

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

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

OSSE
Office of Dispute Resolution
December 17, 2017

<i>Student</i> , ¹)	Case No.: 2017-0248
through <i>Parents</i> ,)	
<i>Petitioners</i> ,)	Date Issued: 12/17/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 12/4/17, 12/6/17 &
("DCPS"),)	12/8/17
Respondents.)	ODR Hearing Room: 2003
)	

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”) because Student was not offered an appropriate Individualized Education Program (“IEP”) and placement for the 2017/18 school year. DCPS responded that it did propose an appropriate IEP and placement on a timely basis.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 9/11/17 and initial assignment on 9/12/17, the case was reassigned to the undersigned on 10/17/17. DCPS filed a response on 9/25/17 and did not challenge jurisdiction. The resolution session meeting took place on 9/25/17, but the parties neither settled the case nor terminated the 30-day resolution period,

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

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which ended on 10/11/17. 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 25-day continuance, which requires a Hearing Officer Determination (“HOD”) by 12/20/17.

The due process hearing took place on 12/4/17, 12/6/17 and 12/8/17 and was closed to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. One or both Petitioners were present for virtually the entire hearing.

Petitioners’ Disclosures, submitted on 11/27/17, contained documents P1 through P28, which were admitted into evidence over various objections. DCPS’s Disclosures, submitted on 11/27/17, contained documents R1 through R38, which were admitted into evidence without objection.

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

1. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
2. *Father*
3. *Division Director* (qualified without objection as an expert in Special Education Programming)
4. *Mother*
5. *Educational Advocate* (qualified over objection as an expert in Special Education Programming and Placement)

Respondent’s counsel presented 6 witnesses in its case (*see Appendix A*):

1. *Teacher* (qualified without objection as an expert in Special Education Programming and Placement)
2. *Clinical Social Worker* (qualified without objection as an expert in Social Work and Provision of Behavior Support Services)
3. *Compliance Case Manager*
4. *Program Manager* (qualified without objection as an expert in Special Education Programming and Placement)
5. *LEA Representative* (qualified without objection as an expert in Special Education Programming and Placement)

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6. *Social Worker* (qualified without objection as an expert in Social Work and Behavior Support)

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

Issue: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement prior to the beginning of 2017/18,² where the IEP developed by DCPS on 6/1/17 (a) failed to provide sufficient hours of specialized instruction, (b) failed to provide sufficient 1:1 support due to Student's narcolepsy, ADHD and anxiety, (c) provided accommodations and services that are only available in a full-time separate program, (d) failed to adequately describe Student's LRE and placement along the continuum, (e) did not allow adequate input into the Specific Learning Support ("SLS") program by Parents, and (f) was a combination placement, with hours in the general education setting that were not appropriate for Student.³ *Respondent has the burden of persuasion, if Petitioners establish a prima facie case.*

Petitioners seek the following relief⁴:

1. A finding that Student was denied a FAPE.
2. DCPS shall reimburse Parents for the 2017/18 school year at Nonpublic School through the date of decision, including tuition, transportation, related services and any other associated costs.
3. Within 15 school days, DCPS shall place and fund Student at Nonpublic School for the remainder of the 2017/18 school year and continuing until DCPS offers a FAPE to Student.
4. Within 15 school days, DCPS shall convene an IEP meeting and (a) revise Student's IEP to include (i) 34 hours/week of specialized instruction outside general education, with integrated Occupational Therapy and Speech-Language supports, and (ii) 1 hour/week of individual Behavioral Support Services outside general education; or in the alternative (b) adopt Student's most recent IEP from Nonpublic School; or in the alternative

² All dates in the format "2017/18" refer to school years.

³ This Issue incorporates both issues (1) and (2) on pages 24-25 of the due process complaint.

⁴ The first relief requested on page 23 of the due process complaint was for "stay-put," which was resolved by the 9/27/17 Order issued by the previous Hearing Officer assigned to this case.

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(c) revise Student's IEP to align with the Hearing Officer Determination issued in this case.⁵

5. Any other just and equitable relief.

At the conclusion of Petitioners' case-in-chief, Respondent's counsel moved for a directed finding on each subpart of the issue in this case. Respondent's motion for a directed finding was taken under advisement by this Hearing Officer based on the need to review documents and hear additional testimony, and is **hereby denied**.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁶ are as follows:

1. Student is a resident of the District of Columbia; Petitioners are Student's Parents.⁷ Student is *Age* and in *Grade* at *Nonpublic School*, where Student began in 2015/16 through unilateral placement by Parents.⁸ At Nonpublic School, a full-time special education day school, Student receives 34.25 hours/week of specialized instruction and 45 minutes/week of behavior support.⁹

2. An HOD concerning Student was issued on 4/13/17 finding a denial of FAPE, determining that Nonpublic School was proper for Student, requiring reimbursement of Nonpublic School by DCPS for 2015/16 and 2016/17, and ordering that a new IEP for Student be developed promptly by DCPS in collaboration with Student's educators at Nonpublic School.¹⁰ The 4/13/17 HOD did not rule on whether any particular amount of specialized instruction outside general education was sufficient for Student, but held that after the IEP team agreed on 15 hours/week of specialized instruction on 12/9/15 the IEPs on 1/6/16 and 8/11/16 were not appropriate when they failed to include that many hours.¹¹

⁵ This paragraph incorporates the requested relief in paragraphs 5 and 6 on page 24 of the due process complaint.

⁶ 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.

⁷ Father; Mother.

⁸ P1-174; Father; Mother.

⁹ P11-11.

¹⁰ P26-30,31,31.

¹¹ P26-28.

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3. IEP Meetings. An IEP team meeting for Student was scheduled by DCPS for 5/18/17 at 12:30 p.m. (the “May meeting”) to review a draft IEP prepared by DCPS.¹² Petitioners’ counsel emailed DCPS on 5/11/17 noting that the draft IEP received from DCPS on 5/10/17 looked like it might be the wrong version as it did not include hours of proposed services but did include many deficiencies that had been raised previously.¹³ DCPS provided an updated draft after 8 p.m. on 5/17/17, the night before the IEP meeting on 5/18/17.¹⁴ Petitioners’ counsel objected to the lateness of the updated draft IEP, asserting a violation of law, but not cancelling the meeting.¹⁵

4. The IEP team met on 5/18/17 as scheduled, but after much back and forth DCPS rescheduled the meeting based on Petitioners’ counsel’s email asserting that DCPS violated the law by not sending an updated draft earlier.¹⁶ The participants were quite discourteous to each other during the meeting.¹⁷ Parents felt “completely disrespected” by DCPS and objected to DCPS’s “dismissive and demeaning attitude” toward them and their advocates at the meeting; DCPS in turn objected to “aggressive outbursts, unnecessary yelling, and walking out of the room.”¹⁸ Petitioners’ counsel wrote to follow up on the “unbelievable” 5/18/17 meeting, expressing concern about DCPS not cancelling the meeting until Parents and advocates had gathered at DCPS’s offices.¹⁹

5. Modest progress was made between DCPS and Nonpublic School on documents at the May meeting: Compliance Case Manager complained that Nonpublic School had not yet provided the latest progress information.²⁰ Nonpublic School representative stated that Nonpublic School had provided all it had.²¹ Compliance Case Manager later emailed that DCPS was able to obtain input and updated present levels of performance from Nonpublic School during the 5/18/17 meeting, so needed only 1 Nonpublic School representative for the next IEP meeting on 6/1/17.²² At the 6/1/17 IEP meeting, DCPS asserted that it had not received current data about Student; Nonpublic School stated that it sent the latest data when available on 5/30/17.²³

¹² P1-17,18.

¹³ P1-17.

¹⁴ P1-26; Father.

¹⁵ P1-30.

¹⁶ P13-6,10.

¹⁷ P1-40,55; P14.

¹⁸ P1-55,59; P13-2,7,8 (third time receiving late DCPS drafts); P13-7 (Father banged on the table, yelled that he does not have to give up his rights, and left the meeting, returning after some time).

¹⁹ P1-39.

²⁰ P13-2.

²¹ *Id.*

²² P1-72.

²³ P14-1,31.

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6. After the abortive May meeting, the subsequent IEP team meeting to finalize Student's IEP was held on 6/1/17 (the "June meeting").²⁴ Parents cancelled business travel and vacation plans to be available for the June meeting.²⁵

7. 6/1/17 IEP. DCPS's IEP for Student was finalized at the 6/1/17 IEP meeting and provided 20 hours/week of specialized instruction outside general education and 180 minutes/month of BSS outside general education.²⁶ The 6/1/17 IEP erroneously stated that Student was a grade lower than was the case, which could not readily be changed by the IEP team.²⁷ Student's disability classification was Multiple Disabilities ("MD") based on Specific Learning Disability ("SLD") and Other Health Impairment ("OHI").²⁸

8. The 6/1/17 IEP reported that Student's most recent Comprehensive Psychological Evaluation was completed on 5/21/15 (and edited on 6/12/15) and that special education services were recommended for Student's narcolepsy, ADHD, epilepsy, and SLD in the areas of written expression, decoding, and math fluency; most recently Student was receiving services outside the school setting for Generalized Anxiety Disorder.²⁹ Student also had issues with processing speed and working memory which impacted access to general education curriculum and required extended time.³⁰

9. Due to serious side effects, Student cannot take medication for ADHD, making Student's situation more challenging.³¹ Mornings are particularly difficult for Student due to fatigue from narcolepsy, resulting in many days when Student misses the first 20-90 minutes of school.³² Student has not had any seizures from epilepsy in some years.³³

10. Student's anxiety is not mild but a generalized anxiety disorder.³⁴ Student "feeling different" from others triggers anxiety.³⁵ Nonpublic School representative stated that Student's ability to begin a task is affected by anxiety.³⁶ Student's obsessive behaviors, such as erasing and constantly checking and rechecking work, relate to Student's anxiety and interfere with learning.³⁷ The 6/1/17 IEP recognized that Student often exhibits anxiety

²⁴ P14-28b; Compliance Case Manager.

²⁵ P1-77.

²⁶ P11-1,14.

²⁷ P11-1; P14-29; P1-20.

²⁸ P11-1,11.

²⁹ P11-4,11; P21-19; P2-27 (Student has "overwhelming" anxiety).

³⁰ P14-20,40; P21-3; Division Director.

³¹ Clinical Psychologist; Mother.

³² Clinical Psychologist; Father; P17-11; Division Director (29 tardies in 2017/18 through November).

³³ Clinical Psychologist.

³⁴ P14-32,34.

³⁵ P14-34.

³⁶ P14-35.

³⁷ P14-28c.

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at the beginning of assignments and needs individualized support to initiate the task; Student is easily distracted, but usually completes work with prompting; Student engages in negative self-talk when Student thinks peers are moving faster in their work.³⁸

11. Student's challenges with interpersonal skills and inability to implement coping skills when experiencing frustration or anxiety prevent Student from attending to academic tasks and remaining in the general education setting.³⁹ Writing is Student's biggest struggle, where the most support is needed.⁴⁰ The 6/1/17 IEP stated that a "myriad of supports and individualized attention is utilized in the classroom to enable [Student] to complete given assignments."⁴¹

12. The 6/1/17 IEP included a page of Other Classroom Aids and Services for educational-related settings (apart from statewide-assessments) and addressed the following:⁴²

- a. Student fatigues frequently and needs access to a place to nap throughout the school day.⁴³ Student still needs naps at school, but less frequently.⁴⁴ Parents and Educational Advocate considered the Proposed Public School nurse's suite to be inappropriate for napping, with 3 couches lined up against a wall; DCPS stated that screens would be obtained to provide privacy.⁴⁵ The expectation was that after school began there would be an IEP meeting with the nurse to develop a plan to address Student's narcolepsy and anxiety.⁴⁶
- b. Among many other accommodations in classroom and testing settings, Student was to be given "extra time" and a "separate environment."⁴⁷ Petitioners' counsel asked at the June meeting what a "separate environment" for writing meant for Student as a practical matter; Program Manager responded that there would be a plan to address it because it was on Student's IEP.⁴⁸
- c. Student was to have an identified safe space and a trusted adult Student could seek out when feeling escalated anxiety.⁴⁹ Social Worker credibly testified that

³⁸ P11-11.

³⁹ P11-12.

⁴⁰ Teacher; P11-9.

⁴¹ P11-4; Father.

⁴² P11-15.

⁴³ *Id.*

⁴⁴ Father.

⁴⁵ P1-176; LEA Representative.

⁴⁶ P1-176.

⁴⁷ P11-15.

⁴⁸ P14-25.

⁴⁹ P11-15.

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she would be the first point of contact for Student and that Social Worker does this now for other students at Proposed Public School.⁵⁰

13. A statement in a box on the 6/1/17 IEP's Least Restrictive Environment ("LRE") page entitled "Describe supplemental supports and services that were previously attempted" stated that Student "requires individualized, one-on-one instruction in a separate environment to achieve academic success in the area of written expression across the curriculum."⁵¹ Petitioners' counsel asked at the June IEP meeting what this statement meant; Program Manager responded that a plan would be developed to address that because it's in the IEP.⁵² Teacher emphasized that DCPS agreed with Petitioners' counsel on writing and included that statement in the IEP, adding that Student "does require that individualized one on one support in the area of written expression."⁵³

14. A significant amount of 1:1 is needed even when Student is in a small group.⁵⁴ Nonpublic School representative stated that there was not sufficient support in the 6/1/17 IEP for Student to access learning and that each goal needed to mention 1:1, as Student cannot access the goals independently.⁵⁵ Parent's advocates urged that 1:1 be included in the IEP; Student needs someone to sit beside Student.⁵⁶ One of Student's Parents sits with Student during all homework and checks on Student every 30 seconds to a minute; what is intended to be 1 hour of homework takes Student about 3 hours.⁵⁷ Program Manager testified that 1:1 support would be provided to Student in SLS in all subjects, if needed.⁵⁸

15. Father asked if Student would be receiving 1:1 support during the 20 hours of specialized instruction; Teacher said it would be provided as written in the IEP.⁵⁹ The need for 1:1 teacher assistance to begin as well as complete written tasks was included in the 1/15/17 Nonpublic School IEP, but not in the 6/1/17 DCPS IEP.⁶⁰ Nonpublic School representative stated that in math at Nonpublic School there were 3 teachers for 6 children and that 1 teacher was providing 1:1 to Student at least every 3 minutes; Nonpublic School more recently has been providing 1:1 to Student every 5-10 minutes.⁶¹

⁵⁰ Social Worker.

⁵¹ P11-17.

⁵² P14-38.

⁵³ P14-33.

⁵⁴ Father.

⁵⁵ P14-10,32.

⁵⁶ P14-5; P17-2,3 (Nonpublic School IEP emphasizes 1:1); P14-32.

⁵⁷ Father; Mother.

⁵⁸ Program Manager.

⁵⁹ P14-38.

⁶⁰ P17-2; P11; Father.

⁶¹ P14-11,32; Division Director.

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16. Educational Advocate emphasized that making up for missed instruction needed to be on the IEP, but was only mentioned in the present levels of performance.⁶²

17. The IEP doesn't specifically state what type of program Student would be in, just that Student needs "20 hours/week outside general education," and not even that Student would be in a self-contained program.⁶³

18. Additional Classroom Accommodations were listed in Student's 6/1/17 IEP, which DCPS asserted were only for classroom "assessments," and addressed:⁶⁴

- a. For ELA/Literacy assessments, Student would be able to use a human scribe, speech-to-text, human signer, or external AT.⁶⁵ Student would be allowed to use a laptop or computer for all written language assignments, and/or text-to-speech software as an accommodation.⁶⁶
- b. Student would be given a location with minimal distractions.⁶⁷ The issue was raised at the June meeting, with concerns that going to lunch with a large group would be a distraction; Program Manager responded that Student has IEP accommodations and might eat in the classroom.⁶⁸ Parents learned on the Proposed Public School visit that for lunch Student would eat with the 100 or so other children in Student's grade.⁶⁹ Educational Advocate credibly testified that lunch with Student's grade could be very disturbing and trigger anxiety; Student doesn't do well in large settings.⁷⁰
- c. Student needs extra time to complete work and assessments as anxiety interferes and Student checks and rechecks work.⁷¹ Student misses class due to narcolepsy and needs time for re-teaching what was missed; Petitioners' counsel sought a plan for missed instruction, asserting that the IEP was deficient.⁷² The IEP contained no plan for how Proposed Public School would address missed instruction from narcolepsy when arriving late or taking a nap.⁷³ Teacher testified that Student would routinely be provided 100% extra time as Petitioners

⁶² P14-7.

⁶³ Teacher.

⁶⁴ P11-18; P14-17,18,41.

⁶⁵ P11-18.

⁶⁶ *Id.*

⁶⁷ P11-19.

⁶⁸ P14-27,39.

⁶⁹ P1-176.

⁷⁰ Educational Advocate.

⁷¹ P14-13.

⁷² P14-30,39.

⁷³ P1-175.

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requested, or even more.⁷⁴ The 6/1/17 IEP stated that Student was to be given “at least 50% extended time” as needed to complete assignments/tasks.⁷⁵

- d. On many assignments and tasks, Student generally needs double the time; time and a half is a very moderate estimate of the extra time needed.⁷⁶ Nonpublic School representative stated that Student needs at least 100% extra time.⁷⁷ On a math test, Student needed the most time of any child in Student’s grade at Nonpublic School; Student is self-aware and compares self to others, often unfavorably.⁷⁸ Teacher suggested 50% or more extra time; Petitioners’ counsel sought 100% extra time or more and understood that DCPS agreed to 100% when Teacher stated in the June meeting “that can definitely be done.”⁷⁹ (Teacher lost some credibility with the undersigned by testifying at the due process hearing that his statement was not agreeing to modify Student’s IEP.⁸⁰) Father asked in June about the 100% time accommodation; Teacher stated it will be applied at any DCPS school, inside and outside general education.⁸¹ Father credibly testified that DCPS had agreed to 100% extra time for Student, but DCPS included only 50% in the IEP.⁸²

19. The 6/1/17 IEP was not a collaboration between Parents and DCPS.⁸³ DCPS announced during the June meeting that there would be 20 hours/week of specialized instruction outside general education, stated that Student would be in the SLS program, and offered 2 DCPS schools.⁸⁴ Parents and their advocates had the opportunity to express their views about what Student needed, including the SLS program.⁸⁵ Nonpublic School representative stated that 20 hours/week were not enough; Student needed to continue receiving special education in all classes, as at Nonpublic School.⁸⁶ Father sought 27.5 hours/week of specialized instruction to cover electives as well as core academic courses.⁸⁷

20. Electives for Student at Proposed Public School would be taught in the general education setting.⁸⁸ General education electives for Student’s grade at Proposed Public

⁷⁴ Teacher.

⁷⁵ P11-19; P14-41.

⁷⁶ P14-13.

⁷⁷ P14-24; Mother (Student needs 100% extra time).

⁷⁸ Division Director.

⁷⁹ P14-18,42.

⁸⁰ Teacher.

⁸¹ P14-38.

⁸² Father; P11-19.

⁸³ P1-177.

⁸⁴ P14-22,36; Father; Mother.

⁸⁵ Teacher; Compliance Case Manager.

⁸⁶ P14-23,37.

⁸⁷ Father.

⁸⁸ P1-176.

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School might include Visual Arts, Music, Theater, PE, and Health which might be very difficult for Student because Common Core requires certain competencies in the electives which may include reading and writing.⁸⁹ Nonpublic School does not require reading and writing for its electives.⁹⁰ Shifting from special education to general education for electives and back again at Proposed Public School would be particularly difficult given Student's level of anxiety.⁹¹ A special education aide is present in the general education electives and supports SLS students as needed.⁹² Compliance Case Manager stated that Student will always receive accommodations in electives, as Student's IEP will always be taken into account.⁹³ LEA Representative explained that dealing with reading and writing in electives can be achieved by teachers differentiating appropriately and using aides to support students who need 1:1 for writing.⁹⁴ During electives, Student could get 1:1 assistance by being pulled aside by a special education aide supporting the general education class; Student could be pulled into a separate environment in the back of the classroom.⁹⁵

21. Proposed Public School could consider whether Student's IEP needed to be increased to 27.5 hours/week, or some other level, at the 30-day review.⁹⁶ The SLS program could provide 27.5 hours/week of specialized instruction only if a child was in the reading enrichment class, which Student does not need.⁹⁷

22. The June IEP meeting ended on a negative note with: Educational Advocate stating the 6/1/17 IEP was a joke; Compliance Case Manager telling Educational Advocate that she doesn't have to be disrespectful; Educational Advocate stating that she can be disrespectful; and Compliance Case Manager adjourning the meeting after "sitting quietly taking disrespect" from Educational Advocate.⁹⁸ Petitioners' counsel's notes from the June meeting conclude with the statement "inappropriate IEP – if disrespectful, sorry."⁹⁹

23. Proposed Public School Observation. Parents and Educational Advocate visited 2 school locations proposed by DCPS, visiting Proposed Public School on 6/7/17.¹⁰⁰ While 8 children were registered in the SLS class for the grade above Student, only 6 were present.¹⁰¹ The SLS children were far behind Student academically; group activities were at

⁸⁹ Educational Advocate; Teacher (all electives involve reading and writing); Clinical Social Worker; Program Manager.

⁹⁰ Educational Advocate; Clinical Social Worker.

⁹¹ Mother.

⁹² LEA Representative.

⁹³ P14-25,38.

⁹⁴ LEA Representative.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ P14-39.

⁹⁹ P14-28 (emphasis in original).

¹⁰⁰ P1-175.

¹⁰¹ *Id.*

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least 3 grade levels below Student.¹⁰² An observed math lesson about measuring objects in inches was very basic and slow paced, but only 1 of the students was able consistently to answer the teacher's questions accurately; Student had received that subject matter some years earlier, even though the students were nominally a year ahead of Student.¹⁰³ In 2017/18, Proposed Public School offers a combined SLS class with Student's grade and the grade above, with a total of 8-9 children.¹⁰⁴ The SLS program provides 27.5 hours/week of specialized instruction outside general education for 3 or 4 of the children with the most serious needs, some of whom are about 5 grade levels behind their nominal grade; none of the SLS students is on or above grade level.¹⁰⁵

24. Given Student's distractibility, the SLS setting at Proposed Public School would not be conducive to Student maintaining focus and minimizing distractions.¹⁰⁶ During the observation, students finishing their work early were given free time; 2 students were allowed to play basketball in the classroom, which was extremely distracting in the middle of an active math lesson.¹⁰⁷ The Proposed Public School building itself was large, with over 300 students.¹⁰⁸

25. Proposed Public School stated that the plan for how Student would make up missed work and the need for additional time on tasks would be addressed after school had begun and they could determine what Student needed.¹⁰⁹ Proposed Public School emphasized reliance on an IEP meeting at the 30-day review of Student's needs in order to make needed modifications.¹¹⁰

26. On 6/22/17, Compliance Case Manager emailed to see if Parents had a preference between the 2 school locations they visited; Parents did not state a preference, asserting through counsel that neither was appropriate to meet Student's needs.¹¹¹ On 7/10/17 DCPS sent a location of services letter to Parents selecting Proposed Public School for Student for 2017/18.¹¹²

27. Classroom Observations at Nonpublic School. DCPS had observed Student on 11/18/15 at Nonpublic School and noted that when Student was working with a teacher and

¹⁰² P1-176.

¹⁰³ P1-175; Mother.

¹⁰⁴ LEA Representative.

¹⁰⁵ *Id.*

¹⁰⁶ P1-175,176.

¹⁰⁷ P1-175; Father.

¹⁰⁸ P1-176.

¹⁰⁹ *Id.*

¹¹⁰ P1-177.

¹¹¹ P1-167,170; Mother.

¹¹² R36-1.

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one other child, “[w]hen the teacher’s focus went to the other student, [Student] stopped working.”¹¹³

28. Program Manager observed Student on 4/25/17 at Nonpublic School and noted that Student would rock in Student’s chair and sing quietly.¹¹⁴ A teacher’s assistant sat next to Student and helped Student answer questions; the teacher provided Student with suggestions and tried to help Student stay on task.¹¹⁵ Program Manager reported that Student “needed a teacher or TA next to [Student] so that [Student] could stay focused on the task.”¹¹⁶ A swinging footrest bar and headphones were initially helpful; “[h]aving three teachers in a small classroom also helped [Student] remained focused, although someone had to constantly be by [Student’s] side. Once someone left, [Student] would lose focus and start to doodle or something similar.”¹¹⁷ Program Manager testified that his notes stating “constantly” did not mean the entire observation, and that losing focus happened “eventually,” rather than immediately.¹¹⁸ Science was a hands-on lesson to which Student was partially attentive; in English when Student was not engaged in the hands-on activity, Student was “often off task and not involved in the lesson.”¹¹⁹ Student “lost focus the last third” of the second class.¹²⁰

29. Academically, Student appeared to be functioning close to or slightly below grade level.¹²¹ Socially emotionally, Student was on grade level (was age appropriate); behaviorally, Student was slightly to moderately below grade level for staying on task and hyperactivity.¹²² Student was most focused when participating in a hands-on activity, accessing a swinging footrest bar, and when a teacher provided 1:1 assistance.¹²³ Program Manager’s final statement in the report was that Student “does require consistent interventions” to combat occasional inattentiveness and hyperactivity.¹²⁴

30. A DCPS observation on 5/10/17 observed Student in hands-on activities in Music prior to working quietly with an iPad; Student was on task 93% of the time and inattentive

¹¹³ R31-2.

¹¹⁴ R31-3,4.

¹¹⁵ R31-4.

¹¹⁶ R31-4; P14-12 (“very accurate”).

¹¹⁷ R31-4; P14-13,33.

¹¹⁸ Program Manager.

¹¹⁹ R31-3,4.

¹²⁰ R31-4.

¹²¹ R31-5; Program Manager.

¹²² *Id.*

¹²³ R31-5.

¹²⁴ *Id.*

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7%.¹²⁵ Student was “nice” and tried hard but struggled in the classroom; Student was usually easily re-directed and responsive to prompting and encouragement.¹²⁶

31. Continuation at Nonpublic School. DCPS’s offer of FAPE was considered inadequate to meet Student’s needs, which Parents communicated to DCPS.¹²⁷ Educational Advocate asserted that Student would be “harmed significantly” and lose the gains made at Nonpublic School and suffer socially emotionally with increased anxiety if Student were placed at Proposed Public School.¹²⁸ Educational Advocate further stated that the IEP was not even close and did not address Student’s significant needs.¹²⁹ Changing schools midyear would be very detrimental, given Student’s anxiety disorder.¹³⁰

32. Parents transmitted a Notice of Unilateral Placement to DCPS on 7/7/17, stating that they intended to continue Student’s unilateral placement at Nonpublic School “after at least ten business days have passed” after DCPS’s receipt of the letter.¹³¹ DCPS acknowledged receipt of the notice on 7/7/17.¹³²

33. Nonpublic School is on OSSE’s list of approved nonpublic day schools, Nonpublic School’s tuition is approved by OSSE, and Nonpublic School was found proper for Student in the 4/13/17 HOD.¹³³ Educational Advocate articulated the benefits of Nonpublic School for Student as including classes with a low student-to-teacher ratio, well qualified teachers, a clinical team to support Student’s social-emotional needs, 1:1 aides when needed, 1:1 instruction to make up missed instruction due to Student’s disability, use of assistive technology, significant accommodations and modifications of the curriculum, and other specialized services necessary for Student to receive an appropriate education.¹³⁴ Student has made progress and received educational benefits at Nonpublic School.¹³⁵

34. Credibility Determinations. Program Manager lost credibility with the undersigned by asserting both in the June meeting and at the due process hearing that he did not see a teacher checking in with Student every 3 minutes at Nonpublic School, even though he reported and acknowledged there was a teacher sitting with Student for an extended period.¹³⁶ In addition to a credibility issue noted in context above, Teacher’s credibility was

¹²⁵ R31-6 (the DCPS report recorded Student as a grade lower than was the case).

¹²⁶ R31-6.

¹²⁷ Father.

¹²⁸ P1-177.

¹²⁹ P14-28; Educational Advocate.

¹³⁰ Father; Mother.

¹³¹ P1-179,180; Father.

¹³² P1-182.

¹³³ P28-4; P26-30; Division Director.

¹³⁴ P1-187.

¹³⁵ Father; Division Director; Educational Advocate.

¹³⁶ P14-32,33; Program Manager.

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further impacted by his emphasis on Student's "mild" anxiety and the lack of any mention of ADHD for much of his testimony.¹³⁷

Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, the LEA must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its recent decision, the 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

¹³⁷ Teacher.

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‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.’ *Andrew F.*, 137 S. Ct. at 1001.

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

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

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

Issue: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement prior to the beginning of 2017/18, where the IEP developed by DCPS on 6/1/17 (a) failed to provide sufficient hours of specialized instruction, (b) failed to provide sufficient 1:1 support due to Student’s narcolepsy, ADHD and anxiety, (c) provided accommodations and services that are only available in a full-time separate program, (d) failed to adequately describe Student’s LRE and placement along the continuum, (e) did not allow adequate input into the SLS program by Parents, and (f) was a combination placement, with hours in the general education setting that were not appropriate for Student. (Respondent has the burden of persuasion, if Petitioners establish a prima facie case.)*

The central question in this case is whether or not DCPS’s 6/1/17 IEP and placement in the self-contained SLS program at Proposed Public School were sufficient to offer Student a FAPE in 2017/18. Unfortunately, while the IDEA and federal courts encourage collaboration between parents and educators, *see Andrew F.*, 137 S. Ct. at 994, there was a great deal of animosity and hostility in this case, negatively impacting Student and the

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support Student needs. However, in the view of the undersigned, Petitioners did establish a prima facie case on the issue in this matter, shifting the burden of persuasion to Respondent, which did not meet its burden of proving by a preponderance of the evidence that Student's IEP and placement were appropriate.

The applicable legal standard for analyzing the appropriateness of an IEP was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was "reasonably calculated to produce meaningful educational benefit" and to permit Student to access the general education curriculum to the extent possible. See *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07.

The measure and adequacy of the IEP are to be determined as of the time it was offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEP is analyzed by considering the specific concerns raised by Petitioners, which are considered in turn, although there is some overlap.¹³⁸ See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Hours of Specialized Instruction. Much of the controversy in this case relates to whether 20 hours/week of specialized instruction outside general education is sufficient as DCPS proposed, or whether Student needs to have at least 27.5 hours/week as Parents asserted. The difference between 20 and 27.5 hours is 2 electives, which Student would take in a general education setting at Proposed Public School in classes of up to 24 children. General education electives for Student's grade at Proposed Public School may include Visual Arts, Music, Theater, PE and Health. These could be very difficult for Student because Common Core requires certain competencies in the electives which may include reading and writing, unlike Nonpublic School which requires no or minimal reading and writing for its electives. Shifting from special education to general education for electives and back again would be particularly difficult given Student's anxiety.

DCPS witnesses testified that a special education aide is present in the general education electives to support SLS students as needed and that the other accommodations on Student's IEP would be taken into account. LEA Representative explained generally that reading and writing in electives can be achieved by teachers differentiating appropriately and using aides to support Student and other children who need 1:1 for writing and that Student might be pulled into a separate environment in the back of the classroom as necessary. But the lack of a full explanation and inclusion in writing on Student's IEP of the apparent push-in special education support described orally left the undersigned

¹³⁸ As an initial matter, a Hearing Officer must determine whether "the State complied with the procedures" set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, quoting *Rowley*, 458 U.S. at 206-07. No such procedural violations were alleged in this case.

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unpersuaded that the hours are adequate, as it seemed that even DCPS was suggesting additional support inside general education.

Considering the big picture, DCPS argued from the fact Student is near grade level academically at Nonpublic School that Student could benefit from some time in general education, which in some circumstances may be the case. Here, however, the undersigned is persuaded by Parent's argument that Student's level of achievement is only possible through great effort where – as DCPS's 6/1/17 IEP explains – a “myriad of supports and individualized attention is utilized in the classroom to enable [Student] to complete given assignments.” DCPS's bottom line here, as in other areas of concern, is that Student should try Proposed Public School and corrections could be made at the 30-day review. At that point, Proposed Public School could increase Student's IEP to 27.5 hours/week in the SLS program, but only if Student was in the reading enrichment class, which it is clear Student does not need.

This Hearing Officer concludes that DCPS did not meet its burden of persuasion on the sufficiency of service hours for Student.

(b) Insufficient 1:1 Support. The record in this case is clear that Student needs a great deal of 1:1 support to make up for instruction that Student misses due to narcolepsy, to help keep Student focused on work given Student's ADHD, and to help address Student's anxiety. Student frequently misses instruction by arriving late due to narcolepsy or needing naps and needs time for instruction on what was missed. Parents sought a plan to address missed instruction, asserting that the IEP was deficient in the absence of a plan, but no plan was developed. As for ADHD, Nonpublic School recently has been providing 1:1 to Student every 5-10 minutes, although in the past a teacher was providing 1:1 to Student at least every 3 minutes, if not sitting steadily with Student. As for anxiety, the need for 1:1 teacher assistance to begin as well as complete written tasks was included in the 1/15/17 Nonpublic School IEP, but not in the 6/1/17 IEP.

As there is only passing mention of 1:1 support in the 6/1/17 IEP, Parent's advocates urged that 1:1 be included expressly in the IEP, while Nonpublic School representative reasonably suggested that each goal should include 1:1, as Student cannot access the goals independently. During the June IEP meeting Father asked if Student would be receiving 1:1 support during the 20 hours of specialized instruction and Teacher responded that it would be provided as written in the IEP, but was of course not clearly included there. Program Manager testified at the due process hearing that 1:1 support would be provided to Student in SLS in all subjects, if needed.

This substantial difference between what DCPS testified it would provide and what it actually included in Student's IEP illustrates the importance of the recent decision in *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 14 (D.D.C. 2017), in which the Court considered whether “the correct yardstick for measuring the proposed services is the text of the IEP or the District's oral assurances.” The Court in *N.W.* concluded that reliance should be on the “text of the IEP in order to encourage clarity and reduce factual disputes.” *Id.* (quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 72 (D.D.C. 2010)).

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A related dispute between the parties focused on how much “extra time” Student would receive for assignments and other tasks. Student needs extra time to complete assignments and assessments as Student’s anxiety interferes and Student checks and rechecks work. Teacher testified that Student would routinely be provided 100% extra time as Parents requested, or even more. Yet the 6/1/17 IEP stated that Student was to be given “at least 50% extended time” to complete assignments/tasks, even after extensive discussions during the June IEP meeting, when Parents understood Teacher was committing to 100% extra time.

Proposed Public School stated that the plan for how Student would make up missed work and the need for additional time on tasks would be addressed after school had begun and they could determine what Student needed, although it was already sufficiently clear to Parents and their advocates. Proposed Public School again emphasized reliance on the 30-day review of Student’s needs in order to make IEP modifications. Similarly, Proposed Public School’s expectation was that after school began there would be an IEP meeting with the school nurse to develop a plan to address Student’s narcolepsy and anxiety. Further, when asked in the June IEP meeting what a “separate environment” for writing meant for Student as a practical matter, Program Manager simply responded that there would be a plan to address it because it was in Student’s IEP. When asked about “individualized, one-on-one instruction in a separate environment to achieve academic success in the area of written expression across the curriculum,” Program Manager again responded that a plan would be developed to address that because it is in the IEP.

However, it is not sufficient for DCPS and Proposed Public School to plan to work out implementation problems down the road and expect Parents to simply trust them and sign up for whatever happens. The law does not require such trust and provides Parents protection from unilateral and arbitrary determination of services by requiring “a description of specialized instruction and services that the child will receive.” *Andrew F.*, 137 S. Ct. at 1000. *See also Stein*, 709 F. Supp. 2d at 73 (“Plaintiffs cannot be penalized for refusing to rely on a hope that appropriate services would be provided”).

This Hearing Officer concludes that DCPS did not meet its burden of persuasion on the sufficiency of 1:1 support.

(c) Accommodations and Services Require Full-Time Setting. Student’s IEP contains a great deal of language about the accommodations and services that Student needs, some of which may be arguably inconsistent with having electives in general education, such as 1:1 instruction in a separate environment. However, the undersigned concludes that DCPS did carry its burden of showing that there may be ways of carrying out the accommodations and services by pulling Student into a separate environment in the back of the room and providing special education assistants in the general education electives to assist with 1:1 tasks with Student. The fact that these are not fully captured or spelled out in the IEP is a problem discussed in subparts (a) and (d) herein. DCPS prevails on this subpart.

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(d) Inadequate Description of LRE and Placement. The ways in which the IEP would purportedly support Student and enable Student to make appropriate progress in light of Student's circumstances are not adequately described in the IEP. As an initial matter, the 6/1/17 IEP merely states that Student needs "20 hours/week outside general education," and doesn't specifically state what type of program Student would be in or even that Student would be in a self-contained program. As discussed in subpart (a) above, it seems that DCPS was contemplating that Student would receive push-in support during general education electives, but the vagueness of the suggested support should be firmed up by providing it in writing in Student's IEP and specifically in the LRE description. *See Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25 (D.D.C. 2016) ("the IEP must be 'specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate.' *Stein*, 709 F.Supp.2d at 70"). *See also* 34 C.F.R. 300.320(a)(5),(7); *A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 159 (D.D.C. 2005). Indeed, the LRE description should be specific enough to adequately inform another district about the program and supports intended for Student were the IEP to be implemented elsewhere.

Worse, DCPS staff sought to take away through oral interpretation what was clearly provided in writing on the IEP. Additional Classroom Accommodations were listed on Student's 6/1/17 IEP, but DCPS asserted they were only for classroom "assessments," despite the IEP language indicating broader application than assessments, as is clear by comparing the column headings, by reference to school discipline policy and transportation, which would not be only related to assessments, and other items.

This Hearing Officer concludes that DCPS did not meet its burden of persuasion on the LRE description.

(e) Parental Input into SLS Program. While DCPS did unilaterally propose the SLS program, Parents and their advocates had the opportunity to express their views about what Student needed, including the SLS program, and did so at length at the June IEP meeting. Parents sought more hours and other particulars discussed above, and there was some give and take, although less collaboration between the parties than if the participants had been interacting more harmoniously. Yet the fact that DCPS did not change its position or adopt Parents' preferences does not mean that they did not have adequate input. *See, e.g., Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power over the IEP team's decisions); *Schoenbach v. Dist. of Columbia*, 2006 WL 1663426, at *5 (D.D.C. 2006). DCPS prevails on this subpart.

(f) Combination Placement. The final concern raised about general education hours in a "combination" setting simply recasts the concerns raised in subpart (a) above without any change in substance.

Denial of FAPE. In considering the concerns discussed above, the undersigned is cognizant of the fact that the analysis is not about achieving a perfect IEP, but one that is reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S.

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Ct. at 1001. *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016) (a “properly developed IEP ‘need not guarantee the best possible education or even a potential-maximizing one.’” *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015) (internal quotation marks omitted)). Yet the undersigned is clear that having sufficient hours of specialized instruction, adequate 1:1 support and extra time as needed, and an adequately articulated IEP – which are not mere procedural matters, but go to the substance of Student’s educational needs – each amount to a denial of FAPE for Student. *See* 34 C.F.R. 300.513(a). Indeed, 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 *Stein*, 709 F. Supp. 2d at 72,

[P]arents are not required to wait and see a proposed IEP 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”).

Placement. Petitioners also challenge the appropriateness of Student’s proposed placement for 2017/18, for which the standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements). Here, the other children in the SLS program appeared far behind Student academically; observed group activities were at least 3 grade levels below Student. A classroom of students with differing intellectual, social, and behavioral needs may satisfy the IDEA as long as “a core group [is] operating at an intellectual level sufficiently comparable” to Student’s to permit Student to continue making academic progress. *S.F. v. New York City Dept. of Educ.*, 2011 WL 5419847, at 17 (S.D.N.Y. 2011), *quoting Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 133-34 (2d Cir. 1998). In the SLS class at Proposed Public School, it appears doubtful that there was a “core group” at a comparable intellectual level to Student.

The observation raised other concerns as well about the proposed placement of Student in the SLS program. Given Student’s distractibility, the SLS setting at Proposed Public School would not be conducive to Student maintaining focus and minimizing distractions, where children finishing their work early were given free time and were allowed to play basketball in the classroom in the middle of a math lesson. Concerns had been raised at the June meeting about the distraction of Student going to lunch with a large group, but Parents learned on the Proposed Public School visit that Student would eat with the 100 or so other children in Student’s grade, which Educational Advocate credibly testified could be very disturbing and trigger Student’s anxiety, as Student doesn’t do well

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in large settings. Further, the Proposed Public School building itself was large, with over 300 students.

Taken together, this Hearing Officer concludes that the placement proposed for Student was not appropriate and is a denial of FAPE. In short, DCPS did “commit a material failure, or leave ‘more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child’s IEP.’” *N.W.*, 253 F. Supp. 3d at 17, *quoting James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Remedy

As the remedy for the denials of FAPE found above, Petitioners seek reimbursement of any payments to Nonpublic School for 2017/18 to date, as well as placement and funding for Student at Nonpublic School for the remainder of 2017/18. Reimbursement and funding for 2017/18 are ordered below, based on 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 ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Under the IDEA, 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 D.C. Circuit Court explained in *Leggett* 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 as discussed above, due to the denials of FAPE by DCPS failing to offer Student an appropriate IEP and placement for 2017/18.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student. Here, the undersigned was persuaded that Nonpublic School is proper for Student by the credible testimony of Father, Division Director and Educational Advocate that Student has made progress and received educational benefits at Nonpublic School. The second prong of *Leggett* is satisfied.

The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioners acted unreasonably. As noted above, there has been an undesirable level of conflict and hostility between participants on both sides, which has no doubt been detrimental to Student. Nonetheless, the hostilities on Petitioners’ side

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appear to be more from the advocates than Parents, which in these circumstances the undersigned will not attribute to Petitioners. Thus, the third prong is satisfied. An Order is issued below covering at least the entirety of 2017/18, as Student does not have an appropriate IEP and placement from DCPS.

ORDER

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

- (1) Upon receipt of documentation of payment by Petitioners, DCPS shall within 30 days reimburse Petitioners for any unreimbursed costs of Nonpublic School they have paid to date for the 2017/18 school year, including tuition, transportation, related services and any other associated costs.
- (2) DCPS shall directly fund the remaining costs of Student for the 2017/18 school year at Nonpublic School, and continuing until DCPS offers a FAPE to Student, including tuition, transportation, related services and any other associated costs.

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

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