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

PETITIONERS, on behalf of STUDENT,[1] Petitioners, v. DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Respondent.	Date Issued: August 3, 2016 Hearing Officer: Peter B. Vaden Case No: 2016-0104 Hearing Dates: June 22-23, 2016 Office of Dispute Resolution, Room 2006 Washington, D.C.

CORRECTED HEARING OFFICER DETERMINATION

(This corrected decision is issued, *nunc pro tunc* to July 26, 2016, to correct technical error as to discussion in original Hearing Officer Determination of prospective placement relief for the 2016-2017 school year, which relief request was withdrawn by Petitioners prior to the June 22-23, 2016 due process hearing.[2])

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In their due process complaint, Petitioners request reimbursement from Respondent District of Columbia Public Schools (DCPS) for Student's enrollment at NONPUBLIC SCHOOL for the 2015-

[1] Personal identification information is provided in Appendix A.
[2] See Order Granting Motion to Correct Error issued August 3, 2016.

2016 school year and seek other relief for alleged denials of a free appropriate public education (FAPE) to Student since the 2010-2011 school year.

Student, an AGE child, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on April 27, 2016, named DCPS as respondent. The undersigned hearing officer was appointed on April 29, 2016. On May 17, 2016, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The parties convened for a resolution session on May 13, 2016, which did not result in an agreement.

On May 25, 2016, Petitioners filed a motion *in limine* to bar DCPS from introducing any evidence concerning the program proposed for the Student at CITY ELEMENTARY SCHOOL, which I denied by order entered June 2, 2016. Petitioners renewed their motion at the due process hearing on June 22, 2016 and I again denied the motion.

The due process hearing was convened before this Impartial Hearing Officer on June 22-23, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by CASE MANAGER and by DCPS' COUNSEL. At the request of Petitioners' Counsel, a foreign language interpreter was provided to assist MOTHER on the first day of the hearing. Petitioners, by counsel, informed the hearing officer that they would not need an interpreter for the second day of the hearing.

Counsel for the respective parties made opening statements. Both parents testified and Petitioners called as additional witnesses HEAD OF SCHOOL, NEUROPSYCHOLOGIST, and EDUCATIONAL ADVOCATE. DCPS called as witnesses

INCLUSION DIRECTOR, TEACHER, CES PROGRAM MANAGER, PRINCIPAL and SCHOOL PSYCHOLOGIST. Petitioners' Exhibits P-1 through P-76 and P-78 through P-79 were admitted into evidence, including Exhibit P-71 admitted over DCPS' objection. Exhibit P-77, pages 9 through 11 only, were admitted over DCPS' objection. DCPS' Exhibits R-1 through R-48 were admitted into evidence, including Exhibit R-46 admitted over Petitioners' objection. On July 15, 2016, Petitioners filed a motion to reopen the record to offer supplemental exhibits P-Supp-1 and P-Supp-2. DCPS filed a response in opposition on July 20, 2016. By order issued July 25, 2016, I denied the motion to reopen the record and Exhibits P-Supp-1 and P-Supp-2 were refused. At the conclusion of Petitioners' case-in-chief, counsel for DCPS moved for summary disposition on Petitioners' Issues V and VI. (See list of Issues for Determination in this decision.) Petitioners, by counsel, then withdrew Issue V with prejudice. I took under advisement DCPS' motion with respect to Issue VI. In light of my findings and conclusions in this decision, I deny, as moot, DCPS' motion for summary disposition.

In lieu of making closing arguments, counsel for the parties requested leave to file post-hearing legal memoranda. In order to accommodate the attorneys' schedules, the briefing deadline was set for July 20, 2016. DCPS, by counsel, filed a consent motion to extend the due date for this final decision from July 11, 2016 to July 26, 2016. On June 28, 2016, the Chief Hearing Officer granted the continuance request. Counsel for the respective parties filed post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the May 17, 2016 Prehearing Order:

> I. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for the Student at the IEP meetings held in February 2014, November 2014, December 2014 and June 2015 in that:
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> a. At each of the above IEP meetings, the IEP teams failed to discuss, determine and indicate on the Student's IEPs what was the appropriate Least Restrictive Environment for Student and the type of placement Student needed along the continuum of alternative placements;
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> b. DCPS denied Student a FAPE by delegating the placement and Least Restrictive Environment determination/decision to a DCPS team that did not include Petitioners and individuals knowledgeable about Student;
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> c. The IEP teams failed to include Applied Behavior Analysis (ABA) on any of the above lEPs;
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> d. The IEPs did not include the services of a one-on-one dedicated aide.
>
> II. Whether DCPS denied Student a FAPE by failing to offer Student placement in a program that could provide Student with a FAPE;
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> III. Whether DCPS denied Student a FAPE for the last two years by failing to issue Prior Written Notices informing the Petitioners of the placement for the Student in an appropriate program and describing what options had been considered, thereby depriving Petitioners of the ability to meaningfully participate and make meaningful decisions concerning the Student's education;
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> IV. Whether DCPS denied Student a FAPE since the 2014-2015 school year by requiring Petitioners to fund the services of a one-on-one aide to assist Student at school;
>
> V. Whether DCPS denied Student a FAPE by failing to timely convene a MDT/IEP meeting to review the report of the IEE neuropsychological evaluation conducted on Student during 2014/2015 by Neuropsychologist[3];
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> VI. Whether DCPS denied Student a FAPE by failing to convene an IEP/MDT meeting to review and revise Student's IEP based on the new information contained in the May 2015 IEE neuropsychological evaluation report;

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[3] At the June 22, 2016 due process hearing, Petitioners, by counsel, withdrew this issue with prejudice.

VII. Whether DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan after repeated requests from Petitioners to do so, beginning over two years ago;

VIII. Whether DCPS denied Student a FAPE by failing to provide ABA Therapy services to Student and include it on his IEPs;

IX. Whether DCPS denied Student a FAPE by failing to develop a safety plan after being on notice for several years that Student had aggressive behaviors and was injurious to himself and others;

X. Whether DCPS denied Student a FAPE by failing to: a) inform Petitioners of the availability of ESY programs; b) ensure that Student's IEP team discussed and determined Student's need for ESY services and c) offered Student an appropriate placement in an ESY program during the summers of 2011, 2012, 2013, 2014 and 2015 and

XI. Whether DCPS denied Student a FAPE by failing to conduct an assistive technology (AT) evaluation of Student beginning more than two years ago.

For relief, Petitioners request that the Hearing Officer order DCPS to reimburse them for Student's enrollment, transportation and related expenses to attend Nonpublic School for the 2015-2016 school year; order DCPS to place and fund Student at Nonpublic School for School Year 2016-2017, with transportation and all related services, an ABA therapist and a 1:1 aide[4]; order DCPS to reimburse Petitioners for their expenses to provide a one-on-one aide for Student at City Elementary School and order DCPS to reimburse Petitioners for the cost of summer programs they provided for Student. Petitioners also seek an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this

[4] The request for prospective placement and services for the 2016-2017 school year was withdrawn by Petitioners in writing, prior to the June 22-23, 2016 due process hearing.

case, as well as the arguments and legal memoranda of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with Petitioners. Testimony of Father. Student is eligible for special education and related services as a student with Autism Spectrum Disorder (ASD). Exhibit R-39. Student also suffers from a seizure disorder. Exhibit P-30.

2. Student was initially evaluated for special education in spring 2011 at DCPS' Early S.T.A.G.E.S. assessment center. On April 28, 2011 Student was determined eligible for special education under the IDEA disability classification Developmental Delay. The evaluation team felt strongly that Student met the criteria then for ASD, but the parents were resistant to the ASD classification. Exhibit P-17.

3. Student's initial IEP was developed on April 28, 2011 at Early S.T.A.G.E.S. The initial IEP identified Adaptive/Daily Living Skills, Communication/Speech and Language, Health/Physical, and Motor Skills/Physical Development as Areas of Concern. For Special Education and Related Services, the IEP provided that Student would received 25 hours per week of Specialized Instruction, 4 hours per month of Speech-Language Pathology, 30 minutes per week of Physical Therapy, and 60 minutes per week of Occupational Therapy, all outside general education. The IEP specified, *inter alia*, that Student should have frequent interactions with typically developing peers to increase his socialization and exposure to these children. The IEP provided that Student did not require the support of a dedicated aide and that Extended School Year (ESY) services were not required. Exhibit P-16.

4. In August 2011, Student was evaluated at UNIVERSITY AUTISM CLINIC to confirm the diagnosis of autism. The University Autism Clinic concurred that

Student met criteria for autism and recommended, *inter alia*, that Student should be placed in a highly structured special education program that had teachers and other specialists with experience working with children identified as having ASDs and that Student should have a minimum of 25 hours input per week of programming and services. Exhibit P-38.

5. At the beginning of the 2011-2012 school year, Student was placed in a program for children with ASD at CITY SCHOOL 2. At City School 2, Student's classroom had 6 children taught by 3 adults. On October 12, 2011, Mother gave consent for Student to be reevaluated at City School 2. At that time, she was provided a copy of the District of Columbia's Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities. Exhibits R-1. On October 19, 2011, the City School 2 IEP team met to review Student's IEP. His Specialized Instruction was changed to 20 hours per week outside general education and 1 hour per day in general education. Exhibit P-15.

6. By letter of March 7, 2012, the parents wrote DCPS to request that Student be placed in an inclusion setting in a regular classroom. The parents wrote, "We are very happy with [Student's] progress over the past year including all the extra therapies. At this point, we feel strongly that he would benefit from an inclusion environment in a regular classroom with the least restrictive environment. . . .In transitioning to a regular classroom, we are requesting a professional "Shadow" to help [Student] make a successful transition. Exhibit R-2.

7. On March 6, 2012, Student's IEP team convened at City School 2 to review his IEP. Both parents attended. Student's Special Education and Related Services were left unchanged from the October 19, 2011 IEP. The March 6, 2012 IEP originally

provided that Student required the support of a dedicated aide. Exhibit P-11. However, the IEP was corrected the same day to state that Student did not require the support of a dedicated aide. Exhibit P-12. The IEP provision for a dedicated aide was an error. In a Prior Written Notice dated March 28, 2012, it was noted that the parents wanted a dedicated aide for the 2012-2013 school year, but the necessary supporting documents were not present and an aide was not necessary for Student's current Least Restrictive Environment at City School 2. Exhibit P-14. An Amended IEP form was completed on March 28, 2012 to remove the request for a dedicated aide as reportedly agreed upon by the parent and LEA. Exhibit P-13.

8. Mother felt that the ASD program at City School 2 was for severely autistic children and was not a "fit" for Student. She was desperate to move Student out of City School 2 and asked to move Student to their neighborhood school, City Elementary School, even though City Elementary School could not provide as many hours of special education services outside general education. Student was accepted at City Elementary School for the 2012-2013 school year. Testimony of Mother.

9. The City Elementary School IEP team convened for an annual review of Student's IEP on February 26, 2013. Both parents attended the meeting. At the IEP meeting, Student was reported to have demonstrated academic and social growth and to have made significant gains despite language challenges and weaknesses in both fine and gross motor skills. The February 26, 2013 IEP provided for Student to receive 5 hours per week of Specialized Instruction outside general education and 4 hours per month of Speech-Language Pathology, 120 minutes per month of Physical Therapy and 240 minutes per month of Occupational Therapy, all outside general education. The

IEP stated that Student did not require the support of a dedicated aide. The team determined that Student was not eligible for ESY services. Exhibits P-10, R-3.

10. The 2012-2013 school year at City Elementary School went well for Student, Testimony of Father, although Mother noticed that in the second semester, Student had more aggressive behaviors and "shut himself down." Testimony of Mother. On his end-of-year report card, Student's ratings were all Meets Expectations or higher. His teacher commented that Student loved coming to school and was well liked by his peers. Exhibit R-4.

11. Student continued at City Elementary School for the 2013-2014 school year. Principal "created" a classroom for Student of 16 students, taught by a general education teacher and an experienced aide. For the first half of the year there were some moments of unevenness. Student went overseas from around Thanksgiving 2013 until after the Winter Break. He missed around 4 weeks of school. His transition back to school was challenging. Testimony of Principal. As of January 24, 2014, Student was reported to be progressing on or to have mastered all of his February 26, 2013 IEP annual goals. Exhibit R-5.

12. On February 18, 2014, City Elementary School provided prior written notice to the parents that Student's IEP would be updated to add specific goals for Reading, Writing, Math and Emotional/Social/Behavioral Development. The reason for the changes was that as academic demands increased, Student was finding it more challenging to comply with classroom requests and to interact meaningfully with adults and peers. The PWN stated that the IEP team felt that additional support was needed throughout the day to provide Student with full access to the general education curriculum. Exhibit P-9.

13. Student's IEP team at City Elementary School convened for his annual IEP review on February 18, 2014. Both parents attended the IEP meeting. The revised IEP identified Mathematics, Reading, Written Expression, Adaptive/Daily Living Skills, Communication/Speech and Language, Emotional, Social and Behavioral Development, and Motor Skills/Physical Development as areas of concern. The February 18, 2014 IEP provided for Student to receive 7.5 hours per week of Specialized Instruction outside general education and 180 minutes per month of Speech-Language Pathology, 120 minutes per month of Physical Therapy and 240 minutes per month of Occupational Therapy, all outside general education. The IEP added 1 hour per month of Consultation Speech-Language Pathology. The IEP stated that Student did not require the support of a dedicated aide. The team determined that Student was not eligible for ESY services. Exhibit P-8.

14. On February 28, 2014, Student suffered a seizure for which he was hospitalized over night. Following the seizure episode, Student returned to school at City Elementary School for half-days. Testimony of Father, Exhibit P-30.

15. On May 5, 2014, Mother met with Principal to discuss a new behavior plan for Student. The Student Support Plan provided Ticket rewards for Student's cooperation in following directions in the academic area and at lunch and recess. At the meeting, Mother requested that for the rest of the 2013-2014 school year, Student's pull-out related services be discontinued because she was concerned that transitioning out of the classroom affected Student's behavior. Exhibits R-9, R-10.

16. Student's report card for the final term of the 2013-2014 school year indicated that Student was approaching expectations (Basic) in Reading, Writing & Language, and Speaking and Listening and was Proficient in all other areas. The

teacher's comments reported that although Student had been resistant when pushed to show his academic abilities, he was participating in full in reading, writing and math workshops producing work that showed he was on grade-level when working one-on-one with a teacher. The teacher reported that Student would move on to the next grade with the ability to independently decode and comprehend books just beneath grade-level standards, write about many self-selected topics and discuss his mathematical thinking. She reported that Student's biggest achievements over the school year were social-emotional developments. Exhibit R-11. Student's end-of-year IEP progress report stated that he was Progressing on all IEP annual goals, except that for Motor Skills/Physical Development, Student had mastered his cutting out shapes goal and had made no progress on 3-step educational activity goal. The Occupational Therapist reported that Student's behavior during OT sessions minimized his participation in tasks and that he constantly required redirection and instruction for sequential tasks. Exhibit R-12.

17. Student remained at City Elementary School for the 2014-2015 school year. In the fall of 2014, there were a lot of challenges with Student's loud outbursts, hurting other children and being physical with adults. Student struggled with noise and transitions, and was unable to consistently follow routines. The outbursts occurred multiple times every day. This was difficult for Student and the rest of the children in the class. It was also a challenge to get Student to comply with assignments and participate in class circle activities. Testimony of Teacher.

18. On September 4, 2014, Principal wrote an email to parents in which she recommended that parents hire GRADUATE STUDENT, who was working part-time in the school library "as a candidate to provide the extra support we have discussed for

[Student] at [City Elementary School]." She wrote that Graduate Student was available in the afternoons, "the time we know [Student] needs additional support most especially." Principal proposed that Graduate Student start with support for Student on Mondays ("often a trickier day for Student") and Tuesday, Wednesday and Thursday afternoons, in the range of 12 hours per week. Exhibit P-57. The parents hired the graduate student to work with Student. Through October 3, 2014, Graduate Student worked 58.5 hours for a total charge of $819.00, paid for by the parents. The school did not offer to pay for this expense. Exhibit P-57, Testimony of Father.

19. On September 9, 2014, City Elementary School provided a Prior Written Notice (PWN) to the parents that DCPS would conduct a triennial reevaluation of Student. The Notice stated that Student had many adaptive and functional skills, however weaknesses in language and visual-motor coordination affected his ability to listen to instruction and complete accompanying tasks independently. The PWN reported that lately, Student had expressed his increasing level of frustration by being non-compliant when asked to perform tasks similar to his peers. Exhibit R-13. In a September 2014 Analysis of Existing Data, Case Manger reported, *inter alia*, that in the prior school year, as classroom demands for independent school work increased, Student required considerable 1:1 adult guidance and intervention. She reported that an increase in adult support was now necessary for Student to demonstrate appropriate academic gains, respond to instruction and assigned tasks and interact appropriately with adults and peers. Exhibit R-13.

20. In October 2014, School Psychologist conducted a psychological reevaluation of Student. She reported that intellectually, Student was generally performing in the Average range of non-verbal intellectual ability, but that the verbal

demand of the standard measure of intellectual assessment, Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), was too much for Student. She reported that access to typical peers had empirically a very positive impact on Student, but that Student had difficulty adhering to school routines and expectations. Following directions and complying with certain class activities had been particularly difficult. On occasion, Student had melt-downs (crying, hitting and screaming) when he had not gotten his way. School Psychologist recommended, *inter alia*, that Student would require intensive, explicit instruction from an adult who was able to provide Student with ongoing support throughout the school day; that Student would benefit from an academic setting where he was able to receive intensive 1:1 support he needed during periods of academic work; that because Student struggled behaviorally and getting him to comply with classroom rules and procedures had proven difficult, participation in a smaller class with additional adult support was recommended; and that Student would strongly benefit from an educational program that allowed him ample opportunities to engage with typical peers during specials classes, lunch, recess, morning meetings, etc. Exhibit R-14.

21. A DCPS speech-language pathologist conducted a speech and language reevaluation of Student in October 2014. This reevaluation included a review of a July 2014 independent evaluation made by one of Student's private speech therapists. The DCPS evaluator reported that Student continued to meet criteria as a student with a speech and language delay, specifically in the areas of expressive language, pragmatic language and receptive language skills. Exhibit R-15.

22. At an eligibility meeting on October 21, 2014, the DCPS eligibility team determined that Student's primary disability classification should be changed from

Developmental Delay to Autism. The parents did not accept the Autism eligibility classification and wanted to defer the decision. Exhibits R-17, R-18.

23. An October 31, 2014 IEP progress report stated that Student had made no progress on most of his annual goals from his February 18, 2014 IEP. Exhibit R-21.

24. Student's IEP team convened at City Elementary School on November 6, 2014 to review Student's IEP. The revised IEP stated that Student's disability classification was ASD. The IEP team reported that Student's behavior impeded his learning and that of other children and that he could disrupt the entire lesson with crying or screaming to the point that he needed to be escorted from the class to calm down. For mathematics, it was reported that Student was mostly unable to apply his knowledge independently in the classroom and that adult support was needed to encourage engagement, prompt for on-task behavior and monitor performance. For reading, the team reported that while Student enjoyed looking through books, he was unable to show consistently that he was deriving meaning from them without an adult's facilitating his participation and prompting his responses and that 1:1 support from an adult was needed for Student's continuing access to curriculum and demonstration of increasing knowledge. For writing, Student was reported to be challenged to sustain the interest and stamina needed to develop a story through the process of writing and that 1:1 support was needed to produce most written work. For Adaptive/Daily Living Skills, Student was reported to need continued adult facilitation throughout the day to support his academic and social growth and Student needed an increase in 1:1 classroom support to carry over the skills from therapy and specialized instruction to independent work/social times in the general education setting. For Speech-Language, Student was reported to demonstrate steady progress in a 1:1 or small group setting. For Emotional,

Social and Behavioral Development it was reported that Student was experiencing more difficulties across the board with regard to his executive functioning, that as classroom demands increased, Student required considerable 1:1 adult guidance and intervention and that an increase in adult support would be necessary for Student to demonstrate appropriate academic gains, respond to assigned tasks and interact appropriately with adults and peers. For Motor Skills/Physical Development, it was reported that Student had not been able to actively engage in any significant amount of classroom learning and that even with 1:1 adult support, his engagement and cooperation had been minimal. Exhibit R-19.

25. The November 6, 2014 IEP provided that Student would receive 11 hours per week of Specialized Instruction outside general education, 180 minutes per month of Speech-Language Pathology and 240 minutes per month of Occupational Therapy. As Consultation Services, Student was to be provided 30 minutes per month for Physical Therapy and 1 hour per month for Speech-Language Pathology. The IEP stated that Student did not require the support of a dedicated aide or ESY services. Exhibit R-19. The parents did not want to sign the IEP because of the change of Student's disability classification to ASD. Another IEP meeting was scheduled for December 4, 2014. Exhibit R-20.

26. When the IEP team reconvened on December 4, 2014, the parents signed the IEP. Exhibit R-23.

27. The December 4, 2014 IEP was amended on December 8, 2014 to provide for physical therapy as a consultative service rather than as a direct services. Exhibit P-3.

28. On November 18, 2014, Principal wrote the parents by email that

Student's physical response to his classmates, and sometimes teachers, which included daily episodes of hitting and occasional biting had to be addressed by the school. Exhibit P-56.

29. In November and December 2014, DCPS' autism coordinators conducted a Functional Behavioral Assessment (FBA) of Student at City Elementary School. Student's teachers reported that his disruptive behaviors occurred daily, or more often, and that the behaviors were significant or very disruptive with potential to hurt someone. Exhibit R-26. In January 2015, the DCPS autism coordinators proposed a Behavior Intervention Plan (BIP) for Student providing strategies of rewards (point sheet) to reinforce desired behaviors and consequences to be implemented for interfering behaviors. Exhibit R-29.

30. Both DCPS autism coordinators stayed at City Elementary School for a month after Winter Break to work with Student. One of the autism coordinators remained until mid-March 2015. The autism coordinators provided a lot of training to teachers at the school. After the autism coordinators arrived, Student made amazing progress and this continued, with some decline, after the coordinators' services were faded out. After March 2015, the autism coordinators continued to provide consultation services to Student's teachers. Testimony of Teacher.

31. At the end of the 2014-2015 school year, Student was reported to be Progressing on or to have Mastered all of his December 4, 2014 IEP goals, except that two Written Expression goals had not been targeted. Exhibit R-44.

32. In spring 2015, the City Elementary School IEP team submitted an IEP Paraprofessional Justification form to DCPS' central office. The justifications included that it was easier to redirect Student to complete a given task when working 1:1; that

Student would leave his seat/area and become noncompliant with adult redirection; that Student's behavior could escalate to disrupting the entire lesson with crying or screaming to the point where he need to be escorted from the class; that following the fading of 1:1 direct support to Student from the DCPS autism coordinators, the IEP team had seen a noticeable and unsafe return of challenging behaviors; that Student required continual support in approaching a task, persisting through a task and understanding of the material; that while Student enjoyed interacting with peers, he often hurts them when trying to get their attention; that School Psychologist had recommended an academic setting where Student was able to receive intensive 1:1 support and that Student's BIP implementation data indicated that without more frequent and consistent 1:1 support, Student exhibited higher levels of challenging and disruptive behavior. The justification form asserted that Student required full-day Paraprofessional support for BIP implementation to ensure the safety of all students as well as academic support across the day. Exhibit P-50.

33. DCPS' Paraprofessional Coordinator conducted two classroom observations of Student in May 2015. In a report dated May 27, 2015, Paraprofessional Coordinator determined that the use of a dedicated aide to support Student was not recommended. Paraprofessional Coordinator testified that she recommended a smaller classroom setting for Student, because she observed that in the smaller setting, Student was able to follow classroom rules. Paraprofessional Coordinator was not aware that the City Elementary School IEP team had reported unsafe behaviors by Student. Exhibit R-36, Testimony of Paraprofessional Coordinator.

34. In May 2015, Neuropsychologist and two colleagues completed an Independent Educational Evaluation (IEE) neuropsychological evaluation of Student.

They diagnosed Student with ASD - Level 2- requiring substantial support without accompanying intellectual impairment and with language impairment. They noted that Student's presentation also included difficulties in attention and executive functioning as well as challenges in sensory and motor processing and self-regulation. They recommended, *inter alia*, that ABA therapy be "reinstated" for Student for the 2014-2015 school year and that for the next academic year that Student transfer to a more structured, full-time academic environment ("*i.e.*, a self-contained classroom with a small student-to-teacher ratio.") Exhibit P-22.

35. On June 3, 2015, City Elementary School submitted to DCPS supporting data for the DCPS LRE team to review concerning Student's need for a more restrictive environment than his inclusion program at City Elementary School. Exhibit P-47.

36. In June 2015, City Elementary School received authorization from DCPS to set up an Early Learning Support (ELS) program at the school. Testimony of Principal, Exhibit P-58.

37. On June 18, 2016, Student's IEP team was convened to amend Student's IEP. The parents shared the results of Neuropsychologist's IEE psychological evaluation of Student. The IEP team recommended an amendment to Student's IEP to add 9 hours per week of Specialized Instruction, outside general education, to support Student for core academic subject (reading, writing, math) as well as content specific areas (social studies, in-class science and academic choice.) The team noted that when Student was supported by an autism coach to implement his BIP after winter break, for a while, his behavior was largely appropriate. But slowly the effects diminished without the additional support of the coach. The team noted that the request for a dedicated aide had not been granted. The team noted that Neuropsychologist's recommendation, that

Student transfer to a more structured, full-time academic environment, confirmed a recommendation of the IEP team presented at a meeting on May 21, 2015. Exhibits P-1, R-34.

38. On June 18, 2015, Student's IEP was amended to increase his Specialized Instruction hours from 11 to 20 hours per week outside general education. Exhibit P-1. This increase was to enable Student to be placed in the new ELS program at City Elementary School. In the ELS program, Student was expected to be able to receive behavior supports and the Lindamood-Bell reading program and still have the opportunity to attend Specials classes, recess and lunch with his typically developing peers. The ELS classroom was expected to have approximately 9, but not more than 12 students. As of June 2015, Principal was unable to tell the parents what the new classroom population would look like or that the teacher would have ABA training. Testimony of Principal.

39. The parents applied for Student's admission to Nonpublic School in May 2015. Testimony of Father. Nonpublic School has an enrollment of [redacted] students in Kindergarten through 8th Grade. The classroom size is 8 students with two teachers. Behavioral support, social skills and OT are integrated into the classroom. Social learning specialists and behavior support specialists provide support to the students. Nonpublic School does not hold a certificate of approval from the DC Office of the State Superintendent of Education (OSSE). The tuition charge at Nonpublic School is $[redacted], per year which includes social learning, behavioral support and OT services. ABA methodology is incorporated throughout the Nonpublic School program. Testimony of Head of School.

40. On August 4, 2015, the parents wrote Principal and Case Manager by email

to inform them that they had decided to move Student out of City Elementary School and into Nonpublic School. Exhibit P-61. On August 20, 2015, Petitioners' Counsel wrote Principal by email that the parents would seek public funding for Student's enrollment at Nonpublic School. Exhibit P-61.

41. Student entered Nonpublic School at the beginning of the 2015-2016 school year, on September 8, 2015. He has made progress in all domains. Hitting others and screaming for attention have been greatly reduced or stopped. Testimony of Head of School, Exhibit P-62.

42. Beginning in August 2015, Petitioners sought to have Educational Advocate observe the ELS program proposed for Student at City Elementary School, but DCPS insisted that Educational Advocate execute a Classroom Observer Confidentiality Agreement as a condition precedent to conducting the observation. Petitioners filed a due process complaint to establish their right to have the educational consultant conduct her classroom observation without executing the advance agreement. In a Hearing Officer Determination issued January 31, 2016 in Case No. 2015-0371, Impartial Hearing Officer Michael Lazan determined that DCPS' requiring execution of the confidentiality agreement, in the form drafted by DCPS, as a condition to observing the City Elementary School program violated the District of Columbia Special Education Student Rights Act of 2014 ("the Student Rights Act"), Sect. 103(5)(A)-(H). Hearing Officer Lazan ordered DCPS to promptly present the Petitioners' educational consultant with a revised observation agreement, excised of the provisions he determined unlawful, and to allow the educational consultant to visit the program at City Elementary School after she executed the revised agreement. Exhibit P-79. On March 3, 2015, Educational Advocate visited City Elementary School and observed the ELS program proposed for

Student. Representation of Petitioners' Counsel.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioners in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).[5]

ANALYSIS

In this case, the Petitioners assert numerous claims concerning the alleged inappropriateness of DCPS' IEPs for Student, compliance with procedural requirements and the conduct and review of assessment and evaluations for Student. I will address these claims in the order certified in the Prehearing Order.

Statute of Limitations Defense

Before reaching the issues concerning the appropriateness of Student's IEPs, I must address DCPS' statute of limitations defense. DCPS has asserted as an affirmative defense that some of Petitioners' claims which predate, by more than two years, the April 27, 2016 filing of the parents' due process complaint are time-barred. As the U.S.

[5] The D.C. Special Education Students' Rights Act of 2014 effected changes to the burden of proof in due process hearings for cases filed after July 1, 2016. *See* D.C. Acts 29-486, § 103(6). This case was filed before the effective date of the new law.

District Court for the District of Columbia recently observed in *Damarcus S. v. District of Columbia*, No. CV 15-851, 2016 WL 2993158 (D.D.C. May 23, 2016), there are two provisions in the IDEA that bear upon the relevant limitations period: 20 U.S.C. §§ 1415 (b)(6) and (f)(3)(C). "The first unambiguously establishes a filing deadline, requiring a due process hearing be requested "within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." *See id.* § 1415(f)(3)(C). The second is included in a section that outlines the types of procedures available under the IDEA, and it mandates [a]n opportunity for any party to present a complaint—(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and (B) **which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint**, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph. *See id.* § 1415(b)(6) (emphasis added)." *Damascus S.*

As the Court pronounced in *Damascus S.*, so long as the complaint is filed within two years of the known or should have known (KOSHK) date, Petitioners are entitled to full relief for that injury. Therefore, the statute of limitations inquiry should focus upon the particular deficiency asserted, and the parents' ability to recognize it. *See id.*

In their complaint the Parents allege several violations by DCPS which predate the filing of the complaint by more than two years, including an inappropriate February

2014 IEP and placement, failure to develop safety plans for several years and failure to include ESY services in Student's IEPs since the summer of 2011. To the extent each of these claims is established by the Petitioners, I will address when the parents gained the information that should have made them aware of the alleged violations or deficiencies. *See Damascus S.* If that occurred more than two years before the April 27, 2016 filing date for the due process complaint, the claims may be time-barred.

ISSUES CONCERNING APPROPRIATENESS OF IEPS

I. Did DCPS deny Student a FAPE by failing to develop an appropriate IEP for the Student at the IEP meetings held in February 2014, November 2014, December 2014 and June 2015 in that:

a. At each of the IEP meetings, the IEP teams failed to discuss, determine and indicate on the Student's IEPs what was the appropriate Least Restrictive Environment for Student and the type of placement Student needed along the continuum of alternative placements;

b. DCPS denied Student a FAPE by delegating the placement and Least Restrictive Environment determination/decision to a DCPS team that did not include Petitioners and individuals knowledgeable about Student;

c. The IEP teams failed to include Applied Behavior Analysis (ABA) on any of the above lEPs;

d. The IEPs did not included the services of a one-on-one dedicated aide.

II. Did DCPS deny Student a FAPE by failing to offer Student placement in a program that could provide Student with a FAPE?

III. Did DCPS deny Student a FAPE for the last two years by failing to issue Prior Written Notices informing the Petitioners of the placement for the Student in an appropriate program and describing what options had been considered, thereby depriving Petitioners of the ability to meaningfully participate and make meaningful decisions concerning the Student's education?

IV. Did DCPS deny Student a FAPE since the 2014-2015 school year by

requiring Petitioners to fund the services of a one-on-one aide to assist Student at school?

IEP Appropriateness Standard

In *Moradnejad v. District of Columbia*, ––– F.Supp.3d ––––, No. 14–1159, 2016 WL 1275577 (D.D.C. Mar. 31, 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

> The Supreme Court explained in *[Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:
>
> > First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.
>
> *Rowley*, 458 U.S. at 206–07, 102 S.Ct. 3034. Courts have consistently underscored that the "appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so." *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)); *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034 (finding that the IDEA does not require that IEPs "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children," only that they be "reasonably calculated to enable the child to receive educational benefits"); *N.T. v. Dist. of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012) ("While the District of Columbia is required to provide students with a public education, it does not guarantee any particular outcome or any particular level of education.").

Moradnejad, supra. "Courts have consistently underscored that the 'appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so'; thus, 'the court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation.'" *K.S. v. District of Columbia*, 962 F. Supp. 2d 216, 221 (D.D.C. 2013)

(citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)).

Petitioners allege that DCPS did not comply with the first prong of the *Rowley* standard – adherence to IEP procedures – in two respects, namely: (i) At each of the IEP meetings, the IEP teams failed to discuss, determine and indicate on the Student's IEPs what was the appropriate Least Restrictive Environment for Student and the type of placement Student needed along the continuum of alternative placements; and (ii) For the last two years DCPS failed to issue Prior Written Notices informing the Petitioners of the placement for the Student in an appropriate program and describing what options had been considered, thereby depriving Petitioners of the ability to meaningfully participate and make meaningful decisions concerning the Student's education.

i. IEP Least Restrictive Environment Discussion

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of his disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA requires that students with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia,* 846 F.Supp.2d 197, 200 (D.D.C. 2012). In its guidance on the 2006 IDEA regulations, the U.S. Department of Education explained the IDEA's LRE requirement:

Even though the Act does not mandate that a child with a disability be educated

> in the school he or she would normally attend if not disabled, section 612(a)(5)(A) of the Act presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a child with a disability can be placed outside of the regular educational environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement in the regular classroom setting must be considered. Following that consideration, if a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that child could be placed in a setting other than the regular classroom. Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate. In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.

U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46588 (August 14, 2006).

While the District must inform parents about its obligation to make available a continuum of alternative placements, as well as which alternatives were considered and rejected, as the Department of Education interprets the IDEA, there is no requirement to detail these LRE considerations in a child's IEP:

> It also should be noted that, under section 615(b)(3) of the Act, a parent must be given written prior notice that meets the requirements of Sec. 300.503 a reasonable time before a public agency implements a proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Consistent with this notice requirement, parents of children with disabilities must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the reasons why those options were rejected. **While public agencies have an obligation under the Act to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children's IEPs of why their educational needs or educational placements**

> **cannot be met in the location the parents' request.** We believe including such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement.

71 Fed. Reg. 46588 (emphasis supplied). Hence, "[t]he issue was not what the IEP said or did not say for its own sake; the issue is whether there was evidence that a critical part of implementing the LRE mandate had been carried out, even when one looks beyond the IEP itself to the full record." *H.L. v. Downington Area School District*, 65 IDELR 223 (3rd Cir. June 11, 2015). *But see Brown v. District of Columbia*, No. 15-0043, 2016 WL 1452330 (D.D.C. Apr. 13, 2016) (IEP is inadequate if it does not include a description of the student's least restrictive environment and discussion of his appropriate placement along the continuum of alternative placements.)

Petitioners contend that the February 2014, November-December 2014 and June 2015 IEPs were all inadequate because the IEPs did not include an account of the IEP team's discussion of what was the appropriate Least Restrictive Environment for Student and the type of placement Student needed along the continuum of alternative placements. Each of the 2014 and 2015 IEPs identifies the setting in which Student will be provided Specialized Instruction and Related Services, that is, whether in or outside of general education, and further explains that Student had previously been placed in a separate special class [at City School 2]. However, none of the IEPs contains a notice that DCPS is required to have a full continuum of placement options or describes the placement options that were actually considered for Student and the reasons why alternative options were rejected. Neither was there evidence that DCPS provided this information to the parents in some other form such as a Prior Written Notice. Therefore, I find that the each of the IEPs was inadequate for failure to include the

required information about the continuum of placements offered or alternative placement options considered for Student.

The February 18, 2014 IEP was developed more than two years before the parents filed their due process complaint in this case. However, there was no evidence that the parents knew or should have known that DCPS was required to provide them notice about the IDEA's continuum of placement requirements prior to the parents' engaging Petitioners' Counsel to represent them in Case No. 2015-0371 (filed on November 17, 2015). I find, therefore, that Petitioners' claim concerning the inadequacy of the LRE discussion in the February 18, 2014 IEP is not time-barred.

As the Court observed in *Brown, supra*, the omission of information in the IEP about alternative placement options considered is a procedural violation of the IDEA and IEP procedural flaws do not automatically mean that a child was denied a FAPE.

> [A] procedural defect in an IEP results in a denial of a FAPE if it "(i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). In other words, to set aside an IEP, "there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits." *N.S. ex rel. Stein v. District of Columbia*, 709 F.Supp.2d 57, 67 (D.D.C.2010) (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990)).

Brown, supra.

In this case, I find that the failure by DCPS to provide the parents written notice its continuum of placements obligation or the alternative placements considered for Student is not sufficient grounds to find the IEPs inappropriate. The evidence establishes that as early as March 2012, the parents were knowledgeable about the

IDEA's continuum of placements provisions. In the 2012-2013 school year, Student was attending City School 2 where he had been placed in a separate class for children with ASD disabilities. In a March 7, 2012 letter to DCPS, the parents wrote, "Our son is currently enrolled in [City School 2] in the Autism special education class. . . . At this point, we feel strongly that he would benefit from an inclusion environment in a regular classroom with the least restrictive environment. . . . Our desire is to place him in the least restrictive environment so that he can be challenged to continue to make positive strides . . ." In this letter, the parents demonstrated that they were not only knowledgeable about the IDEA's least restrictive environment provision, they were able to advocate for Student's transfer from a special class to the, least restrictive, inclusion setting in a regular classroom. Clearly, the parents were able to meaningfully participate in the IEP formulation process[6] and there was no evidence that the lack of description in Student's IEPs about DCPS' obligation to offer a continuum of placements, or the alternative placements considered, caused a deprivation of education benefits. I find that Student was not denied a FAPE by these procedural violations.

b. Prior Written Notices

Next, Petitioners allege that for the last two years, DCPS failed to issue Prior Written Notices (PWNs) informing them of the placement for Student in an appropriate program and describing what options had been considered, depriving them of the ability to meaningfully participate and make meaningful decisions concerning Student's education. DCPS maintains that it complied with the IDEA's PWN requirement. The

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[6] The parents' expert, Educational Advocate, also participated in the June 18, 2015 IEP meeting. Educational Advocate testified that she has attended some 3,000 IEP meetings over 39 years and she was undoubtedly also knowledgeable about the IDEA's LRE and continuum of placements requirements.

IDEA requires that the LEA must give prior written notice before the LEA proposes to initiate or change the identification, evaluation, or educational placement of child with a disability or the provision of FAPE to the child. *See* 34 CFR § 300.503(a). The notice must include (1) A description of the action proposed or refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action and (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action. *See* 34 CFR § 300.503(b).

Over the two years preceding the filing of the complaint in this case, DCPS has initiated placement decisions for Student at IEP meetings on November 6, 2014, December 4, 2014, and June 18, 2015. The November 6, 2014 IEP, completed and signed by the parents on December 4, 2014, changed, *inter alia,* Student's Specialized Instruction and Consultation Services. The June 18, 2015 IEP would have changed Student's placement from the general education setting to, primarily, an Early Learning Support (ELS) classroom outside general education. City Elementary School provided the parents a PWN prior to the December 4, 2014 IEP meeting, but the PWN does not fully describe the proposal to change Student's Specialized Instruction and Related Services. The record does not include a PWN for the proposed June 18, 2015 IEP changes. I find, therefore, that the Petitioners have established that DCPS failed to comply with the IDEA's PWN requirements prior to initiating changes to Student's educational placement at the time of either the December 4, 2014 or the June 18, 2015 IEP meetings.

An agency's failure to give the required prior written notice is a procedural violation of the IDEA. *See Honig v. Doe,* 484 U.S. 305, 312, 108 S.Ct. 592, 598 (1988) (Safeguards include prior written notice whenever the responsible educational agency

refuses to change the child's placement or program.) The purpose of the prior written notice requirement "is to ensure that parents are aware of the decision so that they may pursue procedural remedies." *M.B. ex rel. Berns v. Hamilton Southeastern Schools*, 668 F.3d 851, 861-862 (7th Cir.2011). Prior to the December 2014 IEP meeting, as recently as October 23, 2014, the parents had been provided a Procedural Safeguards Notice with a description of procedural remedies. (Exhibit R-16.) Moreover, City Elementary School provided the parents a PWN before the December 4, 2014 IEP meeting, although the form lacked sufficient detail. At the June 18, 2015 IEP meeting, the parents were assisted by Educational Advocate, who has 35 years experience as a special educator and is certainly knowledgeable about the procedural remedies available to parents. I find that Petitioners have not shown that DCPS' failure to provide appropriate prior written notices, at the time of the IEP meetings in December 2014 and June 2015, impaired their ability to participate in the process or resulted in harm to the Student. Nor were the parents hampered in pursuing their procedural remedies.

In sum, I find that DCPS' failure to ensure compliance with the IDEA's procedural requirements in this case did not impede Student's right to a free appropriate public education, did not significantly impede the parents' opportunity to participate in the decision making process and did not caused a deprivation of educational benefits. Therefore these procedural violations are not actionable.

I turn, next, to the second, substantive, prong of the *Rowley* inquiry: Were the February 2014, November-December 2014 and June 2015 IEPs reasonably calculated to enable Student to receive educational benefits? Petitioners allege that each of these IEPs was deficient because DCPS delegated the placement and Least Restrictive Environment determination/decision to a DCPS team that did not include Petitioners

and individuals knowledgeable about Student; because the IEP teams failed to include Applied Behavior Analysis (ABA) on any of the lEPs; because the IEPs did not include the services of a one-on-one dedicated aide; and because these IEPs (and prior IEPs) did not provide Student Extended School Year (ESY) services. DCPS responds that each of the IEPs met the IDEA's requirements to provide Student a FAPE.

Alleged Delegation of Placement/LRE Decision

The IDEA requires that DCPS ensure that the educational placement decisions for a student with a disability be made the student's IEP team, including the parents and other persons knowledgeable about the student. *See* 34 CFR § 300.116(a). "[E]ducational placement refers to 'the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school.'" *Aikens v. District of Columbia*, 950 F.Supp.2d 186, 191 (D.D.C.2013) *Id.*, citing *T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir.2009).

I find from the hearing record that for each of the February 2014, November-December 2014 and June 2015 IEPs, Student's educational placement was determined by his IEP team, with the participation of his parents. Both parents attended the February 18, 2014 IEP meeting where Student's IEP team determined that Student would have an inclusion placement in the general education setting, with pull-out services for Specialized Instruction and Related Services. The parents also attended the November 6, 2014 and December 4, 2014 IEP meetings, where the IEP team maintained Student's inclusion placement in the general education setting at City Elementary School, with revised pull-out services for Specialized Instruction and Related Services. Both parents, along with Educational Advocate, attended the June 18, 2015 IEP meeting, at which the IEP team amended Student's IEP to provide for 20 hours per

week of Specialized Instruction so that Student could be placed in the new ELS classroom proposed for City Elementary School. This followed the report of the parent's IEE neuropsychologist, who recommended that Student's then-current academic placement, primarily in a regular classroom, was unsuitable. I find that Petitioners have failed to establish that for Student's 2014 and 2015 IEPs, the District delegated Student's educational placement decisions to a DCPS team that did not include the parents.

Lack of Provision for Applied Behavior Analysis on the lEPs

Petitioners contend that the 2014 and 2015 IEPs were inadequate because the IEP teams did not specify that Applied Behavior Analysis (ABA) would be used for Student. DCPS responds that ABA is an instructional methodology and that the IDEA does not require the IEP team to specify, in the IEP, what instructional methodology will be used. In its comments on the 2006 IDEA regulations, the U.S. Department of Education discussed whether instructional methodologies were required for a student's IEP:

> There is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(1)(A)(ii)(I) of the Act, we cannot interpret section 614 of the Act to require that all elements of a program provided to a child be included in an IEP. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed.

Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. at 46665. There was no evidence at the due process hearing that Student's IEP teams determined that specific ABA instructional methods were necessary for Student to receive a FAPE. However in each of the IEPs, the IEP team provided that Student's

"independent work habits would be reinforced through motivational techniques that promote compliance and reward appropriate responses/behaviors." Although ABA methodology was not specified in Student's IEPs, the evidence establishes that at City Elementary School, ABA techniques were, in fact, used to instruct Student. CES Manager explained that ABA is delivered in a number of ways, including reinforcement teaching, discrete trial instruction, classroom set up and others. On May 5, 2014, Mother met with Principal to discuss a Student Support Plan for Student. The Student Support Plan provided ticket rewards for Student's cooperation in following directions in the academic area and at lunch and recess. Principal testified that in the 2014-2015 school year, Student was placed in a smaller, low student-to-teacher ratio, class and positive interventions were used with some success. After the winter break, a Behavior Intervention Plan, based on ABA principles and a visual schedule, were used for Student. In sum, the evidence establishes that ABA principles were part of the teaching program for Student at City Elementary School, although ABA methodology was not specified in Student's IEP. I conclude that the IEP teams' not specifying the use of ABA techniques on Student's IEPs did not make the IEPs inadequate and that Petitioners have not met their burden of proof that Student was denied a FAPE by City Elementary School's failing to provide him ABA therapy services. (*See* Issue VIII.)

Dedicated Aide

The parents allege that Student was denied a FAPE because his 2014 and 2015 IEPs did not provide for 1:1 dedicated aides. DCPS responds that the IEP teams' decisions that Student did not require a dedicated aide were appropriate because Student had made educational progress in the 2012-2013 and 2013-2014 school years without a dedicated aide.

Under the IDEA, a dedicated aide is a "supplementary aid and service" that must be provided in an IEP, if required to assist a child with a disability to benefit from special education and to be educated with nondisabled children in regular classes to the maximum extent appropriate. *See* 34 CFR §§ 300.42, 300.114(b). The IEP team must include a dedicated aide in a child's IEP if required "to permit the child to benefit educationally from [his IEP personalized] instruction." *See Rowley*, *supra*, 458 U.S. at 203. *Cf. Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79, 119 S. Ct. 992, 1000, 143 L. Ed. 2d 154 (1999). The inquiry for this decision is whether at the time Student's IEPs were revised – February 18, 2014, November-December 2014 and June 18, 2015 – were dedicated aide services necessary for Student to assist him to benefit from special education and to be educated with nondisabled children in regular classes to the maximum extent appropriate.

February 18, 2014 IEP

On February 20, 2014, following the February 18, 2014 IEP meeting, Father wrote Case Manager by email to inquire, *inter alia*, "When can we expect a 'shadow' (Page 15 [of the February 18, 2014 IEP] said 'No' to a dedicated aide despite many paragraphs suggesting that he required '1 to 1' supervision to complete his tasks.)" The parents had requested a shadow for Student as early as March 7, 2012 in a letter to DC Public Schools Board of Directors [*sic*]. I find that by February 2014, the parents had information from which they knew or should have known that the February 18, 2014 IEP was, in their view, inadequate for not providing a dedicated aide for Student. This was more than two years before the April 27, 2016 due process complaint filing date. Therefore, I find that as to the February 18, 2014 IEP, the Petitioners' claim concerning Student's not being provided a dedicated aide is barred by the two-year statute of

limitations. *See Brown v. District of Columbia, supra;* 20 U.S.C. § 1415(b)(6)(B).

November-December 2014 IEP

Following completion of Student's triennial reevaluation on October 23, 2014, Student's IEP was reviewed and revised at IEP team meetings convened on November 6, 2014 and December 4, 2014. By the fall of 2014, City Elementary School had amassed an abundance of data showing that Student required a dedicated aide in order to be able to benefit educationally in a regular classroom. In a September 2014 Analysis of Existing Data, Case Manager reported, *inter alia*, that in the prior school year, as classroom demands for independent school work increased, Student required considerable 1:1 adult guidance and intervention. She reported that an increase in adult support was now necessary for Student to demonstrate appropriate academic gains, respond to instruction and assigned tasks and interact appropriately with adults. In an October 10, 2104 psychological reevaluation report, School Psychologist recommended, *inter alia*, that Student would require intensive, explicit instruction from an adult who was able to provide Student with ongoing support throughout the school day; that Student would benefit from an academic setting where he was able to receive intensive 1:1 support he needed during periods of academic work; and that because Student struggled behaviorally and getting him to comply with classroom rules and procedures had proven difficult, participation in a smaller class with additional adult support was recommended.

In the fall of 2014, City Elementary School Principal recognized Student's need for more 1:1 adult support. On September 4, 2014, Principal wrote the parents to recommend that they hire Graduate Student, who was working part-time in the school library, to provide "extra support" to Student during the school day. The parents

followed this recommendation. On November 18, 2014, following an absconding incident, Principal wrote the parents by email that Student's physical response to classmates and teachers, which included daily episodes of hitting and occasional biting, had to be addressed. Student's November-December 2014 IEP team stated in the December 4, 2014 IEP that Student required adult 1:1 support for almost every academic and non-academic areas of concern.

On this record, I find that by the time of Student's annual IEP review in November and December 2014, it was well established that Student required a 1:1 dedicated aide to enable him to benefit educationally in the regular education setting. I conclude that Student was denied a FAPE by the decision of the November-December 2014 IEP team that Student did not require the support of a dedicated aide.

June 18, 2015 IEP

In late May 2015, Neuropsychologist completed her IEE neuropsychological evaluation of Student. In the evaluation report, Neuropsychologist and her colleagues recommended, *inter alia*, that for the 2015-2016 school year, Student transfer to a more structured, full-time academic environment, that was a self-contained class with a small student-to-teacher ratio. This was to address Student's difficulties "maneuvering the demands" of a regular classroom, particularly in terms of the level of stimulation, social expectations and academic demands.

In June 2015, City Elementary School learned that it would be authorized to set up a Early Learning Support (ELS) classroom for children who had a high level of need, but also had skills and abilities to be included in the general education setting. On June 18, 2015, Student's IEP was amended to increase his Specialized Instruction hours to 20 hours per week outside general education. This increase was to permit Student to be

placed in the proposed ELS program at City Elementary School. The ELS program, a special class, was to be a more restrictive environment than Student's inclusion placements in the regular classroom in his prior IEPs.

Rather than consent to Student's proposed placement, in the June 18, 2016 IEP, in City Elementary School's proposed ELS program, the parents enrolled their son in Nonpublic School for the 2015-2016 school year. The evidence does not establish that Student would have required a dedicated aide, if his placement had been changed from the regular classroom to the ELS special class, as proposed in the June 18, 2015 IEP. Neuropsychologist testified that she was not proposing that Student required a dedicated aide, if he were to be removed from the general education setting to the special class she recommended. School Psychologist testified that with a small class setting, Student would receive the 1:1 adult support she had recommended in her October 2014 psychological reevaluation through the teacher or teaching assistant. I find, therefore, that with respect to the June 18, 2015 IEP, the Petitioners have not established DCPS denied Student a FAPE by failing to provide for a dedicated aide.

Petitioners allege as a separate issue (Issue IV) that DCPS denied Student a FAPE "by requiring Petitioners to fund the services of a one-on-one aide [Graduate Student] to assist Student at school" in the fall of 2014. The evidence does not establish that DCPS "required" the parents to hire Graduate Student to provide extra support to Student – but that DCPS did not provide the dedicated aide that Student required and that Principal recommended that they pay for the graduate student themselves. Principal's recommending to the parents that they hire Graduate Student was not a separate denial of FAPE. However, because Student did need a dedicated aide by the fall of 2014, I will order DCPS to reimburse the parents for their expense for Graduate Student's services.

Failure to offer Student placement in a program that could provide a FAPE

Petitioners contend, generally, that DCPS denied Student a FAPE by failing to offer him placement in a program that could provide him a FAPE. The IEP requires that every special education placement must be "based on the child's IEP," 34 C.F.R. § 300.116(b)(2), and be "capable of fulfilling the student's IEP." *Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013). *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119, 2015 WL 5175885 (D.D.C. Sept. 3, 2015). Here Petitioners have offered no evidence that, to the extent that Student's IEPs were appropriate, they could not be fully implemented at City Elementary School. I find that Petitioners have not met their burden of proof on this issue.

REMAINING ISSUES

VI. Did DCPS deny Student a FAPE by failing to convene an IEP/MDT meeting to review and revise Student's IEP based on the new information contained in the May 2015 IEE neuropsychological evaluation report?

Neuropsychologist completed her Independent Educational Evaluation (IEE) Neuropsychological Evaluation of Student in late May 2015. Petitioners allege that DCPS denied Student a FAPE by failing to convene an IEP/MDT meeting to review and revise Student's IEP based on the IEE neuropsychological evaluation report. This claim is not supported by the evidence. The IDEA regulations require that if parents obtain an IEE, the results of that evaluation must be considered by the District, if the evaluation meets agency criteria, in any decision made with respect to the provision of FAPE to the student. *See* 34 CFR § 300.502(c). Student's IEP team, including the parents and Educational Advocate, met on June 18, 2015 to revise Student's IEP to increase his Specialized Instruction Services hours. The IEE Neuropsychological Evaluation is specifically referenced in a June 17, 2015 IEP Amendment form as the justification for

increasing Student's hours of Specialized Instruction to 20 hours per week. I find that DCPS complied with its obligation to consider the results of the IEE evaluation.

VII. Did DCPS deny Student a FAPE by failing to conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIO) after repeated requests from Petitioners to do so, beginning over two years ago?

Petitioners allege that DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment and develop a behavior intervention plan after repeated requests from Petitioners to do so, beginning over two years ago. This allegation was not established by the evidence. DCPS conducted an FBA of Student in December 2014 and developed a BIP in January 2015. There was no evidence at the due process hearing that the parents requested that DCPS conduct an FBA before December 2014.

Under the IDEA, Functional Behavioral Assessments (FBAs) and BIPs are only specifically required in student discipline incidents, when a Manifestation Determination Review (MDR) team determines that a student's code of conduct violation was a manifestation of his disability. *See* 34 CFR § 300.530(f). Notwithstanding, even without a request from the parents, the District's failure to complete Functional Behavioral Assessment and Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

Student's behavior issues, stemming from his ASD disability, evolved over the school years covered in the parents' complaint, and were addressed by DCPS in several stages. At City School 2, Student was placed in a special class for children with ASD disabilities. Beginning in the 2013-2014 school year, at the request of the parents,

Student was placed, in an inclusion setting, in a regular classroom at City Elementary School. On May 5, 2014, Mother met with Principal to discuss a new behavior plan for Student. The May 2014 Student Support Plan provided ticket rewards for Student's cooperation in following directions in the academic area and at lunch and recess. According to Neuropsychologist's report and other data, Student performed "quite well" until the fall of the 2014-2015 school year, when his behavior deteriorated. By December 2014, City Elementary School had arranged for DCPS' autism coordinators to conduct an FBA of Student and a BIP was developed and implemented. I find that Petitioners have not met their burden of proof that DCPS denied Student a FAPE by failing to conduct an FBA and develop a BIP when it became needed.

VIII. Did DCPS deny Student a FAPE by failing to provide ABA Therapy services to Student and include it on his IEPs?

I have addressed this issue above in this decision in my analysis of the Petitioners' claims concerning the alleged inappropriateness of Student's IEPs.

IX. Did DCPS deny Student a FAPE by failing to develop a safety plan after being on notice for several years that Student had aggressive behaviors and was injurious to himself and others?

Petitioners allege that DCPS denied Student a FAPE by failing to develop a safety plan after being on notice for several years that Student had aggressive behaviors and was injurious to himself and others. DCPS maintains that the IDEA does not require that the District develop safety plans for children with disabilities.

DCPS is correct that the IDEA does not expressly require that a school district institute safety plans or Behavior Intervention Plans (BIP). *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). However, an LEA is responsible for providing Related Services necessary to maintain the health and safety of

a child with a disability while the child is in school. These services include, *inter alia*, psychological services, physical and occupational therapy, recreation, counseling services, and social work services in schools. *See* 34 CFR § 300.34, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46571. In addition, the IDEA requires that, in the case of a child whose behavior impedes his learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i).

Beginning in the 2013-2014 school year, at the request of the parents, Student's placement was changed from an ASD support classroom at City School 2 to an inclusion setting, in a regular classroom at City Elementary School. On May 5, 2014, Mother met with Principal to discuss a new behavior plan for Student. The May 2014 Student Support Plan provided ticket rewards for Student's cooperation in following directions in the academic area and at lunch and recess. On November 18, 2014, Principal wrote the parents by email that Student's physical response to his classmates, and sometimes teachers, which included daily episodes of hitting and occasional biting had to be addressed by the school. This followed an incident the week before, when Student had run away from the Physical Education field after being disciplined for hitting another child.

The school responded to Student's worsening behavior by obtaining a Functional Behavioral Assessment of Student by DCPS' ABA coordinators and by developing a BIP based on ABA principles. For two and one-half months after the winter break, the ABA coordinators were on site to institute the plan and to provide training to school staff to implement the BIP. According to Teacher, Student made "amazing progress" under the

BIP. I find, therefore, that Petitioners have not met their burden of proof that the District failed to respond appropriately to Student's unsafe behaviors or that Student was denied a FAPE by the failure of DCPS to develop a safety plan for Student.

X. Did DCPS deny Student a FAPE by failing a) to inform Petitioners of the availability of ESY programs; b) to ensure that Student's IEP team discussed and determined Student's need for ESY services and c) to offer Student an appropriate placement in an ESY program during the summers of 2011, 2012, 2013, 2014 and 2015?

Petitioners allege that DCPS denied Student a FAPE by failing to offer him Extended School Year (ESY) programs during the summers of 2011, 2012, 2013, 2014 and 2015 and not advising the parents of the availability of ESY programs or ensuring that Student's IEP teams discussed and determined his need for ESY services. DCPS responds that the hearing evidence did not establish that Student required ESY services.

Extended School Year (ESY) services are necessary to a FAPE when the benefits a child with a disability gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002). ESY Services are required under the IDEA only when such regression will substantially thwart the goal of "meaningful progress." *Id.* (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir.1988).)

No persuasive evidence was offered at the due process hearing that Student's progress during the regular school year would have been jeopardized if he were not provided ESY services. Teacher testified that Student's school days were generally challenging, and that was not noticeably different after vacations. Neuropsychologist recommended in her May 2015 Neuropsychological Evaluation report that for the 2015-2016 school year, Student should be provided ESY services "to maintain his skill

development." However, in her testimony, Neuropsychologist did not opine that Student's gains during the regular school year would have been jeopardized without ESY services.

Nor was there evidence that Student's possible need for ESY services was not discussed at his IEP meetings. On each of the IEPs in the record, from 2011 through 2015, the IEP teams are reported to have determined that Student did not require ESY services. Father did testify that at the end of Student's 2013-2014 school year (several months after Student's February 18, 2014 IEP meeting), the possibility of a summer program was not mentioned, but neither Father nor any other witness denied that the IEP teams considered whether Student needed ESY services. (Father also testified that if the ESY program were like the ASD special class program at City School 2, the parents did not want it.) In sum, I find that for the period alleged, Petitioners have not established that Student was denied a FAPE by the IEP teams' determinations that Student did not require ESY services.

XI. Did DCPS deny Student a FAPE by failing to conduct an assistive technology (AT) evaluation of Student beginning more than two years ago?

In a DCPS More Restrictive Environment (MRE) Review conducted in summer 2015, the DCPS observer recommended that Student would benefit from an assistive technology (AT) consultation with DCPS' AT supervisor. Based apparently on this MRE Review statement, Petitioners allege that DCPS denied Student a FAPE by failing to conduct an AT evaluation beginning more than two years ago. The IDEA regulations, 34 CFR § 300.305(a), provide that, as part of any evaluation, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data on the child on the basis of that review and input from the child's parents, identify what additional

data, if any, are needed to determine the educational needs of the child. *See* 34 CFR § 300.305(a). There was no evidence at the due process hearing that Student's IEP teams considered an AT evaluation to be warranted or that, prior to the filing of the due process complaint, the parents specifically requested an AT evaluation from the District. (At the due process hearing, DCPS, by counsel agreed to fund an IEE AT evaluation of Student.) I find that the Petitioners have not established that DCPS denied Student a FAPE by not conducting an AT evaluation at some earlier point in time.

RELIEF REQUESTED

Reimbursement for Private School

In this decision, I have determined that Student was denied a FAPE by the failure of DCPS to provide him a dedicated aide in his November/December 2014 IEP. For relief, Petitioners seek, *inter alia*, reimbursement for their expenses for Student's enrollment, transportation and related expenses to attend Nonpublic School for the 2015-2016 school year and an order for DCPS to fund Student's placement at Nonpublic School for the 2016-2017 school year.

In *Leggett v. District of Columbia*, 793 F.3d 59, 63 (D.C.Cir. 2015), the U.S. Court of Appeals for the District of Columbia pronounced the IDEA standard for tuition reimbursement to parents who unilaterally enroll their child in a private school:

> Although Congress envisioned that children with disabilities would normally be educated in "the regular public schools or in private schools chosen jointly by school officials and parents," *Florence County School District Four v. Carter By and Through Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), it provided that parents who believe that their child's public school system failed to offer a free appropriate public education—either because the child's IEP was inadequate or because school officials never even developed one—may choose to enroll the child in a private school that serves her educational needs. *Id.* Specifically, IDEA provides that if parents "enroll the child in a private . . . school without the consent of [the school district], a court or a hearing officer may require the

> [school district] to reimburse [them] for the cost of that enrollment. . . ." 20 U.S.C. § 1412(10)(C)(ii). The statute requires reimbursement, however, only where the school district has failed to "ma[k]e a free appropriate public education available to the child." *Id*. Reimbursement, moreover, may be "reduced or denied" if the parents fail to notify school officials of their intent to withdraw the child, id. § 1412(10)(C)(iii)(I), deny them a chance to evaluate the student, id. § 1412(10)(C)(iii)(II), or . . . otherwise act "unreasonabl[y]," id. § 1412(10)(C)(iii)(III).

Id. 793 F.3d at, 63 (D.C.Cir. 2015). The *Leggett* decision further explained that, "[a]s interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act 'unreasonabl[y].'" *Leggett*, 793 F.3d at 66-67 (citing *Carter*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)). A parent's unilateral private placement is proper under the IDEA so long as it is "reasonably calculated to enable the child to receive educational benefits." *Leggett* at 71 (citing *Rowley*, *supra*, 450 U.S. at 207.)

The facts in this case are atypical, because unlike the usual reimbursement request, the parents did not prove that the most recent IEP offered by DCPS to Student, before the start of the 2015-2016 school year, was inappropriate. I have determined that the November-December 2014 IEP was inadequate for failure to provide Student a dedicated aide. At the time, Student's educational placement was in the regular classroom. When the June 18, 2015 IEP amendment was adopted, Student's placement was changed from an inclusion setting to, primarily, an ELS special class to be established at City Elementary School, where Student would no longer require a dedicated aide.

As of the June 18, 2015 IEP meeting, the ELS classroom at City Elementary School was only a project in the works. The teaching staff had not yet been hired, the student make-up was unknown and the extent that the class would implement an ABA-based teaching methodology was not determined. Thus, the parents did not know the exact services to be provided to Student, the quality of the staff who would be providing them, or the educational model that would be used to deliver these services. *Compare Bobby v. Sch. Bd. of City of Norfolk*, No. 2:13CV714, 2014 WL 3101927 (E.D. Va. July 7, 2014) (The only information that was not available to the parents during the IEP process was the exact location where these services would be delivered.) The parents decided to proceed with enrolling Student at Nonpublic School because nothing was yet in place for him at City Elementary School.

After the June 18, 2015 IEP Amendment was adopted, DCPS compounded the parents' dilemma by not allowing the parents' expert to conduct an observation of the proposed classroom unless she signed an unlawful "Classroom Observer Confidential Agreement." *See* Hearing Officer Determination in *Petitioners v. District of Columbia Public School*, Case No. 2015-0371, (IHO Lazan, Jan. 31, 2015)[7] (Confidentiality Agreement contrary to the letter and spirit of the procedural safeguards of the D.C. Special Education Student Rights Act of 2014, D.C. Code § 38.2571.03.) As a result, although DCPS' June 18, 2015 amended IEP may not have been technically inappropriate, practically, the parents had no way to assess whether the new program proposed by DCPS would meet Student's needs. I conclude, therefore, that the parents were justified in unilaterally placing Student in a private school for the 2015-2016 school year and that the equities weigh in favor of reimbursement.

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[7] January 31, 2015 HOD admitted as Petitioners' Exhibit P-79.

Although the parents' private placement, Nonpublic School, does not hold a certificate of approval from OSSE, the hearing evidence was undisputed that Student has received educational benefits there. Therefore, under the standard pronounced in *Leggett, supra*, the private placement chosen by the parents was proper under the IDEA. Finally, DCPS does not contend that the parents acted unreasonably in enrolling Student enrollment at Nonpublic School for the 2015-2016 school year. In sum, I conclude that the parents have established that DCPS failed to offer FAPE to Student with the December 4, 2014 IEP which did not provide for a dedicated aide, that the denial of FAPE constructively continued after the June 18, 2015 IEP amendment and that the parents' private placement of Student at Nonpublic School after that date was proper under the IDEA. Therefore, the parents are entitled to reimbursement from DCPS for their costs for Student to attend Nonpublic School, for the 2015-2016 school year.

Compensatory Education

Finally, Petitioners request that Student be awarded compensatory education for the denials of FAPE alleged in the complaint. If the parents have established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if he had received the required special education services and the type and amount of services that would place the student in the same position he would have occupied but for the school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. Dist. of Columbia*, 401

F.3d 516, 518 (D.C.Cir. 2005.) The Petitioners must shoulder the burden of proof to provide the hearing officer with sufficient evidence that demonstrates that additional educational services are necessary to compensate the student for the denial of a free and appropriate public education. *See Phillips ex rel. T.P. v. District of Columbia*, 736 F.Supp.2d 240, 250 n.4 (D.D.C.2010).

I have determined in this decision that Student was denied a FAPE by not being offered a dedicated aide in the November-December 2014 IEP. The denial of FAPE continued until the end of the 2014-2015 school year, a period of about 26 school weeks. However, the harm was mitigated by the services provided by DCPS' ABA coordinators, who provided 1:1 services to Student and trained school staff from the end of winter break until mid-March 2015. In addition, as a mitigating factor, the parents hired Graduate Student to provide Student extra in-school support in the early part of the 2014-2015 school year and I will order DCPS to reimburse the parents for that expense.

Educational Advocate proposed a compensatory education plan for Student, Exhibit P-72. However, this plan bears no relation to the limited denial of FAPE which I have found in his decision. The extent of harm to Student from DCPS' not offering him a dedicated aide after November 2014 cannot be determined from the other testimony or exhibits offered at the due process hearing. Therefore, I will deny, without prejudice, Petitioners' request for a compensatory education award. *See Gill v. District of Columbia*, 770 F.Supp.2d 112, 118 (D.D.C.2011), *aff'd.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011) (Due to the lack of evidentiary support, the Court is compelled to find that Plaintiffs have failed to support their claim for compensatory education.) I encourage, but do not order, the parties to endeavor to reach a voluntary agreement on appropriate compensatory education to compensate Student for the failure of DCPS to provide

Student a dedicated aide after the November 4, 2014 IEP meeting, taking into account the benefit Student received from the services provided by DCPS' ABA coordinators from January to March 2015.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED, *nunc pro tunc* to July 26, 2016:

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, DCPS shall, within 30 calendar days, reimburse the parents the costs of tuition, transportation and related covered expenses for Student's enrollment at Nonpublic School for the 2015-2016 school year;

2. DCPS shall, within 30 calendar days, reimburse the parents $ 819.00 for their expense to employ Graduate Student to provide extra in-school support to Student in the 2014-2015 school year;

3. Petitioners' request for a compensatory education award to compensate Student for the failure of DCPS to provide him a dedicated aide beginning in November 2014 through the end of the 2014-2015 school year is denied without prejudice;

4. DCPS' Motion for Summary Adjudication is denied and

5. All other relief requested by the Petitioners herein is denied.

Date: August 3, 2016

s/ Peter B. Vaden
Peter B. Vaden, 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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team