

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
April 30, 2016

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2016-0026
v.)	
)	Date Issued: April 30, 2016
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on February 5, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On February 16, 2016, Respondent filed its Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on February 18, 2016. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on March 7, 2016 and was set to conclude on April 20, 2016. However, once the DPH unexpectedly went into a second day, the parties mutually agreed to continue the HOD deadline until April 30, 2016.

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on March 7, 2016, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by March 9, 2016 and that the DPH would be held on March 16, 2016. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on March 8, 2016.

The DPH was held on March 16, 2016 and April 14, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL], Esq. and DCPS was represented by [RESPONDENT’S COUNSEL], Esq.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-33 were admitted without objection. Respondent’s exhibits R-1 through R-7 were over Petitioner’s objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Psychologist (Parent)²
- (c) Director (Nonpublic School 1)
- (d) Educational Advocate A
- (e) Program Director (Nonpublic School 2)
- (f) Educational Advocate B³

Respondent called the following witness at the DPH:

- (a) Social Worker⁴
- (b) Special Education Teacher (Math/Science) (“Special Education Teacher”)
- (c) French Teacher
- (d) Case Manager
- (e) Mass Communications Teacher
- (f) Special Education Coordinator⁵

Petitioner and Respondent gave written closing arguments.

² Qualified as an expert in Clinical and School Psychology, without objection.

³ Qualified as an expert in Special Education Programming, over Respondent’s objection.

⁴ Qualified as an expert in clinical social work, specifically with respect to the provision of behavioral support to special education students and programming and placement as it relates to special education students, without objection.

⁵ Qualified as an expert in special education programming (meaning goals, accommodations and all portions of the IEP other than the “least restrictive environment” (“LRE”) and service hours portion) and in placement (meaning the service hours and LRE portions of the IEP), over objection as to the portion of the designation related to the LRE.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by providing him with 12 hours of specialized instruction per week outside the general education setting and 4 hours per week of specialized instruction inside the general education setting during the 2015- 2016 school year, rather than 24 hours of specialized instruction per week outside the general education setting, as his IEP requires.
- (b) Whether DCPS denied Student a FAPE by failing to include his parents in the decision to reduce his services at the start of the 2015-2016 school year.
- (c) Whether DCPS denied Student a FAPE by providing him with an inappropriate IEP and placement, in that his current placement is incapable of implementing the services on his IEP.
- (d) Whether DCPS denied Student a FAPE by failing to comply with the local law requiring it to provide documents in advance of IEP meetings, thereby limiting Parent’s ability to meaningfully participate in IEP meetings during the 2015-2016 school year.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE;
- (b) an Order that DCPS shall fund an alternative placement that can provide the level of services Student requires to access his education;
- (c) an Order awarding compensatory education, in the form of placement at Nonpublic School 1 or Nonpublic School 2, to make up for the services DCPS failed to implement on Student’s IEP from the beginning of the 2015-2016 school year to the present time;
- (d) any other relief the hearing officer deems appropriate.

FINDINGS OF FACT

1. Student is [AGE] years old, is in the [GRADE] grade, and resides in Washington, D.C. His father (“Parent”/ “Petitioner”) brings this action on his behalf.⁶
2. Student is eligible for special education services under the disability classification “Specific Learning Disability.”⁷

IEPs/Assessments/Services/Performance/Learning Needs

3. Student had an IEP dated December 3, 2013 that included academic goals in mathematics, reading and written expression. It provided 8 hours of specialized instruction inside the general education setting, and 2 hours of specialized instruction outside the general

⁶ Testimony of Parent; P-6; R-2.

⁷ P-31-1; P-5-1; P-6; R-2-1; R-4-1.

education setting. It indicated that Student is pursuing the high school diploma track (rather than the certificate of completion track).⁸

4. Student received a comprehensive psychological evaluation, reflected in an evaluation report dated August 19, 2014. Psychologist (Parent) conducted the evaluation at DCPS' referral to assess Student's intellectual, academic and social-emotional functioning, and to assist with his academic planning at a time when Student had received all failing grades during the previous school year, notwithstanding the specialized instruction he had received.⁹

5. As a part of the August 2014 comprehensive psychological, Student was administered the Woodcock-Johnson III, which indicated that he had average to low average cognitive abilities, and his academic skills were low for his age (approximately 4-6 years delayed in all academic areas).¹⁰

6. The August 2014 comprehensive psychological evaluation recommended that Student's hours of specialized instruction outside the general education setting be increased beyond the 2 hours he had been receiving at that point, as he learns best in a small group setting.¹¹

7. Student had an IEP dated December 2, 2014 that included academic goals in mathematics, reading and written expression. It provided 24 hours of specialized instruction outside the general education setting, and indicated that Student is pursuing the high school diploma track.¹²

8. Student has been receiving tutoring services from Program Director (Nonpublic School 2) since May 2015, using a specialized reading program.¹³

9. During the 2014-2015 school year, Student earned mostly "Cs," "Bs" and "As" on his report card for each of the four terms; however, he earned an "F" in English during the fourth term.¹⁴

10. The 2015-2016 school year for DCPS began on August 17, 2015.¹⁵

11. District School was not able to provide Student 24 hours of specialized instruction during the 2015-2016 school year and also keep him on track to earn a high school diploma (rather than a certificate).

⁸ P-31.

⁹ Testimony of Psychologist (Parent); P-1.

¹⁰ Testimony of Psychologist (Parent); P-1-4; P-1-14.

¹¹ Testimony of Psychologist (Parent); P-1-10.

¹² P-5.

¹³ Testimony of Program Director (Nonpublic School 2); P-19.

¹⁴ P-17-2.

¹⁵ P-20-1.

12. Beginning at the start of the 2015-2016 school year, District School began providing Student with 12 hours of specialized instruction outside the general education setting and 4 hours of specialized instruction inside the general education setting, even though his IEP in place at that point required 24 hours of specialized instruction outside the general education setting.¹⁶

13. The Scholastic Reading Inventory (“SRI”) assesses a student’s reading level. As of September 2, 2015, Student’s SRI score was 906 (two grade levels behind). A few months prior, on May 28, 2015, his SRI score had been lower at 757.¹⁷

14. During the first term of the 2015-2016 school year, Student earned a “C” in English, while his other grades were “As” and “Bs.” As of October 20, 2015, Student’s interim grade (through the Jupiter online portal through which parents can view their students’ grades) in English was a “D+” and in World History was an “F.”¹⁸

15. A draft IEP dated November 23, 2015 and a finalized IEP dated November 24, 2015 were prepared for Student. Each version of the November 2015 IEP included academic goals in mathematics, reading and written expression; reduced Student’s hours of specialized instruction from 24 hours outside the general education setting to 12 hours of specialized instruction outside the general education setting and 4 hours of specialized instruction inside the general education setting; and indicated that Student is pursuing the high school diploma track.¹⁹

16. The school-based members of Student’s IEP team based their decision to reduce Student’s hours of specialized instruction in the November 24, 2015 IEP on Student’s desire to pursue a high school diploma. They also felt Student had made sufficient academic progress (including because he had received honor roll during the first advisory and his SRI scores had improved) in order to warrant a reduction of his hours of specialized instruction.²⁰

17. Parent had not been aware of the reduction in Student’s hours of specialized instruction until the November 2015 IEP meeting.²¹ Parent and his representatives participated in the November 2015 IEP meeting and expressed their strong disagreement with the reduction in Student’s hours of specialized instruction.²²

18. A functional behavior assessment (“FBA”) was conducted for Student on January 6, 2016 due to moderately intense behaviors he was experiencing on a daily basis, which were interfering with his learning. His behaviors were occurring when he did not understand the

¹⁶ Testimony of Special Education Coordinator.

¹⁷ P-16-3; P-13.

¹⁸ Testimony of Special Education Coordinator; testimony of Social Worker; P-14-1.

¹⁹ P-6; R-2.

²⁰ R-3.

²¹ Testimony of Parent; testimony of Educational Advocate.

²² Testimony of Parent; testimony of Special Education Coordinator.

assignment, felt he was not being assisted by the classroom teachers, and/or when he was in an academic setting that did not challenge him.²³

19. On February 1, 2016, Student was administered the Woodcock-Johnson IV to assess his academic achievement levels. Student tested approximately 3-7 years below grade level in all academic areas. Math calculation skills, sentence reading fluency and math facts fluency were identified as particular areas of weakness for Student, with a 16 to 47 point discrepancy between the scores Student would be predicated to earn based on his ability and what he actually earned. On the other hand, Student showed significant (22-point) improvement in passage comprehension.²⁴

20. Student received an "F" in English during term 2 of the 2015-2016 school year. As of January 20, 2016, Student had a missing assignment in English II, and his Jupiter grade in English at that point was an "F," while his other grades were "As" through "Cs." Eliminating the missing grade would have brought Student close to a passing grade (a "D").²⁵

21. Student has an amended IEP dated February 24, 2016 which includes academic goals in mathematics, reading and written expression. This current IEP provides 12 hours per week of specialized instruction outside the general education setting and 4 hours per week of specialized instruction inside the general education setting. It also added 120 minutes per month of behavioral support services outside the general education setting,²⁶ and 60 minutes per week of reading intervention services. It indicates that Student is pursuing the high school diploma track.²⁷

22. The February 2016 amendment was made without an IEP meeting; however, Parent and his representatives continue to disagree with the number of hours of specialized instruction in that version of the IEP, believing that Student continues to require at least 24 hours of specialized instruction outside the general education setting, as had been reflected in his December 2, 2014 IEP. They expressed this disagreement to the school-based members of Student's IEP team before and after the amendment.²⁸

23. As of March 8, 2016, Student's Jupiter grade in English was an "F," while his other grades were "As" and "Bs."²⁹ As of the DPH, third term grades had not yet been reported. However, Student began receiving behavioral support because he began struggling behaviorally in English during the 2015-2016 school year.³⁰

²³ R-6.

²⁴ Testimony of Educational Advocate B; P-2.

²⁵ Testimony of Special Education Coordinator; testimony of Social Worker; P-15-1.

²⁶ Student's recent previous IEPs had not included any behavioral support.

²⁷ P-7; R-4.

²⁸ Testimony of Parent; testimony of Educational Advocate; P-7-1 and P-7-2.

²⁹ P-33-1.

³⁰ Testimony of Educational Advocate B; testimony of Social Worker.

24. Student's performance in mathematics and science (physics) has wavered to some extent during the 2015-2016 school year. While his grades have been generally between an "A" and a "B," his performance has not been consistent, and he has recently experienced a roller coaster-like dip/rise in his performance, and he has also had some absences. Student has made some progress on the mathematics IEP goals that have been introduced to date. When he is focused, Student is a strong student.³¹

25. Student's performance in his general education French 1 class has not been consistent throughout the 2015-2016 school year. Student has trouble summoning the discipline required to remain still and pay attention for the entire 90 minute French class with 27 students, most of whom are general education students. The language class has gotten progressively more difficult throughout the school year, and when he misses a link in the instruction, it can be difficult for Student to recover. Student's third term grade as of the DPH was estimated to be around a "C" and he is on pace to pass the class for the year; however, his grades have declined during the school year, as has his behavior. The teacher has even had to call the Dean to remove Student from her class because his behavior was so difficult.³²

26. Student has generally performed adequately in his general education Mass Communications class during the 2015-2016 school year; however, Student does not always follow through on obligations such as completing homework. Student enjoys the class and takes it seriously, and will come to the classroom outside of class hours to make up missed work.³³

27. Student works best academically in a small setting. Due to his reading levels, he is not able to handle a full inclusion setting throughout the entire school day. However, Student enjoys and benefits from interaction with nondisabled peers.³⁴

Records/Consent Form

28. DCPS did not provide to Parent all requested records prior to the November 2015 IEP meeting.³⁵ The meeting was rescheduled as a result.³⁶ Parent has made records requests at various points during the school year, and did not always promptly receive records.³⁷

29. On February 19, 2016, Parent signed an acknowledgement that DCPS had provided him the "Notice of Procedural Safeguards Rights of Parents of Students with Disabilities." However, Parent declined to sign the "Consent for Initial Provision of Special Education and Related Services." The form indicates that the parent understands that their "consent is not required for continued services," and that once a parent has consented to the

³¹ Testimony of Special Education Math Teacher.

³² Testimony of French Teacher.

³³ Testimony of Mass Communications Teacher.

³⁴ Testimony of Psychologist (Parent); testimony of Parent; testimony of Educational Advocate B; testimony of Special Education Math Teacher; testimony of French Teacher.

³⁵ Testimony of Parent; testimony of Special Education Coordinator.

³⁶ Testimony of Special Education Coordinator; P-26-1.

³⁷ Testimony of Parent; P-25 through P-29.

initial provision of services, s/he “may revoke [their] consent in writing at any time.”³⁸ Parent did not revoke in writing his consent for Student’s continued special education services.

District School

30. The special education classes at District School have approximately 9-11 students, with a special education teacher and in some instances, an assistant as well. The general education classes at District School have approximately 27 students. District School is not able to implement an IEP that requires 24 hours of specialized instruction outside the general education setting for a student on the high school diploma track. Students with and without disabilities attend District School. There are approximately 32.5 hours in a school week.³⁹

Nonpublic School 1

31. Nonpublic School 1 serves students with SLD (approximately 70% of the student body) or OHI (approximately 30% of the student body). Its classes have approximately 8 students with a special education teacher. It follows the curriculum of the school districts from which its students originate, and it uses a multisensory learning approach. Its tuition is approximately \$37,350 per year, and its students arrive by school bus or metro. There are no nondisabled students at Nonpublic School 1. Student has been accepted to Nonpublic School 1.⁴⁰

Nonpublic School 2

32. Nonpublic School 2 serves students with language-based learning disabilities, including SLD and OHI. Its classes have approximately 8-10 students, with a special education teacher and a shared assistant. It offers speech and language services, occupational therapy, and specialized reading, along with differentiated instruction for students with SLD. Students arrive by school bus or metro, and the tuition is approximately \$42,000 per year. There are no nondisabled students at Nonpublic School 2. Student has been accepted to Nonpublic School 2.⁴¹

CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence 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 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

³⁸ R-5.

³⁹ Testimony of Educational Advocate A; testimony of Special Education Coordinator; testimony of Math Teacher; testimony of French Teacher.

⁴⁰ Testimony of Director (Nonpublic School 1); P-3.

⁴¹ Testimony of Program Director (Nonpublic School 2); P-4.

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 student'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).

- (a) Whether DCPS denied Student a FAPE by providing him with 12 hours of specialized instruction per week outside the general education setting and 4 hours per week of specialized instruction inside the general education setting during the 2015- 2016 school year, rather than 24 hours of specialized instruction per week outside the general education setting, as his IEP requires.**

In reviewing a claim that an LEA failed to implement a student's IEP, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007); see also *Holman v. District of Columbia*, 67 IDEALR 39 (D.D.C. 2016); *Turner v. District of Columbia*, 61 IDELR 126 (D.D.C. 2013). Where an LEA's failure to implement is material (not merely *de minimis*), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

From approximately August 17, 2015 (the start of the 2015-2016 school year) through November 24, 2015 (the day Student's November 2015 IEP was finalized), District School did not implement the IEP requirement in effect at the time (from the December 2, 2014 IEP) that Student receive 24 hours of specialized instruction outside the general education setting. The difference in quantity and type of instruction between the 24 hours outside the general education setting Student was mandated to receive and the 12 hours outside the general education setting and 4 hours inside the general education setting Student actually received was a substantial, significant, and material deviation from Student's IEP. On this basis alone, Student was denied a FAPE. While the question of whether there was a denial of FAPE on this failure to implement issue is not tied to whether Student suffered educational harm, as further discussed with respect to issue "(c)" below, the hearing officer does conclude that Student suffered some educational harm due to the failure to implement. Petitioner met the burden of proving that Student was denied a FAPE due to the failure to implement his IEP from August 17, 2015 through November 24, 2015.⁴²

⁴² The Hearing Officer does not find that there was a failure to implement the IEP after November 24, 2015. The IEP was in fact changed to reduce Student's hours of specialized instruction on November 24,

(b) Whether DCPS denied Student a FAPE by failing to include his parents in the decision to reduce his services at the start of the 2015-2016 school year.

The IDEA mandates that a student's parents to be permitted to be a part of the team that determines the educational placement/educational program of the child. Student's December 2, 2014 IEP, in place at the start of 2015-2016 school year, required 24 hours of specialized instruction outside the general education setting. District School changed Student's placement/educational program in August 2015 when it began providing fewer hours of specialized instruction outside the general education setting than the December 2, 2014 IEP in place at that time required. Parent was not included in this decision until November 2015. This procedural violation rises to the level of substantive denial of FAPE in that it significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Petitioner met the burden of proving that DCPS denied Student a FAPE by failing to include Parent in the decision to reduce Student's services from August 17, 2015 through November 23, 2015 (the date of the draft IEP).

(c) Whether DCPS denied Student a FAPE by providing him with an inappropriate IEP and placement, in that his current placement is incapable of implementing the services on his IEP.

Once an IEP is developed, an LEA must also ensure that the student is located in a placement/school setting "based on the child's IEP." 34 C.F.R. § 300.116. *Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 103 -104 (D.D.C. 2008); *see also O.O. v. District of Columbia*, 51 IDELR 9, 573 F.Supp. 2d 41 (D.D.C. 2008) ("Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set form in the IEP.") District School could not implement Student's IEP during the 2015-2016 school year from August 17, 2015 to November 24, 2015, in that it could not both provide the required hours of specialized instruction and also keep Student on the high school diploma track. For this reason, District School was not an appropriate placement/school setting for Student during this time period.

Additionally, to determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefit. *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). Here, as discussed with respect to issue "(d)," DCPS complied with some but not all of procedural requirements in preparing the November 2015 IEP. Moreover, Petitioner argues that the reduction in hours of specialized instruction on Student's November 2015 IEP was inappropriate and a denial of FAPE. An "IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson*

2015. While the Hearing Officer finds the reduction to have been a denial of FAPE, as discussed with respect to issue "(c)," the denial of FAPE is not due to a failure to implement, after November 24, 2015.

Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In this instance, Student's IEP team had significantly increased his hours of specialized instruction outside the general education setting less than a year prior, due to his need for a small academic setting, and the academic struggles he had during the previous (2013-2014) school year when he had access to fewer hours of specialized instruction outside the general education setting. The December 2014 increase in outside the general education setting hours came after an August 2014 comprehensive psychological evaluation recommending the change due to Student's needs.

While Student's grades were good during the 2014-2015 school year, he ended the year with a fourth term "F" in English, even with the increased specialized instruction for the second half of the school year. Between May 2015 and September 2015, Student's SRI (reading) scores increased significantly. However, during this same period of time, Student was receiving private reading tutoring from Program Director (Nonpublic School 2). Student's report card grades were good during the first term of the 2015-2016 school year. However, prior to the November 2015 IEP meeting, his Jupiter interim grades were wavering in English and World History. Student was assessed with a new Woodcock-Johnson in February 2016, and ultimately, the scores in the August 2014 and February 2015 Woodcock-Johnsons were largely comparable. To the extent that the February 2015 Woodcock-Johnson represents progress – because of an actual score jump and/or because, as Respondent argues, similar scores over time for a student with disabilities such as those Student has actually represents progress, considering that the scores are normed simultaneously against disabled and nondisabled peers – the Hearing Officer does not find the progress in the Woodcock-Johnson scores justified such a drastic reduction in hours of specialized instruction outside the general education setting. If anything, any such progress would demonstrate that with sufficient services and supports, Student can make progress. Abruptly reducing the level of services and support in this particular instance was not reasonably calculated to allow Student to continue making meaningful progress. Additionally, Student's hours had already been reduced prior to his February 2016 Woodcock-Johnson assessment; therefore, data from the new Woodcock-Johnson was not available to the team in November 2015. See *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008) (“[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . .”).

District School personnel were doubtlessly motivated by good intentions in adjusting Student's hours of specialized instruction such that they could continue working with him and maintain him on the high school diploma track. However, the LEA is required to place a student with a disability in an educational setting that can meet his unique needs. It cannot adjust the requirements of the student's IEP to match the level of services a given school/program can provide. For these reasons, the decision to reduce Student's hours in November 2015 was procedural violation of the IDEA. 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 student'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. Student has had some indicators of academic progress during the 2015-2016 school year. However, the evidence also indicates that he has struggled with English, and that his progress in classes such as French and mathematics has waned over the

course of the school year. Student has also had to begin receiving behavioral support, as of February 2016. For these reasons, the Hearing Officer concludes that the November 2015 IEP impeded Student's right to a FAPE and caused a deprivation of educational benefit degree. Petitioner met the burden of proving that DCPS denied Student a FAPE by providing him with an inappropriate IEP and placement from November 2015 through the present time.⁴³

(d) Whether DCPS denied Student a FAPE by failing to comply with the local law requiring it to provide documents in advance of IEP meetings, thereby limiting Parent's ability to meaningfully participate in IEP meetings during the 2015-2016 school year.

Pursuant to DC Code § 38-2571.03, "No fewer than 5 business days before a scheduled meeting where an IEP . . . will be discussed, the public agency scheduling the meeting shall provide parents with an accessible copy of any evaluation, assessment, report, data chart, or other document that will be discussed at the meeting; provided, that if a meeting is scheduled fewer than 5 business days before it is to occur, then these documents shall be provided no fewer than 24 hours before the meeting." On at least one occasion during the 2015-2016 school year (in November 2015) DCPS did not meet this requirement in this case. In this instance, it rises to the level of a substantive denial of FAPE, because the November 2015 IEP meeting had to be rescheduled, and even a slight delay in Parent learning the details of Student's services and beginning the process of trying to have them restored to the levels reflected in the December 2, 2014 IEP significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, and potentially impeded Student's right to a FAPE and/or caused a deprivation of educational benefit. In reaching this conclusion, the Hearing Officer takes into account the significant extent to which Student's IEP had not been implemented as of the November 2015 IEP meeting, and the significant reduction of Student's IEP services after that point. Petitioner met the burden of proof on this issue.

Request for Nonpublic School

An order for DCPS to fund a placement at Nonpublic School 1 or Nonpublic School 2 is part of the relief Petitioner seeks for the denials of FAPE. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

⁴³ Student's February 2016 IEP does not make any changes that undo the denial of FAPE from the November 2015 IEP.

a. Nature and Severity of Student's Disability

Student's SLD disability is moderate but significant. He has average to low average cognitive abilities, and his academic skills were low for his age (approximately 4-6 years delayed in all academic areas). With appropriate programming and support, Student is able to earn average to good report card grades, and make meaningful progress on measures such as his SRI scores.

b. Student's Specialized Educational Needs

Student works best academically in a small setting. Due to his reading levels, he is not able to handle a full inclusion setting throughout the entire school day. However, Student enjoys and benefits from interaction with nondisabled peers.

c. Link between Student's Needs and the Services Offered by Private School

Nonpublic School 1 serves students with SLD (approximately 70% of the student body) or OHI (approximately 30% of the student body). Its classes have approximately 8 students with a special education teacher. It follows the curriculum of the school districts from which its students originate, and it uses a multisensory learning approach. It could provide 24 hours of specialized instruction outside the general education setting; however, it does not have any nondisabled students to provide access to during the remainder of a 32.5 hour school week.

Nonpublic School 2 serves students with language-based learning disabilities, including SLD and OHI. Its classes have approximately 8-10 students, with a special education teacher and a shared assistant. It offers speech and language services, occupational therapy, and Wilson reading, along with differentiated instruction for students with SLD. It could provide 24 hours of specialized instruction outside the general education setting; however, it does not have any nondisabled students to provide access to during the remainder of a 32.5 hour school week

d. Cost of Placement at Private School

Nonpublic School 1 and Nonpublic School 2 have reasonable private school tuition.

e. Extent to Which Private School Represents Least Restrictive Environment ("LRE")

Student works best academically in a small setting. Due to his reading levels, he is not able to handle a full inclusion setting throughout the entire school day; however, he is generally able to make adequate progress in a general education school with sufficient services and supports, including regular and sufficient reading support and sufficient amounts of instruction outside the general education setting. Student enjoys and benefits from interaction with nondisabled peers. For these reasons, a nonpublic school does not represent Student's LRE.

Based on the factors discussed above, a full-time special education day school is not Student's LRE, and neither Nonpublic School 1 nor Nonpublic School 2 would be an appropriate placement for Student under *Branham*.

Compensatory Education

IDEA gives hearing officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at

522-23. The award must “provide the educational benefits that likely would have accrued from special education services” that the school district “should have supplied in the first place.” *Id.* at 524. A compensatory education award must “rely on individualized assessments” after a “fact specific” inquiry. *Id.* “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010), quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527. *See also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10-11 (D.D.C. July 2, 2013).

Here, Petitioner claims Student was harmed by DCPS’ failure to provide 24 hours of specialized instruction outside the general education setting from the start of the 2015-2016 school year through the present time. The Hearing Officer has concluded that the failure to provide 24 hours of specialized instruction this school year has been a denial of FAPE – due to a failure to implement from August 17, 2015 through November 24, 2015, and due to a failure to provide an appropriate IEP from November 24, 2015 through the present time. Student has had some indicators of academic progress during the 2015-2016 school year. However, the evidence also indicates that he has struggled with English, and that his progress in classes such as French and mathematics has waned over the course of the school year. Student has also had to begin receiving behavioral support, as of February 2016. For these reasons, the Hearing Officer concludes Student has suffered some harm as a result of the denials of FAPE he experienced. While an LEA is not required to maximize a student’s progress, it is not permitted to not implement a student’s IEP for several months of the school year and provide an inadequate amount of specialized instruction the remainder of the school based on what it can offer a student on the high school diploma track, when the predictable result is some degree of academic and/or behavioral regression. District School cannot implement a 24 hour per week IEP and maintain Student on a high school diploma track. No evidence was offered at the DPH of another DCPS school that could do so. For these reasons, the Hearing Officer determines that attendance at Nonpublic School 1⁴⁴ for the remainder of the 2015-2016 school year and an intensive summer program are appropriate compensatory education for the four denials of FAPE, particularly to help remediate Student’s reading deficits, which impact him in other academic subjects, and have caused him to falter at certain points during the 2015-2016 school year.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. Within five business days of this decision, DCPS shall fund Student’s attendance at Nonpublic School 1 through the end of the 2015-2016 school year (based on the DCPS school calendar);

⁴⁴ Student has expressed a preference for Nonpublic School 1. As the Hearing Officer finds the two nonpublic schools to be comparable, the Hearing Officer will award Nonpublic School 1.

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Hearing Officer Determination

- B. DCPS shall fund up to 300 hours of an intensive summer program⁴⁵ at Summer Program 1 or Summer Program 2⁴⁶ for use during the summer of 2016 (based on the DCPS school calendar);
- C. DCPS shall convene an MDT meeting within 10 school days of this decision to revise Student's IEP as appropriate, and to develop a plan for transitioning Student into an appropriate location of services for the 2016-2017 school year.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: April 30, 2016

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner's Attorney (electronically)

DCPS' Attorney (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

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).

⁴⁵ The summer program shall provide reading instruction to Student, and may cover other academic areas Parent deems appropriate.

⁴⁶ Parent may select a different summer program if the parties agree it is comparable to Summer Program 1 or Summer Program 2.