

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

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

OSSE
Office of Dispute Resolution
April 26, 2018

<i>Student</i> , ¹)	Case No.: 2018-0022
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 4/26/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 4/9/18
("DCPS"),)	ODR Hearing Room: 111
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 Student had not been provided a sufficiently restrictive Individualized Education Program (“IEP”) and nonpublic placement. DCPS responded that it had provided an appropriate IEP and placement.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 1/31/18, the case was assigned to the undersigned on 2/1/18. Respondent filed a timely response on 2/9/18, which did not challenge jurisdiction. The resolution session meeting took place on 2/14/18 without success. The 30-day resolution period ended on 3/2/18. A final decision in this matter must

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

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be reached no later than 45 days following the end of the resolution period as extended by a 10-day continuance, which requires a Hearing Officer Determination (“HOD”) by 4/26/18.

The due process hearing took place on 4/9/18 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in the entire hearing.

Petitioner’s Disclosures, submitted on 4/2/18, contained documents P1 through P48, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 4/2/18, contained documents R1 through R19, which were also admitted into evidence without objection.

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

1. *Psychologist* (qualified without objection as an expert in Clinical Psychology as it relates to Children with Special Needs)
2. *Admissions Director at Proposed Nonpublic School*
3. *Educational Advocate* (qualified without objection as an expert in Special Education and IEP Development)
4. Parent

Respondent’s counsel presented 1 witness in Respondent’s case (*see Appendix A*), which was *Assistant Principal at Public School* (qualified without objection as an expert in Special Education Programming and Placement).

Petitioner’s counsel presented 1 rebuttal witness briefly, which was Parent.

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

Issue: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement and/or location of services for 2017/18² with an IEP developed on 3/24/17 and amended on 12/6/17, because Student needed a full-time IEP, a sufficiently restrictive setting, increased behavioral supports and proper classification due to academic regression and severe behaviors. *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 DCPS denied Student a FAPE.
2. Within 20 business days, DCPS shall convene an IEP team meeting to provide an IEP that (a) changes Student’s classification to Multiple

² All dates in the format “2017/18” refer to school years.

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Disabilities with Other Health Impairment and Emotional Disturbance, (b) includes counseling services to address Student's anger, frustration and inappropriate behaviors, and (c) provides a location of services at a private, therapeutic day school.³

3. DCPS shall fund compensatory education to address Student's academic deficits due to any denial of FAPE.⁴
4. Other relief as just and reasonable.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's adoptive Parent.⁶ Student is *Age, Gender* and in *Grade* at Public School; prior to March 2017 Student attended *Prior Nonpublic School* and other schools.⁷ Student's birth mother abused both drugs (crack) and alcohol while pregnant with Student and has been frequently incarcerated since; prior to adoption, Student was physically abused by being taped and locked in a closet, and exposed to many dangerous, improper and violent situations by siblings and adults.⁸

³ At the prehearing conference, Petitioner's counsel withdrew the request to make Student's IEP "full-time" as the IEP had already been increased to 27 hours/week of specialized instruction on 2/2/18. This paragraph includes the relief requested in both paragraphs b) and d) on page 11 of the due process complaint.

⁴ Petitioner's counsel was put on notice during 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. Respondent was encouraged to be prepared during the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE were found.

⁵ 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.

⁶ Parent.

⁷ *Id.*

⁸ P7-2; P6-2; Parent.

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2. Student had a longstanding history of academic underachievement; behaviors were a hindrance to the ability to access general education, as Student exhibited challenges in the classroom.⁹ Student struggled across all academic areas, which was compounded by negative behaviors.¹⁰ DCPS received a special education referral for Student while at Prior Nonpublic School and convened an initial Multidisciplinary Team (“MDT”) meeting on 10/18/16 and began special education testing.¹¹

3. Student was formally diagnosed with ADHD (Combined Type) and later Unspecified Depressive Disorder.¹² The MDT team reconvened on 2/23/17 and agreed that Student met the criteria and was eligible for special education and related services.¹³ Student’s disability classification is Other Health Impairment (“OHI”) based on Attention Deficit Disorder (“ADD”) or Attention Deficit Hyperactivity Disorder (“ADHD”).¹⁴

4. Student’s initial IEP was on 3/24/17 after Student transferred to Public School and provided for 10 hours/week of specialized instruction inside general education and 180 minutes/month of Behavioral Support Services (“BSS”) inside general education.¹⁵ Student’s next IEP was on 12/6/17, with specialized instruction increased to 10 hours/week inside general education and another 10 hours/week outside general education, and 180 minutes/month of BSS inside general education and another 120 minutes/month outside general education.¹⁶ Student’s next IEP was on 2/2/18 and provided for 27 hours/week of specialized instruction outside general education and 240 minutes/month of BSS outside general education.¹⁷

5. A Psychological and Educational Evaluation dated 1/26/17 administered the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) and found that Student’s Full Scale IQ (“FSIQ”) was 80, in the Low Average range, with processing speed (PCI) of 98, verbal reasoning (VCI) of 78, and fluid reasoning (FRI) of 69.¹⁸ Psychologist found comparable results in the Comprehensive Psychological Evaluation of Student on 7/28/17 (with a revised report on 9/25/17) with the Woodcock-Johnson IV Tests of Cognitive Ability in which brief intellectual ability (“BIA”) was 88, in the Low Average range, with Oral Vocabulary of 85, Number Series of 79 and Verbal Attention of 111.¹⁹ On academics, the Comprehensive Psychological Evaluation found Student’s Reading domain

⁹ P6-16; P24-3; P15 (disciplinary actions in 2015 and 2016); P4-1 (e.g., 9/17/13 Student Intervention Plan); Psychologist; Educational Advocate.

¹⁰ P6-2.

¹¹ P29-1,4.

¹² P6-16; P11-11.

¹³ P30-2.

¹⁴ P24-1.

¹⁵ P24-1,9.

¹⁶ P25-1,9.

¹⁷ R6-1,9.

¹⁸ P6-1,17.

¹⁹ P11-5,6.

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was 73 (Low) and 5 grades below level, Math domain was 81 (Low Average) and 4 grades below level, and Writing domain was 92 (Average) and 3 grades below level.²⁰

6. On 5/23/17, Student's SRI reading lexile was 6 grades below level; on 8/29/17, Student's SRI reading lexile had improved by 2 grades.²¹ Student's grades have been poor; for 2017/18 term 1, Student received 7 "Ds" or "Fs," 1 "B" (in Art) and 1 "C-" (in Math Support).²² Student's other reported grades were poor.²³

7. At the time of the initial IEP on 3/24/17, Parent reported that Student was "doing well" at Public School and that there hadn't been any issues; the special education teacher proposed 10 hours/week of specialized instruction inside general education.²⁴ Student had very poor attendance at Public School, and was more concerned about being social in class than doing schoolwork; Student was very social and had many friends.²⁵

8. Student got in trouble soon after arriving at Public School, including an altercation with other students and a parent.²⁶ Student was suspended from 5/4/17 to 5/15/17 for fighting.²⁷ Student's IEP Progress Report for the 4th term of 2016/17 indicated that Student was generally progressing apart from issues of aggression.²⁸ Public School developed an Individual Student Safety Plan for Student on 6/2/17.²⁹

9. In 2017/18, Student had accumulated 19 disciplinary referrals by 10/18/17, often 2 a day.³⁰ Beyond verbal aggression, Student became angry and once threw a chair in an incident.³¹ Student was often identified by peers as an instigator and frequently involved in drama with peers, often via social media.³² Student was having behavioral challenges at Public School even with BSS; Student was involved in conflict and resulting mediations with the same group of young people.³³

10. Public School conducted a Functional Behavioral Assessment ("FBA") and developed a detailed Behavioral Intervention Plan ("BIP") for Student on 10/18/17; the FBA noted that Student was more likely to elope or be off task when challenged academically

²⁰ P11-6,7.

²¹ P18-3; P21-3.

²² P21-1,2.

²³ P22-1.

²⁴ R3-2.

²⁵ P11-10; Assistant Principal (social kid).

²⁶ P8-2.

²⁷ P19-1; Educational Advocate.

²⁸ P26-1,4,5.

²⁹ P8-1.

³⁰ P9-1,3,4; Educational Advocate.

³¹ P9-5.

³² P9-5; P31-1 (fight resulting from social media); P36-1 (fight available on Instagram).

³³ P27; P32-2.

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and least likely to exhibit those behaviors in classes where Student had rapport with the teacher or specific roles in the class.³⁴

11. Psychologist revised Student's Comprehensive Psychological Evaluation on 9/25/17 to increase the recommendation for Student to 15 hours/week of specialized instruction outside general education in reading and math, and inclusion supports in all other academic classes; Psychologist testified that by "inclusion supports" she meant special education services.³⁵ Psychologist also recommended counseling for Student of 240 minutes/month outside general education.³⁶ The MDT team reviewed the Comprehensive Psychological Evaluation at a 10/25/17 meeting and based on Student's behaviors decided to implement the BIP and have a 30-day review.³⁷

12. Public School stated at a 12/6/17 meeting that it had submitted a Least Restrictive Environment ("LRE") package to OSSE seeking a more restrictive placement for Student.³⁸ Petitioner's counsel asked about Student receiving full-time specialized instruction in the interim; Assistant Principal responded that Student may be at the limit on classes outside general education.³⁹ At the conclusion of the 12/6/17 meeting, the IEP hours were to be increased to 10 hours inside general education and 10 outside general education "as agreed upon," apparently by the IEP team, including Parent and her counsel (based on Educational Advocate's notes).⁴⁰

13. At the 12/6/17 meeting, Public School stated that all Student's teachers had been trained on Student's FBA/BIP and conducted tracking with common themes noted of Student's late arrival to class, missing class assignments, not completing homework assignments, and engaging in horseplay.⁴¹

14. A 2/2/18 IEP meeting reviewed the LRE report from OSSE which concluded that Student may benefit from a more restrictive school setting; Assistant Principal recommended that Student not remain at Public School and said she would submit a change in LOS to DCPS for a program outside Public School.⁴² Assistant Principal testified that she had been wrong and that it turned out that Public School's Behavior & Education Support ("BES") program was the right place for Student.⁴³ On 2/14/18, DCPS issued the

³⁴ P9-1; P10.

³⁵ P11-11; Psychologist.

³⁶ Psychologist; P11-12 (at least an hour a week).

³⁷ P32.

³⁸ P33-1.

³⁹ P33-2.

⁴⁰ P33-3.

⁴¹ P33-1.

⁴² P34-1.

⁴³ Assistant Principal.

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LOS letter for the BES program at Public School, to which Petitioner's advocates dissented.⁴⁴

15. Psychologist recommended in the Comprehensive Psychological Evaluation that Student be classified for special education as a child with an Emotion Disturbance ("ED") as well as ADHD (OHI).⁴⁵ At Public School meetings on 5/11/17 and 10/25/17, Petitioner's advocates urged the ED classification, due to inappropriate physical contact by Student; DCPS disagreed.⁴⁶ At the 12/6/17 meeting, Petitioner's counsel again raised the issue of ED classification; the social worker noted that 1:1 Student did well.⁴⁷ The DCPS Review of Psychologist's evaluation concluded that Psychologist's recommendation for ED and OHI was not substantiated with data required for eligibility determinations according to IDEA and DCPS criteria.⁴⁸ Assistant Principal testified that she viewed Student as having maladaptive behaviors rather than being ED.⁴⁹ Student's programming wouldn't change whether classified as ED or just OHI.⁵⁰

16. Student's IEP team gradually moved Student to more restrictive settings as 2017/18 progressed, beginning with pullout for ELA and math and inclusion for social studies and science.⁵¹ The IEP team determined that a full-time BES program was Student's LRE.⁵² The BES classroom had 8 students and 3 or more adults.⁵³ Student had lunch, recess and gym class (2 times a week) with nondisabled peers and did well behaviorally.⁵⁴ Student does not need a separate day school, as Student "craves" interaction with nondisabled peers.⁵⁵ Student wants more time in general education and is working toward classes in general education as an incentive.⁵⁶ Psychologist testified that Student needed enhanced structure and support, but that the BES program was not enough, despite not having observed Student in the BES program.⁵⁷ Educational Advocate did not observe in the BES classroom or speak to Student's BES teachers.⁵⁸

17. Student is doing well in the BES program and doing much better than in any other setting; Student's altercations and social media issues had died down even prior to moving

⁴⁴ P45-1.

⁴⁵ P11-11; Psychologist.

⁴⁶ P32-1,3; P35-1,2 (6/19/17 dissent letter); Educational Advocate.

⁴⁷ P33-2.

⁴⁸ R11-6.

⁴⁹ Assistant Principal.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Psychologist.

⁵⁸ Educational Advocate.

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into the BES classroom.⁵⁹ Student's BES teachers told Assistant Principal that Student was turning in assignments and doing much better; Student is one of the higher performers in ELA and getting to be a leader within the BES classroom, which is bringing out a greater level of engagement.⁶⁰ Student is developing a positive relationship with teachers, so the BES program is working for Student.⁶¹ Student still uses profanity, but is easily redirected, which is a positive change.⁶² While Student is still sometimes late to class, Student is not eloping and not exiting class to hang out in the hallways and avoid work as in the past.⁶³

Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, 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.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support

⁵⁹ Assistant Principal.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

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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.*, 137 S. Ct. at 1001.

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.*, 137 S. Ct. at 1000 (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).

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

Issue: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement and/or location of services for 2017/18 with an IEP developed on 3/24/17 and amended on 12/6/17, because Student needed a full-time IEP, a sufficiently restrictive setting, increased behavioral supports and proper classification due to academic regression and severe behaviors. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did establish a prima facie case on this issue, shifting the burden to Respondent, which met its burden of persuasion as discussed below.

The applicable legal standard for analyzing the appropriateness of an IEP was

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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.*, 137 S. Ct. at 1001. 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*, 190 F. Supp. 3d 35, 51 (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 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, which are considered below in turn.⁶⁴ See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

Specialized Instruction. Petitioner’s initial challenge to the IEP at issue is the amount of specialized instruction, which Petitioner asserts should be “full-time,” even though the independent Comprehensive Psychological Evaluation on which Petitioner relies itself recommended less than full-time specialized instruction. The big picture here is that Student went from an initial IEP on 3/24/17 to a full-time IEP in just over 10 months, exceeding the Comprehensive Psychological Evaluation recommendation.

Considering these steps in more detail, Student’s initial IEP on 3/24/17 provided for 10 hours/week of specialized instruction inside general education, which Psychologist criticized for being insufficient in the independent evaluation, making her recommendations on 9/25/17 for 15 hours/week of specialized instruction outside general education in reading and math along with inclusion support for other academic classes. Student’s MDT team reviewed Psychologist’s recommendations at a 10/25/17 meeting, but based on Student’s behaviors decided to implement the BIP that was developed on 10/18/17 and then hold a 30-day review. When the MDT met again on 12/6/17, Public School had submitted an LRE package to OSSE seeking a more restrictive placement for Student. Petitioner’s counsel sought full-time specialized instruction in the interim, but Public School was concerned that as a practical matter Student was at the limit on classes outside general education. So by the conclusion of the 12/6/17 MDT meeting there was agreement – apparently including Parent and her advocates – to increase Student’s IEP to 10 hours of specialized instruction inside general education and 10 hours outside, which was a large step from the initial IEP of 10 hours all inside. Student’s IEP team then met on 2/2/18 to review the LRE report from OSSE which concluded that Student might benefit from a more restrictive school setting and the team agreed on a full 27 hours/week of specialized instruction outside general education.

Looking at this progression in retrospect, Petitioner may understandably argue that DCPS was somewhat behind the curve and Student may have needed support a little sooner

⁶⁴ 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. No such procedural violations were alleged in this case.

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than provided. But as noted above, the proper analysis is to consider the situation prospectively, as of the time the IEP decisions were made, when it was not clear whether the level of services adopted would be sufficient or not given the range of actions that were being taken at the same time to address Student's significant behaviors through the Safety Plan and then the FBA and BIP, along with other efforts to impact Student's focus at school through BSS and the various mediations in which Student participated, all of which apparently helped improve the situation for Student over time. Viewed prospectively, the undersigned concludes that Public School's steps were reasonable and that it was not at all clear on 12/6/17 or at the time the MDT met to review the Comprehensive Psychological Evaluation that Student required a full-time IEP, especially when Psychologist had recommended only 15 hours/week outside general education for Student.

Behavior Support Services. Student's initial IEP on 3/24/17 began with 180 minutes/month of BSS inside general education, which Psychologist criticized in her 9/25/17 Evaluation, urging a shift of services outside general education in the amount of 240 minutes/month. Public School ended up at that level on 2/2/18, but had first added 120 minutes/month of BSS outside general education to the 180 minutes inside general education in the 12/6/17 IEP. As noted above, viewed prospectively it was not clear how much BSS would be needed to meaningfully address Student's behavioral issues with the Safety Plan and then the FBA and BIP, along with mediations among the group with which Student was fighting. The undersigned concludes that Public School's steps were reasonable moves in just over 10 months from 180 minutes (albeit inside general education) to 300 minutes (combined), before ending up at the 240 minutes outside general education sought by Petitioner.

ED Classification. Petitioner also challenged DCPS for not adding an ED classification along with OHI to Student's IEP. However, the IDEA is clear that Local Education Agencies ("LEAs") are not required to classify children by their disability as long as they have been found eligible to receive the special education and related services they need. See 20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. 300.111(d). Assistant Principal explained that she viewed Student as having maladaptive behaviors rather than being ED, which impacts the definition of ED at 34 C.F.R. 300.8(c)(4)(ii). But more importantly, Assistant Principal credibly testified that Student's programming would not change whether classified as ED or just OHI. The law is clear that a student's identified needs, not the disability category, determine the services that must be provided to the child. 34 C.F.R. 300.320(a)(2)(i); *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (the "IDEA charges the school with the responsibility of developing an appropriate education, not with coming up with a proper label"); *M.M. v. Lafayette Sch. Dist.*, 2012 WL 398773, at *17 (N.D. Cal. 2012), *aff'd in part, rev'd in part on other grounds and remanded*, 767 F.3d 842 (9th Cir. 2014). The undersigned is thus clear that there is no violation here.

Placement/Location of Services/Setting. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements). Here, DCPS met its burden of

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demonstrating that Public School was able to implement Student’s IEPs, including the full-time 2/2/18 IEP. As a practical matter, Student is doing well in the BES program, in fact doing much better than in any other setting. This Hearing Officer concludes that Student did not need a separate full-time day school, as Student desired interaction with nondisabled peers and did well interacting with them at lunch, recess and certain classes. Finally, while the location of services for a child is generally within the discretion of DCPS, here Assistant Principal recommended that Student not remain at Public School and intended to obtain a different location for Student, but Assistant Principal forthrightly acknowledged that she was mistaken and it turned out that Public School’s BES program was the right place for Student. There is no legal error here.

ORDER

Petitioner has not prevailed on any of 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 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)
OSSE-SPED (due.process@dc.gov)
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