

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

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

OSSE  
Office of Dispute Resolution  
December 01, 2018

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2018-0237
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 12/1/18
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates: 11/13/18 & 11/14/18
("DCPS"),	)	ODR Hearing Room 112
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been provided an appropriate IEP and placement following an 8/21/18 Hearing Officer Determination (“HOD”). DCPS responded that it provided a suitable IEP and a choice of adequate locations.

**Subject Matter Jurisdiction**

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

**Procedural History**

Following the filing of the due process complaint on 9/19/18, the case was assigned to the undersigned on 9/20/18. Respondent filed a response on 10/3/18 and did not challenge jurisdiction. The resolution session meeting (“RSM”) was held on 10/10/18 without resolving the case or shortening the 30-day resolution period, which ended on

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

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10/19/18. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires an HOD by 12/3/18.

The due process hearing took place on 11/13/18 and 11/14/18, and was closed to the public. Petitioner was represented by *Petitioner's counsel*. DCPS was represented by *Respondent's counsel*. Petitioner participated in most of the hearing.

Petitioner's Disclosures, submitted on 11/6/18, contained documents P1 through P162, which were admitted into evidence without objection. Respondent's Disclosures, submitted on 11/6/18, contained documents R1 through R17, which also were admitted into evidence without objection.

Petitioner's counsel presented 4 witnesses in Petitioner's case-in-chief (*see Appendix A*):

1. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
2. *Physical Therapist* (qualified without objection as an expert in Physical Therapy)
3. *Educational Advocate* (qualified over objection as an expert in IEP Programming and Placement)
4. Parent

Respondent's counsel presented 3 witnesses in Respondent's case (*see Appendix A*):

1. *Support Programs Manager* (qualified over objection as an expert in Special Education Programming and Placement, with Emphasis on Home Based or Homebound Placement)
2. *School Psychologist at Public School and Proposed Public School* (qualified without objection as an expert in Psychology)
3. *Case Compliance Manager*

Petitioner's counsel recalled Parent and Educational Advocate as rebuttal witnesses.

Respondent's counsel was permitted to briefly recall Compliance Case Manager as a surrebuttal witness.

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

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**Issue:** Whether DCPS denied Student a FAPE by failing to develop or provide an appropriate IEP and/or placement/location of services for 2018/19,<sup>2</sup> where Student requires a dedicated aide and a safety plan in a small, therapeutic, nonpublic school due to Student's deteriorating health situation. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 10 days, DCPS shall revise Student's IEP to provide (a) a dedicated aide, (b) a safety plan, (c) medical accommodations, and (d) access to interventions required for Student to attend school.
3. DCPS shall fund placement of Student at a nonpublic, therapeutic day school with a location of services that can implement the IEP in a small, structured setting.
4. DCPS shall provide or fund compensatory education for any denial of FAPE.<sup>3</sup>
5. Any other relief that is just and reasonable.

At the end of Petitioner's case-in-chief, Respondent moved for a directed finding based on an alleged failure to establish a prima facie case on the single issue in this case, which was taken under advisement by the undersigned and is hereby denied for the reasons set forth in the conclusions of law below.

Respondent's counsel also raised several times during the hearing the question of whether the matter was ripe for hearing. The undersigned gave serious consideration to the issue, as Student's IEP at issue had not been developed at the time of the due process complaint. However, counsel for Respondent acknowledged that his concerns were a matter of principle and dismissing the due process complaint as requested would merely result in a delay of a couple of months without any substantive change in the information or documents available for a hearing at that later time. Respondent did criticize Parent for not including the new IEP in her disclosures, even though that was caused by Respondent not providing the finalized IEP to Parent until after business hours on the day disclosures were due a few

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

<sup>3</sup> Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence at the due process hearing supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denials of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denials of FAPE. Respondent was encouraged at the prehearing conference to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event any denial of FAPE is found.

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hours later, long after the 10/10/18 IEP meeting. *See* D.C. Code 38-2571.03(4). Further, Respondent did not move its disclosures into evidence at the beginning of the hearing – as is its right – thereby preventing Parent from relying during her case-in-chief on the finalized IEP in Respondent’s disclosures. At the same time, Respondent added Proposed Public School as an optional location of services very late in the process, which was permitted in an effort to move the matter forward expeditiously. With Student not having attended school since 2016/17 and the case having been filed as an expedited non-discipline matter, the undersigned concluded as an equitable matter that the case needed to proceed with urgency and denied Respondent’s calls for dismissal based on ripeness.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>4</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student’s Parent. Parent. Student is *Age*, *Gender* and in *Grade*.<sup>5</sup> Student has not attended school since the spring of 2016/17, due to concerns about whether Student could be safe at school given extensive health and emotional issues.<sup>6</sup> DCPS is concerned about school avoidance and possible “learned helplessness” by Student, who DCPS views as very capable and high-functioning, and able to be self-sufficient and achieve ambitious goals in life, despite the many medical challenges.<sup>7</sup>

2. Student has a longstanding history of significant medical problems, head injuries, behavioral challenges, and academic difficulties.<sup>8</sup> An undisputed overview of Student’s medical situation listed 13 medical conditions and 15 current medical providers; Student currently has 22 prescriptions.<sup>9</sup> Student has had dozens of medical and psychological appointments each year.<sup>10</sup> Student reportedly has been injured at all schools attended and taken by ambulance to the emergency room.<sup>11</sup>

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<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> Parent; R14-1.

<sup>6</sup> Parent.

<sup>7</sup> Support Programs Manager.

<sup>8</sup> P143-25.

<sup>9</sup> P7-1 (compiled by Petitioner’s counsel); Educational Advocate (prescriptions).

<sup>10</sup> *See* P68-1,2; P129-1.

<sup>11</sup> Parent.

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3. Student was diagnosed with Ehlers-Danlos Syndrome (“EDS”) in 2014, which is a genetic connective tissue disorder that can lead to a wide range of cardiovascular, digestive, neurological, and joint problems, and is associated with chronic pain, poor healing from injury, and increased risk of physical injury due to joints being more flexible than other body parts.<sup>12</sup> Parent testified that Student has sprained knee simply getting out of bed; another time, Student slipped on steps and damaged knee ligaments, resulting in three months in a wheelchair.<sup>13</sup>

4. Student was diagnosed with Postural Orthostatic Tachycardia Syndrome (“POTS”), also in 2014, which involves significant drops in blood pressure and elevated heart rate after standing or eating, with generalized weakness, dizziness, and loss of consciousness.<sup>14</sup> Student used to have many instances of syncope (fainting or losing consciousness) due to not knowing the warning signs for oncoming episodes, but is now aware of the warning signs and has not lost consciousness since December 2017.<sup>15</sup>

5. Student has had multiple head injuries as a result of syncope, with the worst incident in May 2017 when Student was unconscious for 30 minutes after hitting head due to fainting, then had another syncope episode after going to the hospital and hit head again, resulting in a moderate concussion.<sup>16</sup> Parent testified that she had “had enough” and that was the last time Parent allowed Student to go to school.<sup>17</sup> Earlier, Student had a significant head injury after losing consciousness while crossing a street and passed out in the middle of the street; as a result, Student does not go anywhere alone and is always accompanied by someone to prevent fainting and hitting Student’s head.<sup>18</sup>

6. Student also has a long history of problems with anxiety, depression, binge eating, attention, and panic attacks; anxiety increased as Student was afraid of fainting due to POTS.<sup>19</sup> Student has shown socialization problems when in school and reported being bullied by both students and teachers in school, which led to not wanting to attend school due to not feeling supported by teaching staff.<sup>20</sup>

7. Attendance. Student did not attend any school in 2017/18, but reportedly engaged in online study or home schooling due to medical concerns; a clinician for Student and DCPS staff agreed that home schooling could be to Student’s detriment.<sup>21</sup> In 2016/17, Student attended school about 60 of 180 school days.<sup>22</sup> The 8/21/18 HOD stated that both Student’s

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<sup>12</sup> P143-4; P142-4 (high risk for joint dislocation); P15-1; P10-1.

<sup>13</sup> Parent.

<sup>14</sup> P143-4; Clinical Psychologist.

<sup>15</sup> P143-4; P10-1; P15-1; Parent.

<sup>16</sup> P143-4; Clinical Psychologist.

<sup>17</sup> Parent.

<sup>18</sup> P143-4; Clinical Psychologist; Parent.

<sup>19</sup> P143-4; Clinical Psychologist.

<sup>20</sup> P143-7.

<sup>21</sup> R11-1; P144-2,5; P13-1; P50-1; P27-1; R6 (Bates number DCPS-95).

<sup>22</sup> P144-3; P13-1; R11-1 (135 absences); R6 (Bates number DCPS-95).

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psychiatrist and pediatric psychologist testified that Student could return to school but would require supports; Case Compliance Manager confirmed that this was consistent with their testimony and agreed that Student could return to school.<sup>23</sup> School Psychologist evaluated Student in May 2018 and does not believe that Student is too medically fragile to return to school.<sup>24</sup> Support Programs Manager also testified that there is no medical reason for Student not to go to school with sufficient accommodations, which DCPS is willing to make.<sup>25</sup> Student is active in private life and is seen out in the community, as is appropriate for a young person of Student's age.<sup>26</sup> Parent's request to place Student in a nonpublic school indicates that Parent also believes Student can go to school.<sup>27</sup>

8. Prior Proceedings. A due process hearing involving Student was conducted by another Hearing Officer in August 2018 with an HOD issued on 8/21/18 in which a revised IEP and educational placement were to be determined by Student's IEP team following receipt of independent educational evaluations ("IEEs") that DCPS had authorized for neuropsychology and physical therapy.<sup>28</sup> The HOD required that the revised IEP include, among other things: (a) a small classroom setting with a low student-to-teacher ratio; (b) access during the school day to a counselor or therapist and to a nurse; and (c) a safety plan for responding to Student's medical emergencies.<sup>29</sup>

9. At the time of the August 2018 hearing, DCPS proposed an IEP meeting, but Parent preferred to wait until the HOD and neuropsychological evaluation were completed before meeting.<sup>30</sup> Parent would have agreed without a meeting to amend the IEP to include a dedicated aide, access to a nurse at all times, and a full-time program in a small structured setting.<sup>31</sup> DCPS encouraged Parent to allow Student to attend Public School when school began in 2018/19 on 8/20/18.<sup>32</sup> Petitioner's counsel provided the IEE neuropsychological evaluation to DCPS on 9/13/18 and requested "interim" educational services until it was reviewed and incorporated into an IEP; interim services were requested at other times as well, but never provided.<sup>33</sup>

10. For educational placement, DCPS had agreed at the time of the August 2018 hearing and HOD to fund Student's placement in either of two nonpublic schools sought by

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<sup>23</sup> P138-16; Case Compliance Manager. *See also* R2-16 (Student was more robust in 2017/18 than previously, but had a "component of school avoidance"); R2-10.

<sup>24</sup> School Psychologist.

<sup>25</sup> Support Programs Manager (DCPS safely educates many children with very serious medical needs, including "g-tubes" and tracheotomies).

<sup>26</sup> Support Programs Manager.

<sup>27</sup> School Psychologist.

<sup>28</sup> P138-15,16,17,18.

<sup>29</sup> P138-18.

<sup>30</sup> P148-2.

<sup>31</sup> *Id.*

<sup>32</sup> P148-1.

<sup>33</sup> P150-1,2,3; Educational Advocate.

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Parent, if Student was accepted by either of the schools, which was agreeable to all.<sup>34</sup> Those nonpublic schools did not accept Student, nor have any of the other nonpublic schools to which application has been made.<sup>35</sup>

11. DCPS consistently asserted in contemporaneous emails and in testimony that it did not agree that Student needed a nonpublic placement and did not agree to fund Student in any nonpublic school other than the two it agreed on at the time of the prior case.<sup>36</sup> The 8/21/18 HOD noted that “DCPS must ensure that another suitable educational placement location is identified,” if neither of the then-pending nonpublic schools accepted Student.<sup>37</sup>

12. After the IEP meeting on 10/10/18, Petitioner’s counsel requested a copy of the finalized IEP more than once; it was not transmitted to her until after business hours on 11/6/18, the day disclosures were due a few hours later in this case.<sup>38</sup>

13. IEEs. The IEE neuropsychological evaluation report was completed on 9/11/18 by Clinical Psychologist.<sup>39</sup> Cognitively, Student performed in the Average range on the majority of cognitive domains, except for deficits in verbal abilities and working memory.<sup>40</sup> Academically, Student showed significant deficits in reading (phonological processing) and math (calculation).<sup>41</sup> The overlap of academic and cognitive deficits was consistent with a diagnosis of Specific Learning Disorder with Impairment in Reading – Moderate and Specific Learning Disorder with Impairment in Math – Moderate.<sup>42</sup> Student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) – Inattentive Type in 2011; Student continues to meet criteria for diagnosis of ADHD – Predominantly Inattentive Type.<sup>43</sup>

14. The IEE physical therapy evaluation dated 7/19/18 was transmitted to DCPS on 7/26/18.<sup>44</sup> Student can sit in a classroom chair for about 20-30 minutes before requiring exercises to increase blood flow and change of position to prevent syncope.<sup>45</sup> Student cannot carry books or a backpack or a computer due to risk of shoulder, elbow, wrist/hand dislocations and joint instability; having a second set of books, laptop and supplies at home would keep from having to carry items back and forth.<sup>46</sup> Student can participate in the

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<sup>34</sup> P138-17.

<sup>35</sup> Parent; P155-1 (not “proper fit”); P156-1 (no nurse on staff); P157-1 (“think we would not be a fit”); P158 (not an “appropriate placement”).

<sup>36</sup> Case Compliance Manager; R16-1; P147-1.

<sup>37</sup> P138-17.

<sup>38</sup> P153-1; P154-1; Case Compliance Manager.

<sup>39</sup> P143-1.

<sup>40</sup> P143-26.

<sup>41</sup> *Id.*

<sup>42</sup> P143-27.

<sup>43</sup> P143-5,28.

<sup>44</sup> P142-1; Educational Advocate.

<sup>45</sup> P142-4; Physical Therapist.

<sup>46</sup> P142-4,5.

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school environment, as long as Student's entire team is aware of limitations and implement a proper plan for access and safety; a dedicated aide was recommended to address all school-based motor and safety needs, to prevent injury during episodes of syncope or dizziness and to carry out a safety evacuation plan.<sup>47</sup> Continued use of a body suit was recommended for shoulder and hip stability and alignment.<sup>48</sup> Student cannot type or write for long periods and may need a scribe, although Student can use voice to text and text to audio applications.<sup>49</sup>

15. IEPs. Student has been eligible for special education and related services for many years; Student's classification during the timeframe at issue has been Multiple Disabilities ("MD"), with both Specific Learning Disability ("SLD") and Other Health Impairment ("OHI").<sup>50</sup>

16. The IEP resulting from the 10/10/18 IEP meeting was finalized on 11/6/18 and provided 20 hours/week of specialized instruction outside general education and 30 minutes/month of Behavioral Support Services ("BSS") outside general education, but no dedicated aide.<sup>51</sup> On 10/10/18, IEP goals were amended or added for reading, math, and socio-emotional behavior, with collaboration between Educational Advocate and School Psychologist; Parent agreed with the goals.<sup>52</sup> The Other Classroom Aids and Services in the 10/10/18 IEP were enhanced from Student's prior IEP and permitted (1) eating salty snacks and drinking water (for medical needs), (2) extra time to go to the restroom and transition between classes, (3) use of elevator, (4) access to school counselor, social worker, and/or psychologist, (5) access to nurse at all times, (6) standing/movement breaks, and (7) small classroom setting with low student-to-teacher ratio.<sup>53</sup> Support Programs Manager testified that a safety plan would be prepared as part of a transition plan for returning Student to school, which DCPS stood ready to prepare whenever Student actually showed up at school so DCPS could determine what Student specifically needed.<sup>54</sup>

17. The 10/10/18 IEP contained present levels for reading that stated little more than Student "demonstrated a strong ability to read and comprehend grade level texts"; written expression included a Woodcock-Johnson IV ("WJ-IV") data point in the baseline, but no data in the present levels, which stated without data that Student has "difficulty writing" thoughts on paper.<sup>55</sup> The present levels for emotional, social and behavioral development relied on information from 2016/17; School Psychologist explained that data from school was needed, rather than evaluation information, and 2016/17 was Student's last time in

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<sup>47</sup> P142-4,6; Physical Therapist.

<sup>48</sup> P142-5.

<sup>49</sup> P142-6; Physical Therapist.

<sup>50</sup> P143-1; R14-1; R5-1; School Psychologist.

<sup>51</sup> R14-1,10.

<sup>52</sup> P162-1; Educational Advocate; School Psychologist.

<sup>53</sup> R14-10; R5-10 (3/21/17 IEP).

<sup>54</sup> Support Programs Manager.

<sup>55</sup> R14-5,7.

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school; a baseline did refer to an unspecified IEE.<sup>56</sup> School Psychologist believed the PLOPs were appropriate given the circumstances with Student not attending school.<sup>57</sup>

18. The parties strongly disagreed about whether DCPS refused to consider the recent IEEs for the new IEP; data from the July 2018 psycho-educational evaluation was incorporated.<sup>58</sup> School Psychologist testified that the IEE neuropsychological evaluation used a similar list of instruments as the psycho-educational evaluation; Student presented pretty much the same in both evaluations and Student's scores were similar.<sup>59</sup> DCPS's psycho-educational evaluation, conducted by School Psychologist, found that Student "continues to require intensive support to be successful."<sup>60</sup> School Psychologist believed the IEP services totaling 20 hours/week of specialized instruction and 120 minutes/month of BSS were appropriate for Student.<sup>61</sup>

19. Petitioner has consistently sought a dedicated aide for Student.<sup>62</sup> Physical Therapist testified that a dedicated aide would be helpful to carry things from class to class that Student could not carry and to watch out for Student in case of fainting so there would not be injury to Student or others Student might hit while falling.<sup>63</sup> Student's body suit is worn under clothing and Student may also need assistance to go to the restroom.<sup>64</sup> A letter from Student's psychiatrist stated that for Student's safety a dedicated aide might be needed at school until syncope episodes become less frequent.<sup>65</sup> Educational Advocate testified that Student still needs a dedicated aide.<sup>66</sup>

20. Educational Placement. The IEE neuropsychological evaluation concluded that Student needed a highly structured/specialized classroom setting with a range of accommodations.<sup>67</sup> Clinical Psychologist testified that Student needed the features of a therapeutic day school, including lower student-teacher ratio, but did not necessarily need a nonpublic school; Student could to go to a public school if it was appropriate.<sup>68</sup> Support

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<sup>56</sup> R14-7,9.

<sup>57</sup> School Psychologist.

<sup>58</sup> P162-1,2; Educational Advocate; Support Programs Manager.

<sup>59</sup> School Psychologist.

<sup>60</sup> R6 (Bates number DCPS-96).

<sup>61</sup> School Psychologist.

<sup>62</sup> P139-12,13 (issue and remedy sought in current due process complaint); P148-1; P161-2 (dedicated aide requested in 10/10/18 IEP meeting, based on evaluations and Student's condition and use of body suit); P59-1 (4/18/18 eligibility meeting).

<sup>63</sup> Physical Therapist.

<sup>64</sup> Educational Advocate; Parent (main zipper is on back).

<sup>65</sup> P9-1 (undated).

<sup>66</sup> Educational Advocate.

<sup>67</sup> P143-29.

<sup>68</sup> Clinical Psychologist.

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Programs Manager testified that Public School, despite its overall size, could offer a small classroom setting with low student-to-teacher ratio.<sup>69</sup>

21. Student cannot safely move through a crowded school because Student can't physically protect self.<sup>70</sup> Parent has long considered Public School to be too large with too many students attending to provide a safe learning environment for Student, who she viewed as "far too fragile."<sup>71</sup> Parent did not trust Public School to keep Student safe and testified that Student "won't go [to Public School]. Period."<sup>72</sup> Student's emotional difficulties impact school attendance; with anxiety about fainting and having no one to support or help at school, Student doesn't want to go to school.<sup>73</sup> The more time Student is out of school the harder it is to return to school.<sup>74</sup>

22. DCPS sought to have Student visit Public School at a time when there were no students to walk around and see if there were concerns about distances and fatigue and the like that could be addressed.<sup>75</sup> School Psychologist's professional opinion was that Student could attend Public School or Proposed Public School and either could implement Student's IEP.<sup>76</sup>

23. School Psychologist works at Proposed Public School each week and Support Programs Manager works with a team at Proposed Public School and both provided testimony that the undersigned found more credible than the conclusory and unsubstantiated testimony about Proposed Public School from Educational Advocate.<sup>77</sup> Support Programs Manager testified that Proposed Public School is a much smaller school than Public School and would be an appropriate setting for Student as it is safe, can support Student and would provide good role models.<sup>78</sup> Proposed Public School has a building large enough for 1200 students, but there are no more than 250 on the rolls and only about 175-185 students are present each day.<sup>79</sup> Proposed Public School has a nurse and therapists available on a daily basis.<sup>80</sup> There are 7-9 students in most special education classes and special education students are generally just on one hallway.<sup>81</sup> Student could attend, thrive and be successful

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<sup>69</sup> Support Programs Manager.

<sup>70</sup> Physical Therapist.

<sup>71</sup> P153-1; P51-1,2,3; R2-3 (Student "medically fragile").

<sup>72</sup> Parent.

<sup>73</sup> Clinical Psychologist.

<sup>74</sup> Case Compliance Manager.

<sup>75</sup> R16-1; Case Compliance Manager.

<sup>76</sup> School Psychologist (works in both Public School and Proposed Public School part of each week).

<sup>77</sup> School Psychologist; Support Programs Manager; Educational Advocate.

<sup>78</sup> Support Programs Manager.

<sup>79</sup> School Psychologist.

<sup>80</sup> Support Programs Manager.

<sup>81</sup> School Psychologist.

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at Proposed Public School<sup>82</sup> A thoughtful transition plan with buy-in from Parent is needed to get Student back into school.<sup>83</sup>

24. Proposed Public School is not overwhelming like a small, crowded charter school.<sup>84</sup> Nonpublic schools would be too restrictive for Student; Student would thrive with broader diversity than in a nonpublic school.<sup>85</sup>

25. Compensatory Education. The 8/21/18 HOD denied Petitioner's request for compensatory education in that case because DCPS had already issued funding authorization for Student to receive the requested 300 hours of compensatory academic tutoring and/or mentoring.<sup>86</sup> Since authorization, Student has used compensatory education for mentoring, but snags have delayed tutoring.<sup>87</sup> Support Programs Manager asserted that compensatory education was not owed for missing services in the pending case, but that a plan to transition Student back to school should include tutoring.<sup>88</sup>

26. Petitioner's Compensatory Education Plan for Student calculated the period of harm from the beginning of 2018/19 on 8/20/18 for the denials of FAPE alleged.<sup>89</sup> The Plan calculated 260 hours of missed specialized instruction and two hours of missed BSS, but based on qualitative analysis (rather than hour-for-hour) sought only 150 hours of tutoring and four hours of counseling, along with speech-language and occupational therapy evaluations, a safety plan, a dedicated aide, an amended IEP and placement in a small, nonpublic, therapeutic day school with a full-time IEP.<sup>90</sup>

### Conclusions of Law

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

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

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<sup>82</sup> Support Programs Manager.

<sup>83</sup> *Id.*

<sup>84</sup> School Psychologist.

<sup>85</sup> Support Programs Manager; School Psychologist (nonpublic is not Student's least restrictive environment ("LRE")).

<sup>86</sup> P138-17,18.

<sup>87</sup> Educational Advocate; Case Compliance Manager.

<sup>88</sup> Support Programs Manager.

<sup>89</sup> P159-1.

<sup>90</sup> P159-2.

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“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, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *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 decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *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).

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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 § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

**Issue:** *Whether DCPS denied Student a FAPE by failing to develop or provide an appropriate IEP and/or placement/location of services for 2018/19, where Student requires a dedicated aide and a safety plan in a small, therapeutic, nonpublic school due to Student’s deteriorating health situation. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue based on expert testimony and the extensive record of the challenges facing Student, shifting the burden of persuasion to DCPS, which failed to prove that the 10/10/18 IEP developed for Student was appropriate in the absence of a dedicated aide and safety plan, but did demonstrate that Proposed Public School could be appropriate with accommodations.

The applicable legal standard for analyzing the appropriateness of the IEP at issue was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 517 (D.C. Cir. 2018), *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA” in that case, requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”).

The measure and adequacy of the IEP are determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving a perfect IEP, but one reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA “stops short of requiring public schools to provide the best possible education”). *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at \*21 (D.D.C. 2016), quoting *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.<sup>91</sup> *See* 34 C.F.R. 300.320(a); *Honig*, 484 U.S. at 311.

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<sup>91</sup> A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013),

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Dedicated Aide. Petitioner has consistently sought a dedicated aide for Student, which Physical Therapist recommended to address Student's school-based motor and safety needs. Physical Therapist explained in her testimony that a dedicated aide could watch out for Student in case of fainting so that Student would not be injured or cause injury to others when falling. A dedicated aide would also be helpful to carry books, backpack, laptop and other things from class to class that Student cannot carry. Further, Student may even need assistance to go to the restroom due to difficulty manipulating the tight body suit Student wears for support. The need for a dedicated aide was also endorsed in a letter from Student's psychiatrist who agreed that a dedicated aide might be needed at school until syncope episodes become less frequent. Educational Advocate also credibly testified that Student does need a dedicated aide.

The undersigned concludes that Student does require a dedicated aide to benefit from special education and access the curriculum in the most literal way possible – by being able to go to school. *See* 34 C.F.R. 300.34(a); *Rowley*, 458 U.S. at 203 (dedicated aide required if necessary “to permit the child to benefit educationally from [the IEP personalized] instruction”). Without a dedicated aide, Student was not able to attend school and benefit from any specialized instruction. Providing a dedicated aide for Student may well not be needed for the long term, but is needed now to help Student return safely to school and should have been provided in the 10/10/18 IEP. Nor is this a mere procedural violation of 34 C.F.R. 300.320(a)(4), but amounts to a substantive violation and a denial of FAPE, for the lack of a dedicated aide impeded Student's right to a FAPE and caused a deprivation of educational benefit by preventing access to school. 34 C.F.R. 300.513(a).

Safety Plan. Pursuant to 34 C.F.R. 300.320(a)(4), the Other Classroom Aids and Services in the 10/10/18 IEP go a good ways toward addressing many of the health and safety concerns implicated by Student returning to school, and include requirements from the 8/21/18 HOD, apart from a safety plan. The undersigned finds a safety plan necessary for Student to be able to attend school, given Student's many health and medical challenges. DCPS explained that a safety plan should be prepared as part of a transition plan for easing Student's return to school, with the actual plan to be developed when Student visited the school in person, which Student declined to do at Public School. However, in the view of the undersigned, DCPS should have prepared as much of the safety plan as it could, even if details and fine points needed to be added later. Developing the framework of a safety plan certainly could have been done and might have given Parent and Student some confidence that the plan was on the right track and that details would, in fact, be forthcoming once Student showed up to prepare to return to school.

The lack of any safety plan was an impediment to Student returning to school. Although DCPS asserts with some circularity that it would have provided a safety plan if Student had returned to school, the undersigned concludes that as much of the safety plan as possible needed to come first in order to overcome legitimate concerns about Student's safety. In the view of this Hearing Officer, the lack of a safety plan for Student is a

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quoting *Rowley*, 458 U.S. at 206-07. No specific procedural violations were alleged in this case.

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substantive violation and a denial of FAPE, as the lack of any safety plan impeded Student's right to a FAPE and caused a deprivation of educational benefit by discouraging Student from attending school, as well as significantly impeding Parent's participation in decision-making about Student's ability to attend school safely. 34 C.F.R. 300.513(a).

Hours of Specialized Instruction/Need for Nonpublic School. The 5/30/18 psycho-educational evaluation conducted by School Psychologist found that Student "continues to require intensive support to be successful." With the foundation as Student's evaluator, School Psychologist convincingly testified that the provision of 20 hours/week of specialized instruction in the 10/10/18 IEP was appropriate for Student. The IEE neuropsychological evaluation concluded that Student needed a highly structured/specialized "classroom" setting with a range of accommodations. The evaluator, Clinical Psychologist, added in his testimony that Student needed the features of a therapeutic day school, including lower student-teacher ratios, but did not necessarily need a nonpublic school and could go to a public school if appropriate. Support Programs Manager and School Psychologist asserted that nonpublic schools would be too restrictive and not Student's LRE. Student would thrive with a broader diversity of peers than found in a full-time nonpublic school. Thus, the undersigned is persuaded that a nonpublic school is not required for Student at this time and that 20 hours/week of specialized instruction is appropriate.

Goals. At the 10/10/18 IEP meeting, IEP goals were amended or added for reading, math, and socio-emotional behavior, through collaboration between Educational Advocate and School Psychologist. Parent agreed with the goals in the IEP and the undersigned is persuaded that there was no violation of 34 C.F.R. 300.320(a)(2) (statement of measurable annual goals required).

Present Levels of Performance. The 10/10/18 IEP contained weak statements of present levels of performance ("PLOPs"). The reading PLOPs stated little more than Student "demonstrated a strong ability to read and comprehend grade level texts." Written expression included a WJ-IV data point in a baseline, but no data in the PLOPs which broadly stated that Student has "difficulty writing" thoughts on paper. The present levels for emotional, social and behavioral development relied on information from 2016/17, but School Psychologist convincingly explained that school data was needed for this category, rather than evaluation information, and 2016/17 was Student's last time in school. School Psychologist testified that the PLOPs were appropriate generally given the circumstances of Student not attending school. But with the availability of the new IEE neuropsychological evaluation the undersigned holds that overall the PLOPs did not satisfy the requirement of 34 C.F.R. 300.320(a)(1). This is a procedural violation, which does not mean Student was denied a FAPE, as there must be an "educational harm" in order to establish a denial of FAPE based on a procedural violation. *See, e.g., Taylor v. Dist. of Columbia*, 770 F. Supp. 2d 105, 109-10 (D.D.C. 2011); 34 C.F.R. 300.513(a). Here, there is no educational harm for the PLOPs should be updated once Student returns to school and there is data on Student's performance in the classroom and testing.

In sum, this Hearing Officer concludes that DCPS did deny Student a FAPE based on an inappropriate IEP due to the lack of a dedicated aide and any safety plan, which

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results in the Order below requiring a dedicated aide and a safety plan, along with medical accommodations and other interventions as needed, and compensatory education as discussed below.

### **Educational Placement**

The applicable legal standard for educational placement under the IDEA requires “school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student’s IEP.” *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018) *citing* *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also* *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP”).

DCPS asserted in this case that Public School continued to be acceptable for Student, but also emphasized the suitability and appropriateness of Proposed Public School. School Psychologist’s professional opinion was that Student could attend either Public School or Proposed Public School and either could implement Student’s IEP. But Parent had long considered Public School to be too large a school with far too many students to be able to provide a safe learning environment for Student. Physical Therapist’s expert opinion was that Student could not safely move through a crowded school like Public School, because Student was at risk from being bumped or knocked down and was unable to physically protect self.

Based on her work with a team at Proposed Public School, Support Programs Manager credibly testified that Proposed Public School would be an appropriate setting for Student, as it is safe, can support Student and would provide good role models. Proposed Public School is a much smaller school than Public School. Although the building is large enough for 1200 students, there are no more than 250 on the rolls and only about 175-185 students are present each day, so Proposed Public School is not overwhelming like a small, crowded charter school. Proposed Public School has a nurse and therapists available on a daily basis. Most special education classes have 7-9 students and the special education classes are generally on just one hallway. Support Programs Manager was confident that Student could attend, thrive and be successful at Proposed Public School.

The undersigned concludes that on balance DCPS met its burden of persuasion on educational placement, as the placement and location proposed will afford Student the opportunity to actually attend school and make appropriate progress in Student’s circumstances. *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), *quoting* *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

### **Compensatory Education**

In determining compensatory education for a denial of FAPE, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792,

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799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Here, Petitioner’s Compensatory Education Plan for Student calculated the period of harm from the beginning of 2018/19, although the IEP challenged in this case was not developed until 10/10/18, less than two months ago, and not finalized until 11/6/18. Based on the denials of FAPE alleged, the Plan calculated 260 hours of missed specialized instruction and two hours of missed BSS, but applied a qualitative analysis (rather than hour for hour) and sought an award of 150 hours of tutoring and 4 hours of counseling, along with other remedies: speech-language and occupational therapy evaluations, a safety plan, a dedicated aide, an amended IEP and placement in a small, nonpublic, therapeutic day school with a full-time IEP.

Thus, taking into account the denials of FAPE found in this case and the quite limited period of harm, and carefully considering the totality of the circumstances, including Support Programs Manager’s acknowledgement that tutoring is needed for Student’s transition, the undersigned concludes that it is appropriate to award 100 hours of academic tutoring as compensatory education in this case. In the view of the undersigned, BSS need not be made up through a separate award of counseling, as Student missed less than one hour of BSS and the other elements that Student is receiving will make up that minimal loss. In the judgment of the undersigned, this compensatory education award of 100 hours of academic tutoring should put Student in the place Student should have been, but for the denials of FAPE found herein.

### **ORDER**

Petitioner has prevailed on certain aspects of the issue in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS shall amend Student’s IEP to provide a full-time dedicated aide for Student as soon as Student is ready to attend Proposed Public School, which shall be no later than the first school day after Winter Break.
- (2) Within ten days, DCPS shall begin meeting with Student (and Parent and/or advocate(s) as determined by Parent) in order to develop a thorough plan for transitioning Student back to school at Proposed Public School, which shall include (a) a safety plan for addressing medical emergencies and other safety issues, (b)

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needed medical accommodations, if any, and (c) other interventions required for Student to attend school, if any, and make conforming amendments to Student's IEP.

(3) As compensatory education, DCPS shall provide letter(s) of authorization for 100 hours of academic tutoring from independent providers chosen by Petitioner, with such letter(s) to be provided within 10 business days after Petitioner's request(s).

(4) Any delays caused by Student, Parent or their advocate(s) shall result in day-for-day extensions of the deadlines herein.

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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