

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

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

OSSE  
Office of Dispute Resolution  
August 05, 2019

---

<i>Student</i> , <sup>1</sup>	)	Case No.: 2019-0108
through <i>Parents</i> ,	)	
<i>Petitioners</i> ,	)	Date Issued: 8/5/19
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates: 7/19/19 & 7/23/19
("DCPS"),	)	ODR Hearing Room: 423
Respondent.	)	
	)	

---

**HEARING OFFICER DETERMINATION**

**Background**

Petitioners, Student's Parents, 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") due to DCPS failing to provide an Individualized Education Program ("IEP") and placement for 2018/19<sup>2</sup> with full-time specialized instruction and support. DCPS asserted that the IEP it proposed was appropriate and could be implemented at Student's in-boundary school.

**Subject Matter Jurisdiction**

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

**Procedural History**

Following the filing of the due process complaint on 4/22/19, the case was assigned to the undersigned on 4/23/19. Respondent filed a late response on 5/6/19, which challenged jurisdiction based on Parents' appeal to the U.S. District Court of a prior Hearing

---

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

<sup>2</sup> All dates in the format "2018/19" refer to school years.

## Hearing Officer Determination

Case No. 2019-0108

Officer Determination (“HOD”) relating to Student in 2016/17 and 2017/18, even though the current complaint relates only to subsequent years, because the prior case also sought prospective relief. After inconclusive discussions during the prehearing conference, a briefing schedule was established on the jurisdictional issue, as discussed below. A resolution meeting took place on 5/8/19, but the parties neither settled the case nor shortened the 30-day resolution period, which ended on 5/22/19. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 30-day continuance granted on 7/5/19, which requires a Hearing Officer Determination by 8/5/19.

The prehearing conference in this case was held on 6/27/19 and the Prehearing Order issued on 6/28/19. The due process hearing took place on 7/19/19 and 7/23/19 and was closed to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. Petitioners were present for the entire hearing.

Petitioners’ Disclosures, submitted on 7/12/19, contained a cover letter and documents P1 through P33, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 7/12/19, contained a cover letter and documents R1 through R15, which were also admitted into evidence without objection.

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

1. *Psychology Director at Nonpublic School* (qualified without objection as an expert in Psychology)
2. *Head of Two Grades at Nonpublic School* (qualified without objection as an expert in Special Education Administration)
3. *Educational Consultant* (qualified without objection as an expert in Special Education Programming and Placement)
4. *Mother*
5. *Father*

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

1. *LEA Representative* (qualified without objection as an expert in Special Education Programming and Placement)
2. *School Psychologist* (qualified without objection as an expert in School Psychology and Evaluation)
3. *Special Education Program Specialist* (qualified without objection as an expert in Special Education Programming and Placement)

## Hearing Officer Determination

Case No. 2019-0108

4. *Social Worker* (qualified without objection as an expert in Social Work and Behavioral Support Services)

The parties agreed on a single stipulation at the beginning of the hearing: The in-boundary *Dual-Language School* is not suitable for Student.

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

**Issue 1:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement for 2018/19, due to (a) the lack of full-time specialized instruction and support outside general education throughout the school day, as well as an insufficient amount of Behavioral Support Services (“BSS”), and (b) placement in programs that were inappropriate due to the need for dual-language ability or special education inclusion with isolation resulting from no pull-out of other students, as well as size of building and classes, noise, pacing of instruction, instructional presentation method, level of staffing, and similar concerns. *Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*

**Issue 2:** Whether Nonpublic School is an appropriate placement for Student. *Petitioners have the burden of persuasion.*

The relief requested by Petitioner is:

- DCPS shall (a) reimburse Parents for tuition and related services they paid to Nonpublic School for the 2018/19 school year, and (b) prospectively place Student at Nonpublic School for the 2019/20 school year.

Respondent filed a Motion to Dismiss the due process complaint in this case on 7/8/19, asserting that Petitioners’ appeal to the U.S. District Court of the HOD in Case No. 2018-0123 on 7/27/18 stripped the undersigned of jurisdiction over the pending case due to Petitioners seeking overlapping remedies. Petitioners filed an Opposition on 7/12/19, which was quickly followed by Respondent’s Reply on 7/12/19. At the beginning of the due process hearing, the undersigned denied the Motion to Dismiss, providing a brief oral explanation on the record. Later in the hearing, Respondent’s counsel orally “renewed” the motion to dismiss, which is hereby denied for the same reasons as initially. *See Collette v. Dist. of Columbia*, CV 18-1104 (RC), 2019 WL 3502927, at \*6 (D.D.C. Aug. 1, 2019), and cases cited therein.

In short, the two cases focus on different school years and different Local Education Agencies (“LEAs”). The case on appeal sought reimbursement for 2016/17 and 2017/18 against *Public Charter School*, while the current case seeks reimbursement for 2018/19 from DCPS. Petitioners in this case sought an IEP for 2018/19 from DCPS and not from Public Charter School, and there was no objection raised by DCPS. Nor could there have been an objection when Student was enrolled in DCPS and had no further involvement with Public Charter School for 2018/19. Under the IDEA, Parents must have a remedy if the 2018/19 IEP or placement were not appropriate and denied Student a FAPE, and that remedy cannot be against Public Charter School, which had nothing to do with DCPS’s IEP

## Hearing Officer Determination

Case No. 2019-0108

or proposed placement in 2018/19. It is true that Petitioners in their appeal to the district court did seek prospective relief for 2018/19 from Public Charter School, but the undersigned is confident that there will be no difficulty in avoiding double recovery should it come to that. Nor has DCPS cited any legal authority for the proposition that the mere possibility of overlapping remedies is a sufficient basis for blocking Parents' current challenge of DCPS's 2018/19 IEP and placement.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>3</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioners are Student's Parents.<sup>4</sup> Student is *Age*, *Gender* and completed *Grade* at Nonpublic School.<sup>5</sup> Parents have been concerned about Student since Student began school; in addition to difficulty staying engaged in the classroom and picking up sound combinations and writing, Student had challenges with the numbers 6 and 9 and reversing the letter "S"; loud noises cause Student significant distress.<sup>6</sup>

2. IEPs. Student's 2/10/16 IEP at Public Charter School, was based on the disability category Specific Learning Disability ("SLD") and provided 1 hour/week of specialized instruction outside general education and 120 minutes/month of BSS outside general education, along with 30 minutes/month of occupational therapy consultation.<sup>7</sup> The IEP noted that Student struggles with issues of anxiety and at times struggles to interact appropriately with peers.<sup>8</sup>

3. DCPS developed the IEP at issue in this case on 12/5/18 based on the disability category of Multiple Disabilities ("MD"), due to SLD and Other Health Impairment ("OHI"), and provided 5 hours/week of specialized instruction outside general education, 10 hours/week of specialized instruction inside general education, 120 minutes/month of BSS outside general education and 120 minutes/month of occupational therapy consultation.<sup>9</sup> The IEP prominently noted that Student's scores on Anxiety, Withdrawal and Somatization

---

<sup>3</sup> 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.

<sup>4</sup> Mother.

<sup>5</sup> Mother.

<sup>6</sup> P14-17,19.

<sup>7</sup> P4-1,7.

<sup>8</sup> P4-5.

<sup>9</sup> P22-1,13.

## Hearing Officer Determination

Case No. 2019-0108

fall in the clinically significant range.<sup>10</sup> Parents disagreed only with the service hours in the IEP; Educational Consultant sought more hours during the IEP team meeting.<sup>11</sup>

4. Nonpublic School's IEP on 2/12/19 provided 32 hours/week of special education with integrated speech-language and occupational therapy, and 2 individual psychological sessions of 90-minutes each per month and 2 group psychological sessions of 90-minutes each per month.<sup>12</sup> Student was considered to be a year below grade level in reading, a year and a half below grade level in written language, and half a year behind in math.<sup>13</sup> The Nonpublic School special education team noted that when feeling anxious Student will sometimes be emotional and seek to avoid the situation; Student is typically able to recover from the situation with some adult support; Student continues to need adult support.<sup>14</sup> The 2/12/19 meeting to review Nonpublic School's IEP noted that Student was closer to grade level in reading than before, but below grade level in the ability to use the information.<sup>15</sup>

5. DCPS Involvement. A prior due process hearing seeking reimbursement for the cost of Nonpublic School for Student in 2016/17 and 2017/18 resulted in a 7/27/18 HOD concluding among other things that DCPS was responsible for offering Student a FAPE in 2017/18 even if Student was not enrolled there.<sup>16</sup> Petitioners appealed the HOD to the U.S. District Court, seeking as relief not only reimbursement but placement and funding at Nonpublic School going forward, which overlaps with relief sought in this due process hearing.<sup>17</sup>

6. DCPS acknowledged receiving a referral for special education evaluation of Student on 8/13/18.<sup>18</sup> DCPS had an initial IEP team meeting on 9/7/18; Parents believed that Student needed a smaller school setting and class size, with added support to engage the curriculum; DCPS understood from Nonpublic School that Student was performing on grade level.<sup>19</sup> DCPS agreed to conduct evaluations.<sup>20</sup>

7. On 9/7/18, Student was found eligible for special education based on SLD impacting both written expression and emotional, social, and behavioral development.<sup>21</sup> An eligibility meeting was held at DCPS Central Office on 11/8/18; disability worksheets for SLD, OHI

---

<sup>10</sup> P22-3.

<sup>11</sup> Mother; Educational Consultant.

<sup>12</sup> P24-1.

<sup>13</sup> P24-3.

<sup>14</sup> P24-4.

<sup>15</sup> P23-1,2.

<sup>16</sup> P8-1,18.

<sup>17</sup> P17-15; Father.

<sup>18</sup> P9-1; R4-1.

<sup>19</sup> P11-1,2.

<sup>20</sup> P11-3; Mother.

<sup>21</sup> P11-4.

## Hearing Officer Determination

Case No. 2019-0108

and then MD resulted in the conclusion that Student met the criteria for all 3, with OHI for anxiety and inattention and SLD for math and writing.<sup>22</sup>

8. At a 12/5/18 IEP team meeting, Student's teacher noted that Student rarely speaks to anyone in the classroom.<sup>23</sup> Student was in individual therapy; Social Worker suggested group therapy.<sup>24</sup> The team briefly discussed what Nonpublic School will do to "step [Student] down" to a public school program; DCPS recommended that Student attend the in-boundary school.<sup>25</sup> Head of Two Grades testified that Student can move to a less restrictive environment when Student's academics are stable and strong and Student is a strong self-advocate, but that Student is "definitely" not at that place now.<sup>26</sup> Mother testified that Student can transition back to public school when Student can advocate for self.<sup>27</sup>

9. Student's Needs. Student is very bright, but a "very fragile kid" who is eager to do well; Student is very anxious and doesn't know how to engage socially.<sup>28</sup> As recently as 2017/18, Student would sometimes hide under Student's desk.<sup>29</sup> Anxiety impacts Student's work and participation at Nonpublic School; anxiety is a major piece of Student's day.<sup>30</sup> Student was more available for learning in 2018/19 than previously; Student felt safe at Nonpublic School, so was taking more risks.<sup>31</sup> Student has issues with executive functioning, with difficulties planning, managing multiple tasks and task completion.<sup>32</sup> As Student's anxiety increases it makes executive functioning worse.<sup>33</sup> A Nonpublic School psychologist sees Student weekly due to anxiety and being overwhelmed in class; between sessions Student fairly often seeks out a specific social worker.<sup>34</sup> School Psychologist's assessment of Student found academic and attention challenges and that Student needed behavior supports due to being distracted and anxious.<sup>35</sup>

10. DCPS used the Strengths and Difficulties Questionnaire ("SDQ") with several people close to Student on 10/22/18 and found several categories that were Very High, the highest level: Student's teacher rated Student Very High in Overall Stress, Emotional Distress and Peer Problems Difficulties; another teacher rated Student Very High in Peer Problems, with Overall Stress rated High; Student's psychologist rated Student Very High

---

<sup>22</sup> P18; R11-2.

<sup>23</sup> P21-2.

<sup>24</sup> *Id.*

<sup>25</sup> P21-4.

<sup>26</sup> Head of Two Grades.

<sup>27</sup> Mother.

<sup>28</sup> Head of Two Grades.

<sup>29</sup> *Id.*

<sup>30</sup> P23-2.

<sup>31</sup> P23-2.

<sup>32</sup> Psychology Director.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> School Psychologist.

## Hearing Officer Determination

Case No. 2019-0108

in Overall Stress, Emotional Distress and Peer Problems; and Mother rated Student Very High in Overall Stress, Emotional Distress and Peer Problem Difficulties.<sup>36</sup> These very high ratings all occurred with Student in the small, supportive, Nonpublic School environment.<sup>37</sup>

11. Cognitive. Based on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) in the 10/15/18 DCPS comprehensive psychological evaluation, School Psychologist found Student to be in the Average range for overall intellectual ability, with a Full Scale IQ (“FSIQ”) of 111, and composite scores that ranged from 98 for Processing Speed Index (“PSI”) to 126 for Visual Spatial Index (“VSI”).<sup>38</sup> Student’s cognitive scores were higher than when previously tested.<sup>39</sup>

12. Academics. School Psychologist noted in the 10/15/18 evaluation that the Woodcock-Johnson IV Tests of Achievement (“WJ-IV”) found that Student performed in the Average range for Broad Reading and Broad Writing, and the Low Average range for Broad Math, but with unevenly developed skills and a pattern of strengths and weaknesses that would impact overall academic performance.<sup>40</sup> The WJ-IV scores were higher than before, but not as high as Student’s cognitive strength would suggest; Student’s academic performance was more than 2 standard deviations below cognitive ability in certain areas.<sup>41</sup> DCPS recommended Student be found eligible for special education services as a student with MD, due to SLD and OHI.<sup>42</sup>

13. According to the 10/15/18 evaluation, Student has a history of learning challenges as well as anxiety concerns; previous evaluations reported elevated scores on internalizing behavior indices based on depression, somatization, anxiety, withdrawal and atypicality; Student made progress but continued to have challenges in these areas; anxiety, withdrawal and somatization are all in the clinically significant range.<sup>43</sup> According to the Behavior Assessment System for Children, Third Edition (“BASC-3”), Student has internalizing behaviors that may impact overall progress, with Very Elevated teacher scores for anxiety and somatization, and Elevated for depression.<sup>44</sup>

14. Observations of Student. For the 10/15/18 comprehensive psychological evaluation, School Psychologist observed Student for an hour in a class with 7 children and noted that Student was confused about what Student was doing; after completing each step, Student had to be prompted by teacher to continue; teacher checked with Student often to ensure

---

<sup>36</sup> P16-1,2; R10-1; Social Worker.

<sup>37</sup> Head of Two Grades.

<sup>38</sup> P14-7,20.

<sup>39</sup> Educational Consultant; P14-3 (previous FSIQ was 104).

<sup>40</sup> P14-11,20.

<sup>41</sup> Educational Consultant; P14-20.

<sup>42</sup> P14-20.

<sup>43</sup> P14-20,21.

<sup>44</sup> P14-14,15,16.

## Hearing Officer Determination

Case No. 2019-0108

Student was completing the assignment; and Student brought work for review by the teacher.<sup>45</sup>

15. During School Psychologist's assessment, Student was easily distracted by common noises like the air conditioner and birds outside the window.<sup>46</sup> Mother reported Student's auditory sensitivity to School Psychologist.<sup>47</sup> Student has a history of auditory sensitivities that may impact Student's ability to attend to tasks.<sup>48</sup>

16. Student was distracted while answering School Psychologist's questions and often forgot the question asked.<sup>49</sup> Student presented as somewhat anxious during assessment with rapid speech and wringing hands; Student was self-aware of the heightened level of anxiety and spoke about it with School Psychologist.<sup>50</sup> Student's teacher observed heightened anxiety when Student was unable to successfully complete classwork, although this improved considerably from 2017/18.<sup>51</sup> Mother reported that Student continued to struggle with being overcome by emotions; changes caused anxiety where Student would withdraw or become overwhelmed by emotions.<sup>52</sup>

17. Student is used to a low ratio of children-to-teachers at Nonpublic School; in algebra there were 10 students and in English, 7; observing those classes on 12/5/18, Educational Consultant, who has worked with Student since 2016/17, noted that Student was on task more consistently compared to previous years, but did not interact with or speak to peers socially before or during class as others did.<sup>53</sup> Student's English teacher noted that Student will only speak to her and not to peers and observed Student's ongoing anxiety.<sup>54</sup> While doing better in 2018/19, Student's teacher had "significant concerns" for 2019/20 when Student transitions to a higher level, as any transition will be difficult for Student in all areas – academically, emotionally and socially.<sup>55</sup> Student had a very difficult transition at Nonpublic School from 2016/17 to 2017/18.<sup>56</sup>

18. Student's occupational therapist at Nonpublic School stated that Student is resistant to assistance in the classroom and will shut down entirely or tune out whoever is trying to help.<sup>57</sup> Student often stands off to the side during recess and participates in group activities

---

<sup>45</sup> P14-5; Educational Consultant (typical for Student).

<sup>46</sup> P14-5.

<sup>47</sup> *Id.*

<sup>48</sup> R8-12; Educational Consultant (noise throws Student off).

<sup>49</sup> P14-5.

<sup>50</sup> *Id.*

<sup>51</sup> P14-4.

<sup>52</sup> *Id.*

<sup>53</sup> P20-1,2; Head of Two Grades (Student's classes at Nonpublic School generally contain 7 or 8 students total, apart from performing arts and physical education).

<sup>54</sup> P20-3.

<sup>55</sup> P20-3,4.

<sup>56</sup> Head of Two Grades.

<sup>57</sup> R8-3.



## Hearing Officer Determination

Case No. 2019-0108

less than peers.<sup>58</sup> Student generally requires much more support than typically developing children to engage in the learning process.<sup>59</sup>

19. Proposed Public School Program. Educational Consultant visited Proposed Public School with Parents on 3/5/19 and concluded it was inappropriate for Student's academic, social, emotional and behavioral needs; Student needs specialized instruction outside general education for the entire day in small classes with low student-to-teacher ratios; Educational Consultant did not see an effort by DCPS to create a meaningful IEP for Student's academic and functional advancement in the programming proposed.<sup>60</sup>

20. Proposed Public School's philosophy is "inclusion" of children with IEPs in general education.<sup>61</sup> Educational Consultant and Parents understood from Proposed Public School that there are no students receiving specialized instruction outside general education at Proposed Public School, although the statement may have been only about Student's grade.<sup>62</sup> LEA Representative asserted that out of 14 students with IEPs in Student's grade, a small number had pull-out hours.<sup>63</sup> LEA Representative explained that inclusion can permit work on different goals by having the special education teacher working at the back of the general education classroom.<sup>64</sup>

21. Educational Consultant and Parents questioned whether 1 full-time special education teacher, 1 full-time speech-language pathologist, and 1 part-time occupational therapist would be sufficient to cover Student's IEP on top of the other students.<sup>65</sup> During observation, the special education teacher responded to students who raised their hands, which Student does not do.<sup>66</sup> LEA Representative explained that the special education teacher at Proposed Public School has only 14 children on her roster so had capacity for Student; the special education teacher is in general education classes as much as possible, but would pull out Student if the IEP required that.<sup>67</sup>

22. The Proposed Public School team would not meet with Parents to discuss Student's needs and IEP implementation until Student was enrolled.<sup>68</sup> Proposed Public School staff repeatedly stated "we can't say yet" or "we'll just have to figure it out" during the tour.<sup>69</sup> Proposed Public School intended to conduct additional diagnostic testing once Student enrolled to determine what Student needed, which was a risk if Proposed Public School was

---

<sup>58</sup> R8-12.

<sup>59</sup> *Id.*

<sup>60</sup> P26-1.

<sup>61</sup> Educational Consultant; P26-1,3; LEA Representative ("correct").

<sup>62</sup> P26-1,3; LEA Representative (disputed statement); Educational Consultant.

<sup>63</sup> LEA Representative.

<sup>64</sup> *Id.*

<sup>65</sup> P26-3; P25-1.

<sup>66</sup> P25-1.

<sup>67</sup> LEA Representative.

<sup>68</sup> P26-4.

<sup>69</sup> P25-2; Mother.

## Hearing Officer Determination

Case No. 2019-0108

not be able to provide it.<sup>70</sup> Proposed Public School intended to implement Student's IEP however written, but Educational Consultant testified that a special education class-of-one for Student would not be appropriate.<sup>71</sup> LEA Representative emphasized in testimony that a 30-day review could ensure that Student obtained what was needed.<sup>72</sup>

23. The special education teacher at Proposed Public School had a desk and space to pull out students in a classroom separated only by a whiteboard from a bilingual class, which would cause visual and auditory distraction to Student.<sup>73</sup> Father noted that initially Proposed Public School staff said they didn't have a pull-out room for specialized instruction outside general education, but later identified 2 tables on one side of the bilingual classroom as the place for individual pull-out.<sup>74</sup> LEA Representative testified that other arrangements could be made, such as Student working there when the other class was in another space.<sup>75</sup>

24. The Proposed Public School building itself was too large for Student, especially when anxious or overwhelmed.<sup>76</sup> With 500 students, the noise level in the large all-purpose room on the first floor could be high and inappropriate for Student.<sup>77</sup> Each morning all students gather in the cafeteria (all-purpose room) until their teachers come to pick up their classes; the noise would be too great for Student.<sup>78</sup> Father was particularly concerned about noise levels and the impact on Student; lunch in the all-purpose room was especially loud.<sup>79</sup> Educational Consultant stated that Student required support during unstructured times to improve social interactions, rejecting Proposed Public School's optional team building activities that students can choose to participate in or not.<sup>80</sup> LEA Representative countered that that Proposed Public School was a typical school and "relatively quiet."<sup>81</sup>

25. A short math class observation at Proposed Public School showed about 25 students, a general education teacher and a special education teacher; the students were expected to independently complete a math sheet; Student requires specialized instruction in math and constant cueing.<sup>82</sup>

---

<sup>70</sup> P26-5.

<sup>71</sup> LEA Representative; Educational Consultant.

<sup>72</sup> LEA Representative.

<sup>73</sup> P26-2; P25-1; LEA Representative (shared classroom is "very true").

<sup>74</sup> P25-3.

<sup>75</sup> LEA Representative.

<sup>76</sup> P26-2.

<sup>77</sup> *Id.*

<sup>78</sup> P26-4.

<sup>79</sup> P25-2,3.

<sup>80</sup> P26-3.

<sup>81</sup> LEA Representative.

<sup>82</sup> P26-4; P25-1.

## Hearing Officer Determination

Case No. 2019-0108

26. During a brief observation of science class at Proposed Public School there were about 18 students and 1 teacher; 2 students were giving a presentation and students were expected to take notes in their blank journals; Student would require significant support.<sup>83</sup>

27. During a brief observation of social studies class at Proposed Public School there were about 25 students and 1 teacher; students were supposed to take notes about a video; the pace of lesson, method of instruction, language, and written output were all inappropriate for Student; Student requires constant cueing.<sup>84</sup>

28. For electives at Proposed Public School, large class sizes of up to 25 students and inability to provide individualized instruction to Student made them inappropriate for Student.<sup>85</sup> It is hard for Student to get help in classes, especially if the classes are larger than 15 students.<sup>86</sup> Student would be easily overwhelmed by the size and noise of classes with more than 15 students.<sup>87</sup> LEA Representative twice stated only that Proposed Public School had classes of less than 40 children; on cross-examination she lowered her estimate to 20-30 children, and agreed many classes were about 25.<sup>88</sup>

29. In academic classes, the pacing, instructional methods, written output expectations, class size and supervision of work completion were all inappropriate for Student.<sup>89</sup> In at least 2 of the Proposed Public School classrooms, teachers simply let students volunteer and did not try to coax participation from others; Student would need much more prompting.<sup>90</sup> Proposed Public School students are not permitted to use cellphones, but Student is used to such technology at Nonpublic School for academic and organizational tasks.<sup>91</sup>

30. The Proposed Public School social worker provided group pull-out services for BSS, but there were no other students of Student's gender receiving group services, so such services would not have been available to Student.<sup>92</sup> Proposed Public School included grades through Student's grade in 2018/19, but does not offer the grade Student will be in for 2019/20.<sup>93</sup>

---

<sup>83</sup> P26-4,5.

<sup>84</sup> P26-5; P25-1.

<sup>85</sup> P26-3,4; P25-1 (music class with 25 kids would be "impossible" for Student).

<sup>86</sup> Psychology Director.

<sup>87</sup> Psychology Director; Educational Consultant (recommends smaller classes of no more than 10-12).

<sup>88</sup> LEA Representative.

<sup>89</sup> P26-2.

<sup>90</sup> P25-3.

<sup>91</sup> P26-4.

<sup>92</sup> *Id.*

<sup>93</sup> P26-2.

## Hearing Officer Determination

Case No. 2019-0108

31. LRE. Educational Consultant was clear that Student's LRE in 2018/19 and to the present is a full-time special education setting for all classes, including electives and lunch in a smaller environment with support.<sup>94</sup>

32. Progress at Nonpublic School. Nonpublic School is for students with language-based learning disabilities, with average or above average intelligence.<sup>95</sup> Nonpublic School has a certificate of approval from OSSE; tuition is just under \$50,000/year.<sup>96</sup>

33. Student's NWEA MAP scores from the Fall of 2016 to the Spring of 2019 show steady growth in reading rising from the 53<sup>rd</sup> percentile to the 86<sup>th</sup> percentile of normed students; math has been bumpier, but Student increased from the 48<sup>th</sup> percentile to the 62<sup>nd</sup> percentile.<sup>97</sup> Student's 2018/19 End of Year Progress Report, Report Card and progress notes at Nonpublic School indicate that Student is doing well, with cueing, prompting and support.<sup>98</sup>

34. Psychology Director persuasively testified that Student has "absolutely" made progress at Nonpublic School, but still needs support.<sup>99</sup> Student benefits from being educated with other special education students and cannot attend school successfully with non-disabled students; Student still has challenges just being with other students with disabilities.<sup>100</sup> Psychology Director and Mother credibly testified that Student is appropriately placed at Nonpublic School.<sup>101</sup>

### 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

---

<sup>94</sup> Educational Consultant.

<sup>95</sup> Head of Two Grades.

<sup>96</sup> Head of Two Grades; Father.

<sup>97</sup> Head of Two Grades; P27-1.

<sup>98</sup> P29; P30; P28; Head of Two Grades.

<sup>99</sup> Psychology Director.

<sup>100</sup> *Id.*

<sup>101</sup> Psychology Director; Mother.

## Hearing Officer Determination

Case No. 2019-0108

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.” *Endrew 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, Respondent 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); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *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 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, the LEA 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); *Montuori ex rel. A.M. v. Dist. of Columbia*, No. 17-2455 (CKK), 2018 WL 4623572, at \*3 (D.D.C. 9/26/18).

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).

## Hearing Officer Determination

Case No. 2019-0108

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); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *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 IEP and/or placement for 2018/19, due to (a) the lack of full-time specialized instruction and support outside general education throughout the school day, as well as an insufficient amount of BSS, and (b) placement in programs that were inappropriate due to the need for dual-language ability or special education inclusion with isolation resulting from no pull-out of other students, as well as size of building and classes, noise, pacing of instruction, instructional presentation method, level of staffing, and similar concerns. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners established a prima facie case on this issue through expert testimony and documents, shifting the burden to Respondent, which did not meet its burden of persuasion, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S.*, 190 F. Supp. 3d at 51 (IEP must be “reasonably calculated to produce meaningful educational benefit”).

The measure and adequacy of the IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving perfect IEPs, but simply IEPs reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (the IDEA “stops short of requiring public schools to provide the best possible education”). *See also Hill v. Dist. of Columbia*, No. 14-cv-1893 (GMH), 2016 WL 4506972, at \*21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). The appropriateness of Student’s IEPs is analyzed by considering the specific concerns raised by

## Hearing Officer Determination

Case No. 2019-0108

Petitioners, which are considered next.<sup>102</sup> See 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

The central question here is whether – as DCPS urges – Student merely needed 15 hours/week of specialized instruction, of which only 5 hours/week were to be outside general education, as Student was close to grade level and had high MAP scores. Or, on the other hand, whether – as Petitioners urge – Student needed full-time support in order to achieve academic success and overcome severe anxiety and attentional challenges.

The undersigned is persuaded by those who know Student best that despite being very bright, Student is very fragile. Student is very anxious and anxiety impacts Student's work and participation even at Nonpublic School. Student also has executive functioning issues, with difficulty planning, managing and completing tasks, on top of Student's long-standing learning disabilities. DCPS conducted the Strengths and Difficulties Questionnaire in which Student was found to be very high in overall stress by Student's psychologist, Student's teacher and Mother. Student was also found to be very high in emotional distress by Student's teacher, Student's psychologist and Mother. Further, Student was found to be very high in peer problems by Student's teacher, Student's psychologist and Mother. These very high ratings of stress and distress all occurred even with Student in the supportive Nonpublic School environment. The seriousness of these concerns was corroborated by the comprehensive psychological evaluation conducted by DCPS, which found anxiety, withdrawal and somatization to all be in the clinically significant range for Student.

Moreover, significant information was provided by the observations of Student in classes at Nonpublic School. As part of the DCPS comprehensive psychological evaluation, School Psychologist observed Student in a class with only 7 children and noted that Student was confused about what Student was doing; after completing each step Student had to be prompted by the teacher to continue; and the teacher checked with Student often to ensure Student was completing the assignment. This conveys in a nutshell why Student would very likely not succeed in a general education classroom without special education supports, if Student had 10-15 hours unsupported each week, with only 5 hours/week outside general education and 10 inside general education. As to DCPS providing most specialized instruction inside general education rather than outside, DCPS's occupational therapy evaluation noted that Student's occupational therapist at Nonpublic School stated that Student is resistant to assistance in the classroom and will either shut down entirely or tune out whoever is trying to help.

There is, of course, much more, as Student has auditory sensitivities and was found during School Psychologist's assessment to be easily distracted by common noises like the air conditioner and even birds outside the window, which may impact Student's ability to attend to tasks. Further, Student was so distracted while answering School Psychologist's

---

<sup>102</sup> A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. Procedural violations were not specifically alleged in this matter.

## Hearing Officer Determination

Case No. 2019-0108

questions that Student often forgot the question asked. At least one of Student's teachers has significant concern that 2019/20 may be even worse for Student, who is due to transition to a higher school level. Based on the very difficult transition that Student experienced shifting from 2016/17 to 2017/18 at Nonpublic School, Student could well have difficulties in all areas – academically, emotionally and socially.

Respondent did not meet its burden of persuading the undersigned that 5 hours/week of specialized instruction outside general education and 10 hours/week inside general education were reasonably calculated to enable Student to make appropriate progress in Student's circumstances. This is a substantive violation and a denial of FAPE, resulting in the remedy set forth below.

Placement. Turning to Petitioners' concerns about placement at Proposed Public School (or a program like that offered at Proposed Public School), the applicable legal standard for educational placement is that the IDEA requires "school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018), citing *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). See also *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS "must place the student in a setting that is capable of fulfilling the student's IEP").

Here, DCPS selected Student's in-boundary school, Proposed Public School, as suitable for Student in 2018/19.<sup>103</sup> The initial placement controversy between the parties was over the fact that Proposed Public School has a philosophy of "inclusion," meaning that the school seeks to keep even students with IEPs in the general education classroom, rather than pulling them out or having separate special education classrooms. At the same time, Proposed Public School staff were certain that if Student had specialized instruction outside general education on Student's IEP that the school could and would provide it. Less clear was whether in such circumstances there would be any other students in the outside general education class with Student.

Educational Consultant and Parents were certain they were told on their tour of Proposed Public School that the school had no students receiving specialized instruction outside general education, while LEA Representative clearly testified that a handful of children in Student's grade had IEPs including some services outside general education. Either way, it is clear that Student would have had very few, if any, peers in classes outside general education, which ignores important social aspects of education. Student's significant social needs were made clear by Student's notable lack of engagement with peers, even in a very supportive environment with similarly disabled children. This was emphasized in *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 18 (D.D.C. 2017), where the Court concluded that a "class of one" just for specials was problematic enough to make the selected public school inappropriate in light of the student's needs.

---

<sup>103</sup> A second in-boundary school was stipulated by the parties as not being suitable for Student as it was a dual-language school.



## Hearing Officer Determination

Case No. 2019-0108

Proposed Public School had many other challenges, beginning with the fact that Parents felt that the Proposed Public School building itself was too large for Student and certainly too noisy, as all students gathered in one space at the beginning of the day, and lunchtime was particularly noisy. Student could be easily overwhelmed by the size and noise of classes at Proposed Public School. Quick observations of academic classes by Educational Consultant revealed 18-25 students in each, where the pacing, instructional methods, written output expectations, class size and supervision of work completion were all inappropriate for Student in the credible expert opinion of Educational Consultant. It is difficult for Student to get help in classes, especially if the classes are larger than about 15 students. Nor was it clear that Student could have received BSS group services at Proposed Public School. Proposed Public School had no other students of Student's gender receiving group services from the social worker, so such services may not have been available to Student at that time.

With the small classes and extensive supports of Nonpublic School, Student is doing well there, but the undersigned is persuaded that, in the absence of those supports at Proposed Public School, Student would not make appropriate progress given Student's circumstances. *See N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 35 (D.D.C. 2008) (disabled students who are making progress in an appropriate nonpublic program should not be automatically disqualified from receiving the very services enabling their success). Further, Proposed Public School did not attempt to work out many issues in advance of enrollment by Student, but the law is clear that parents are not obliged to put their children into situations that do not appear viable in order to prove a denial of FAPE. As the Court explained in *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 72 (D.D.C. 2010),

[P]arents are not required to wait and see a proposed IEP [or placement] in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2492-93, 174 L. Ed. 2d 168 (2009) (holding that parents may be reimbursed for private-school placement when a school district fails to provide a FAPE even where the student has never received instruction in the public school); *see also Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) ("a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement").

The undersigned concludes that on balance Respondent has failed to carry its burden of persuasion on the placement issue. There was a material failure in the ability of Proposed Public School to provide the services required by Student's IEP, and the placement proposed would not afford Student the opportunity to make appropriate progress in Student's particular circumstances. *N.W.*, 253 F. Supp. 3d at 17, *quoting James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016). This failure is a substantive violation and a denial of FAPE, with the remedy addressed below.

**Issue 2:** *Whether Nonpublic School is an appropriate placement for Student.*  
(Petitioners have the burden of persuasion.)

## Hearing Officer Determination

Case No. 2019-0108

Petitioners demonstrated that Nonpublic School, where Student is doing well and has been educated for 3 years, is proper and appropriate for Student. The legal standard for proper placement should be comparable for school districts and for parents. *Leggett*, 793 F.3d at 70. Under *Endrew F.*, 137 S. Ct. at 1001, the question is whether Parents' unilateral private placement was reasonably calculated to enable Student to make appropriate progress given Student's circumstances. *Cf. Leggett*, 793 F.3d at 71, *quoting Rowley*, 458 U.S. at 207, 102 S. Ct. 3034. *See also Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994), *quoting Rowley*, 458 U.S. at 176, 102 S. Ct. at 3034; *N.G.*, 556 F. Supp. 2d at 37.

Student's 2018/19 Progress Report and report card at Nonpublic School indicate that Student is doing well – due to cueing, prompting and support – with Student's NWEA MAP reading scores rising from the 53rd to the 86th percentile and math from the 48th to 62nd percentile while at Nonpublic School. Psychology Director persuasively testified that Student has “absolutely” made progress at Nonpublic School, but still needs support, so is appropriately placed there. In short, Nonpublic School is providing meaningful educational benefit and Student is making progress appropriate in Student's circumstances. For these reasons, this Hearing Officer concludes that Nonpublic School is proper and appropriate for Student. *See* 34 C.F.R. § 300.148.

### Remedy

As the remedy for the denials of FAPE concerning Student's IEP and placement in 2018/19, Petitioners now seek reimbursement of their payments to Nonpublic School for 2018/19, along with a request for Student to be prospectively placed at Nonpublic School for 2019/20. Judge Colleen Kollar-Kotelly last year confirmed that “if there is no public school which is suitable, the school district ‘must pay the cost of sending the child to an appropriate private school.’” *Montuori*, 2018 WL 4623572, at \*3, *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005). *See also Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (if a public school program were available to enable student to receive educational benefits, DCPS would not need to consider nonpublic placement).

Under the IDEA, however, parents who unilaterally place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993), *quoting Burlington*, 471 U.S. at 374. The Court of Appeals explained in *Leggett v. Dist. of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015), that,

As 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].”

Here, the first prong of *Leggett* is met due to the denials of FAPE by DCPS failing to provide Student an appropriate IEP and placement, as discussed at length in the first issue,

## Hearing Officer Determination

Case No. 2019-0108

above. The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student, which is addressed and satisfied in the second issue, above. The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioners acted unreasonably. Here, Parents interacted reasonably with DCPS, including their actions following the prior HOD on 7/27/18 when they promptly requested an IEP to be developed by DCPS. There was no serious assertion by DCPS that the third prong is not satisfied.

Accordingly, this Hearing Officer concludes that Parents should be reimbursed for Student's tuition and related services at Nonpublic School for the entirety of 2018/19. DCPS argued that it should not be responsible for any costs prior to the completion of the 12/5/18 IEP, yet it is clear from the timeline that Parents acted reasonably promptly after the 7/27/18 HOD to initiate the referral process with DCPS. Further, given the inadequate IEP and placement that DCPS provided, if the referral had been initiated more quickly DCPS would simply have gotten to its less than adequate results more quickly and there would be no question that DCPS is responsible for the entirety of 2018/19.

The more challenging aspect is Petitioners' request for prospective relief for 2019/20, which received virtually no attention during the due process hearing. In particular, there was no discussion of placement and Student's options with DCPS for 2019/20, as Proposed Public School does not go beyond Student's grade in 2018/19. DCPS did not suggest any placement or school for Student for 2019/20, and the options at the advanced level may have been more challenging for Student than Proposed Public School. In the due process complaint there was no request for compensatory education, but Petitioners do seek to have Student prospectively placed at Nonpublic School for 2019/20. Judge Rudolph Contreras emphasized in his very recent decision in *Collette v. Dist. of Columbia*, CV 18-1104 (RC), 2019 WL 3502927, at \*14 (D.D.C. Aug. 1, 2019), that apart from compensatory education, "a hearing officer can also remedy the denial of a FAPE by ordering prospective relief."

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 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; *Collette*, 2019 WL 3502927, at \*14. Each of these considerations is addressed below.

(a) Nature and Severity of Student's Disability: Based on DCPS's own evaluation and analysis of Student last Fall, DCPS agreed that Student met the criteria for SLD for math and writing and OHI for anxiety and inattention, and was thus categorized as MD. As DCPS's 12/5/18 IEP noted, Student's evaluation scores on Anxiety, Withdrawal and Somatization fell in the clinically significant range. The expert school personnel who know

## Hearing Officer Determination

Case No. 2019-0108

Student best consider Student to be very fragile. Ratings of “very high” for stress and distress (and more) occurred even in the supportive Nonpublic School environment.

(b) Student’s Specialized Educational Needs: As discussed in Issue 1 above, the undersigned determined that Student’s disability was sufficiently severe that Student required more than the specialized instruction that DCPS proposed in its IEP. Indeed, Student needed full-time special education services to meet the standards of *Andrew F.*, with small class sizes and low student-to-teacher ratios, which DCPS cannot provide at Proposed Public School and did not suggest elsewhere.

(c) Link Between Student’s Needs and the Services Offered by Nonpublic School: Nonpublic School is for students with language-based learning disabilities, with average or above average intelligence, so Student is a good fit there. Further, Student has made good progress at Nonpublic School over the last 3 years, and has established relationships at the school where it is clear Student can continue to be successful in the coming year.

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

(e) Least Restrictive Environment: As discussed in Issue 1, above, based on Student’s educational needs, and behavioral needs including anxiety, a general education setting such as Proposed Public School is not appropriate and is not Student’s LRE for it is not sufficiently restrictive. Placement at Nonpublic School, where Student only has interaction with peers who are like Student, 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). The least restrictive environment factor in *Branham* is of less importance than the IDEA’s “primary goal of providing disabled students with an appropriate education.” *See Q.C-C. v. Dist. of Columbia*, 164 F. Supp. 3d 35, 55 (D.D.C. 2016) (quoting *Carter By & Through Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991), *aff’d*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993)). Put colloquially, when throwing a rope to a struggling swimmer it is better to err on the side of having the rope a little too long than fatally too short.

Considering all the factors above, it is the conclusion of this Hearing Officer that Nonpublic School meets the higher *Branham* standard for prospective placement, which is sought for all of 2019/20 but the undersigned limits to the first half of the school year to enable DCPS to attempt to provide a FAPE to Student beginning in January 2020, if desired. In the view of the undersigned, this remedy meets the Court’s guidance that the 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.

**Hearing Officer Determination**

Case No. 2019-0108

**ORDER**

Petitioners have prevailed on the issues in this case, as set forth above. Accordingly, **it is hereby ordered that:**

Within 30 days, DCPS shall (a) upon receipt of documentation of payment by Petitioners, reimburse Petitioners for tuition and related services for Student at Nonpublic School for the entire 2018/19 school year, and (b) fund tuition and related services for Student at Nonpublic School for the first half of the 2019/20 school year and until a FAPE is offered by DCPS.

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:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov