

**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
February 18, 2017

<i>Student,</i> ¹)	Case No.: 2016-0287
through her <i>Parent,</i>)	
<i>Petitioner,</i>)	Date Issued: 2/18/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 1/25/17 & 2/7/17
(“DCPS”),)	ODR Hearing Room: 2003
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because ■ was not provided an appropriate placement and ■ Individualized Education Program (“IEP”) was not fully implemented. DCPS responded that Student could have gone to ■ neighborhood school and that ■ IEP was largely implemented.

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 12/6/16, the case was assigned to the undersigned on 12/7/16. DCPS filed an untimely response on 12/20/16, and did not challenge jurisdiction. The resolution session meeting took place on 1/12/17; the 30-day resolution period ended on 1/5/17. A final decision in this matter must be reached no later

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

Hearing Officer Determination

Case No. 2016-0287

than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 2/19/17.

The due process hearing took place on 1/25/17 and 2/7/17, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present during the entire hearing.

Petitioner’s Disclosures, submitted on 1/17/17, contained documents P1 through P12, which were admitted into evidence over objection to P8, P9, P10, P11, and P12; objections to P5 and P6 were withdrawn by Respondent at the due process hearing.

Respondent’s Disclosures, submitted on 1/17/17, contained documents R1 through R12, which were admitted into evidence without objection. Respondent’s two Supplemental Disclosures, both of which were submitted on 1/18/17, contained documents R13 through R15, which were admitted into evidence without objection. Respondent’s further Supplemental Disclosures, submitted on 1/24/17, contained document R16, which was withdrawn at the due process hearing and not offered into evidence.

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Parent
2. *Educational Advocate* (qualified over objection as an expert in Educational Programming)

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

Respondent’s counsel presented a single witness in Respondent’s case (*see* Appendix A): *Special Education Coordinator at Public Charter School* (qualified without objection as an expert in Special Education Programming and Placement).

Issues 1 and 2² in the 1/12/17 Prehearing Order were withdrawn without prejudice by Petitioner at the due process hearing (and had been largely withdrawn by Petitioner’s

² The issues withdrawn by Petitioner without prejudice are:

Issue 1: Whether DCPS denied Student a FAPE by failing to evaluate █ adequately, including all areas of suspected disability, as Student needs: (a) an occupational therapy evaluation (as recommended by the March 2016 comprehensive psychological evaluation), (b) a neuropsychological evaluation due to processing issues, and (c) an assistive technology assessment due to processing and speech-language issues.

Issue 2: Whether DCPS denied Student a FAPE by failing to propose an appropriate IEP on 5/4/16, which lacks: (a) special education services throughout the day, (b) counseling, (c) social-emotional goals, and (d) determination and description of her least restrictive environment (“LRE”).

Hearing Officer Determination

Case No. 2016-0287

1/19/17 Notice of Withdrawal). Thus, only Issues 3 and 4 remain to be decided in this HOD, which are:

Issue 3: Whether DCPS denied Student a FAPE by failing to propose an appropriate placement since the 5/4/16 IEP, as Public Charter School could not provide specialized instruction outside general education. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

Issue 4: Whether DCPS denied Student a FAPE by failing to implement ■ 5/4/16 IEP, which requires specialized instruction outside general education that Public Charter School could not and did not provide; nor did Public Charter School provide all required speech-language pathology services. *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief³:

1. A finding that Student was denied a FAPE.
2. Within 5 business days, DCPS shall place and fund Student at *Nonpublic School*, including tuition, related services, and transportation.
5. Compensatory education for any denial of FAPE from August 2016 to the present.⁴

³ At the due process hearing, Petitioner withdrew the following two paragraphs from her requested relief, based on withdrawing Issue 1:

3. Within 10 business days, DCPS shall provide funding authorization at market rates for the following independent evaluations: (a) occupational therapy, (b) neuropsychological, and (c) assistive technology. DCPS shall also fund at market rates any other evaluations recommended by the evaluations required in this paragraph.

4. Within 15 school days after completion of the evaluations in the paragraph above, DCPS shall convene an IEP team meeting to review the evaluations and revise Student's IEP as appropriate.

⁴ Petitioner stated in her 1/19/17 Notice of Withdrawal, and confirmed at the due process hearing, that the relevant period for consideration of compensatory education was from August 2016 to the present; Petitioner did not challenge the appropriateness of placement at the end of the 2015/16 school year.

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

Hearing Officer Determination

Case No. 2016-0287

Respondent made an oral motion pursuant to 34 C.F.R. 512(b)(1) to strike Educational Advocate's testimony about 150 hours of tutoring being an appropriate amount of compensatory education, after Respondent elicited on cross-examination that Educational Advocate had conducted some informal testing of Student before and after ■■■ allegedly missed special education services at Public Charter School. Respondent's motion was denied by the undersigned on the record, however any such informal "evaluation" is not included in the Findings of Fact below, nor relied on in the conclusions reached herein.

Respondent also made an oral motion for a directed verdict after Petitioner presented her case-in-chief and rested. The undersigned took the motion under advisement and hereby denies the motion for the reasons set forth in the Conclusions of Law below.

The parties were permitted to submit legal citations and references after the hearing, which Petitioner did on 2/8/17.

Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age* and in *Grade* at Public Charter School.⁷ Before beginning Public Charter School at the start of 2016/17,⁸ Student attended *Prior Public School* for 3 years, through 2015/16, when ■■■ completed the highest grade offered at Prior Public School.⁹

2. Student is classified as having a Specific Learning Disability ("SLD"), and meets the SLD criteria for Reading, Math and Writing.¹⁰ Student's initial IEP was developed on 5/4/16 and provides 15 hours/week of specialized instruction outside general education,

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

⁶ Parent.

⁷ Parent. Special Education Coordinator testified that Public Charter School is in the process of becoming an "LEA Charter," that is, its own Local Education Agency ("LEA") for purposes of part B of the IDEA, with a planned transition date of 7/1/17; for now, DCPS is responsible for meeting the IDEA requirements applicable to an LEA. Special Education Coordinator; *see* 5E D.C.M.R. § 923.3.

⁸ All dates in the format "2016/17" refer to school years.

⁹ Parent.

¹⁰ P4-1; P2-7; P3; 34 C.F.R. 300.8(c)(10).

Hearing Officer Determination

Case No. 2016-0287

along with 4 hours/month of Speech Language pathology outside general education and 30 minutes/month of Behavioral Support Services outside general education.¹¹

3. Student's general intellectual ability, as measured by the Woodcock-Johnson III, is a 65, which is Very Low.¹² On the Woodcock-Johnson Achievement test, in Broad Reading Student was 3 years behind █ grade (score of 73, which is Low); in Broad Math █ was over 3 years behind █ grade (score of 67, which is Very Low); and in Broad Written Language █ was less than 2 years behind █ grade (score of 89, which is Low Average).¹³ Student's ability to learn academic material is very low; Student requires constant repetition, causing █ frustration.¹⁴

4. During the 5/4/16 IEP team meeting, the Prior Public School participants said their "hands were tied" and that it was up to DCPS's "Central Office" downtown to find a school that could implement Student's IEP.¹⁵ A Prior Written Notice dated 5/4/16 on the Initial Provision of Services provided that the school/site for services would be Prior Public School.¹⁶

5. Parent repeatedly asked Prior Public School for a good school to implement Student's new IEP.¹⁷ The special education coordinator at Prior Public School promised to help find a school to implement Student's IEP, but stated that Parent's neighborhood school was not a good school for Student.¹⁸ Parent stopped by Prior Public School several times in the summer of 2016, but never got any guidance or help finding an appropriate school for Student, so had to find a school on her own.¹⁹

6. Parent chose Public Charter School during the summer of 2016 because she worked around the corner from the school, her mother-in-law used to work at the school, and she had friends who sent children in special education there.²⁰ Parent was no longer represented by an attorney or advocate at that time, after obtaining Student's IEP in May 2016.²¹ Parent did not call counsel again for help until around Thanksgiving 2016.²² Educational Advocate was "shocked" that Parent enrolled Student at Public Charter School and would have strongly discouraged Parent from sending █ there if she had known about it.²³ Special

¹¹ P4-11; Educational Advocate.

¹² P2-3,7.

¹³ P2-4,7.

¹⁴ Educational Advocate.

¹⁵ *Id.*

¹⁶ R7-1.

¹⁷ Parent.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Educational Advocate.

²³ *Id.*

Hearing Officer Determination

Case No. 2016-0287

Education Coordinator at Public Charter School had previously told Educational Advocate that the school could not provide special education services outside general education.²⁴

7. On 7/7/16, Parent met Special Education Coordinator at Public Charter School and gave her Student's IEP; Special Education Coordinator said they would talk at the beginning of school, but they did not have any further conversation then or later.²⁵ Parent did not understand that Public Charter School couldn't provide special education services outside general education, or "pull-out" services.²⁶ Parent came away from the 7/7/16 meeting at Public Charter School with the understanding that Student had been accepted, so bought [REDACTED] school uniform on 7/9/16.²⁷ Parent believed that Public Charter School could provide the special education services Student needed because she was never told it couldn't, although she testified that ¶ 27 of her due process complaint was "false" in stating that Public Charter School "informed the parent" that it could implement Student's IEP.²⁸

8. Public Charter School is not permitted to reject children with IEPs, so Special Education Coordinator typically explained to parents that the school offered a fulltime "inclusion" setting, although it was adding an additional resource component in 2016/17 to permit specialized instruction outside general education.²⁹ Special Education Coordinator wanted parents to know the special education limitations at Public Charter School so they could make informed choices about sending their children there.³⁰

9. After beginning at Public Charter School, Student became increasingly frustrated, began wetting the bed, and began seeing a psychiatrist for therapy 5 times a week.³¹ Student isn't acting [REDACTED] age and is still playing with baby dolls.³² Student changed notably for the worse from June to December 2016, and by the latter date was emotionally withdrawn, frustrated, tired, and no longer wanted to go to school, where [REDACTED] was teased and belittled.³³

²⁴ *Id.*

²⁵ Parent.

²⁶ *Id.*

²⁷ *Id.*

²⁸ R9-9; Parent.

²⁹ Special Education Coordinator. *See* 5E D.C.M.R. § 3019.1 ("A public charter school in the District of Columbia may not deny enrollment or otherwise discriminate in its admissions policies or practices on the basis of a child's disability or status as a child with special needs, the child's need or potential need for special education services, supplementary aids or services, or any other accommodation.").

³⁰ Special Education Coordinator (it was clear to the undersigned that Special Education Coordinator didn't recall specifically what she said to Parent).

³¹ Parent.

³² *Id.*

³³ Educational Advocate.

Hearing Officer Determination

Case No. 2016-0287

Student had excellent school attendance in the past, but now resists school because ■■■ is teased by other children and told ■■■ is “stupid.”³⁴

10. When Student began Public Charter School, Parent did not realize ■■■ was not receiving ■■■ required special education services.³⁵ Public Charter School said Student was doing well in October 2016, but ■■■ wasn't.³⁶ Public Charter School sent several packets of work home for Student to do over winter break because ■■■ was failing classes.³⁷ Some Public Charter School teachers seemed not to know that Student had an IEP and said that Student just needed to try harder, even though the work was too difficult for ■■■.³⁸ Student's teachers were given “snapshots” of ■■■ IEP, including goals and objectives, and had access to ■■■ entire IEP.³⁹

11. Parent did much of Student's homework for ■■■ in an effort to help ■■■ which Parent told Student's math and reading teachers at Public Charter School.⁴⁰ Student's math was particularly difficult for both Student and Parent; Public Charter School recommended a smartphone application called Photomath, which allows a picture to be taken of a math problem in order to receive the answer from the app, which Parent and Student used to obtain homework answers without working through the step-by-step instructions.⁴¹

12. Student's grades at Public Charter School halfway through the first term of 2016/17 were 3 “As,” 2 “Cs,” and 1 “F.”⁴² At the end of the first term of 2016/17, Student's grades were 1 “A,” 3 “Cs,” and 2 “Fs.”⁴³ The 2 “Fs” were close to being “Cs,” and 2 of the “Cs” were close to being “Fs.”⁴⁴ Student passed several classes at Public Charter School; grades – especially “As” – may have been “given” rather than “earned.”⁴⁵ Public Charter School is a rigorous school; transitioning to it from a public school can be difficult for any child due to all the new aspects of the school as well as the rigor.⁴⁶

13. Public Charter School recognized that it could not implement Student's IEP when ■■■ arrived at the beginning of 2016/17.⁴⁷ Special Education Coordinator confirmed at the 1/12/17 RSM that Public Charter School could not accommodate Student's IEP until

³⁴ Parent.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Educational Advocate.

³⁹ Special Education Coordinator.

⁴⁰ Parent.

⁴¹ Parent; Educational Advocate.

⁴² P9-1.

⁴³ P9-2.

⁴⁴ *Id.*

⁴⁵ Educational Advocate.

⁴⁶ Special Education Coordinator.

⁴⁷ *Id.*

Hearing Officer Determination

Case No. 2016-0287

12/1/16 when a new special education educator arrived.⁴⁸ From the beginning of the school year until 12/1/16, Student's case manager was pulling ■■■ out for small group services up to 7.5 hours/week, with Science, Social Studies and an Enrichment block outside general education; Student was receiving co-teaching in the general education classroom in core subjects from both a special education teacher and a general education content teacher.⁴⁹

14. Parent initially thought that all of Student's classes were special education, but later concluded that Student was not being pulled out of general education from August through November 2016.⁵⁰ Beginning in December 2016, Parent began talking to Student every night about whether ■■■ was being pulled out of her classes, which Student said only happened once before winter break.⁵¹ If a school cannot implement an IEP, Special Education Coordinator stated that it should call an IEP team meeting, including the DCPS liaison, analyze the student's data, and discuss and decide what to do about placement and/or location of services for the child.⁵²

15. Student began receiving ■■■ full outside general education services on ■■■ IEP on 12/1/16, receiving about 13 hours/week of Math and English, plus another 2 hours/week of Enrichment, which Special Education Coordinator credibly testified was valuable time with a special education teacher (and not a "glorified" study hall).⁵³ Student's special education services have been provided at Public Charter School since 12/1/16; Student can continue to receive ■■■ special education services there.⁵⁴

16. The special education teacher who began providing services on 12/1/16 left Public Charter School by late December; another special education teacher provided services to Student in his place.⁵⁵ The "bell schedule" does not show any difference in Student's courses from 8/26/16 to 1/17/17, but that schedule doesn't indicate when Student was pulled out of general education.⁵⁶ At Public Charter School, 137 of 700 total students are in special education.⁵⁷

⁴⁸ R15-2; Educational Advocate.

⁴⁹ Special Education Coordinator (testimony was somewhat inconsistent, as Special Education Coordinator also testified that Student may have been pulled out for Reading, but for no more than 7.5 hours total).

⁵⁰ Parent.

⁵¹ *Id.*

⁵² Special Education Coordinator.

⁵³ P9-10; Special Education Coordinator (overstated hours in her testimony as 17.5 compared to hours on schedule; also, Enrichment was only 4 days/week and Parent arrived early on 5th day).

⁵⁴ Special Education Coordinator.

⁵⁵ *Id. v*

⁵⁶ Special Education Coordinator; P9-9,10.

⁵⁷ Special Education Coordinator.

Hearing Officer Determination

Case No. 2016-0287

17. Special Education Coordinator believed that Student was receiving all [REDACTED] Speech Language services because the service provider did not indicate any services were missed; Parent testified that Student was getting few, if any, services.⁵⁸ Public Charter School Speech Language Therapy Progress Notes state that Student was given 6 hours of services during the 15 weeks from the beginning of school through the last week of reported services on 12/9/16.⁵⁹

18. On 1/17/17, Student was conditionally accepted as a student at Nonpublic School.⁶⁰ Nonpublic School is a small school with children like Student, so would not be as threatening to [REDACTED] it is therapeutic, nurturing, and loving, which would be especially helpful for Student.⁶¹ Nonpublic School serves only disable children, so cannot provide services inside general education, but Educational Advocate is not concerned about Student not having an IEP calling for fulltime specialized instruction as Student is worsening; Student is being “lost” emotionally and academically.⁶²

19. The Proposed Compensatory Education Plan submitted by Educational Advocate and Petitioner’s counsel proposed 150 hours of individual tutoring based on a qualitative analysis considering what it would take to put Student where [REDACTED] would have been but for the denial of a FAPE.⁶³ The frequency and length of tutoring sessions should be determined when services are provided, based on Student’s circumstances at that time.⁶⁴ The 150 hours suggested are a minimum, as Student was greatly harmed by Public Charter School’s failure to implement [REDACTED] IEP.⁶⁵ The proposal was not based on an hour-for-hour calculation of what was missed, so Educational Advocate testified that 150 hours are appropriate whether Student missed 3 months or 5 months of services.⁶⁶

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*

⁵⁸ Special Education Coordinator; Parent.

⁵⁹ R12 (3 of the 6 entries include start and stop times that would suggest 80 minute sessions, but the undersigned relies on the clear record of 60 minutes/session on the Progress Notes).

⁶⁰ P8-1; Educational Advocate.

⁶¹ Educational Advocate.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ P10-2; Educational Advocate.

⁶⁵ Educational Advocate.

⁶⁶ *Id.*

Hearing Officer Determination

Case No. 2016-0287

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”).

“[T]o further Congress’ ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(14); *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 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 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). 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. Congress, however, “did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

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.

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 shall carry the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent shall have the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6);

Hearing Officer Determination

Case No. 2016-0287

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.” 5E D.C.M.R. § 3030.3.

Issue 3: *Whether DCPS denied Student a FAPE by failing to propose an appropriate placement since the 5/4/16 IEP, as Public Charter School could not provide specialized instruction outside general education. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case, shifting the burden of persuasion to Respondent, which failed to meet its burden of proving that it proposed an appropriate placement for Student.

Providing Student a FAPE under the IDEA requires 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 Smith*, 846 F. Supp. 2d at 202 (school needs to provide only basic floor of opportunity), *quoting Rowley*, 458 U.S. at 201. Indeed, a FAPE by definition must include “an appropriate preschool, elementary school, or secondary school education.” 20 U.S.C. § 1401(9)(C); 34 C.F.R. 300.17(c). Analysis of “placement” may sometimes be rather theoretical, *cf. Dist. of Columbia v. Vinyard*, 901 F. Supp. 2d 77, 85 (D.D.C. 2012) (the meaning of educational placement “falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP”), but the case law is clear that “DCPS is required to offer the student ‘placement in a school that can fulfill the requirements set forth in the IEP.’” *Garmany v. Dist. of Columbia*, 935 F. Supp. 2d 177, 183 (D.D.C. 2013), *quoting O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C. 2008); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (District must match “child with a school capable of fulfilling” needs). That was not done in this case.

Here, Student received ■■■ initial IEP on 5/4/16, which required 15 hours/week of specialized instruction outside general education, along with 4 hours/month of Speech Language pathology and 30 minutes/month of Behavioral Support Services. Parent credibly testified that she did not know where Student’s IEP could be implemented and repeatedly sought help from Prior Public School. Parent was told at the 5/4/16 IEP meeting that DCPS’s “Central Office” would have to determine where Student was placed. But the evidence in the record indicates that the only action by DCPS was issuing a Prior Written Notice on 5/4/16 on the Initial Provision of Services, which stated that the school/site for services for Student would be Prior Public School, where ■■■ was within weeks of completing the highest grade offered.

DCPS argued at the due process hearing that, in the absence of a proposed placement, Student’s neighborhood school was the default. Parent testified without rebuttal that the special education coordinator at Prior Public School told her that ■■■ neighborhood school was not a good place to implement Student’s IEP. DCPS may not simply rely on a

Hearing Officer Determination

Case No. 2016-0287

presumption of appropriate placement, as it bears the burden of persuasion. DCPS did not persuade the undersigned that Parent's neighborhood school was proposed or could adequately implement Student's IEP, with its 15 hours of specialized instruction outside general education, in order to provide a basic floor of opportunity for [REDACTED]. While a formal notice of placement may not be required, here the required information about Student's placement was not set forth at the IEP meeting or otherwise, unlike the situation in *O.O.*, 573 F. Supp. 2d at 53.

In the absence of a placement or even guidance from DCPS, Parent found Public Charter School and enrolled Student there, not understanding that it was an "inclusion" school that could not adequately implement Student's new IEP. DCPS argued persuasively that it can't prevent parents from enrolling children at inappropriate schools, such as Public Charter School with its inclusion model. But the issue here is whether or not DCPS proposed an appropriate placement to implement Student's IEP; this Hearing Officer concludes that it did not. If DCPS had appropriately placed Student, there is no indication that Parent would have enrolled Student at Public Charter School and this litigation would have been avoided entirely.

The failure to provide an appropriate placement prevented proper implementation of Student's IEP and thus deprived Student of educational benefit and impeded [REDACTED] right to a FAPE. See 34 C.F.R. 300.513(a). This denial of a FAPE contributes to the award of compensatory education below, although Petitioner's request for placement and funding of Student at Nonpublic School is denied, as discussed in the Remedies section, below.

Issue 4: *Whether DCPS denied Student a FAPE by failing to implement [REDACTED] 5/4/16 IEP, which requires specialized instruction outside general education that Public Charter School could not and did not provide; nor did Public Charter School provide all required speech-language pathology services. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of proof on this issue. Respondent acknowledged that Public Charter School did not fully implement Student's IEP until 12/1/16, resting its defense on the lack of materiality and minimal damages.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (must show failure to "implement substantial or significant provisions of the IEP"); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "*de minimis* failure to implement all elements of [the student's] IEP." *Johnson*, 962 F. Supp. 2d at 268, quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is "the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

Hearing Officer Determination

Case No. 2016-0287

In the testimony presented in this hearing, there was direct conflict between Parent and Special Education Coordinator about how much specialized instruction Student was receiving prior to 12/1/16. Special Education Coordinator asserted that Student was receiving half, or 7.5 hours/week, instead of the required 15 hours/week on Student's IEP. The undersigned on balance gives more weight to the testimony of Special Education Coordinator than Parent, whose assertions that Student was pulled out only once before winter break do not seem credible. However, Special Education Coordinator was not close to Student's situation and seemed to overstate in her testimony some hours of service provided Student. Thus, the undersigned holds that Student received somewhat less than half the required service hours outside general education for several months leading up to 12/1/16, which is not a minor discrepancy, but a material deviation, and a serious loss to a child in need of services. *Cf. Van Duyn*, 502 F.3d at 823 (missing 5 out of 8-10 hours/week is a material implementation failure).

Similarly, Special Education Coordinator testified that Student was receiving all ■■■ Speech Language services because the service provider did not indicate any services were missed, while Parent testified that Student was getting few, if any, services. Not being persuaded by one over the other, the undersigned relies on the documentary evidence presented. The Public Charter School Speech Language Therapy Progress Notes indicate that Student was given 6 hours of services during the 15 weeks from the beginning of school through the last week of reported services on 12/9/16 (just after the filing of the due process complaint on 12/6/16). Student was supposed to receive about an hour per week of Speech Language pathology services (4 hours/month), so here, too, Student was provided less than half of ■■■ needed services (6 of 15 hours), which this Hearing Officer holds was also a material deviation from Student's IEP.

These material deviations contribute to the award of compensatory education below, for the materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail." *Walker v. Dist. of Columbia*, 2014 WL 3883308, at *5 (D.D.C. 2014). *See also Turner*, 952 F. Supp. 2d at 40 ("[s]ignificantly, a plaintiff does not have to prove a resulting harm caused by the failure to implement"), *quoting Wilson*, 770 F. Supp. 2d at 275. Here, moreover, there was harm, as demonstrated by Student's worsening grades, with the grades ■■■ did receive apparently being artificially boosted by Parent completing homework that Student turned in, and by Student's worsening emotional state.

Remedies

As remedies for these denials of FAPE, Petitioner seeks both funding for Student to attend Nonpublic School and compensatory education, which are considered in turn.

Nonpublic Placement. If no public school is available to implement Student's IEP, then DCPS "must pay the costs of sending the child to an appropriate private school." *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 518-19 (D.C. Cir. 2005). Such an award of nonpublic school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Dist. of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (citations omitted).

Hearing Officer Determination

Case No. 2016-0287

Here, however, the credible testimony from Special Education Coordinator was that Student had received appropriate special education services from Public Charter School since 12/1/16 and could receive such services going forward. As the Court explained in *NT v. Dist. of Columbia*, 839 F. Supp. 2d 29, 34 (D.D.C. 2012), quoting *Jenkins*, 935 F.2d at 305 (citations and quotations omitted), “if there is an appropriate public school program available . . . the District need not consider private placement, even though a private school might be *more* appropriate or better able to serve the child.”

Further, a placement award must be tailored to meet the child’s specific needs and the courts have developed a set of relevant considerations to determine whether nonpublic placement is appropriate. *Branham*, 427 F.3d at 11-12. Here, the nature and severity of Student’s disability and ■■■ specialized educational needs were serious but did not rise to a level sufficient to convince the undersigned that funding of Nonpublic School would be appropriate. In addition, Nonpublic School does not represent the least restrictive educational environment for Student at this time, as ■■■ IEP provides only 15 hours/week of specialized instruction outside general education and the remainder inside general education (apart from an hour or so of related services per week). But Nonpublic School provides no opportunities for general education. Educational Advocate did testify to her lack of concern about the absence of general education because Student is worsening and needs a more restrictive placement. But if that is true, it suggests the need for further assessments and adjustment of Student’s IEP, not an estimate on the fly by an expert in the midst of a due process hearing. In sum, while this decision does not rule on the suitability of Public Charter School for Student going forward, this Hearing Officer does not find it appropriate to place or fund Student at Nonpublic School at this time.

Compensatory Education. The IDEA gives Hearing Officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. See *Reid*, 401 F.3d at 522-23; *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *25 (D.D.C. Aug. 26, 2016) (IDEA prescribes broad discretion in fashioning relief for educational deprivation). The proper amount of compensatory education, if any, depends on how much more progress Student might have shown if ■■■ had received the required special education services, and the type and amount of services that would place Student in the same position ■■■ would have occupied but for DCPS’s violations of the IDEA. See *Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-39 (D.D.C. 2011), citing *Reid*, 401 F.3d 516. In short, “compensatory education aims to put a student . . . in the position [s]he would be in absent the FAPE denial.” *B.D.*, 817 F.3d at 798.

The U.S. Court of Appeals for the District of Columbia Circuit recently made plain that “compensatory education awards require a ‘flexible approach’ tailored to the facts of each case, and, as we made clear in *Reid*, a mechanical award of services identical to those wrongly denied is inappropriate. *Reid*, 401 F.3d at 524.” *B.D.*, 817 F.3d at 799. While there is “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,” *id.*, 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

Hearing Officer Determination

Case No. 2016-0287

compensatory education award and limitations of the record are no excuse). Nor is a student 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*, 2016 WL 5485101, at *9 (D.D.C. Sept. 29, 2016), quoting *Reid*, 401 F.3d at 523-24.

Based on careful consideration of the facts and circumstances resulting in the denials of FAPE found above, this Hearing Officer awards 150 hours of independent academic tutoring at a pace determined by Parent in consultation with the service provider(s). The undersigned bases this award on the Proposed Compensatory Education Plan submitted by Petitioner, as bolstered by the credible expert testimony of Educational Advocate during the due process hearing. The awarded hours are to be used within 18 months from the date of this HOD in order to ensure that the remedial services Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent that would result from a compensatory education award stretching over an excessively long timeframe.

ORDER

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

Compensatory education for the denial of FAPE in this case shall consist of DCPS funding 150 hours of independent academic tutoring to be used within 18 months from the date of this HOD; any unused hours will be forfeited. DCPS shall authorize such services within 10 business days after receiving Petitioner’s written selection of service provider(s).

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

Counsel of Record (Appendix A, by email)

Hearing Officer Determination

Case No. 2016-0287

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