

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

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

OSSE
Office of Dispute Resolution
August 29, 2017

<i>Student</i> , ¹)	Case No.: 2017-0154
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 8/23/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (ODR Rooms): 8/15/17
("DCPS"),)	(2004), 8/16/17 (2006), 8/18/17 (2006)
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because had not been provided appropriate Individualized Education Programs (“IEPs”) and placement. DCPS responded that the IEPs and placement were appropriate.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 6/7/17, the case was assigned to the undersigned on 6/8/17. DCPS filed a response on 6/19/17 and did not challenge jurisdiction. The resolution session meeting took place on 6/21/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 7/7/17. A final decision in this matter must be reached no later than 45 days following the end of the

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

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resolution period which, as extended by a 5-day continuance, requires a Hearing Officer Determination (“HOD”) by 8/26/17.

The due process hearing took place on 8/15/17, 8/16/17, and 8/18/17, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout the hearing.

Petitioner’s Disclosures, submitted on 8/8/17, contained documents P1 through P31, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 8/3/17, contained documents R1 through R41, which also were admitted into evidence without objection.

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

1. *Center Director of Reading Provider* (qualified without objection as an expert in the Interpretation of Reading and Written Expression Assessments and Resulting Recommendations)
2. Parent
3. *Private Psychologist* (qualified over objection as an expert in School Psychology)
4. *Admissions Director* at Nonpublic School
5. *Educational Advocate* (qualified over objection as an expert in Special Education Programming and Placement, and Development of Compensatory Education Plans)

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

1. *Special Education Teacher* (qualified without objection as an expert in IEP Development and Special Education Programming)
2. *Case Manager*
3. *Social Worker* (qualified without objection as an expert in School Social Work)
4. *School Psychologist* (qualified without objection as an expert in School Psychology and Special Education Programming and Placement)

Petitioner’s counsel recalled Parent as the sole rebuttal witness.

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

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Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement from 10/6/15 to the present. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by providing inappropriate IEPs on 10/6/15, 10/7/16 and/or 5/16/17,² where the IEPs: (a) failed to provide sufficient hours and type of specialized instruction; (b) failed to include sufficient, appropriate, measurable goals with measurable baselines; (c) called for an inappropriate placement (combination general education/inclusion setting); and/or (d) the 5/16/17 IEP failed to include appropriate hours of specialized instruction in mathematics and reading. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 3: Whether DCPS denied Student a FAPE by (a) failing to fully implement 10/7/16 and/or 5/16/17 IEPs, when DCPS changed services and placement unilaterally (providing out of general education hours in mathematics not on IEP, and not providing out of general education hours required in reading and written expression), and/or (b) not including Parent in the decision to change Student's special education services and placement.³ *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Within 15 business days, DCPS shall fund Student at Nonpublic School, with transportation.
3. Within 15 business days, DCPS shall convene an IEP meeting and revise Student's IEP to: (a) increase the hours of specialized instruction outside general education; (b) describe Student's Least Restrictive Environment; and (c) remove references to Student's need for resource or inclusion services to access the curriculum.
4. DCPS shall fund compensatory education for any denial of FAPE from 10/6/15 to the present.⁴

² Issue 2 combines portions of issues 2, 3 and 4 from pp. 24-25 of the due process complaint.

³ Issue 3 combines the remaining portions of issues 3 and 4 from pp. 24-25 of the due process complaint.

⁴ Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged at the prehearing conference to be

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The parties were permitted to submit citations, which Petitioner did near the end of the hearing.

Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age* and has completed *Grade* at *Public School*, where *begin* in 2014/15.⁷ Student was retained one year early in *education*.⁸ Student is scheduled to attend *New Public School* in 2017/18.⁹

2. Student is eligible for special education and related services as a child with a Specific Learning Disability ("SLD").¹⁰ Student previously was classified as having an Intellectual Disability.¹¹ In addition to a diagnosis of Specific Learning Disability, Student's 4/1/17 Comprehensive Psychological Reevaluation also diagnosed *with* Attention Deficit – Hyperactivity Disorder ("ADHD") – Inattentive Type, and a Generalized Anxiety Disorder.¹²

3. Student's 10/6/15 IEP (the "2015 IEP"), 10/7/16 IEP (the "2016 IEP"), and 5/16/17 IEP (the "2017 IEP"), each provided the same amount of specialized instruction: four hours/week of Math inside general education, three hours/week of Reading outside general education, and one hour/week of Written Expression outside general education; each had the same consultation services, with 30 minutes/month of Behavioral Support Services ("BSS"); only the 2017 IEP contained any related services, with 100 minutes/month of BSS.¹³ Student's earlier 10/7/14 IEP (the "2014 IEP") provided five hours/week of Math inside general education, three minutes/day (sic) of Reading outside general education, and two

prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ *Id.*

⁸ Parent; R36-2.

⁹ Parent.

¹⁰ P9-1; P8-1; P7-1; P20-19.

¹¹ Parent; P20-1.

¹² R36-19; Private Psychologist.

¹³ P7-7; P8-7; P9-9.

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minutes/day (sic) of Written Expression outside general education, along with 30 minutes/month of consultation BSS.¹⁴

4. For most of 2016/17,¹⁵ Student was receiving an extra four hours/week of specialized instruction outside general education with the addition of Resource Math, which was not on 2016 or 2017 IEPs.¹⁶

5. The Present Levels of Academic Achievement and Functional Performance (“present levels”) for Math in Student’s 2015 IEP indicated that Student was three years behind in Math based on iReady scores.¹⁷ The present levels in Student’s 2016 and 2017 IEPs indicated that Student was four years behind in Math based on iReady scores.¹⁸ Student was four years behind at both the beginning of the year (“BOY”) on 9/2/16 and the middle of the year (“MOY”) on 3/28/17.¹⁹

6. The present levels for Reading in Student’s 2015 IEP indicated that Student was Below Basic and two years below grade level.²⁰ The present levels in Student’s 2016 IEP for Reading indicated that was Below Basic.²¹ The present levels in Student’s 2017 IEP stated that was Below Basic in the BOY Reading Inventory on 9/1/16, but increased 122 points by MOY on 2/6/17.²²

7. The present levels for Written Expression in Student’s 2015, 2016 and 2017 IEPs do not contain any objective data for Writing and noted each year that Student is able to convey a clear message, but lacked creativity and detail.²³

8. The present levels for Emotional, Social, and Behavioral Development concerns for Student’s 2015, 2016 and 2017 IEPs contained the exact same description (including a repeated typo), which stated that Student tended to “shut down” when felt a task was too difficult, as well as during written assignments and testing.²⁴

9. In 2015 PARCC testing, Student was Level 1 (the lowest rating) in English Language Arts (“ELA”) (scoring better than 2% of students in grade at Public School and 20% in DCPS) and just barely in Level 2 for Math (scoring better than 3% of students in grade at Public School and 26% in DCPS).²⁵ In 2016 PARCC testing, Student was

¹⁴ P5-1,9.

¹⁵ All dates in the format “2016/17” refer to school years.

¹⁶ Case Manager; P8: P9.

¹⁷ P7-3.

¹⁸ P8-3; P9-3.

¹⁹ P9-3; P27-2.

²⁰ P7-4.

²¹ P8-4.

²² P9-4; P27-3.

²³ P7-5; P8-5; P9-5.

²⁴ P7-6; P8-6; P9-6.

²⁵ P22-1,2,3,4.

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Level 1 in ELA (scoring better than 3% of students in grade at Public School and 18% in DCPS) and Level 2 for Math (scoring better than 9% of students in grade at Public School and 38% in DCPS).²⁶

10. Student's 2015, 2016 and 2017 IEPs each contained one goal for each academic area of concern; that single goal was based word-for-word on a Common Core Standard for Student's grade in 2015 and was repeated word-for-word in the other IEPs.²⁷ Student's 2015, 2016 and 2017 IEPs shared a single identical goal in the Emotional, Social, and Behavioral Development area of concern; in addition, the 2017 IEP contained three further goals relating to Emotional, Social, and Behavioral Development which were added at the time the BSS related services were added in 2017.²⁸

11. Deficits are the basis for IEP goals, unless they are achieved in other ways.²⁹ The weaknesses in Student's present levels of performance were not addressed by IEP goals; one goal in each academic area was not sufficient for Student's needs; the goals were not individualized for Student.³⁰ Student needs support in every subject, as well as for anxiety.³¹ The BSS related services were added to the 2017 IEP to address Student's anxiety.³²

12. Special Education Teacher drafted the 2015 IEP but testified that he had "no answer" for why he drafted a single goal per area that was word-for-word from the Common Core standards.³³ Special Education Teacher chose inclusion Math for the 2015 IEP because that was what the previous year had been, so tried inclusion first to see if the child could succeed and see how it goes.³⁴ Case Manager drafted the 2016 IEP and testified that a student can't be expected to progress with too many goals.³⁵ If goals were mastered then they would change.³⁶ The goals were repeated because they had not been mastered.³⁷

13. The baselines for the three academic goals were repeated in each of Student's 2015, 2016 and 2017 IEPs and were not measurable; for instance, the math baseline in each IEP

²⁶ P26-1,2,3,4.

²⁷ Math: P7-3; P8-3; P9-4; Reading: P7-4; P8-5; P9-5; Written Expression: P7-4; P8-5; P9-6.

²⁸ P7-6; P8-6; P9-7.

²⁹ School Psychologist.

³⁰ Educational Advocate.

³¹ *Id.*

³² Educational Advocate; Social Worker.

³³ Special Education Teacher.

³⁴ *Id.*

³⁵ Case Manager.

³⁶ Case Manager; School Psychologist.

³⁷ P10-2.

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stated that Student would “have the opportunity to use skills to add, subtract and multiply to work on this goal throughout the year.”³⁸

14. Student had an identical, detailed set of Other Classroom Aids and Services included in 2015, 2016 and 2017 IEPs, which required in part: directions to be repeated, simplified, broken down and modeled; increased processing time to allow for presented information and responses; manipulatives to be given when possible; information scaffolded; guided notes and graphic organizers; permission to copy from a paper rather than the board; use of a calculator; texts provided at level whenever possible; teachers to read aloud certain passages; cues, prompts and answer choices to be provided; more time to process information; breaks after task completion; extended time on assignments; tasks chunked; permission to verbally explain written responses; and teacher-prepared slides provided.³⁹

15. The Other Classroom Aids and Services need to be provided in general education classes, which wouldn’t happen because teachers don’t have time.⁴⁰ As of 10/7/16, Student was not receiving teachers’ copies of slides or notes as required.⁴¹ Special Education Teacher credibly testified that many of the Other Classroom Aids and Services were provided in Student’s inclusion Math class in 2015/16.⁴²

16. Student’s cognitive ability is “significantly lower” than peers, with processing speed in particular being “very, very low.”⁴³ A Comprehensive Psychological Evaluation in 2007 found, based on the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (“WPPSI-III”), that Student’s Full Scale IQ (“FSIQ”) was 73, in the Borderline range.⁴⁴ A Comprehensive Psychological Reevaluation in 2014 found, based on the Reynolds Intellectual Assessment Scales (“RIAS”), that Student had a Composite Intelligence Index (“CIX”) of 91, in the Average range; a Verbal Intelligence Index (“VIX”) of 85, in the Below Average range; and a Nonverbal Intelligence Index (“NIX”) of 100, in the Average range.⁴⁵

17. The results of a Woodcock-Johnson IV (“WJ-IV”) assessment reviewed on 10/7/16 were considered by the team to be invalid and not representative of Student’s ability.⁴⁶ An independent Comprehensive Psychological Reevaluation dated 4/1/17 found, based on the Wechsler Intelligence Scale for Children, Fifth Edition (“WISC-V”), that Student had a FSIQ of 73, which is Very Low, with subtests ranging from Processing Speed of 53 (Very Low) to Verbal Comprehension of 81 (Low Average) and Fluid Reasoning of 85 (Low

³⁸ P7-4; P8-4; P9-4.

³⁹ P7-7; P8-7; P9-10.

⁴⁰ Educational Advocate.

⁴¹ P10-2; Educational Advocate.

⁴² Special Education Teacher.

⁴³ Private Psychologist.

⁴⁴ P20-3.

⁴⁵ P20-9.

⁴⁶ R31-2; P11-1; P23-1.

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Average).⁴⁷ The WJ-IV Achievement Tests showed global deficits; in a battery of 13 tests, Student was two years below grade level in one test and for each of the other 12 tests was four to six years below grade level.⁴⁸ Student's affect is flat, as is frustrated from trying best but not doing well.⁴⁹

18. A four-hour assessment on 6/15/17 by Reading Provider concluded that Student had serious reading deficits and was "not functionally literate," as reading ability is not sufficient for to function in the real world.⁵⁰ Student was having to put forth an unreasonable level of effort to generate a poor result with reading.⁵¹

19. Parent had numerous meetings at Public School about Student; the meetings included how to help not shut down and feel confident doing work.⁵² Compared to all the special education meetings she has had over the years while unrepresented, Parent was shocked at the tension and aggressiveness in the meetings in 2016/17 when Educational Advocate attended; the meetings were very heated and a "little scary."⁵³ Despite the fact that Educational Advocate and School Psychologist each have decades of experience, they have a problematic history of working together; Educational Advocate testified that during an IEP meeting School Psychologist asked her if she wanted to "go out to fight"; School Psychologist denied saying that, but testified she suggested meeting later to compare resumes to see who was best qualified.⁵⁴

20. During the first advisory (first quarter) of 2016/17, Student tested out of Reading Workshop and was then placed in Resource Math without an IEP meeting.⁵⁵ Parent recalled being told about the Resource Math class, but having no role in the decision; the Resource Math class was mentioned or discussed in the 11/28/16 team meeting.⁵⁶ Case Manager testified that Student's IEP should have been increased by four hours/week outside general education for Resource Math.⁵⁷ On Student's IEPs, there was no reduction in Reading or Writing services outside general education; the Reading Workshop that ended was not separately listed on Student's IEPs.⁵⁸ Student's IEP team met on 5/16/17 and Student's Resource Math class was mentioned in 2017 IEP, but was not included on the services

⁴⁷ R36-6,17.

⁴⁸ R36-10,11,12 (two errors were corrected on the record to conform Passage Comprehension in the chart to the figures in the text and vice versa for Broad Mathematics); Private Psychologist.

⁴⁹ Private Psychologist.

⁵⁰ Center Director; P28.

⁵¹ Center Director.

⁵² Parent.

⁵³ *Id.*

⁵⁴ Educational Advocate; School Psychologist.

⁵⁵ Parent; Educational Advocate.

⁵⁶ Parent; Educational Advocate; P11-2.

⁵⁷ Case Manager.

⁵⁸ Case Manager; School Psychologist.

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page.⁵⁹ Case Manager didn't know why Resource Math wasn't included as part of Student's IEPs.⁶⁰

21. Student struggled academically at Public School, beginning in 2014/15 when arrived; team was concerned about ability to complete school assignments and keep up with the pace of instruction at Public School.⁶¹ Student's grades were not good in 2014/15 (F in Spanish, D in Geography, C's in Math and Science) and got worse in 2015/16.⁶² In 2015/16, Student received two D's as first advisory grades, so was encouraged to attend after-school and lunch-period tutoring; in the second advisory, Student was getting two F's.⁶³ Student's final grades in 2015/16 were mostly C's with two B's and an F in Music.⁶⁴ Student failed Music in both 2015/16 and 2016/17, as received no support despite the writing required.⁶⁵ In the fourth quarter of 2016/17, Student received a D+ in ELA and a D in Art, in which didn't have support.⁶⁶ Parent's advocates asserted that Student's grades were subjective and inflated; some were the result of being able to be re-taught material and retaking tests to improve results.⁶⁷ Student couldn't keep up with school work near the end of 2016/17; didn't turn in a lot of homework or a National History Day project that caused to shut down.⁶⁸

22. By the end of 2015/16 and in 2016/17, Student was struggling more in school and seeking more help, so was getting after school tutoring three to four times a week, tutoring at lunch, and on many Saturdays.⁶⁹ Even with the extra tutoring, Student struggled and was not making the progress should have.⁷⁰ Despite great effort, Student was only turning in a portion of homework and was missing as many as 41% of assignments in classes without support.⁷¹ Parent tried to help Student on homework, which was "very stressful," as Student's notes were not good and it was difficult to figure out what had been taught.⁷² Student didn't receive a copy of teachers' notes as was supposed to.⁷³

23. In 2015/16, there were 25-30 children in Student's combined homeroom/first period Math class, which was larger than all other classes due to homeroom.⁷⁴ In 2016/17,

⁵⁹ P9-3,9.

⁶⁰ Case Manager.

⁶¹ R21-1,3.

⁶² Parent.

⁶³ P16-10; Parent.

⁶⁴ P3-1,2.

⁶⁵ Parent.

⁶⁶ *Id.*

⁶⁷ Educational Advocate; P18-1,7.

⁶⁸ Parent.

⁶⁹ Parent; Case Manager (Student putting forth "tremendous effort").

⁷⁰ Parent.

⁷¹ Educational Advocate.

⁷² Parent.

⁷³ *Id.*

⁷⁴ Special Education Teacher.

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there were 14 children in Student's Math class; 13 in Science; 13 in Geography; six in Resource ELA; and six to eight in Resource Math.⁷⁵ Classes were 50 minutes long, five days a week, which was considered four hours/week (rather than four hours and 10 minutes) for IEP purposes.⁷⁶

24. Public School is an "inclusion" school, where they try to educate all children together, with pull-out (Resource classes) only available for Math and ELA, which are smaller and provide more one-to-one assistance.⁷⁷ There are essentially no special education services for other subjects, such as Science and Social Studies, although Special Education Teacher has occasionally heard of some push-in with "informal" hours that were not on the IEP, but no pull-out.⁷⁸

25. Student did not have support at Public School outside Math, Reading and Writing.⁷⁹ If the Public School team had revealed that they were offering all the support available, Parent and her advocates would have sought a change in placement.⁸⁰ Neither Parent nor anyone else complained about the 2015 IEP or its service hours.⁸¹ If more special education hours were needed, it would be up to the assistant principal at Public School to figure it out or initiate the process of finding another school for Student.⁸²

26. Student is very shy and introverted and at times socially withdrawn; Student shuts down emotionally when frustrated and is easily frustrated; when shut down may remain silent for extended periods.⁸³ Student shuts down quickly when doesn't understand or work is challenging; it took three days to complete the Comprehensive Psychological Reevaluation in March 2017.⁸⁴ Student has always had issues in school, by running out of the classroom, or crying, or outbursts, but in 2014/15 was overwhelmed and began to shut down and not participate; this occurred more in 2015/16, and then was worse in 2016/17, especially in October and November, sometimes shutting down in the morning and then again in the afternoon.⁸⁵

27. In the 10/7/16 team meeting, Math teacher stated that Student shuts down if asked questions, Student may cry, and they can't get back after shuts down; Student had been shutting down in class for a while.⁸⁶ The team decided to provide Parent daily check-ins by email about Student shutting down and work on strategies to lessen the

⁷⁵ P10-1; Case Manager.

⁷⁶ Special Education Teacher.

⁷⁷ Special Education Teacher; Case Manager.

⁷⁸ Special Education Teacher.

⁷⁹ Parent.

⁸⁰ Educational Advocate.

⁸¹ Special Education Teacher.

⁸² *Id.*

⁸³ R36-2;3,14; Case Manager; Special Education Teacher (Student is shy).

⁸⁴ Private Psychologist.

⁸⁵ Parent.

⁸⁶ P10-1; R31-2.

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behaviors; Social Worker said he would check-in with Student more frequently to monitor these behaviors.⁸⁷ Daily emails were sent to Parent on whether Student was shutting down at school.⁸⁸ Student was paired in inclusion Math class with a buddy (who had similar struggles and also received special education services) to help support each other and figure things out in class.⁸⁹

28. By 11/28/16, teachers reported “more shut downs recently” and some days Student shut down completely; Parent also reported trouble with Student shutting down more; Parent requested text messages when Student was having a “bad day.”⁹⁰ Possible causes for shutting down were pursued, such as being tired, someone bothering or something going on at home; Parent wondered if was staying up too late; there were no obvious triggers.⁹¹

29. By 1/11/17, Educational Advocate was seeking an FBA, but Public School thought it was not justified because whatever was happening was working better for Student, as was making decent grades, with B’s.⁹² Case Manager and Social Worker said they would be checking in with Student.⁹³ On 3/22/17, Public School finally noted agreement with an FBA and BIP, which was completed on 3/22/17 by Social Worker who noted that Student shut down and was nonresponsive for different lengths of time through 2016/17.⁹⁴ In the FBA, the academic team stated that Student shut down about two or three times per week.⁹⁵ The FBA found academic frustration and that shutting down was escape behavior and avoidance.⁹⁶

30. Parent felt Student was “working around the clock” but barely making it at school.⁹⁷ Student was very dependent on teachers and struggled when had to work independently; had difficulties completing grade level work and had difficulty sustaining attention on tasks, with a very short attention span.⁹⁸ Student worked hard and tried best, but efforts were not sustained and hasn’t developed the necessary skills to move forward.⁹⁹

31. The 4/1/17 Comprehensive Psychological Reevaluation concluded that it is “imperative” that Student receive intensive academic/support/services; because of Student’s

⁸⁷ R31-2.

⁸⁸ Case Manager.

⁸⁹ Case Manager; School Psychologist.

⁹⁰ P11-2.

⁹¹ P11-2,3.

⁹² P12-1; R33-1; Educational Advocate.

⁹³ R33-1.

⁹⁴ P13-2; R2-36; P27-3; Social Worker.

⁹⁵ P27-3; Parent (that’s average “on a good week”).

⁹⁶ Social Worker.

⁹⁷ Parent.

⁹⁸ R36-4.

⁹⁹ Private Psychologist.

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academic delays and other challenges, needs a special education program that is full-time, highly structured, organized, highly controlled, therapeutic, without excessive external stimuli, and a small class size with low student to teacher ratio.¹⁰⁰ Student needs classes of no more than six students to receive individualized attention; Private Psychologist is not aware of any appropriate DCPS schools with classes that size.¹⁰¹ Student needs full-time special education due to limited cognitive abilities and academic scores and generalized anxiety.¹⁰² Student needs full-time services outside general education or will fall further and further behind.¹⁰³

32. New Public School generally has 25-30 students per class.¹⁰⁴ Student would be lost in a big class at a higher grade level and would benefit from a small classroom size.¹⁰⁵ New Public School would not have time to focus on Student and give the one-to-one needs.¹⁰⁶ Student doesn't like to stand out, so the school team was concerned that a self-contained setting at New Public School would not benefit Student because would stick out more and thus shut down more.¹⁰⁷ Parent was aware of self-contained classrooms at New Public School and considered them more overwhelming and that Student would be more withdrawn.¹⁰⁸ Student recognizes limitations compared to peers at Public School, so was not socializing at Public School as used to.¹⁰⁹ Student is motivated by peers, so School Psychologist concluded that with limitations will have to work harder.¹¹⁰

33. Student's 2017 IEP is not adequate for New Public School and would cause Student harm; Student would be overwhelmed at New Public School with general education Math and pull out only for English.¹¹¹ Student can't handle electives such as Music, which failed twice at Public School.¹¹² Due to Student's cognitive limits and slow processing speed, would likely have a very difficult time at New Public School.¹¹³ The 30-day review process would not be sufficient to prevent harm to Student at New Public School, as New Public School doesn't have an appropriate program available for .¹¹⁴ Parent is familiar with New Public School as she experienced an older child struggling there who

¹⁰⁰ R36-19.

¹⁰¹ Private Psychologist.

¹⁰² *Id.*

¹⁰³ Educational Advocate.

¹⁰⁴ Case Manager.

¹⁰⁵ Private Psychologist.

¹⁰⁶ *Id.*

¹⁰⁷ Case Manager.

¹⁰⁸ Parent.

¹⁰⁹ *Id.*

¹¹⁰ School Psychologist.

¹¹¹ Educational Advocate.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

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needed less support than Student.¹¹⁵ Parent is clear that Student requires “way more hours” than are on IEP; Parent considers New Public School to be a good school, but with Student’s needs she feels certain cannot succeed there.¹¹⁶

34. Nonpublic School accepted Student for 2017/18 by letter dated 7/31/17, with the caveat that the school reserved the right to determine if it continues to be an appropriate placement after 2017/18.¹¹⁷ Nonpublic School is an OSSE-approved school for SLD as well as Other Health Impairment (“OHI”), which typically involves ADHD.¹¹⁸ Classes at Nonpublic School often contain four to six students, with a maximum of eight.¹¹⁹

35. A high level of anxiety felt by a child in public school is often reduced at Nonpublic School; counselors are available on staff if needed.¹²⁰ Nonpublic School hopes students don’t need extra tutoring there, but makes sure they don’t fall behind.¹²¹ Student visited Nonpublic School for two days and was excited, if nervous about visit; worked hard and was very positive about the school.¹²² Student did not shut down or exhibit anxiety during two-day visit and everyone on the team felt was a good match with the school.¹²³ Student is excited by the prospect of a separate day school where fits by being similar to peers.¹²⁴ With the academic intensity of Nonpublic School, Student may improve greatly in academics.¹²⁵ Nonpublic School provides a daily reading tutorial and Admissions Director was confident that Student would not need Reading Provider in addition to Nonpublic School; Admissions Director was not aware of any student at Nonpublic School ever having a dual reading program at Nonpublic School and elsewhere at the same time.¹²⁶

36. Student going to Nonpublic School is a way of making up for the harm has suffered, and putting in the place should be, as Nonpublic School has an extensive reading program to remedy Student’s reading, which is key problem.¹²⁷ Educational Advocate credibly testified that if the extensive reading program at Reading Provider is not provided as compensatory education, that Student could benefit from 50-100 hours of

¹¹⁵ Parent.

¹¹⁶ *Id.*

¹¹⁷ P29-1; Parent (tried to get Student into another nonpublic school which rejected because of low cognitive levels).

¹¹⁸ Admissions Director (also testified about reasonableness of tuition); P30-4; Administrative Notice by Hearing Officer.

¹¹⁹ Admissions Director.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Admissions Director; Parent.

¹²³ *Id.*

¹²⁴ Parent.

¹²⁵ Admissions Director.

¹²⁶ *Id.*

¹²⁷ Educational Advocate.

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tutoring as compensatory education to aid in transitioning to Nonpublic School; counseling or mentoring of Student would not be needed.¹²⁸

37. Credibility. Special Education Teacher’s credibility was somewhat diminished by qualifying many answers by making a statement about Student and then adding how Student was no different from others, such as stating that he prompted Student once or twice per class period which was “no more and no less” than others because is an “average student,” and testifying that Student performed better working one-to-one and then adding that is “true for any student.”¹²⁹

38. The undersigned was a little skeptical about some of Social Worker’s assertions which seemed overly dramatic, with statements about 100 minutes/month of BSS – which was only in place for several weeks at the end of 2016/17 – being “almost too much” to address Student’s anticipated needs at New Public School, and that Student was “thriving” with the services in place at Public School in light of the ongoing record of shutting down and strenuous efforts to keep up with the work at Public School.¹³⁰

Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471

¹²⁸ *Id.*

¹²⁹ Special Education Teacher.

¹³⁰ Social Worker.

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U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Endrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

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

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement from 10/6/15 to the present. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

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Issue 2: *Whether DCPS denied Student a FAPE by providing inappropriate IEPs on 10/6/15, 10/7/16 and/or 5/16/17, where the IEPs: (a) failed to provide sufficient hours and type of specialized instruction; (b) failed to include sufficient, appropriate, measurable goals with measurable baselines; (c) called for an inappropriate placement (combination general education/inclusion setting); and/or (d) the 5/16/17 IEP failed to include appropriate hours of specialized instruction in mathematics and reading. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on Issues 1 and 2 (which are analyzed together), shifting the burden of persuasion to Respondent, which did not meet its burden of demonstrating that it provided appropriate IEPs and placement for Student. The evidence is clear that Student has significant cognitive limitations and behavioral issues in shutting down that require significant levels of special education support that Student has not been provided to achieve appropriate progress. Student only managed to receive passing grades to date through great effort, which caused to be overwhelmed academically and to suffer anxiety as well.

The applicable legal standard for analyzing the appropriateness of an IEP has recently been articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was “reasonably calculated to produce meaningful educational benefit” and to permit Student to access the general education curriculum to the extent possible. *See Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. The measure and adequacy of IEPs are to be determined prospectively as of the time they were provided to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

The appropriateness of Student’s IEPs is analyzed by considering each specific concern raised by Petitioner in turn. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Specialized Instruction. Student’s three IEPs covering 2015/16 and 2016/17 and going forward into 2017/18 all contain the same modest amount of specialized instruction: four hours/week of Math inside general education, three hours/week of Reading outside general education, and one hour/week of Writing outside general education. Even including the additional four hours/week of Math outside general education that Student was provided for most of 2016/17, as discussed below, the undersigned is persuaded that this was not sufficient specialized instruction in 2015/16 or 2016/17, and that Student needs a full-time outside general education program in 2017/18.

As an initial matter, Student’s cognitive ability is significantly lower than peers, with a FSIQ of 73 and processing speed of only 53. A battery of WJ-IV achievement tests showed global deficits, with Student testing four to six years below grade level on nearly every test. Student’s PARCC scores were also very low and IEP present levels confirm

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serious deficits. Student's most recent assessment concluded that is not functionally literate, despite Age and Grade.

Not surprisingly, Student has struggled academically at Public School, beginning in 2014/15 when arrived. Student's grades were not good in 2014/15, got worse in 2015/16, and was unable to keep up with school work in late 2016/17. By the end of 2015/16 and in 2016/17, Student was struggling more in school and seeking more help, receiving after-school tutoring three to four times a week, tutoring at lunch, and tutoring on many Saturdays. Student managed to get passing grades, which advocates viewed as not earned, but even those grades were only achieved through Student's great effort and struggle, as reading and other basic skills are far below grade level.

In addition to – or as a result of – cognitive limitations and academic challenges, Student shuts down emotionally when is frustrated, when doesn't understand, and when the work is challenging. After Student shuts down, may remain silent for extended periods. Student shutting down has continued through time at Public School and has not been resolved. Further, in Comprehensive Psychological Reevaluation earlier this year, Student was diagnosed with Generalized Anxiety Disorder, demonstrating to the undersigned that the level of support Student received in the past is clearly not sufficient going forward, as Student moves to a more challenging academic level. School Psychologist testified that Student is motivated by peers, so took the view that with Student's limitations would simply have to work harder. This Hearing Officer rejects that harsh approach as inimical to the IDEA's goals and the Supreme Court's perspective on supporting children so they can make appropriate progress.

Viewing each of the challenged IEPs as of the time it was offered to Student, the 2015 IEP on 10/6/15 was developed after Student had passing grades the previous year and did modestly increase specialized instruction from 2014/15 (taking the 2014 IEP's five minutes/day outside general education at face value). But in light of the challenges facing Student, the undersigned concludes that Respondent did not prove that the 2015 IEP's level of specialized instruction was sufficient. Next, the 2016 IEP on 10/7/16 made no increase in service hours at all, despite the growing challenges that Student faced in 2015/16, so Respondent failed to prove that the 2016 IEP was appropriate when developed. Finally, the 2017 IEP on 5/16/17 was developed in contemplation of Student going on to a higher grade at New Public School, where was expected to face even greater challenges. An independent Comprehensive Psychological Reevaluation strongly recommended a full-time IEP, but Public School added no specialized instruction (only related services for the first time to address Student's anxiety), even though the Resource Math class had been provided to Student outside general education throughout most of the year. Respondent clearly has not proved that the 2017 IEP was appropriate, whether considered as drafted or with the additional four hours of Resource Math.

(b) Goals and Baselines. Student's 2015, 2016 and 2017 IEPs each contained only one goal each for Math, Reading and Writing. That single goal in each academic area of concern was copied word-for-word from a Common Core Standard at Student's grade level in 2015 and then repeated word-for-word in the 2016 and 2017 IEPs. One goal in each academic area was not sufficient to address Student's significant deficits and the repetition

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indicates lack of progress. *See Andrew F.*, 137 S. Ct. at 996 (largely carrying over the same goals from one year to the next indicated failure to “make meaningful progress”). Nor were the goals individualized for Student. *See* 34 C.F.R. 300.320(a)(2); *Andrew F.*, 137 S. Ct. at 994 (IEP requires “careful consideration of the child’s individual circumstances”). The baselines for the three academic goals were also repeated in the 2015, 2016 and 2017 IEPs and were not measurable. For instance, the math baseline in each IEP stated that Student would “have the opportunity to use skills to add, subtract and multiply to work on this goal throughout the year.” While repeated failure to provide adequate goals and baselines in IEPs might be considered procedural violations, this Hearing Officer concludes that here the violations were a denial of FAPE by depriving Student of educational benefits that should have resulted from Public School’s actions to meet additional goals that were needed to address Student’s deficits. *See* 34 C.F.R. 300.513(a).

(c) Inappropriate Placement. In determining the appropriateness of Student’s educational placement, the standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfil the student’s IEP requirements).

As concluded in subpart (a) above, Student was not receiving all the specialized instruction needed to make appropriate progress in 2015/16 and 2016/17. However, according to Public School’s witnesses, Student was apparently receiving all the specialized instruction that was available to at Public School, for there was no support available in subjects other than Math and English. Thus, since Student needed more specialized instruction as held above, Student’s placement at Public School was not appropriate and a way needed to be found to provide more support for Student at Public School or in a different place that could provide more support. This is not requiring Respondent to “perfectly satisfy” the IEPs Student should have had, but Respondent “cannot commit a material failure, or leave ‘more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child’s IEP.’” *N.W. v. Dist. of Columbia*, 2017 WL 2080250, at *7 (D.D.C. May 15, 2017), quoting *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

(d) Math and Reading Hours. Early in 2016/17, Student tested out of Reading Workshop and so was able to take the Resource Math class, which was four hours/week outside general education. Inexplicably, those hours were never included on 2017 IEP (or 2016 IEP), as they should have been since they were clearly special education services being provided to Student. However, it became clear during the due process hearing that – contrary to Petitioner’s allegations – neither the three hours of Reading nor the one hour of Writing per week required by Student’s IEPs were reduced, so there was no violation for reducing Reading. The error as to Math is merely procedural, as it did not prevent those needed services from being provided to Student.

In sum, as discussed above, this Hearing Officer concludes that Issues 1 and 2 involve substantive violations of the IDEA and denial of a FAPE that are remedied below

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through compensatory education and placement of Student at Nonpublic School for 2017/18.

Issue 3: *Whether DCPS denied Student a FAPE by (a) failing to fully implement 10/7/16 and/or 5/16/17 IEPs, when DCPS changed services and placement unilaterally (providing out of general education hours in mathematics not on IEP, and not providing out of general education hours required in reading and written expression), and/or (b) not including Parent in the decision to change Student's special education services and placement. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden on both parts of this final issue.

(a) Failure to Implement. Petitioner failed to meet her burden of proving that DCPS did not adequately implement Student's 2016 or 2017 IEPs, which relates to the addition of the Resource Math class for Student early in 2016/17, which was not included on Student's IEPs as discussed above. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "*de minimis* failure to implement all elements of [the student's] IEP." *Johnson*, 962 F. Supp. 2d at 268, quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is "the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is "no requirement that the child suffer educational harm in order to find a violation" in a failure to implement claim. *James*, 194 F. Supp. 3d at 139.

Here, Petitioner apparently misunderstood that Student's Resource ELA class had terminated, which permitted to be included in the Resource Math class. But it was clear at the due process hearing that there was no termination of any services on Student's IEP. Instead, Student had tested out of Reading Workshop early in 2016/17, which permitted Student to take the Resource Math class, which was the type of additional academic support sought by Petitioner and her advocates. Thus, Respondent did not fail to implement any elements on Student's 2016 and 2017 IEPs. It is not clear to the undersigned whether Petitioner's counsel is nonetheless asserting a claim based on Public School providing *more* services than listed on Student's IEPs, but in light of Petitioner vigorously pursuing more specialized instruction to assist Student and considering the Resource Math class to be a positive benefit to Student, this Hearing Officer concludes that any such deviation from Student's IEP is *de minimis* and certainly not a denial of FAPE.

(b) Petitioner also failed to meet her burden on the issue of meaningful parental participation in determining special education services and placement. The IDEA clearly requires parental participation and involvement in determining the educational program and placement of their child. *See* 34 C.F.R. 300.321, 300.322, 300.327, 300.116(a)(1), 300.501(c); *Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013). Here, the issue is whether Parent had input into the decision to add the Resource Math class for

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Student early in 2016/17, as she should have had. Parent's recollection was that she was simply told about the decision after it was made, even though the Resource Math class was discussed or at least mentioned in the 11/28/16 team meeting, for it was included in Educational Advocate's meeting notes. Given the robust legal representation of Parent by her advocates, it is clear to the undersigned that Parent certainly could have discussed it further and provided more input even after the initial decision by Public School staff, if there had been anything she wished to say. As it was, the decision to provide more specialized instruction for Student in 2016/17 was clearly in line with what Parent was seeking, so any failure to provide her more formal input was merely procedural and had no impact on Student's education or decision-making about the provision of FAPE to Student. There were numerous team meetings attended by Parent and her advocate throughout 2016/17, in addition to many other communications between Parent and Public School, including daily emails, and Parent was strongly represented by counsel. There was no violation for lack of parental participation here.

Remedies

The IDEA gives Hearing Officers "broad discretion" to provide an equitable remedy for students who have been denied a FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *25 (D.D.C. Aug. 26, 2016) (IDEA prescribes broad discretion in fashioning relief for educational deprivation). As discussed next, funding of Student at Nonpublic School for 2017/18 is the primary remedy ordered both as Student's appropriate placement looking forward and as compensatory education to make up for the denial of a FAPE and put Student in the place she should have been. In addition, 50 hours of academic tutoring is ordered as additional compensatory education as discussed below.

Nonpublic Placement. If an appropriate public school program were available for Student, *i.e.*, one reasonably calculated to enable her to make appropriate progress in circumstances, DCPS need not consider nonpublic placement, even though a nonpublic school might be more appropriate or better able to serve her. *Endrew F.*, 137 S. Ct. at 1001; *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (*citing Rowley*, 458 U.S. at 207). However, if no suitable public school is available to fulfill Student's IEP needs – and none was suggested other than New Public School – Respondent must cover the costs of sending her to an appropriate nonpublic school. A nonpublic school placement is proper under the IDEA if the education provided there is reasonably calculated to enable Student to receive educational benefits. *Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994). *See also, e.g., N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008).

An award of nonpublic school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Dist. of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (citations omitted). Placement awards must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of relevant considerations to determine whether a particular placement is appropriate for a particular student, including the nature and severity of the

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student's disability, the student's specialized educational needs, the link between those needs and the services offered by the nonpublic school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Each of these considerations is addressed below.

(a) Nature and Severity of Student's Disability: The evidence unambiguously establishes that Student suffers from an SLD and has severe cognitive limitations, along with ADHD and anxiety as was recently diagnosed. In addition, Student regularly shuts down when frustrated and may remain silent for extended periods.

(b) Student's Specialized Educational Needs: The expert testimony was that Student needs a full-time, highly structured, organized, highly controlled, therapeutic placement, without excessive external stimuli, and a small class size of six students with a low student to teacher ratio, which DCPS cannot provide at New Public School or elsewhere.

(c) Link Between Student's Needs and the Services Offered by Nonpublic School: Nonpublic School focuses on children with SLD and OHI, and the school team felt that Student was a good match there after two-day visit. Student worked hard during visit and was very positive about the school; did not shut down or exhibit anxiety during time there. Admissions Director testified that with the academic intensity of Nonpublic School, Student may improve greatly in academics, which would help restore to the position should have been in but for the denial of a FAPE.

(d) Cost of Placement at Nonpublic School: Nonpublic School is on OSSE's list of approved nonpublic day schools and its rates are reasonable. DCPS did not question Nonpublic School's rates and offered no evidence that the cost of placement at Nonpublic School would be higher than at other local nonpublic schools serving students with similar disabilities.

(e) Least Restrictive Environment: Much testimony was given about how Student does not want to stand out as different from general education children by going to special education classes or even asking questions in class. Student's shutting down behaviors when faced with challenges and failure to understand, along with newly-diagnosed generalized anxiety, indicate that a general education setting such as New Public School is not appropriate. A placement such as Nonpublic School, where Student has interaction only with students like even though there is no interaction with nondisabled peers, is the least restrictive environment for Student at this time. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) ("[i]n determining the least restrictive environment, consideration is given to the types of services that the child requires," citing 34 C.F.R. 300.552(d)); *N.T. v. Dist. of Columbia*, 839 F. Supp. 2d 29, 35 n.3 (D.D.C. 2012).

Considering all of the factors above, it is the conclusion of this Hearing Officer that Nonpublic School is a proper and appropriate placement for Student.

Compensatory Education. In determining appropriate compensatory education, the award must undo the FAPE denial's affirmative harm and compensate for lost progress. *Butler v. Dist. of Columbia*, 2017 WL 3491827, at *4 (D.D.C. Aug. 14, 2017). There is

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

The undersigned carefully considered Educational Advocate’s Proposed Compensatory Education Plan (at P1), which proposed 500-600 hours of instruction from Reading Provider, along with the testimony of Center Director about the need for such reading instruction. However, the undersigned was persuaded that the intensive reading program at Nonpublic School, with its daily reading tutorial, would adequately address Student’s deficits. Indeed, Admissions Director persuasively testified that Student should not need reading instruction outside Nonpublic School and was not aware of any student at Nonpublic School ever having a dual reading program at Nonpublic School and elsewhere at the same time.

However, in addition to placement at Nonpublic School, which is expected to make significant progress towards remedying Student’s deficits, Petitioner is awarded an additional 50 hours of academic tutoring as compensatory education to help Student make the transition to Nonpublic School. This award is based on the undersigned’s determination of what would be most beneficial to put Student in the position should have been in at this point given the deficits resulting from a denial of FAPE. This Hearing Officer’s determination of 50 hours of academic tutoring is based on the expert testimony of Educational Advocate, who credibly asserted that in the absence of instruction by Reading Provider, some 50-100 hours of tutoring would benefit Student as compensatory education to aid in transitioning to Nonpublic School, but that counseling or mentoring of Student would not be needed.

Based on this analysis, DCPS is ordered below to provide funding within 10 days of Petitioner’s request for 50 hours of academic tutoring from an independent provider chosen by Petitioner. All hours are to be used within 12 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner has prevailed in significant part, as set forth above. Accordingly, **it is hereby ordered that:**

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- (1) Within 15 business days, DCPS shall pay the costs of Nonpublic School for Student for the 2017/18 school year, including tuition, transportation, related services and fees.
- (2) DCPS shall provide a letter of authorization for 50 hours of academic tutoring from an independent provider chosen by Petitioner, with such letter to be provided within 10 business days after Petitioner's request. All hours are to be provided and used within 12 months; any unused hours will be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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