

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
April 02, 2017

<i>Student</i> , ¹)	Case No.: 2017-0013
through [REDACTED] <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 4/2/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 3/24/17
("DCPS"),)	ODR Hearing Room: 2003
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”) because [REDACTED] was not given appropriate Individualized Education Programs (“IEPs”) in the absence of a special education teacher, along with failures to implement [REDACTED] IEPs. DCPS responded that Student did have appropriate IEPs which were properly implemented.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 1/17/17, the case was assigned to the undersigned on 1/18/17. DCPS filed a timely response on 1/26/17, and did not challenge jurisdiction. The resolution session meeting took place on 1/30/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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2/16/17. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 4/2/17.

The due process hearing took place on 3/24/17 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present during virtually the entire hearing.

Petitioner’s Disclosures, submitted on 3/17/17, contained documents P1 through P9, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 3/17/17, contained documents R1 through R12, which were admitted into evidence without objection.

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

1. *Educational Advocate* (qualified without objection as an expert in Special Education Programming)
2. *School Psychologist* (DCPS)
3. *Assistant Principal* (at *Nonpublic School*)
4. Parent

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see Appendix A*)

1. *Independence & Learning Support (“ILS”) Specialist*
2. *Local Education Agency (“LEA”) Representative* (qualified without objection as an expert in Special Education Programming)

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

Issue 1: Whether DCPS denied Student a FAPE by failing to (a) develop an appropriate IEP on 10/13/16 and/or 1/9/17 with a special education teacher of the child as a member of the IEP team, because Student does not have a special education teacher despite an IEP requiring 27 hours/week of specialized instruction outside general education, (b) develop an IEP on 10/13/16 and/or 1/9/17 which was reasonably calculated to provide educational benefits, where ■■■ had made minimal or no academic progress in the last 3 years, and/or (c) identify an appropriate location of services.² *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

² Issue 1 combines issues 1, 2, 4 and 5 in the due process complaint (p.4).

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Issue 2: Whether DCPS denied Student a FAPE by failing to implement █ IEP, specifically with regards to special education instruction, as █ has made minimal or no academic progress over the last 3 years. *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief:

1. Within 10 school days, DCPS shall place and fund Student at Nonpublic School capable of implementing █ IEP for the 2016/17 school year and ESY during the summer of 2017.
2. DCPS shall provide compensatory education for any denial of FAPE during the 2 years preceding the complaint in the form of Nonpublic School placement for the 2017/18 school year.³

The parties were permitted to submit citations after the hearing but did not do so.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age* and in *Grade* at *Public School*.⁶ Student received █ first IEP in 2010; █ disability classification was changed from Specific Learning Disability to Intellectual

³ At the due process hearing, Petitioner expressly withdrew "tutoring" as a form of requested compensatory education.

Petitioner's counsel was put on notice at the prehearing conference that 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. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

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

⁵ Parent.

⁶ *Id.*

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Disability (“ID”) in 2013.⁷ Student remains eligible for special education and related services as a child with Intellectual Disability.⁸

2. Student’s current IEP, dated 1/10/17, provides for 27 hours/week of specialized instruction outside general education, 2 hours/month outside general education of each Occupational Therapy (“OT”), Behavioral Support Services (“BSS”), and Speech Language Pathology (“SLP”), and 30 minutes/month of OT consultation.⁹ SLP services had been omitted on the previous IEPs, with which Parent strongly disagreed and they were restored.¹⁰

3. An earlier IEP meeting to update Student’s IEP was nominally held on 10/19/16 (although the IEP was mistakenly dated 10/13/16); Public School had not been able to contact and include Parent, so only LEA Representative and a librarian attended the meeting, which was to meet the requirement of having a new IEP within a year of the previous IEP, which was on 10/20/15.¹¹ The 10/19/16 IEP did not change any services from 10/20/15, except for omitting SLP consultation.¹²

4. Student’s 10/20/15 IEP provided for 27 hours/week of specialized instruction outside general education, 2 hours/month outside general education of OT and BSS, 30 minutes/month of OT consultation, and 60 minutes/month of SLP consultation.¹³ Student’s 10/21/14 IEP provided for 27 hours/week of specialized instruction outside general education, 2 hours/month outside general education of each OT, BSS and SLP, and 30 minutes/month of OT consultation.¹⁴

5. In October 2016, Student’s Full Scale IQ was 59, based on the Wechsler Intelligence Scale for Children, Fifth Edition (“WISC-V”), which was considered in the Deficient range.¹⁵ All of Student’s WISC-V Composite Scores were in the Deficient range.¹⁶ Student’s Full Scale IQ in 2013 was 57, based on the WISC-IV, falling in the lower extreme range.¹⁷ As of October 2013 Student had “significant cognitive and academic weaknesses”; significant deficits in cognitive areas appeared to impact ■■■ ability to adequately improve ■■■ academic skills.¹⁸

⁷ P5-1.

⁸ P4-1; P5-1.

⁹ P4-16.

¹⁰ LEA Representative.

¹¹ P3-1; P2-1; LEA Representative; R6.

¹² P3-16; P2-15.

¹³ P2-15.

¹⁴ P1-15.

¹⁵ P5-5.

¹⁶ P5-6.

¹⁷ P5-3.

¹⁸ P5-2,3.

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6. School Psychologist conducted the 10/12/16 Comprehensive Psychological Evaluation and found that Student was learning and performing within the Deficient range in all academic areas.¹⁹ Educational Advocate testified about Student's academic deficiencies, noting that is why Student is classified as ID.²⁰

7. The 10/12/16 Comprehensive Psychological Evaluation concluded that Student had made "minimal progress" in recent years, but had the "intellectual capacity" to learn.²¹ Based on the evaluation, Educational Advocate testified that Student didn't receive instructional value at Public School, and that the 10/20/15, 10/19/16 and 1/10/17 IEPs were very similar, with the same goals and objectives, due to lack of progress.²² Parent never wanted Student at Public School and expressed concern that DCPS could not adequately address the needs of children with disabilities, based on previous experiences with his children.²³ Parent was concerned that Student is not being taught more vocational and daily living skills, while also wishing ■■■ could earn a high school diploma.²⁴

8. Student was reading on about a 1st grade level in 2013 and now is on a 2nd or 3rd grade level; Woodcock-Johnson assessments indicated that Student was on a 1st or 2nd grade level for both Reading and Math in 2016.²⁵ According to the EdMark reading series, Student is able to read 2nd to 3rd grade level stories independently.²⁶ ILS Specialist reviewed Student's progress in ■■■ reading programs (for which data is generated online every time ■■■ logs in) and determined that ■■■ is on a 2nd to 3rd grade level.²⁷ In Math, Student was at a Kindergarten level at the beginning of the current school year according to iReady, but at a 1st grade level by the midyear assessment, with 2 domains showing 2nd grade.²⁸

9. Student wants to learn and go to school.²⁹ Student participates in class, is able to follow oral and written directions, has creative ideas, is able to understand written work when ■■■ teacher scaffolds it, and "is ready to learn on a daily basis."³⁰ Student is "progressing nicely" and "doing great!"³¹

¹⁹ P5-11,9,10.

²⁰ Educational Advocate (Educational Advocate is a retired DCPS principal, the godmother of Student and a friend of the family).

²¹ School Psychologist; P5-11; Educational Advocate.

²² Educational Advocate.

²³ Parent.

²⁴ Parent; R8-3.

²⁵ School Psychologist; *cf.* P1-6 (October 2015: "reading on a 1.4 grade level"); P4-6 (January 2017: reading at a "mid 2nd grade level with comprehension").

²⁶ P5-4.

²⁷ ILS Specialist.

²⁸ LEA Representative.

²⁹ Parent.

³⁰ P5-4 (interview with Substitute).

³¹ R2-1,2 (able to tell time in 2015/16, Reporting Period 3).

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10. While 27 hours/week is an appropriate amount of specialized instruction outside general education, Student would benefit from more time with typically developing peers, as kids learn from each other.³² Being around typically developing peers assists with Student's socio-emotional development and ■■■ self-esteem and coping skills.³³ Student is not in any general education classes, apart from Student's ILS class being in Physical Education together with a general education class.³⁴ Student should not be separated from nondisabled peers all the time; Student is fine at lunch in a general education setting, as ■■■ has no behavioral problems and talks with other students.³⁵ Not long ago Student was shy, but now ■■■ is very comfortable and confident socially.³⁶

11. Student's special education teacher ("Special Education Teacher") took extended medical leave a few weeks into 2016/17.³⁷ The instructional aide in Student's special education classroom became the long term substitute ("Substitute") in Special Education Teacher's absence.³⁸ Substitute had been learning how to provide special education instruction from Special Education Teacher.³⁹ Special Education Teacher continues to be the teacher of record for Student's class; Public School continues to expect that Special Education Teacher will return to work at some point.⁴⁰ Parent only found out there was not a special education teacher in Student's classroom at the 1/10/17 IEP meeting, which was upsetting because of the impact on Student and because Public School had not informing Parent of the problem for months.⁴¹

12. There were 8 students in Student's self-contained ILS class earlier in 2016/17, with Substitute and an instructional aide; there are now 6 students plus two adults.⁴² Substitute knew Student last school year when he was the instructional aide in ■■■ class.⁴³ Substitute is a licensed math teacher who is not certified in special education, but is taking classes with the goal of becoming a certified special education teacher.⁴⁴

13. ILS Specialist provides academic support for ILS programs at DCPS.⁴⁵ ILS Specialist has observed and worked with Substitute 5-6 times in person this school year, in

³² LEA Representative.

³³ School Psychologist.

³⁴ LEA Representative; ILS Specialist.

³⁵ School Psychologist.

³⁶ LEA Representative.

³⁷ R10-1; P5-4; LEA Representative. All dates in the format "2016/17" refer to school years.

³⁸ ILS Specialist; R10-1.

³⁹ ILS Specialist.

⁴⁰ R10-1; LEA Representative.

⁴¹ Parent.

⁴² ILS Specialist; LEA Representative.

⁴³ P5-4.

⁴⁴ ILS Specialist; R8-1.

⁴⁵ ILS Specialist.

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addition to email.⁴⁶ LEA Representative has observed Student's class 10 times this school year.⁴⁷ Substitute is differentiating instruction for his special education students.⁴⁸ ILS Specialist observed Substitute teaching fractions in Math, among other things, and found him very patient with students and noted that he provided good visuals with manipulatives.⁴⁹ Substitute is doing well teaching Math, but not quite as well at differentiating standardized curriculum for English (ELA); reading interventions are tougher for him.⁵⁰ Since Substitute is a new teacher, he is doing what is needed, without being predisposed to use a particular or favored methodology.⁵¹

14. Substitute implements his student's special education goals and receives help in adapting the content, delivery and methodology for each child.⁵² Substitute has been receiving significant support from ILS Specialist, LEA Representative and ILS Specialist's counterpart, as well as supervision and oversight, for instructional planning and delivery for the ILS class.⁵³

15. ILS Specialist has informally observed Student and determined that ■■■ benefits from the ILS classroom and model for instruction.⁵⁴ Any lack of progress was not because Student did not have a special education teacher.⁵⁵ It is appropriate to keep repeating the same things in Student's IEPs because ■■■ makes very slow progress due to ■■■ disability.⁵⁶ Student is confident and doing well socially.⁵⁷

16. On 1/10/17 there was no special education teacher for Student at the IEP team meeting; no one was identified as a special education teacher.⁵⁸ LEA Representative attended the meeting as a school representative/coordinator, and only said she was a special education teacher at the end of the meeting.⁵⁹ The special education teacher's role is an important one at IEP team meetings, as the special education teacher should have worked

⁴⁶ *Id.*

⁴⁷ LEA Representative.

⁴⁸ *Id.*

⁴⁹ ILS Specialist.

⁵⁰ ILS Specialist; LEA Representative.

⁵¹ LEA Representative.

⁵² ILS Specialist.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ LEA Representative.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Educational Advocate.

⁵⁹ *Id.*

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with the child and determined what [REDACTED] actually needs.⁶⁰ Substitute came late to the IEP meeting (due to a training) and was identified as a general education teacher on the IEP.⁶¹

17. Using the Vineland assessment, Substitute had rated Student as “average” in adaptive behaviors, but Parent saw many problems and rated Student much lower.⁶² School Psychologist was concerned that Substitute may have overlooked things, so gave the Vineland assessment to the school social worker; her results matched Parent’s.⁶³ On 1/10/17 the IEP team reviewed the adaptive behavior assessments completed by Parent and the school social worker.⁶⁴ The IEP team concluded on 1/10/17 that Student continued to meet the criteria for special education as a student with a cognitive disability, and continued to need 27 hours/week of specialized instruction, along with SLP, OT and BSS services.⁶⁵

18. Based on Parent’s concern about immediately having a special education teacher for Student, DCPS offered Student a seat in an ILS program in another public school, which Parent and his counsel rejected.⁶⁶ Change is hard for Student, so it is best to have no more movement among schools than is necessary.⁶⁷

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*, 15-827, 2017 WL 1066260, at *4 (U.S. Mar. 22, 2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F.*, 2017

⁶⁰ *Id.*

⁶¹ Educational Advocate; P4-1.

⁶² School Psychologist; Educational Advocate.

⁶³ School Psychologist.

⁶⁴ R8-2.

⁶⁵ R8-2,3.

⁶⁶ LEA Representative; R10-1; R11-1.

⁶⁷ Educational Advocate.

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WL 1066260, at *4, 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, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 2017 WL 1066260, at *4; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 2017 WL 1066260, at *12. 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 recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Andrew F.*, 2017 WL 1066260, at *12.

In addition, Respondent 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; *Andrew F.*, 2017 WL 1066260, at *10 (children with disabilities should receive education in the regular classroom to the extent possible).

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).

Petitioners carry the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioners establish a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based

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solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to (a) develop an appropriate IEP on 10/13/16 and/or 1/9/17 with a special education teacher of the child as a member of the IEP team, because Student does not have a special education teacher despite an IEP requiring 27 hours/week of specialized instruction outside general education, (b) develop an IEP on 10/13/16 and/or 1/9/17 which was reasonably calculated to provide educational benefits, where ■■■ had made minimal or no academic progress in the last 3 years, and/or (c) identify an appropriate location of services. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden of persuasion to Respondent, which did meet its burden of proving by a preponderance of the evidence that Student’s IEP and placement were appropriate. The overarching issue here is whether Student is making as much progress as can be reasonably expected in ■■■ circumstances. While School Psychologist sees that Student has the capacity to learn, there is no doubt that ■■■ is cognitively quite limited, yet has been making some academic progress.

The applicable legal standard for analyzing the appropriateness of an IEP has just been articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 2017 WL 1066260, at *10. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was “reasonably calculated to produce meaningful educational benefit” and to permit Student to access the general education curriculum to the extent possible. *See Damarcus S. v. Dist. of Columbia*, 2016 WL 2993158, at *12 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEP are to be determined as of the time it was offered to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner relating to the lack of a special education teacher on Student’s IEP team and lack of progress. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

As an initial matter, a Hearing Officer must determine whether “the State complied with the procedures” set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, *quoting Rowley*, 458 U.S. at 206-07. Here, Petitioner asserted that DCPS failed to include a special education teacher as part of the IEP team that developed ■■■ 1/10/17 IEP,⁶⁸ in violation of

⁶⁸ As noted above, the 1/10/17 IEP meeting (which was referenced in the due process complaint as 1/9/17) was the critical gathering to update Student’s IEP, as Public School had not been able to contact Parent and ensure his attendance at the 10/19/16 IEP meeting,

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34 C.F.R. 300.320(a)(3), which plainly requires “[n]ot less than one special education teacher of the child” as part of the IEP team.⁶⁹ Substitute is not a special education teacher and so was listed as a general education teacher at the 1/10/17 IEP meeting. LEA Representative was not introduced as a special education teacher at the IEP meeting, but was listed on the IEP as both LEA/School Representative and special education teacher, even though she was not actually a special education teacher for Student. Thus, this Hearing Officer concludes that DCPS did not comply with 34 C.F.R. 300.320(a)(3), which is a procedural violation of the IDEA. *See R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 940 (9th Cir. 2007) (failure to include a special education teacher on the IEP team who actually taught child was a procedural violation).

The analysis does not end there. Procedural violations of IDEA do not, without more, mean a child was denied a FAPE. *See Schoenbach v. Dist. of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004). Only procedural violations which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (failure affecting a child’s education is a denial of a FAPE, *citing Lesesne ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)); *Smith v. Dist. of Columbia*, 2010 WL 4861757, at *4,5 (D.D.C. 2010) (no relief warranted where petitioner has not shown DCPS’s failure affected substantive rights or that the child’s “education would have been different” but for the violation).

Here, there was no indication that the lack of a special education teacher on the IEP team impacted the outcome of the IEP. Indeed, one of Petitioner’s concerns was that the 1/10/17 IEP was too similar to previous IEPs which were developed with the involvement of special education teachers. A DCPS witnesses convincingly testified that the 1/10/17 IEP was appropriate with 27 hours of specialized instruction outside general education in the self-contained ILS program, along with 2 hours/month of each OT, BSS and SLP. Thus, this Hearing Officer concludes that the procedural violation did not result in a substantive denial of a FAPE to Student.

Turning next to subpart (b) of Issue 1, Petitioner raised concerns about the lack of progress by Student in the last 3 years and the repetition in ■■■ IEPs from year to year, but did not allege what services or aspects of the IEP should have been modified or enhanced. Parent made clear his overall dissatisfaction with DCPS educating children with disabilities and his preference for Nonpublic School. Yet Parent did not specifically criticize the self-contained ILS program in general or the program at Public School beyond his

which proceeded with only 2 school personnel in a pro forma manner within the one-year timeframe after ■■■ previous IEP. Thus, the undersigned focuses on the 1/10/17 meeting and IEP as substantively at issue in this case.

⁶⁹ Petitioner is not challenging the lack of a “highly qualified” special education teacher, as required by 34 C.F.R. 300.18(a), so Petitioner’s more basic claim about the lack of a special education teacher is not barred by the rule of construction in 300.18(f) that there is no right of action for failure of an employee to be “highly qualified.”

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understandable frustration about not having a certified special education teacher in the ILS classroom and not being informed about the long term absence of the special education teacher of record.

An IEP is not required to, and cannot, guarantee any particular outcome or any particular level of academic progress. *See, e.g., Holman v. Dist. of Columbia*, 2016 WL 355066, at *2 (D.D.C. 2016). DCPS presented cogent evidence that Student's IEP was appropriate given ■■■ circumstances and that ■■■ is making some progress, with 27 hours of specialized instruction outside general education in the self-contained ILS program, along with 2 hours/month of each OT, BSS and SLP. DCPS further convincingly set forth how Student benefits from ■■■ exposure to typically developing peers, convincing the undersigned that ■■■ hours outside general education should not be increased.

Finally, as for subpart (c) of Issue 1, Petitioner did not raise any problem with the location of services, apart from not having a satisfactory teacher, as Student is in a small self-contained class with a good ratio of adults to students. As a general matter, as long as the educational placement is appropriate, the particular location of services selected – *i.e.* which bricks-and-mortar school – is up to DCPS, with the possibility of location or a specific school taking on greater significance in certain circumstances not raised here. *See, e.g., Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984); *Eley v. Dist. of Columbia*, 2012 WL 3656471, at *8 (D.D.C. 2012); *Eley v. Dist. of Columbia*, 47 F. Supp. 3d 1, 16-17 (D.D.C. 2014). To the extent that Petitioner was concerned about educational placement, Student's placement in the self-contained ILS program with related services, in which Student has been making some amount of progress, appears to the undersigned appropriate in Student's circumstances based on available evidence.

Issue 2: *Whether DCPS denied Student a FAPE by failing to implement ■■■ IEP, specifically with regards to special education instruction, as ■■■ has made minimal or no academic progress over the last 3 years. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet his burden of proof on this issue. For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

Here, Petitioner made a conventional failure to implement assertion that Student's ILS class was in a joint Physical Education class with general education students, which this Hearing Officer views as merely *de minimis*, based on a comparison of the PE class to all of

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Student's academic classes. This conclusion is bolstered by the lack of any problem raised by Petitioner from Student interacting with general education students in Public School, along with the extensive testimony from DCPS witnesses about how well Student does with ■ typically developing peers and the benefit ■ receives from that engagement.

To the extent that Petitioner's failure to implement claim is based on the lack of a special education teacher in ■ ILS classroom, the analysis begins with the recent decision in *Q.C-C. v. Dist. of Columbia*, 164 F. Supp. 3d 35, 51 (D.D.C. 2016). In *Q.C-C.*, the Court explained that as defined in the IDEA, "special education" includes not only education by certified special education teachers, but also a broader range of instruction by others, relying on 20 U.S.C. § 1401(29) ("special education" means "specially designed instruction . . . designed to meet the unique needs of a child with a disability") and 34 C.F.R. 300.39(b)(3) (defining "specially designed instruction" without reference to certification), and *Leggett v. Dist. of Columbia*, 793 F.3d 59, 63 (D.C. Cir. 2015) (quoting 20 U.S.C. § 1401(29)). See also *L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1176 (9th Cir. 2016), *opinion amended and superseded on denial of reh'g sub nom., L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 2017 WL 824697 (9th Cir. Feb. 27, 2017).

Here, Public School did provide specially designed instruction for Student in the ILS classroom. The un rebutted testimony was that Substitute provided differentiated instruction with the assistance and under the supervision of LEA Representative, with significant input and assistance from ILS Specialist and another. As demonstrated at the due process hearing, the content, methodology and/or delivery of instruction was adapted as needed for Student. See 34 C.F.R. 300.39(b)(3) ("[s]pecially designed instruction means adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction"). Accordingly, this Hearing Officer finds that Student was provided special education as called for by ■ IEP, and there was no material failure to implement Student's IEP.

ORDER

Petitioner has not prevailed on the issues 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

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controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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