

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

Office of Dispute Resolution
1050 First Street, N.E., 4th Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
April 16, 2018

<i>Student</i> , ¹)	Case No.: 2018-0014
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 4/16/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (Rooms): 4/3/18 (111),
("DCPS"),)	4/4/18 (112) & 4/10/18 (Conf. Bridge)
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 an appropriate Individualized Education Program (“IEP”) and a residential placement. DCPS responded that it provided an IEP with services comparable to the IEP from a prior state and that a nonpublic day school was Student’s least restrictive environment.

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 1/19/18, the case was assigned to the undersigned on 1/22/18. Respondent filed a timely response on 1/23/18, which did not challenge jurisdiction. The resolution session meeting took place on 2/12/18 without

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

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success and the 30-day resolution period ended on 2/18/18. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by agreed-upon 10-day and 6-day continuances, which require a Hearing Officer Determination (“HOD”) by 4/20/18.

The due process hearing took place on 4/3/18, 4/4/18 and 4/10/18 (closing arguments) 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 3/27/18 and supplemented on 3/28/18 by agreement, contained documents P1 through P61, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 3/27/18 and supplemented on 3/28/18 by agreement, contained documents R1 through R25, which were also admitted into evidence without objection. Respondent’s 3/28/18 Motion to Add Witness and Exhibit was agreed to by Petitioner and granted by the undersigned on the record during the due process hearing. Respondent’s subsequent 4/2/18 Motion to Add Witness and Exhibit was not agreed to by Petitioner and not provided more than 24 hours prior to the start of the hearing, so was denied by the undersigned on the record during the due process hearing.

Petitioner’s counsel presented 5 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. *Educational Expert* (qualified without objection as an expert in Clinical Psychology, with regard to Evaluating and Making Recommendations for Children with Special Needs)
2. *Educational Advocate* (qualified over objection as an expert in Psychology, Neuropsychology, and Special Education Programming)
3. *Psychiatrist* (qualified without objection as an expert in Psychiatry)
4. *Special Education Consultant* (qualified without objection as an expert in Special Education Programming)
5. Parent

Respondent’s counsel presented 3 witnesses in Respondent’s case (*see Appendix A*):

1. *Special Education Teacher at Public School*
2. *Special Programs Manager* at OSSE
3. *LRE Program Manager* at DCPS (qualified over objection as an expert in Residential Transition)

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At the beginning of the due process hearing, the parties agreed to a single stipulation, which was that “Petitioner and Respondent agree to amend Student’s IEP to add a full-time dedicated aide.”

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

Issue: Whether DCPS denied Student a FAPE from November 2017 by failing to provide an appropriate IEP, placement and/or location of service, where the 12/11/17 IEP developed by DCPS was deficient because it: (a) lacked appropriate goals, particularly in the area of adaptive functioning; (b) failed to include baseline data; (c) did not provide a dedicated aide; (d) did not provide accommodations for statewide assessments; (e) did not provide sufficient behavioral support services (“BSS”); and (f) failed to place Student in a residential program. *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. DCPS shall amend Student’s IEP to provide a residential program as Student’s Least Restrictive Environment (“LRE”) and add (a) baseline data, (b) appropriate adaptive goals, (c) an increase in behavioral support services, and (d) a dedicated aide.
3. DCPS shall place and fund Student in a residential placement through OSSE, with transportation for Parent and Student.
4. DCPS shall conduct or fund an FBA and develop a BIP for Student.²
5. DCPS shall fund compensatory education for any denial of FAPE.³
6. Any other relief that is just and reasonable.

² During closing arguments, Petitioner’s counsel expressly withdrew Petitioner’s request for an updated FBA/BIP.

³ 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 during the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

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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, Gender and in Grade at Public School.⁶ Student lives with Parent and a guardian (collectively, "parents") and a younger sibling who also has significant needs;

2. Student was born and raised in ; in 2014, Student was in a nonpublic day program in through 2015/16, was then in a public self-contained program in Maryland in 2016/17 until December or January, then was home schooled for several months, then moved to in April or May 2017 where Student received a school placement but had not begun attending school before being , was then taken back to but did not attend school, and finally moved to temporary housing in the District of Columbia at the beginning of November and began at Public School on 11/15/17.⁸

3. Student has a history of significant emotional, behavioral and intellectual concerns and is currently diagnosed with Unspecified Psychosis, Disruptive Mood Dysregulation Disorder, Mild Intellectual Disability and Attention Deficit Hyperactivity Disorder ("ADHD").⁹ Student has not been diagnosed with schizophrenia, but Psychiatrist considers it highly likely.¹⁰ Student is verbally and physically aggressive and physically attacks parents, teachers, peers and others; Student's behavior impedes learning.¹¹ Student is medicated but continues to strike with no warning and has extreme agitation; Father states that Student does not mean harm, "has a good heart" and "is very loving and caring."¹²

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.*

⁷ Parent; P54-1 (guardian); P16-3; P21-25,44

⁸ Parent; P21-27; R14-4,6,9,13; P17-1,2; P21-36 (went to live with Parent's mother for a short period); P21-44; LRE Program Manager.

⁹ Psychiatrist; Parent; R14-13; P16-25.

¹⁰ Psychiatrist.

¹¹ P1-2.

¹² P16-33; P17-3; Parent.

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4. Student's Full Scale IQ ("FSIQ") was 50 based on the Stanford-Binet-Fifth Edition in 2015, which is a percentile rank of less than 0.1; Nonverbal IQ and Verbal IQ were both 52.¹³ Student's academic functioning was also very low according to the Woodcock-Johnson Tests of Achievement-Fourth Edition, with 14 of 15 subtests resulting in a percentile rank of less than 0.1.¹⁴

5. Student has had an IEP for many years.¹⁵ When Student arrived at Public School, staff made an immediate request for an LRE review and comparable services placement.¹⁶ An IEP was developed by DCPS on 12/11/17 to provide services comparable to Student's 2015 IEP in with 35 hours/week of specialized instruction outside general education, 30 minutes/week of BSS, 60 minutes/week of occupational therapy ("OT"), and 90 minutes/week of speech-language pathology, all outside general education; Student's disability classification was Multiple Disabilities ("MD") based on Emotional Disturbance ("ED") and Other Health Impairment ("OHI").¹⁷

6. DCPS's 12/11/17 IEP was based on the IEP because Parent did not promptly inform DCPS that Student had a more recent IEP from nearby Maryland.¹⁸ Parent seemingly did not mention that fact to the evaluators conducting the Neuropsychological Evaluation either, who did not include the fact in their report.¹⁹ Once it was discovered, Parent twice refused consent to Public School to obtain the records.²⁰

7. Parent testified that Student has been unstable for a long time and needs to be stabilized.²¹ Parent reported that Student was not doing well with change; Student reacts negatively even when faced with changes in everyday activities or routines.²² Student's stressors included recent moves and new school.²³

8. Student is now in a specially-developed self-contained classroom at Public School with only Student's sibling and a separate teacher and dedicated aide for each child; on occasion 3-4 other students with IEPs are also in the room; Student has never been aggressive towards the other students and is delighted and friendly, but interactions are closely monitored.²⁴

¹³ P16-4,5.

¹⁴ P16-6,7.

¹⁵ Parent.

¹⁶ R14-7.

¹⁷ R14-1; P1-1,14,15; Parent; Educational Expert.

¹⁸ P31-1.

¹⁹ R14-2.

²⁰ R14-7.

²¹ Parent.

²² Parent; P16-16.

²³ P21-27.

²⁴ Special Education Teacher; R14-4,6,10.

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9. Parent was not comfortable with DCPS administering medication to Student, preferring to administer it himself to ensure Student takes it.²⁵ One of Student's medications is required 3 times a day; Public School suggested Parent come to Public School to administer Student's medication during the day, but Parent and/or guardian declined; Public School has a nurse on staff.²⁶ DCPS sought a release from Parent to speak to Student's therapist about medication management, but Parent declined.²⁷ Student's behavioral incidents at Public School have almost all occurred in the afternoon.²⁸

10. Parent does not trust Public School or DCPS and feels he was lied to in the past and that information is being withheld from him now, which he only finds out from other parents or his children.²⁹ Parent is a school psychologist and was very forthright in most of his testimony, although certain discrepancies came out in the hearing, as noted herein.³⁰ For instance, Parent initially told Public School staff that Student required toileting every half hour and had to be monitored due to smearing feces, but that behavior has not been observed at Public School, where Student is taken to the bathroom once or twice a day.³¹ The Neuropsychological Evaluation states that Student has needed physical restraint "almost daily," apparently based on information from Parent, but that seems to be an overstatement.³²

11. The Neuropsychological Evaluation relied on Special Education Consultant for input as Student's teacher; she is listed in the Maryland documents as Student's aunt.³³ The BASC-3 ratings of Special Education Consultant and Parent were very similar and both were flagged on the "F Index" indicating a negative view of Student's behaviors and the need for Extreme Caution in interpreting the scores, as they may be "overly catastrophizing" Student's behaviors.³⁴ Special Education Teacher later completed BASC-3 rating scales for Student with ratings that were very different from Special Education Consultant's; Special Education Teacher's ratings found that Student is similar to other children of similar age in classroom behavior, self-control, anxiety-based behaviors, attention level, and adaptive skills.³⁵

12. A Psychological Reevaluation in July 2016 in Maryland included Autism Spectrum Rating Scales responses from Parent and a Maryland ESY teacher that were dramatically different, with Parent rating most scales in the very elevated range and Student's teacher's

²⁵ R21-3.

²⁶ Special Education Teacher; R21-3 (in meeting with DCPS, Petitioner's counsel stated that DCPS can't force Student to be medicated).

²⁷ P5-2.

²⁸ R14-10; P5-2 (negative behaviors appear to peak between 1:00 and 2:00 p.m.).

²⁹ Parent.

³⁰ P16-2; Administrative Notice.

³¹ R14-3.

³² P16-24; R14-4.

³³ R14-5 (aunt); P17-3

³⁴ P16-14,19,20,24; R14-5.

³⁵ R14-11,12,13.

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response in the low to average range indicating no problem exhibited.³⁶ Parent's ratings were also very elevated on a Conners Comprehensive Behavior Rating Scale.³⁷ The evaluating psychologist noted that Parent's rating/reporting of Student's behavior was "vastly" different from the Maryland teachers who saw nothing like what Parent had reported; the psychologist's observations were in line with the teachers'.³⁸

13. The Neuropsychological Evaluation noted that neither the neuropsychologist nor the collaborative team observed Student's violent and aggressive behaviors during the 2017 evaluation or in 2015.³⁹ For the Neuropsychological Evaluation, numerous attempts were made to contact both school and treating medical personnel to no avail, so the Neuropsychological Evaluation rested on scores, reports by Parent and Special Education Consultant which "unfortunately" present with a high F and behaviors that were not seen or evidenced in any of the sessions, "prohibiting the use of clear residential recommendations, from a professional and ethical standpoint."⁴⁰

14. Behavior. Since beginning Public School in mid-November 2017, Student has had 5 incidents in which Student could not be calmed and ended up being taken to *Hospital* for psychiatric care, .⁴¹ After each trip to Hospital, Student was released to return to school without any limitations.⁴² After hospitalization, Public School required a Plan of Care Conference before Student returned to school.⁴³

15. On Student's first day at Public School on 11/15/17, Student had serious behavioral issues in which Student tried to choke the assistant principal and tried to get her to choke Student, and threatened to kill her and Special Education Teacher, among other things; 911 was called 2 different times and Student was taken to Hospital and admitted for a week.⁴⁴ This was Student's first psychiatric hospitalization.⁴⁵ Student told the psychiatric assessor at Hospital that Student moved from to , had fun in and had been making friends in DC.⁴⁶ Student initially reported hearing sounds, then denied auditory hallucinations as well as visual hallucinations.⁴⁷

³⁶ P17-11,12; R14-7,8.

³⁷ P17-13,14.

³⁸ R14-8; P17-13.

³⁹ P16-25; R14-5.

⁴⁰ P16-25; R14-5,6 (no attempt was made to talk to Public School teachers; the evaluation was conducted by 11/1/17 before Student began school there).

⁴¹ P6-1.

⁴² P24-2 (11/22/17); P23-6 (11/29/17); P22-20 (1/3/18); P21-1 (2/20/18); P20-1 (3/9/18).

⁴³ E.g., P7-1 (11/15/17 to 11/22/17); P6-1 (2/6/18 to 2/20/18).

⁴⁴ P16-4; P24-23,34 (medical file shows admission on 11/15/17; header date is in error); P28-1 *et seq.* (teacher narrative); Parent.

⁴⁵ Parent; P24-34.

⁴⁶ P24-64.

⁴⁷ *Id.*

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16. On 11/29/17, after a total of 2 days of class in Public School, Student was taken by police to the emergency department of Hospital for increased aggression and behavioral disturbance; Student acknowledged that Student threatened to kill Principal and attempted to bite and punch her.⁴⁸ Student did not meet criteria for admission to Hospital and was discharged on 11/29/17.⁴⁹

17. On 1/3/18, the first day back from Winter Break, Student physically assaulted (scratched, kicked, punched, and attempted to choke) Principal and appeared to be responding to internal stimuli, yelling “Get away from me”; Student was sent to the emergency department at Hospital by ambulance, but discharged the same day.⁵⁰ Parent reported that Student’s behaviors had been worse at school compared to home and had increased recently.⁵¹

18. Student’s longest admission was from 2/6/18 to 2/20/18, when Student was finally hospitalized after worsening behavior for 3 days with the police called by Public School each day; Student was trying to strike and bite staff and police.⁵² The final hospitalization in Student’s record was from 3/5/18 to 3/9/18.⁵³

19. DCPS developed Individual Student Safety Plans on 11/14/17 and 2/23/18, noting that Student is triggered by requests from adults to do something Student does not want to do, when feeling shame or embarrassment (such as inability to read), or from unknown factors; “strategies that worked” in the 11/14/17 Plan were calling 911, which was expanded on 2/23/18 to calling parents, calling ██████████ and calling 911.⁵⁴

20. An FBA was conducted on 2/15/18 which called for ongoing and updated collaboration between school, parents, community and outside medical providers.⁵⁵ A BIP was developed for Student on 2/16/18.⁵⁶

21. Student had many good days at Public School, when Student’s behaviors were cooperative, controlled and appropriate, and Student could be readily redirected as necessary.⁵⁷ For instance, on 11/28/17 Student had a “wonderful day” until 2:45 p.m. and managed to complete all academic assignments.⁵⁸ On 12/5/17, Student had a “PERFECT day from start to finish” working on academics.⁵⁹ On 12/6/17, “Another BEAUTIFUL day!

⁴⁸ P23-1,10,12,34; P27-1,2 (teacher narrative).

⁴⁹ P23-38.

⁵⁰ P22-1,8,27; R20-4 (Student appeared to be hallucinating).

⁵¹ P22-11.

⁵² P21-1,3,7,8.

⁵³ P20-1.

⁵⁴ P8-1,2; P4-1,2.

⁵⁵ R9-1,3.

⁵⁶ R8-1,2.

⁵⁷ R14-3.

⁵⁸ P28-7.

⁵⁹ P28-9,10 (emphasis in original).

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No inappropriate behaviors!,” as Student was very polite and cooperative and did academic work.⁶⁰ On 12/12/17, Student had a “really good day” until around 1:25 p.m.⁶¹ On 12/13/17, Student had a “Wonderful day.”⁶² On 12/19/17, Student had a “wonderful day” and “could be a stand up comic!!!!”; Student completed all academic tasks.⁶³ On 12/20/17, Student had a good day with a “bumpy moment.”⁶⁴

22. Placement. Parent was directed to enroll Student in Public School while proper placement was determined; neither DCPS nor Petitioner considered Public School an appropriate placement.⁶⁵ Upon enrollment of Student on 11/15/17, DCPS took very prompt action based on Parent’s wish for residential placement, assigning the case on 11/16/17 to LRE Program Manager, who deals with the residential transition process (and was determined to be an expert in that area at the due process hearing).⁶⁶ DCPS suggested shifting Student to a Behavior & Education Support (“BES”) program at another DCPS school as a better fit on an interim basis, but Parent and his advocates refused the change.⁶⁷ Parent was concerned about Student mimicking bad behaviors in a BES classroom; for instance, one day Student came home limping so Parent knew Student has seen a child limping at school.⁶⁸

23. Special Education Teacher testified that Student made educational progress even at Public School and had taken steps in the right direction; Student was better at spelling Student’s name, could do double digit addition, liked computer programs and was eager to learn.⁶⁹ As indicated by Student’s IEP Progress Report for term 2, Student made some progress in Public School in writing, communication/speech-language, and on a cognitive goal.⁷⁰

24. Psychiatrist testified that nonpublic special education day schools had been tried before without success and that Student may be a danger to self and needs highly trained staff to avoid hospitalizations.⁷¹ Educational Advocate also asserted that day programs have not worked for Student and Student experienced destabilization.⁷² Student made a positive adjustment to *Prior Day School*, where Student began in September 2014.⁷³ Student made

⁶⁰ P28-10,11 (emphasis in original).

⁶¹ P28-11.

⁶² P28-13.

⁶³ P28-14,15 (emphasis in original).

⁶⁴ P28-16.

⁶⁵ Educational Expert; Parent.

⁶⁶ LRE Program Manager.

⁶⁷ Educational Expert.

⁶⁸ Parent; P17-3 (concerned about separate day school in _____ due to mimicking).

⁶⁹ Special Education Teacher.

⁷⁰ R12-1,4,5,6.

⁷¹ Psychiatrist.

⁷² Educational Advocate.

⁷³ P12-1,2.

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progress in Maryland based on the terms 1 and 2 in 2016/17.⁷⁴

report card for

25. Parent sought residential placement from the time of enrolling Student at Public School.⁷⁵ Special Education Teacher didn't think residential was "far removed" at first, but never agreed to residential and never changed her mind.⁷⁶ Many of the behaviors described by Parent were not displayed at school, such as urinating on self, playing with feces, head banging and regular elopement; nor had Student been observed at Public School rubbing eyes raw or excessively, much less trying to tear them out.⁷⁷

26. Parent went into a 12/4/17 placement meeting with DCPS and OSSE thinking that the Public School members of the IEP team were all in favor of residential placement based on statements from Special Education Teacher, which Parent testified she did not deny when asked directly in the meeting.⁷⁸ By contrast, DCPS and OSSE understood that Student's entire IEP team, including Parent, agreed on 12/11/17 that Student's placement should be a full-time, separate, therapeutic, nonpublic, special education day school ("nonpublic day school"); OSSE has been working since then to find a suitable nonpublic day school for Student.⁷⁹ Petitioner's counsel emailed that Parent was willing to have Student in a nonpublic day school on an interim basis, but that residential placement was necessary.⁸⁰ Special Programs Manager credibly testified at the due process hearing that Parent agreed to a nonpublic day school placement on 12/11/17 without any qualification about it being interim.⁸¹

27. OSSE sent out information to nearly a dozen potential nonpublic day schools, providing all documentation received from Parent or DCPS, and sending additional information as it became available.⁸² Most nonpublic day schools declined to accept Student.⁸³ Proposed Day School B accepted Student, but the classroom best suited for Student was full, so Student could only begin on 7/3/18 with ESY and then in 2018/19.⁸⁴

28. Proposed Day School A accepted Student with the condition that Student have a dedicated aide added to the IEP.⁸⁵ Parent testified that Proposed Day School A had

⁷⁴ P29-1.

⁷⁵ Parent; Special Education Teacher.

⁷⁶ Special Education Teacher.

⁷⁷ *Id.*

⁷⁸ Parent.

⁷⁹ Special Programs Manager (Parent agreed with rest of team); LRE Program Manager (Parent agreed with rest of team); P39-7,8; P45-6 (OSSE would continue to seek a nonpublic day school until the IEP team made a different placement decision).

⁸⁰ P39-7.

⁸¹ Special Programs Manager.

⁸² Special Programs Manager; R7-1,2; R24-1.

⁸³ R7-2; R24.

⁸⁴ P41-1.

⁸⁵ Special Programs Manager.

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suggested that he seek out legal assistance to pursue a more restrictive setting than a nonpublic day school; a clinician at Proposed Day School A did not recommend the school's program for Student at that time.⁸⁶ LRE Program Manager credibly testified that she considered Proposed Day School A an appropriate school for Student; Proposed Day School A has a psychiatrist, has accepted Student and Student can start right away with a dedicated aide added to the IEP; transportation can be set up in 3 school days.⁸⁷

29. DCPS's 1/29/18 Review of Independent Educational Evaluation (the Neuropsychological Evaluation) concluded that residential placement was not indicated for Student, for a day program would be sufficient as Student previously received in and Maryland, along with community mental health services for Student and family, psychiatric services and medication monitoring.⁸⁸

30. LRE Program Manager testified that it was notable that Hospital never recommended residential treatment for Student.⁸⁹ LRE Program Manager testified that she was not troubled by Student's behavioral problems at Public School or reported hallucinations.⁹⁰ Student's psychiatric meltdowns should be addressed by treatment providers working together with Student's family and school; Parent needs to rely on the wraparound services in the community.⁹¹ LRE Program Manager has a great deal of experience and credibly testified that she knows what a child who needs residential placement looks like, and in her expert opinion Student is not at that level at this time.⁹²

31. Placement is not fixed and if a nonpublic day school is not sufficient for Student, then the IEP team can come back and make the placement more restrictive by shifting to residential.⁹³ LRE Program Manager convincingly recommended not skipping a nonpublic day school and going directly to residential placement on the continuum, as Student had not been in school at all for nearly a year, and might well do better when acclimated to the classroom with a teacher Student likes who could work to develop rapport with Student.⁹⁴

32. Residential Placement. DCPS was willing to place Student in a nonpublic day school, but did not have enough data to support residential placement.⁹⁵ DCPS sought a release to speak with Hospital, Student's therapist, and Student's psychiatrist.⁹⁶ Parent

⁸⁶ Parent; P39-8; R21-3 (Petitioner's counsel stated Parent retained her after Proposed Day School A suggested he get an attorney).

⁸⁷ LRE Program Manager.

⁸⁸ R14-13.

⁸⁹ LRE Program Manager.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ P2-4; P5-1; R21-2.

⁹⁶ P5-2; P42-1.

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would only consent to DCPS speaking with Student's providers if he was present, and proposed a call with Psychiatrist during an appointment at 8:30 p.m. on 3/9/18.⁹⁷

33. LRE Program Manager noted that absence of documentation supporting residential placement apart from Psychiatrist's letters, but Psychiatrist hasn't worked with DCPS teachers or programs and has not formally assessed Student.⁹⁸ Hospital has not recommended residential treatment for Student after Student being repeatedly hospitalized there.⁹⁹

34. Psychiatrist has treated Student since 2013; Student has worsened over the years, with minimal response to various medications.¹⁰⁰ Student may be a danger to self as Student hears voices saying to hurt self and stab Parent; the voices say to take own eyeball out and take ear off, resulting in bruising around Student's eyes and scratches behind ears.¹⁰¹ Psychiatrist testified that Student is not a danger at the moment, but Psychiatrist's last recommendation to Parent was that if Student is again a danger to self, Student should be admitted for (non-educational) residential treatment.¹⁰² As for whether residential treatment is needed for Student's education, Psychiatrist never spoke to Principal or anyone at DCPS or Proposed Day School A or Proposed Day School B about Student.¹⁰³ Psychiatrist testified that Student's education would be better if Student was in a residential program.¹⁰⁴

35. Psychiatrist recommended residential placement on 12/8/17 in a one-paragraph letter that concluded, "Kindly be advised that patient will benefit and is recommended for patient to be at a residential treatment facility with an intensive therapeutic setting."¹⁰⁵ Psychiatrist reiterated his recommendation in a 3/23/18 letter stating that "auditory hallucinations, physical attacks on parents, teachers, and principal, suicidal and homicidal ideation continues to escalate" and listing the 5 trips to Hospital (which resulted in 3 admissions with stay from 5 to 15 days); Psychiatrist recommended a 7-day residential treatment facility.¹⁰⁶

36. Psychiatrist stated in his 3/23/18 letter that Student sees him twice a week and also sees a therapist in his medical center twice a week.¹⁰⁷ Psychiatrist readily agreed during his testimony that it would be desirable for Student to have a psychiatrist closer to Student's home and stated that he had suggested a local (D.C.) psychiatrist to Parent.¹⁰⁸ As of

⁹⁷ P42-1.

⁹⁸ LRE Program Manager.

⁹⁹ Psychiatrist.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ P14-1.

¹⁰⁶ P15-1.

¹⁰⁷ P15/1; R16-2 (confirming twice a week appointments with Psychiatrist).

¹⁰⁸ Psychiatrist.

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2/20/18, Parent had not connected with outpatient psychiatric services in DC “due to recent move.”¹⁰⁹

37. Student has been accepted by *Residential School*, pending medical review; the annual cost is \$292,000, which includes an educational aide.¹¹⁰

38. Other IEP Issues. Petitioner’s counsel raised concerns about some aspects of the 12/11/17 IEP within weeks of its creation.¹¹¹

39. The present levels of performance in Student’s 12/11/17 IEP have the same 2 paragraphs repeated over and over for every section – a total of 24 identical statements (including typographical and grammatical errors).¹¹²

40. In the area of Adaptive/Daily Living Skills, Student’s 12/11/17 IEP provided only 1 goal which is about spelling words correctly.¹¹³ Other goals should have been more streamlined and specific.¹¹⁴

41. Student’s 12/11/17 IEP contained no baseline information for any goal, stating 19 times, “No baseline established.”¹¹⁵

42. Student’s 12/11/17 IEP did not provide for a dedicated aide, but Educational Expert credibly testified that a dedicated aide was needed given the intensity of the incidents; Educational Advocate noted that a dedicated aide was being provided even though not on the IEP.¹¹⁶

43. Student’s 12/11/17 IEP requires Student to participate in the regular statewide assessment, rather than the alternate assessment.¹¹⁷

44. Student’s 12/11/17 IEP provided for 30 minutes/week (120 minutes/month) of BSS, which Educational Expert credibly testified was not enough given the level of Student’s challenges.¹¹⁸ Student received more BSS than on the IEP, for in the partial month (due to development of IEP and Winter Break) of December 2017, Student received 75 minutes; in January 2018, Student received 375 minutes; in February 2018, Student received 210 minutes and missed 2 sessions.¹¹⁹

¹⁰⁹ P21-26.

¹¹⁰ P56.

¹¹¹ P33-2,3.

¹¹² P1-3,4,5,6,7,8,9,10,11,12; Special Education Consultant; Educational Advocate.

¹¹³ P1-7; Special Education Teacher (acknowledged lack of adaptive goals).

¹¹⁴ Educational Expert; Educational Advocate.

¹¹⁵ P1-3,4,5,6,7,8,9,10,11,12,13; Special Education Consultant; Educational Advocate.

¹¹⁶ Educational Expert; P1-14; Educational Advocate.

¹¹⁷ P1-17.

¹¹⁸ Educational Expert; Educational Advocate.

¹¹⁹ R20.

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45. Compensatory Education. Based on all of the claims asserted in the case, Educational Advocate prepared a thorough Compensatory Education Proposal recommending compensatory education of 150 hours of independent tutoring and 25 hours of counseling.¹²⁰ Educational Advocate suggested in her testimony that all hours be provided after discharge of Student from a residential facility, at a rate of 3-4 hours/week over the course of a year.¹²¹

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 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

¹²⁰ P55-6.

¹²¹ Educational Advocate.

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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. Weast*, 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 from November 2017 by failing to provide an appropriate IEP, placement and/or location of service, where the 12/11/17 IEP developed by DCPS was deficient because it: (a) lacked appropriate goals, particularly in the area of adaptive functioning; (b) failed to include baseline data; (c) did not provide a dedicated aide; (d) did not provide accommodations for statewide assessments; (e) did not provide sufficient BSS; and (f) failed to place Student in a residential program. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did establish a prima facie case, shifting the burden to Respondent which met its burden of persuasion on the issue of placement and the lack of need for a residential program, but not on the appropriateness of other aspects of the IEP.

As an initial matter, it is the view of the undersigned that the IDEA requirements for children who transfer from another state are not applicable in this case because the transfer

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was not within the same school year and because Student did not have an IEP in effect in another state at the time Student arrived in D.C.¹²² Instead, DCPS was required pursuant to 34 C.F.R. 300.323(c)(1) to meet to develop an IEP within 30 days of determining that Student needed special education and related services, which was satisfied by the 12/11/17 IEP meeting. DCPS was also required pursuant to 34 C.F.R. 300.323(c)(2) to make services available to Student as soon as possible following the IEP, which was satisfied by the extensive services at Public School and the prompt efforts undertaken to consider residential placement and then to find a suitable nonpublic day school for Student. *See Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F. Supp. 2d 254, 260 (D.D.C. 2005) (“prompt resolution of disputes involving the educational placement of learning disabled children is imperative”). Further, DCPS explained that since it agreed from the start that Student needed a nonpublic day school, it has appropriately devoted its energies to trying to locate a suitable nonpublic day school for Student which would then update and improve Student’s IEP for implementation there.

Turning to the substance, the applicable legal standard for analyzing the appropriateness of the 12/11/17 IEP at issue in this case was 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

¹²² *See* 20 U.S.C. § 1414(d)(2)(C)(i)(II):

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation . . . if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

See also 34 C.F.R. 300.323(f) (same). However, if these provisions did apply, the undersigned determines that DCPS would have met the requirement of comparable services based on the 12/11/17 IEP that DCPS has been diligently seeking to implement in a nonpublic day school which would be comparable to Student’s nonpublic placement and would exceed Maryland’s public self-contained program.

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concerns raised by Petitioner, which are considered below in turn.¹²³ See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311. However, the heart of this case turns on whether or not residential placement is required at this point, which is considered first.

Residential Placement. While on the most restrictive end of the IDEA’s continuum of placements at 34 C.F.R. 300.115, a residential placement may be appropriate if necessary for educational purposes, but not if the residential placement is a response to medical, social or emotional problems that are segregable from the learning process. See *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985); 34 C.F.R. 300.104 (a residential program must be at no cost to parents, if “necessary” to provide special education and related services to disabled child). See also *Dist. of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (residential placement may be appropriate if necessary to obtain “any kind of educational benefit” and not used for medical, social, or emotional reasons with only “incidental educational benefit,” quoting *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 431 (3d Cir. 2013)).

Further, as noted above the IDEA expressly mandates that disabled students be educated in the least restrictive environment to the maximum extent appropriate, 20 U.S.C. § 1412(a)(5). So a Local Education Agency (“LEA”) must consider less restrictive alternatives before placing a student in a residential facility. See *Leggett v. Dist. of Columbia*, 793 F.3d 59, 72 (D.C. Cir. 2015) (residential placement necessary only where school officials failed to offer a day school reasonably calculated to provide educational benefits); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (residential placement is not appropriate when lesser restrictive placements can adequately meet a student’s needs).

Here, the parties agree – and the undersigned concurs – that at a minimum a nonpublic day school is required for Student. Thus, the central issue is whether a nonpublic day school can provide appropriate educational benefit given Student’s circumstances, or whether a residential placement is required at this time to provide “any kind of educational benefit,” which was vigorously litigated in the 2-day due process hearing.

As Parent testified, Student has been unstable for a long time and needs to be stabilized. Until beginning at Public School in mid-November 2017, Student had been out of school for nearly a year, during which time Student moved to

, returned to and then moved to temporary housing in D.C. where Student was enrolled in a new school mid-year. These are challenging events that could throw any child off-kilter, much less one suffering from the mix of serious disabilities and challenges facing Student.

The question is whether the needed stabilization can occur in a nonpublic day placement or whether it requires residential treatment. Psychiatrist and Educational

¹²³ 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 procedural violations were alleged in this case.

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Advocate asserted that day programs have not worked for Student in the past and that Student experienced destabilization. But the record suggests otherwise, for as stated in the facts above Student made a positive adjustment to Prior Day School in _____, as well as making progress in Maryland as shown on Student's report card. Indeed, it may be that Student was destabilized by not being in school and not having the stability of a known school environment, which is still lacking in the interim location at Public School.

An unfortunate breakdown in trust occurred between Parent and DCPS, where Parent felt he had been lied to and then that Public School was withholding information. On the other hand, Parent was not sharing full information with DCPS from the beginning, failing to disclose early on that Student had recently attended school in nearby _____ and then refusing to sign a document release for the Maryland documents, describing symptoms that Public School staff did not see in Student, refusing to permit the nurse at Public School to administer needed medication to Student (as well as Parent or guardian refusing to administer it themselves to Student at school), and repeatedly refusing to allow DCPS to speak with Student's providers. While Parent has rights and was not obliged to be more forthcoming, that did not give DCPS the information it sought to determine whether Student required a residential placement.

Both school personnel and evaluators have seen Student in a very different light than Parent, and have not validated many of the symptoms described by Parent, which has resulted in differing conclusions about whether residential placement is necessary. While Student's violence towards teachers at Public School and 5 trips to the hospital (with three admissions) are undeniable, LRE Program Manager testified based on her experience that she was not troubled by this behavior at Public School or by Student's reported hallucinations. LRE Program Manager explained that Student's psychiatric meltdowns should be addressed by treatment providers working together with Student's family and school, and that Parent can rely on the wraparound services in the community. Instead of collaboration, Parent seemed to seek to inhibit the flow of information and keep DCPS from talking to Student's providers.

After Student's IEP team decided on a nonpublic day school on 12/11/17, OSSE sent out information to nearly a dozen potential nonpublic day schools, providing all documentation received from Parent or DCPS, in order to find a suitable school for Student. Most declined, but 2 accepted Student and determined that they could serve Student's needs. Proposed Day School B accepted Student, but the classroom best suited for Student was full, so Student could only begin in the summer. The other, Proposed Day School A, accepted Student with the condition that Student have a dedicated aide added to the IEP, which was achieved by the stipulation at the beginning of the due process hearing. Although Parent had some concerns about Proposed Day School A, LRE Program Manager considered Proposed Day School A an appropriate school for Student, based on her experience and expertise.

Significantly, Hospital did not recommend residential treatment for Student, despite multiple hospitalizations and analysis of Student. Nor did the Neuropsychological Evaluation conclude that residential treatment was appropriate, based on not seeing the violent and aggressive behaviors raised by Parent in the 2017 evaluation or in 2015, as well

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as the concerns raised by the F index. Indeed, the only recommendation for residential placement was from Psychiatrist, who never spoke to Principal or anyone at DCPS and testified that Student's education would be better if Student were in a residential program. However, "better" is not the applicable standard, for if Student can achieve appropriate educational benefit from a nonpublic day school it does not matter if the residential program is better. In fact, there were indications of educational progress by Student even in Public School, despite all of Student's behavioral issues.

LRE Program Manager persuasively recommended not foregoing a nonpublic day school for Student and directly implementing residential placement, as Student had not been in school for nearly a year, and might well do much better when acclimated to the classroom with a teacher Student likes who could work to develop rapport with Student. LRE Program Manager credibly testified that she knows what a child who needs residential placement looks like, and in her expert opinion Student is not at that level at this time. Moreover, placement is of course not fixed and if a nonpublic day school is not sufficient for Student, then the IEP team can come back and make the placement more restrictive by shifting to residential.

In sum, this Hearing Officer is persuaded that DCPS has met its burden and that Student's LRE at this time is a nonpublic day school, where Student may be able to find sufficient stability to get on a path that will provide the behavioral improvements and educational benefits that all wish for Student.

Educational Placement. 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, the undersigned has determined that a nonpublic day school is Student's LRE and the IEP need not incorporate a residential placement. Thus, DCPS has met its burden and placing Student in a nonpublic day school such as Proposed Day School A or Proposed Day School B (when space is available) would be a suitable educational placement.

Other IEP Concerns. Petitioner raises a number of other concerns about Student's 12/11/17 IEP which can be resolved expeditiously. To begin, the present levels of performance in Student's IEP have the same 2 paragraphs repeated over and over for every section in the IEP, which total 24 identical statements down to the typographical and grammatical errors. This gave the appearance of words in IEP boxes, but provided little meaningful information for the benefit of Student or those trying to address Student's serious needs through implementing the IEP.

(a) Appropriate Goals, Particularly in Adaptive Functioning. Petitioner is quite right that the IEP lacks any adaptive functioning/daily living goals and merely include a stray spelling goal in the adaptive functioning section. The undersigned found Educational Expert credible in calling for more streamlined and specific goals, but recognizes that this was an initial IEP that was pulled together quickly in order to begin offering services comparable to a prior IEP.

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(b) Baseline Data. Student's IEP contained no baseline information for any goal, repeating 19 times, "No baseline established." Again, recognizing this was just the initial IEP developed on 12/11/17 when Student had only been in Public School for a few days (due to arrival in mid-November and hospitalizations), the undersigned holds that there was no IDEA violation from not including baselines at that time, although baselines should certainly be included going forward.

(c) Dedicated Aide. Student's IEP did not provide for a dedicated aide. Educational Expert credibly testified that a dedicated aide was needed given the intensity of the incidents and should have been included in the 12/11/17 IEP. However, as Educational Advocate noted, a dedicated aide was actually provided to Student even though not on the IEP – along with a 1:1 teacher – so there was no harm to Student from the omission of a dedicated aide on the IEP, although it is to be added by stipulation for the future.

(d) Accommodations for Assessments. The IEP requires Student to participate in the regular statewide assessment, rather than the alternate assessment, which would seem more suitable given Student's limitations, including an FSIQ of 50. While this should be corrected, the impact on Student was surely minimal.

(e) Behavioral Support Services. Student's IEP provided for only 30 minutes/week (or 120 minutes/month) of BSS, which Educational Expert credibly testified was not enough given the level of Student's significant behavioral challenges. Student did receive more BSS than was on the IEP, for in December 2017 (which was a partial month due to development of the IEP on the 11th and Winter Break) Student received 75 minutes; in January 2018, Student received 375 minutes; and in February 2018, Student received 210 minutes despite missing 2 sessions. While Petitioner's experts spoke of the need for 30 minutes/day of BSS, it is unclear to the undersigned that so much BSS would be desirable, as it is important for Student to settle in and be able to spend as much time as possible on academics as opposed to behavior and self-regulation. Accordingly, the Order below requires 60 minutes/week, which should be adjusted up or down as appropriate over time.

Denial of FAPE. In considering the concerns above, the undersigned is cognizant of the fact that the analysis is not about achieving a perfect IEP, but one that is reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001. *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016). This is especially true in the circumstances here in which the IEP was promptly developed for a newly-enrolled student from another state in order to begin services. Yet, on balance and given that DCPS bears the burden of persuasion, the undersigned concludes that taken together the various concerns raised about Student's 12/11/17 IEP (other than residential placement) denied Student a FAPE, as the IEP was not reasonably calculated to enable Student to make appropriate progress under the circumstances, which results in the remedy set forth below.

Remedy

The IDEA gives Hearing Officers broad discretion to provide an equitable remedy for students who have been denied a FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401

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F.3d 516, 522-23 (D.C. Cir. 2005); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *25 (D.D.C. 2016) (IDEA prescribes broad discretion in fashioning relief for educational deprivation).

While there is “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D.*, 817 F.3d at 799, that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid*, 401 F.3d at 523-24.

Here, as remedy for the denial of FAPE found above in the various IEP issues, within 30 days an IEP team meeting shall be convened by DCPS or the applicable LEA to revise Student’s IEP by (1) adding suitable adaptive functioning/daily living goals, (2) including appropriate baseline data, (3) including a full-time dedicated aide (if not already added), (4) providing accommodations for alternate assessments, and (5) increasing the level of BSS from 30 to 60 minutes/week outside general education. Compensatory education is also awarded below, based on this Hearing Officer’s determination of what would be most beneficial to put Student in the position Student should have been in at this point had there been no deficiencies in the IEP. This determination takes into account the Compensatory Education Proposal and testimony of Educational Advocate, recognizing that only a portion of the claims were found to be a denial of FAPE, so the Proposal’s recommendation of independent tutoring and mentoring has been reduced accordingly.

As a result of these factors, DCPS is ordered below to provide funding for a total of 40 hours of counseling and/or tutoring, with the blend at the option of Petitioner from independent provider(s) chosen by Petitioner. All hours are to be used within 18 months¹²⁴ in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

¹²⁴ In her testimony, Educational Advocate suggested a period of 2 years within which to use an award of compensatory education, but that was premised on the compensatory education services not beginning until after residential placement ended. Since this HOD does not order residential placement the compensatory education can begin much sooner and a shorter timeframe for using the services is appropriate.

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ORDER

Petitioner has prevailed on certain IEP claims, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 30 days, an IEP team meeting shall be convened by the current LEA in order to revise Student's IEP by (a) adding suitable adaptive functioning/daily living goals, (b) including suitable baseline data, (c) including a full-time dedicated aide (if not already added), (d) providing accommodations for alternate assessments, and (e) increasing the level of BSS from 30 to 60 minutes/week outside general education.
- (2) As compensatory education for the denial of FAPE found above, DCPS shall provide a letter(s) of authorization for a total of 40 hours of counseling and/or tutoring at Petitioner's option from independent provider(s) chosen by Petitioner, with such letter(s) to be provided within 10 business days after Petitioner's request(s). All hours are to be provided and used within 18 months; any unused hours will be forfeited.

Any and all other 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:

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