

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

PETITIONERS, on behalf of STUDENT, ¹)	
)	Date Issued: December 22, 2017
Petitioners,)	
)	Hearing Officer: Peter B. Vaden
v.)	
)	Case No: 2017-0252
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	Hearing Dates: December 7 and 8, 2017
Respondent.)	
)	Office of Dispute Resolution, Room 2006 Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.).

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on September 15, 2017, named District of Columbia Public Schools (DCPS) as Respondent. In their due process complaint, Petitioners allege that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by failing to provide appropriate Individualized Education Programs (IEPs) and educational placements since the 2015-2016 school year. This case was originally assigned to former impartial hearing officer NaKeisha Sylver-Blount. The case was reassigned to the undersigned hearing officer on October

¹ Personal identification information is provided in Appendix A.

17, 2017. Due to the reassignment, the due process hearing dates had to be continued to December 7-8, 2017. To accommodate the new hearing dates, I granted DCPS' unopposed continuance request to extend the final decision due from November 29, 2017 to December 22, 2017.

Petitioners and DCPS met for a resolution session on October 3, 2017, which did not result in an agreement. On October 24, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing was convened before this Impartial Hearing Officer on December 7 and 8, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Both parents testified and Petitioners called CLINICAL PSYCHOLOGIST, ADMISSIONS DIRECTOR and PROGRAM DIRECTOR as additional witnesses. DCPS called LEA REPRESENTATIVE as its only witness. Petitioners' Exhibits P-1 through P-23 were all admitted into evidence without objection. DCPS' Exhibits R-1 through R-15 were all admitted into evidence, including Exhibit R-7 admitted over Petitioners' objection. Counsel for the respective parties made closing arguments. There was no request to file post-hearing written arguments.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the October 24, 2017

Prehearing Order:

A. Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs since at least the beginning of the 2015-2016 school year. Student's IEPs allegedly were inappropriate because (1) they did not provide enough specialized instruction hours outside of the general education setting; (2) they do not provide for 1:1 aides, (3) they failed to classify Student under both autism spectrum disorder (ASD) and other health impairment for attention deficit hyperactivity disorder (OHI-ADHD); (4) they failed to provide Student with necessary classroom accommodations; (5) the IEPs did not provide speech and language services; (6) the IEPs failed to provide Student an appropriate educational placement along the continuum of alternative placements, capable of addressing both Student's academic and social and emotional needs.

B. Whether DCPS denied Student a FAPE by failing to provide an appropriate functional behavioral assessment (FBA) since January 5, 2016.

C. Whether DCPS denied Student a FAPE by failing to provide the parents with a valid prior written notice when the parents requested in April 2016 that Student's IEP be amended back to include a 1:1 aide.

D. Whether DCPS denied Student a FAPE by failing to provide the parents with a valid prior written notice when the parents requested in May 2016 that Student's IEP be amended to include extended school year (ESY) services.

E. Whether DCPS denied Student a FAPE by providing the parents in August 2017 a prior written notice, relating to Student's 2017-2018 school assignment, that failed to meet the content of notice requirements of the IDEA.

and

F. Whether DCPS failed to ensure that Student was offered appropriate educational placements since the 2015-2016 school year to meet Student's need for small classroom size, structured programming, differentiated instruction and staff trained to work with Autism Spectrum Disorder (ASD) students.

For relief in this case, the Petitioners request that DCPS be ordered to fund Student's private placement at one of two proposed nonpublic schools. The Petitioners also seek compensatory education for the denials of FAPE alleged in the due process complaint. During the due process hearing, the parties, by counsel, agreed on a

stipulated award of compensatory education to be provided, if the hearing officer finds that Student was denied a FAPE as alleged in the due process complaint.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments of counsel, this hearing officer's findings of fact are as follows:

1. Student resides with the parents in the District of Columbia. Testimony of Father. Student is eligible for special education and related services as a student with an Autism Spectrum Disorder (ASD). Exhibit R-6.

2. Student made good progress when enrolled at CITY SCHOOL 1. In the 2014-2015 school year, Student matriculated to CITY SCHOOL 2. Student declined at City School 2. Student had a dedicated aide at City School 1 and at City School 2, but at City School 2, Student was resistant to having an aide. Testimony of Mother.

3. Student's February 10, 2015 IEP at City School 2 provided for 10 hours per week of Specialized Instruction in the general education setting, 1 hour per month of Behavioral Support Services outside general education, 2 hours per month of Behavioral Support Services in general education, and 60 minutes per month of Consultation Services for Behavioral Support Services and for Speech-Language Pathology. This IEP provided that Student would have a dedicated aide for 6 hours per day. Exhibit P-1.

4. In October 2015, PROGRAM MANAGER made an observation of Student at City School 2 to determine the appropriateness of renewal of the dedicated aide. Program Manager reported being informed by Student's resource teacher that Student did not engage in class and was failing classes. The resource teacher stated that Student was not disruptive, but did not participate in class or complete class work. Program

Manager noted that Student felt more negatively about having an adult there at all times and recommended that a plan should be put in place to begin to “fade” the one-on-one support so that the aide would be removed by the end of the 2015-2016 school year.

Exhibit P-2.

5. On December 14, 2015, a City School 2 social worker completed a Functional Behavioral Assessment (FBA) of Student. The social worker reported that on classroom standardized assessments, Student had scored in the Advanced range for Reading and within one year of grade level for Math. However, Student was failing most academic courses. Observation results indicated that Student was off-task 80% of the time and only engaged in appropriate classroom behavior when an adult was providing 1:1 attention. The social worker recommended, *inter alia*, that Student would benefit from a small classroom setting where attention could be given on a consistent and frequent basis. Exhibit P-5.

6. Student’s City School 2 IEP team met on January 5, 2016 for the annual review of Student’s IEP. The January 5, 2016 IEP reduced Student’s Special Education and Related Services to 6 hours per week of Specialized Instruction in general education, 200 minutes per month of Behavioral Support Services in general education and 30 minutes per month of Behavioral Support consultation services. The IEP team determined that Student did not require the support of a dedicated aide, because Student was keeping a distance as far away as possible from the existing aide and the aide was of no help to Student. Exhibit P-6.

7. Student’s January 8, 2016 interim report card, Exhibit P-9 (report card erroneously dated January 8, 2015), indicated that Student’s work was of limited quality and showed little understanding of concepts and skills in Language and Literature,

French, Social Studies and Music. Student struggled particularly in Language Arts and Social Studies. Testimony of Father.

8. Student remained at City School 2 for the 2016-2017 school year. On November 14, 2016, DCPS OBSERVER made an observation of Student on the referral of the school's special education coordinator, who reported that Student continued to experience school failure with the existing supports and was not responding to interventions. School staff reported to DCPS Observer that Student "has just checked out. [Student] is not motivated to participate in classroom work." DCPS Observer recommended certain behavior intervention strategies, but did not support moving Student to a more restrictive environment. Exhibit R-14.

9. On November 29, 2016, the City School 2 IEP team met for the annual review of Student's IEP. The November 29, 2016 IEP states that Student's disengagement in class had impeded access to the general education curriculum, particularly in English and Mathematics. Student had been placed in small-group resource classes for Math and ELA. Since being placed in this more restrictive placement, Student was still observed to be disengaged from the class content and relatively non-responsive to teacher intervention. Student was also reported to be struggling with getting to class on time and attending class for the full length of the period. Student was reported to have a propensity to abscond from classrooms and the lunchroom. When Student was in class, it was reported to be difficult to get Student engaged with academics. Student would sit quietly, but refused to put out any work. The November 29, 2016 IEP team increased Student's Special Education and Related Services to 20 hours per week of Specialized Instruction, including 10 hours outside general education, 200 minutes per month of behavioral support services in general

education and 20 minutes per month of Behavioral Support Consultation Services.

Exhibit P-10.

10. On February 28, 2017, City School 2 provided written notice to the parents that Student was at risk for failure in Social Studies, Science and Math. Exhibit P-11. The parents took Student to Saturday school at City School 2 to make up work.

Testimony of Father.

11. In March 2017, the parents had Student evaluated by Clinical Psychologist to help the parents understand Student's diagnosis. Testimony of Father. Clinical Psychologist conducted a comprehensive neuropsychological evaluation. Clinical Psychologist administered an extensive battery of cognitive, academic achievement and social-emotional functioning assessments. She reported that Student reluctantly participated in testing and engaged minimally with the examiner. Student's scores on cognitive testing were Average to Low Average. Neurological testing indicated weakness in the areas of phonological processing and memory. On measures of attention and executive functioning, Student struggled with tasks that required sustained attention. In the area of academics, Student demonstrated weakness in comprehension and some challenges with oral reading fluency. Social-emotional testing indicated that Student continued to meet criteria for Autistic Disorder. Projective testing indicated that Student had limited emotional and social awareness and preferred fantasy interactions to real world situations. Clinical Psychologist reported that when academic or social situations become too effortful or difficult, Student shuts down. Clinical Psychologist recommend that Student needed a full-time special education program that specializes in Autism, ideally including small class size, one-on-one support, differentiated

instruction and behavior therapy services. Clinical Psychologist diagnosed Student with Autistic Disorder and Attention-Deficit Hyperactivity Disorder (ADHD). Exhibit P-12.

12. The parents provided a copy of Clinical Psychologist's neuropsychological evaluation report to City School 2. On June 8, 2017, an IEP team meeting was convened at City School 2 to review the independent assessment and consider the parents' request for a nonpublic placement for Student. Exhibits P-15, P-16. The parents came away from the meeting optimistic that their request for a nonpublic placement for Student would be granted by DCPS. Testimony of Father.

13. Student's final grades for the 2016-2017 school year at City School 2 were D in Math, C in English, F in Science and D in Social Studies. Exhibit P-14. On Student's IEP progress report for the 4th reporting period, Student was reported to be progressing on academic and transition annual goals, but to be making no progress on Social, Emotional and Behavioral Development goals. Exhibit R-13.

14. After the June 8, 2017 meeting at City School 2 when the parents requested a nonpublic placement for Student, the parents did not hear anything more from DCPS until August 4, 2017, when DCPS wrote to the parents that the District had made a FAPE available to Student at City School 2 and DCPS would not bear the cost of a private placement. Testimony of Father, Exhibit P-17.

15. Student matriculated to CITY SCHOOL 3 for the 2017-2018 school year. On October 12, 2017, City School 3 SCHOOL PSYCHOLOGIST conducted a review of Clinical Psychologist's March 2017 neuropsychological evaluation of Student. As part of her report, School Psychologist interviewed Student's World History teacher at City School 3. This teacher reported that Student was resistant to following norms and expectations of the classroom and did not complete class work or homework. The

teacher stated that because Student did not communicate, it was difficult to assess Student's level of understanding. The teacher reported that Student did not participate in daily instruction and he could not recall a single contribution that Student had made to the class discussion. In her written report, School Psychologist recommended, *inter alia*, that Student may benefit from a full-time special education setting with specific emphasis on Autism Spectrum Disorders. Exhibit R-10.

16. On November 27, 2017, Student's IEP team was convened at City School 3. No changes were made to Student's Special Education and Related Services from the November 29, 2016 City School 2 IEP. The IEP team determined that Student required the support of a full-time (7 hours per day) dedicated aide. Exhibit R-6. The team also agreed that Student would be provided a laptop computer for class. Testimony of LEA Representative. The parents continued to press for Student's placement in a nonpublic special education day school and were not in agreement with the decisions of the November 27, 2017 IEP team. Exhibit R-7.

17. On November 28, 2017, City School 3 submitted to DCPS a Justification and Plan for Dedicated Aide for Student. City School 3 reported in the Justification narrative that Student has great difficulty following directions, maintaining focus, ignoring internal and external stimuli, negotiating transitions, interacting with peers, responding to adults, managing materials, and keeping track of assignments; that Student is non-responsive and does not participate in ongoing activities unless an adult is sitting next to Student to prompt and reward actions; that when given directives, Student is oppositional but not aggressive; that transitions are difficult; that Student will often flee the classroom and run down the hall to escape; that Student becomes over-stimulated by the educational environment; that Student entered City School 3

being significantly below academic skill levels in most areas; that with the direct support of an adult to prompt and re-teach, Student has gained skill in all areas and is close to grade level; that Student still requires a full-time dedicated support but is building tolerance as Student acquires skills; and that aide support was not projected to be needed beyond this school year. Exhibit R-8.

18. Student's grades for the first grading period at City School 3, which ended on November 27, 2017, were all F's and D's. Exhibit P-18. Student has made "very, very minimal progress" at City School 3. Testimony of LEA Representative.

19. At City School 3, Student is currently actually receiving 16 hours per week of instruction in a self-contained setting for Math, Social Studies, English and Science. Student takes Creative Writing in the general education classroom. Testimony of LEA Representative.

20. NONPUBLIC SCHOOL 2 is a private special education day school in suburban Maryland. Nonpublic School 2 uses Applied Behavior Analysis (ABA) principles in its instruction. The school provides small class size with 2:1 student to staff member ratio. Students in the Nonpublic School 2 program receive instruction in social skills and adaptive learning every day. Nonpublic School 2 offers several different programs for students on the autism spectrum, including the Multiple Learning Needs (MLN) program for students who have average cognitive abilities. Virtually all students in the MLN program receive speech and language services. Testimony of Program Director.

21. From her review of Student's records, Program Director has determined that Student would be appropriate for the MLN program at Nonpublic School 2. The instructional levels in the MLN program fit Student's profile. Nonpublic School 2 does

not offer admission to prospective public-funded students until school district funding is approved. If funding for Student is confirmed, before making an admissions decision, Nonpublic School 2 would complete a comprehensive review of Student's record, communicate with Student's current teachers and arrange for Student to make a full-day visit. Testimony of Program Director.

22. Nonpublic School 2 holds a current certificate of approval from the D.C. Office of the State Superintendent of Education (OSSE). The annual tuition fee is approximately \$53,000 to 56,000. Testimony of Program Director.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioners in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

The issues for decision alleged by the parents in this case are as follows:

A. Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs since at least the beginning of the 2015-2016 school year. Student's IEPs allegedly were inappropriate because (1) they did not provide enough specialized instruction hours outside of the general education setting; (2) they do not provide for 1:1 aides, (3) they failed to classify Student under both autism spectrum disorder (ASD) and other health impairment for attention deficit hyperactivity disorder (OHI-ADHD); (4) they failed to provide Student with necessary classroom accommodations; (5) the IEPs do not provide speech and language services; and (6) the IEPs failed to provide Student an appropriate educational placement along the continuum of alternative placements, capable of addressing both Student's academic and social and emotional needs.

B. Whether DCPS denied Student a FAPE by failing to provide an appropriate FBA since January 5, 2016.

C. Whether DCPS denied Student a FAPE by failing to provide the parents with a valid prior written notice when the parents requested in April 2016 that Student's IEP be amended back to include a 1:1 aide.

D. Whether DCPS denied Student a FAPE by failing to provide the parents with a valid prior written notice when the parents requested in May 2016 that Student's IEP be amended to include extended school year (ESY) services.

E. Whether DCPS denied Student a FAPE by providing the parents in August 2017 a prior written notice, relating to Student's 2017-2018 school assignment, that failed to meet the content of notice requirements of the IDEA.

F. Whether DCPS failed to ensure that Student was offered appropriate educational placements since the 2015-2016 school year to meet Student's need for small classroom size, structured programming, differentiated instruction and staff trained to work with ASD students.

A.

Alleged Denials of FAPE before Current IEP and Educational Placement

During the due process hearing in this case, the parents and DCPS agreed to an inclusive compensatory education remedy for Student in the event that this hearing officer determined that the evidence established that DCPS denied Student a FAPE with respect to the parents' procedural and substantive claims predating Student's current

IEP and educational placement. Based on this stipulation agreement, my task now is determine (1) whether DCPS denied Student a FAPE with respect to past IEPs and educational placements, (2) whether DCPS' current City School 3 IEP and educational placement are appropriate for Student and (3) if the current IEP is not adequate, whether the parents' proposed nonpublic placement is appropriate for Student.

I address first Petitioners' claims concerning denials of FAPE to Student with respect to past IEPs and educational placements. The Petitioners offered little evidence concerning the appropriateness of Student's IEPs preceding Clinical Psychologist's independent neuropsychological evaluation of Student in March 2017. However, it is undisputed that Student made good progress when enrolled at City School 1 and that after matriculating to City School 2 in the 2014-2015 school year, Student declined. In the fall of 2015, Student's resource teacher reported that Student did not engage in class, did not complete class work and was failing. In December 2015, a City School 2 social worker reported that on classroom standardized assessments, Student had scored in the Advanced range for Reading and within one year of grade level for Math. However, Student was failing most academic courses. Observation results indicated that Student was off-task 80% of the time and only engaged in appropriate classroom behavior when an adult was providing 1:1 attention. The social worker recommended, *inter alia*, that Student would benefit from a small classroom setting where attention could be given on a consistent and frequent basis. Student's City School 2 IEP team met on January 5, 2016 for the annual review of Student's IEP.

For reasons not explained at the hearing, after Student's performance declined at City School 2, Student's IEP team reduced Student's special education services. Student's February 10, 2015 IEP had provided 10 hours per week of Specialized

Instruction in the general education setting, in addition to Behavioral Support Related Services and a dedicated aide for 6 hours per day. Notwithstanding Student's well-documented lack of progress under the February 10, 2015 IEP, in the January 5, 2016 IEP, the City School 2 IEP team reduced Student's Special Education and Related Services to 6 hours per week of Specialized Instruction in general education. The IEP team also determined that due to Student's resistance, the dedicated aide was of no help to Student and the team removed dedicated aide services from Student's IEP.

DCPS had the burden of persuasion to show that the IEP team's decision to reduce Student's special education services, when Student was declining academically, was justified and that the January 5, 2016 IEP was appropriate for Student. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F.*, 137 S.Ct. at 999. . . . The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully

integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

At the due process hearing, DCPS offered no explanation for the January 5, 2016 IEP team's decision to reduce Student's Specialized Instruction from 10 hours per week to 6 hours per week. DCPS has not shown that the January 5, 2016 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances, notably that Student was already failing and the City School 2 social worker had recommended that Student would benefit from a small classroom setting where attention could be given on a consistent and frequent basis. I find that Student was denied a FAPE by the inadequate IEP.

Where the parents have established a denial of FAPE, Student is entitled to an award of compensatory education. *See Butler v. District of Columbia*, 2017 WL 3491827 (D.D.C. Aug. 14, 2017). Because the parties have stipulated to the amount of compensatory education that should be awarded for *any* denial of FAPE in this case, I will award Student the hours of services agreed to by the parties, namely 50 hours of academic tutoring at \$65.00 per hour and 50 hours of Behavioral Support Services at \$124.47 per hour. Having determined that Student is entitled to the compensatory education award stipulated to by the parties, it is unnecessary for me to reach the other

past denials of FAPE alleged by the Petitioners.²

B.

Appropriateness of Current IEP and Educational Placement

On November 29, 2016, Student's City School 2 IEP team met for the annual review of Student's IEP. Before the meeting, Student had already been placed in small-group resource class for Math and ELA, but Student was still observed to be disengaged from the class content and relatively non-responsive to teacher intervention. Student was also reported to be struggling with getting to class on time and attending class for the full length of the period. The November 29, 2016 IEP team increased Student's IEP Special Education and Related Services to 20 hours per week of Specialized Instruction, including 10 hours outside general education, 200 minutes per month of behavioral support services in general education and 20 minutes per month of Behavioral Support Consultation Services School.

Student matriculated to City School 3 at the beginning of the 2017-2018 school year. Student's grades for the first grading period at City School 3, which ended on November 27, 2017, were all F's and D's. Exhibit P-18. According to LEA Representative, Student has made "very, very minimal progress" at City School 3. The City School 3 IEP team met on November 27, 2017 for the annual review of Student's IEP. The City School 3 IEP team continued unchanged the provisions for Special

² With regard to the parents' contention that Student should have been classified as having on Other Health Impairment (OHI) based upon Student's ADHD diagnosis (in addition to the ASD disability), I note that the IDEA does require that the disability classification be identified in the IEP. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE.)

Education and Related Services from Student's November 29, 2016 at City School 2. The parents contend that the decision of the City School 3 IEP team not to revise Student's special education services and educational placement to address Student's lack of progress was inappropriate. I agree.

In *Andrew F.*, the Supreme Court wrote that to be appropriate, an IEP must be reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002. DCPS' expert, LEA Representative, testified that the City School 3 IEP team agreed that the hours of special education and related services from the November 29, 2016 IEP remained appropriate for Student. LEA Representative testified that although Student was functioning way below grade level in Math and Writing, Student scored in the average range for comprehension and reading. LEA Representative explained that to warrant an increase in services, the IEP team would need to see that Student was not able to function in *all* academic areas.

The parents' expert, Clinical Psychologist, opined that Student needs a full-time special education setting because at City School 2, Student had been disengaged, would shut down and was not available for learning. She opined that for Student to recover academic skills and become re-engaged, Student needs the support of a full-time special education setting for all subject areas and that Student needs instruction from staff familiar with ASD students.

I found Clinical Psychologist's opinion more credible than that of LEA Representative. First, LEA Representative provided no authority for her assertion that an increase in services would only be warranted if Student were unable to function in all academic areas. Moreover, she later testified that Student was placed in a self-contained classroom for 16 hours per week although the City School 3 IEP provided for

no increase in services. Also, LEA Representative seemed unaware that Student received D's and F's in all subject areas for the first grading period at City School 3. For her part, Clinical Psychologist had evaluated Student over three sessions in March 2017 and was very familiar with Student's profile. Moreover, it is well documented that Student was not making appropriate progress at City School 3 with the level of services and placement provided in the November 29, 2016 IEP. In October 2017, Student's World History teacher reported to the school psychologist that Student was resistant to following norms and expectations of the classroom and did not complete class work or homework. The teacher stated that Student did not participate in daily instruction and he could not recall a single contribution that Student had made to the class discussion. Because Student did not communicate, it was difficult for the teacher to assess Student's level of understanding. As noted, Student received all D's and F's for the first grading period.

The IEP team did restore Student's dedicated aide in the November 27, 2017 IEP. However, it was well known that Student was resistant to having a dedicated aide and Student kept the farthest distance possible from past aides. In sum, it is very clear from the records that the services and educational setting provided in the November 29, 2016 IEP did not suffice to enable Student to make progress at City School 3, appropriate in light of Student's circumstances. *See Andrew F., supra.* I conclude that the decision of the November 27, 2017 IEP team at City School 3 to continue Student's IEP special education and related services unchanged was a denial of FAPE.

Remedy

In addition to the stipulated compensatory education award discussed above in this decision, the parents seek an order for DCPS to fund Student's prospective

placement at Nonpublic School 2 for the remainder of the 2017-2018 school year. (Student has been offered admission at NONPUBLIC SCHOOL 1. The parents put on evidence concerning the alleged appropriateness of both private schools, but their preference is that Student be placed at Nonpublic School 2. I make no finding as to the appropriateness of Nonpublic School 1 for Student.)

In *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the D.C. Circuit Court of Appeals set forth considerations “relevant” to determining whether a private school 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 private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student’s Disability

Student is diagnosed with moderate functioning Autism Spectrum Disorder and Attention Deficit-Hyperactivity Disorder. Student’s March 2017 scores on cognitive testing were Average to Low Average. Student entered City School 3 being significantly below academic skill levels in most areas. It was reported by City School 3 officials that Student has great difficulty following directions, maintaining focus, ignoring internal and external stimuli, negotiating transitions, interacting with peers, responding to adults, managing materials, and keeping track of assignments; that Student is non-responsive and does not participate in ongoing activities unless an adult is sitting next to Student to prompt and reward actions; that when given directives, Student is oppositional but not aggressive; that transitions are difficult; that Student will often flee

the classroom and run down the hall to escape and that Student becomes over-stimulated by the educational environment. Student's grades for the first term of the 2017-2018 school year were all D's and F's.

b. Student's Specialized Educational Needs

According to the credible opinion of Clinical Psychologist, Student needs the support of a full-time special education setting for all subject areas and Student needs instruction from staff familiar with ASD students.

c. Link between Student's Needs and the Services Offered by Nonpublic School

Nonpublic School 2 is a private special education day school in suburban Maryland which serves students with ASD and related disabilities. Nonpublic School 2's Multiple Learning Needs (MLN) program serves students, like Student, with average cognitive skills. The MLN program offers small class size, a low student-to-teacher ratio and staff trained to work with children with ASD. Nonpublic School 2 uses Applied Behavior Analysis (ABA) principles in its programming for ASD students. Although Nonpublic School 2 has not yet formally considered Student's application for admission, Program Director testified that based upon her review of Student's records, Student is appropriate for the MLN program.

d. Cost of Placement at Nonpublic School

The annual tuition at Nonpublic School 2 is approximately \$55,000 per year. Nonpublic School holds a current certificate of approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE). DCPS has not shown that Nonpublic School 2's annual tuition cost is out of line with other OSSE-approved schools for students with similar disabilities.

e. Least Restrictive Environment

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of the disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. See 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA requires that students with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. See, e.g., *Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). Over the last several school years, DCPS has attempted to meet Student’s educational needs in the public school setting with a combination of regular classes and, increasingly, pull-out services in special classes. In this less restrictive setting, Student has not made progress appropriate in light of Student’s circumstances. The least restrictive setting 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. District 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)). I find that at this time, a more restrictive setting for Student is warranted.

Considering all of the above factors, I conclude that Petitioner has established that Nonpublic School 2 is an appropriate placement for Student and I will order DCPS to fund Student’s placement there for the remainder of the 2017-2018 school year, subject to Student’s meeting Nonpublic School 2's admission requirements.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. Within ten business days of the date of this order, DCPS shall ensure that funding authorization is issued for the parents to enroll Student in Nonpublic School 2, with transportation, for the remainder of the 2017-2018 Nonpublic School 2 school year;
2. Promptly after DCPS' winter break, DCPS shall ensure that Student's IEP team is convened to review and revise, as appropriate, Student's IEP and educational placement for the 2017-2018 school year in conformity with 34 CFR § 300.320, *et seq.* and with this decision;
3. As compensatory education for the denial of FAPE in this case, not later than 20 business days from the date of this decision, DCPS shall provide funding authorization to the parents to obtain compensatory education services as stipulated to by the parties at the due process hearing, namely 50 hours of academic tutoring at \$65.00 per hour and 50 hours of Behavioral Support Services at \$124.47 per hour and
4. All other relief requested by the Petitioner herein is denied.

Date: December 22, 2017

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

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