sup>

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<sup>21</sup> P8p124.

<sup>22</sup> P33p320-23; Prior Public School Teacher.

<sup>23</sup> Educational Advocate.

<sup>24</sup> Prior Public School Teacher; School Social Worker (prior to 1/27/22 a BIP was not needed).

<sup>25</sup> Educational Advocate.

P42p349-50.

<sup>26</sup> R19p67; School Social Worker.

<sup>27</sup> R23p103; School Social Worker.

<sup>28</sup> P42p349-50.

<sup>29</sup> P38p341; School Social Worker.

<sup>30</sup> P39p343.

<sup>31</sup> P44p355-59.

<sup>32</sup> P45p361-67.

<sup>33</sup> P47p375.

<sup>34</sup> School Social Worker.

<sup>35</sup> Director.

<sup>36</sup> *Id.*

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10. Evaluations. DCPS completed an appropriate psychological evaluation of Student on 6/23/21, during the pandemic.<sup>37</sup> DCPS authorized an Independent Educational Evaluation (“IEE”) comprehensive psychological evaluation when the due process complaint was filed in this case.<sup>38</sup> The independent comprehensive psychological evaluation report dated 8/14/23 was not available to Student’s IEP team in developing Student’s IEPs.<sup>39</sup> The independent comprehensive psychological evaluation warned of a high probability that the Behavior Assessment System for Children, Third Edition (“BASC-3”) scores might not be sufficiently reliable.<sup>40</sup> The independent comprehensive psychological evaluation found Student’s Full Scale IQ (“FSIQ”) was 68, but that IQ score was not needed.<sup>41</sup> Student’s performance on the independent comprehensive psychological evaluation was adversely affected by Student’s persistent use of a phone during the evaluation, so gave no insight into Student’s disability.<sup>42</sup>

11. Whether a comprehensive psychological evaluation includes cognitive scores depends on what is needed or helpful on a case-by-case basis.<sup>43</sup> A cognitive assessment was not needed to program for Student.<sup>44</sup> Student did not need a cognitive assessment; Prior Public School Teacher was not concerned about having sufficient data for Student’s initial IEP.<sup>45</sup> Nothing in Student’s speech-language evaluation suggested a cognitive was needed.<sup>46</sup> Nor is there any requirement for socio-emotional testing of all special education students.<sup>47</sup> The BASC-3 showed problems that were known and didn’t reveal anything different.<sup>48</sup>

12. An Analysis of Existing Data (“AED”) was conducted on 12/14/22 and there was no request for cognitive testing; Public School completed the evaluations requested.<sup>49</sup> There was no request for additional testing while Student was at Public School (2022/23); cognitive and socio-emotional testing were not requested.<sup>50</sup> An FBA-II was proposed by the school team, not Petitioner, which identified concerns.<sup>51</sup> Petitioner’s counsel did raise the

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<sup>37</sup> P28p234; School Psychologist.

<sup>38</sup> Educational Advocate; P32.

<sup>39</sup> Educational Advocate; P32p273.

<sup>40</sup> P32p301.

<sup>41</sup> P32p306,316; School Psychologist.

<sup>42</sup> P32p307; School Psychologist.

<sup>43</sup> Educational Advocate.

<sup>44</sup> School Psychologist; R38p280 (*see, e.g.*, “Comprehensive Cognitive Assessments Are Not Necessary for the Identification and Treatment of Learning Disabilities,” *Archives of Clinical Neuropsychology* 32 (2017) 2-7).

<sup>45</sup> Prior Public School Teacher.

<sup>46</sup> P31; School Psychologist.

<sup>47</sup> School Psychologist.

<sup>48</sup> Educational Advocate; P32p317.

<sup>49</sup> R10p24; Public School Teacher.

<sup>50</sup> Public School Teacher; Prior Public School Teacher.

<sup>51</sup> LEA Representative.

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need for a cognitive assessment at the end of the 12/14/22 AED meeting which was intended to focus on Assistive Technology (“AT”), so could not be addressed then.<sup>52</sup>

13. Academics. Reading. Student’s beginning-of-year reading iReady on 10/8/20 indicated that Student was 4 years below grade.<sup>53</sup> Student’s beginning-of-year reading iReady on 9/23/22 indicated that Student was 5 years below grade, but did not match previous scores and resulted from Student sleeping or rushing.<sup>54</sup> Student’s end-of-year reading iReady on 6/8/23 indicated that Student had increased by 68 points, well above the “stretch” goal and was 3 years below grade.<sup>55</sup>

14. Math. Student’s beginning-of-year math iReady on 10/2/20 indicated that Student was 4 years below grade.<sup>56</sup> Student’s beginning-of-year math iReady on 9/12/22 indicated that Student was 4 years below grade.<sup>57</sup> Student’s end-of-year math iReady on 5/30/23 indicated that Student was 3 years below grade, with an increase of 14 points to very near the typical score, increasing from level 1 to 3.<sup>58</sup>

15. Student was making “some” progress or “good” progress in reading and math iReady scores, even without ESY.<sup>59</sup> Student’s IEP progress reports indicated that lack of progress on 7/25/23 was due to non-attendance.<sup>60</sup> A Multi-Disciplinary Team (“MDT”) meeting on 4/5/23 noted that Student was getting to school on time, which was having positive impacts, had gained in math and could decode grade level texts.<sup>61</sup>

16. Specialized Instruction. The MDT meeting on 4/5/23 reviewed Petitioner’s request for more specialized instruction hours and concluded that Student was making a lot of progress with current hours and a more restrictive setting would not be best for Student.<sup>62</sup> Specifically, Petitioner sought an increase in specialized instruction to 20 hours/week outside general education, from 3 hours/week outside general education and 5.75 hours/week inside general education, due to functioning below grade level in reading, writing and math.<sup>63</sup> DCPS witnesses testified that Student was making good progress and an increase to 20 hours/week was not appropriate and would have disrupted Student’s progress.<sup>64</sup>

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<sup>52</sup> P46p369,373; LEA Representative (AT added to IEP on 2/8/23).

<sup>53</sup> R32p250.

<sup>54</sup> P37p339; Public School Teacher.

<sup>55</sup> R30p210.

<sup>56</sup> R32p259.

<sup>57</sup> P36p337; P46p369.

<sup>58</sup> R31p227; LEA Representative.

<sup>59</sup> Educational Advocate.

<sup>60</sup> R24p111,118 (progressing).

<sup>61</sup> R35p272-73; P49p385 (Student close to grade level in a “lot of areas”).

<sup>62</sup> R35p273.

<sup>63</sup> P51p391; Educational Advocate.

<sup>64</sup> Prior Public School Teacher.



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17. Attendance was the biggest thing affecting Student academically.<sup>65</sup> Student was late almost every day, and absent about 50 days, which impacted academics.<sup>66</sup> Student didn't usually attend math or reading classes, even though Student wanted to do well and learn.<sup>67</sup> Student was impeded in 2022/23 by attendance and tardiness.<sup>68</sup> Student attended ESY inconsistently in 2022.<sup>69</sup> Student's team agreed on ESY in 2023; Student had some failures from not attending ESY.<sup>70</sup>

18. Student thrived in general education with the existing level of specialized instruction, rather than in a self-contained Behavior & Education Support ("BES") or Specific Learning Support ("SLS") classroom.<sup>71</sup> Student doesn't have severe behavior issues and is not violent or aggressive.<sup>72</sup> A BES classroom was not appropriate for Student, as being around other BES students would trigger Student.<sup>73</sup> The school team felt strongly that a self-contained setting would be bad for Student, both academically and socio-emotionally.<sup>74</sup> Student's report card for 2021/22 showed good progress and growth, with 331 points of growth in reading from beginning to end of year.<sup>75</sup> Student made good progress in 2021/22 in both academics and behavior.<sup>76</sup>

### 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

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<sup>65</sup> School Social Worker.

<sup>66</sup> Educational Advocate.

<sup>67</sup> P46p369; Parent.

<sup>68</sup> Public School Teacher.

<sup>69</sup> R25p143; Prior Public School Teacher.

<sup>70</sup> R35p273; Educational Advocate.

<sup>71</sup> School Social Worker.

<sup>72</sup> *Id.*

<sup>73</sup> LEA Representative.

<sup>74</sup> *Id.*

<sup>75</sup> R28p202.

<sup>76</sup> Prior Public School Teacher.

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are ‘tailored to the unique needs’ of a particular child.” *Endrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

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

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

In addition, the local education agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455 (CKK), 2018 WL 4623572, at \*3 (D.D.C. 2018).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* 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,

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

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on 6/23/21, 10/8/21, 4/22/22, 5/23/22, 5/25/22, and/or 4/5/23 by (a) not providing sufficient behavior interventions and no behavioral intervention plan, (b) not being based on sufficient evaluative data, and/or (c) for the 5/23/22, 5/25/22, and 4/5/23 IEPs, not providing at least 20 hours/week of specialized instruction outside general education. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a *prima facie* case concerning Student's IEPs through testimony and documents, shifting the burden to DCPS, which met its burden of persuasion.

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

(a) Behavior Interventions, Including a BIP. The IDEA requires in the case of a student whose behavior impedes the student’s own learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports (“PBIS”) and other strategies to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). Here, DCPS did consider Student to be a child whose behavior impeded Student’s own learning or that of others in each IEP at issue herein. The IEPs at Prior Public School utilized PBIS as a whole school incentive for increasing positive behavior, while the Public School IEP noted the BIP that

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<sup>77</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. Certain procedural concerns are discussed herein.

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was developed in 2023. In addition, each IEP relied on 120 minutes/month of BSS outside general education, which Petitioner made little emphasis on increasing.<sup>78</sup>

There was, however, a great deal of emphasis on Petitioner's desire for BIPs, even though Educational Advocate acknowledged that a BIP could not have been implemented in 2021/22 during virtual schooling and that a BIP would show what was already known. As for DCPS, Prior Public School Teacher and School Social Worker credibly asserted that early BIPs were not needed. Further, the undersigned was persuaded that the reference at the end of the FBA to developing a BIP was no more than standardized language on the form and did not mandate action by DCPS. In 2021/22, Student's IEPs were appropriate and Prior Public School Teacher saw no "red flags" indicating a BIP should be required. In any case, a BIP-II for Student was developed in due course at Public School. In addition to BIPs, Individual Student Safety Plans were developed for Student on 11/3/21 and 1/4/23 due to concerns about suicide and self-harm.

Accordingly, the undersigned concludes that DCPS met its burden of persuasion on whether there were sufficient behavioral interventions, including BSS, to enable Student to make appropriate progress in light of Student's circumstances.

(b) Sufficient Evaluative Data. Student's IEPs do not fail on the basis of too little evaluative data, as explained in more detail in Issue 2, below. Petitioner failed to request evaluations early on from DCPS, but was authorized to obtain an independent comprehensive psychological evaluation once she filed this complaint.

(c) Specialized Instruction. While Student had only 3 hours/week of specialized instruction outside general education (along with 5.75 hours/week of specialized instruction inside general education) on the current IEP, Petitioner asserts that Student's IEPs since 5/23/22 should have provided 20 hours/week of specialized instruction outside general education.

The MDT meeting on 4/5/23 reviewed Petitioner's request for more specialized instruction hours and concluded that Student was making a lot of progress with the current hours and a more restrictive setting would not be best for Student. DCPS witnesses convincingly testified that Student was making good progress and an increase to 20 hours/week was not appropriate and would have disrupted Student's progress.

Petitioner sought that Student be placed in a self-contained BES (or SLS) classroom, even though Student thrived in general education with existing levels of specialized instruction. Student didn't have severe behavior issues and is not violent or aggressive. The undersigned is clear that a BES classroom was not appropriate for Student, as being around other BES students could trigger Student. The school team felt strongly that a self-

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<sup>78</sup> As a related service, BSS 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).

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contained setting would be bad for Student, both academically and socio-emotionally and the undersigned concurs where the solid evidence was that Student was progressing.

The undersigned is clear that Student's IEPs need not have specialized instruction outside general education quadrupled to 20 hours/week of specialized instruction to enable Student to make appropriate progress in the circumstances. There is no violation here.

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

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student by conducting (a) a psychological evaluation by June 2021 which included cognitive functioning and teacher and Parent input on the BASC-3, and/or (b) an FBA-II by November 2021. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this issue. The importance of assessing students in all areas of suspected disability was emphasized in *Z.B.*, 888 F.3d at 518, *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments, such as an FBA, is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) ("in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable [the student] to receive educational benefits" (citation omitted)); 34 C.F.R. § 300.304(c)(4).

On the other hand, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information based on the suspected needs of the child. *Z.B.*, 888 F.3d at 518; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006); *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016). The need for psychological and FBA-II assessments by certain dates are considered in turn.

(a) Psychological Evaluation. DCPS completed a psychological evaluation of Student on 6/23/21, during the pandemic, which School Psychologist concluded was appropriate, despite Petitioner's claims that it needed both a cognitive assessment and input on a BASC-3. Educational Advocate concurred that whether a psychological evaluation includes cognitive scores depends on what is needed or helpful on a case-by-case basis.

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Here, School Psychologist credibly testified that a cognitive assessment was not needed to program for Student. Nor was there any concern about having sufficient data for Student's initial IEP on 6/23/21. The independent comprehensive psychological evaluation determined Student's FSIQ, but that score was not needed, as School Psychologist explained.

School Psychologist further testified that there is no requirement for socio-emotional testing of all students. The BASC-3 that was recently conducted as part of the independent comprehensive psychological evaluation merely showed problems that were known and didn't reveal anything different, suggesting the lack of any benefit had the testing been done in 2021. In addition, the independent comprehensive psychological evaluation warned of a high probability that the BASC-3 scores might not be sufficiently reliable. Student's performance on the independent comprehensive psychological evaluation was also adversely affected by Student's persistent use of a phone during the evaluation, so gave little or no insight into Student's disability. The outcome in 2021 might have been no different.

(b) Functional Behavioral Assessment II. Petitioner did not demonstrate that she had requested an FBA-II prior to November 2021, much less that one was required to provide a FAPE. Indeed, LEA Representative credibly testified that an FBA-II was not needed in 2021/22. An FBA-I was conducted at Prior Public School on 5/27/21 to address off-task behaviors and falling asleep at school. When the FBA-II was completed on 1/27/23, it also focused on off-task behaviors and skipping class, the latter of which was only for 3 minutes twice a day. The FBA-II was ultimately proposed by the school team, not Petitioner, with the team identifying concerns. At most this would merely be a procedural violation that does not rise to the level of a denial of FAPE. *See Z.B.*, 888 F.3d at 524.

In sum, this Hearing Officer is not persuaded that any further assessments were needed to provide a FAPE to Student. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at \*4,5 (D.D.C. 2010) (no relief warranted where petitioner has not shown that the child's "education would have been different" but for the violation).

**Issue 3:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate placement and/or location of services as of January 2023 due to safety and/or behavior concerns. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did not establish a *prima facie* case as to placement and/or location of services, as there was an insufficient assertion that DCPS could not fulfill Student's IEPs at Public School. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527, 113 S. Ct. 2742, 2758, 125 L. Ed. 2d 407 (1993) (a *prima facie* case requires enough evidence to raise an issue for the trier of fact); *W.S. v. Dist. of Columbia*, 502 F. Supp. 3d 102, 121 (D.D.C. 2020) (then-Judge Ketanji Brown Jackson) ("[i]n determining the sufficiency of a *prima facie* case . . . a hearing officer must determine whether, after considering all of a plaintiff's evidence, a reasonable trier of fact could find in favor of the plaintiff"). Further, Director plainly testified that none of the bases on which DCPS students may be transferred applied

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to Student, with which Petitioner's counsel concurred, so no *prima facie* case has been established.

In short, the IDEA requires "school districts to offer placement/location of service in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018), citing *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). See also *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS "must place the student in a setting that is capable of fulfilling the student's IEP").

Here, the undersigned concludes that Public School provided Student with 10 hours/week of specialized instruction and 120 minutes/month of BSS in January 2023 and could have provided more services if found warranted. Maintaining Student at Public School afforded Student the opportunity to make appropriate progress in Student's particular circumstances. See *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), quoting *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

### **ORDER**

Petitioner has not prevailed on any 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).

Copies to:

Counsel of Record (Appendix A, by email)  
ODR (hearing.office@dc.gov)