

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

Office of Dispute Resolution  
1050 First Street, N.E., 4<sup>th</sup> Floor  
Washington, D.C. 20002

OSSE  
Office of Dispute Resolution  
February 26, 2018

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2017-0316
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 2/6/18
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates: 1/24/18, 1/25/18 &
("DCPS"),	)	1/30/18
Respondent.	)	ODR Hearing Room: 111
	)	

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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 was not provided an appropriate Individualized Education Program ("IEP") and placement for Student's needs. DCPS responded that the IEP and placement were appropriate for Student.

**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 11/27/17, the case was assigned to the undersigned on 11/28/17. DCPS filed a response after hours on 12/7/17, and did not challenge jurisdiction, apart from the authority of the undersigned to enforce prior Hearing Officer decisions. The resolution session meeting ("RSM") was held on 1/16/18. The 30-day resolution period ended on 12/27/17. A final decision in this matter must be reached no

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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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later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 2/10/18.

The due process hearing took place on 1/24/18, 1/25/18 and 1/30/18 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 first 2 days of the hearing; Petitioner’s mother was present for the additional 3<sup>rd</sup> day of the hearing.

Petitioner’s Disclosures, submitted on 1/17/18, contained documents P1 through P45, which were admitted into evidence over specified objections to certain documents. Respondent’s Disclosures, submitted on 1/17/18, contained documents R1 through R9, which were admitted into evidence without objection.

Petitioner’s counsel presented 6 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Psychologist* (qualified without objection as an expert in Psychology)
2. *Head of School at Nonpublic School* (qualified over objection as an expert in Special Education Programming and Administration)
3. *Dean of Students at Nonpublic School* (qualified without objection as an expert in Special Education Programming and Placement)
4. *Clinical Director of ABA Provider* (qualified without objection as an expert in Applied Behavior Analysis)
5. *Director of Communication & Education Support (“CES”) Program*
6. *Educational Advocate* (qualified over objection as an expert in Special Education Programming and Placement)

Respondent’s counsel presented 7 witnesses in Respondent’s case (*see* Appendix A):

1. *Special Education Specialist* (qualified without objection as an expert in Special Education Programming and Placement)
2. *Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
3. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy (“OT”))
4. *Program Specialist* (qualified without objection as an expert in Special Education Programming and Placement for Children with Autism)
5. *Assistant Principal at Proposed Public School* (qualified without objection as an expert in Special Education Programming and Placement)

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6. *Special Education Teacher* (qualified without objection as an expert in Special Education Programming and Placement)
7. Director of CES Program (qualified without objection as an expert in Special Education Programming and Placement for Students with Autism)

The issues<sup>2</sup> to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 1/30/17 which: (a) did not reflect prior Hearing Officer decisions and directly contradicted a 9/1/16 HOD; (b) provided inappropriate related services based on outdated data, including pull-out services for OT, Speech and Language, and Behavioral Support Services (“BSS”); (c) failed to provide sufficient information about Student’s appropriate educational placement/LRE/continuum of services; (d) included a “dedicated aide” instead of a 1:1 ABA shadow under the supervision of a BCBA; (e) did not involve Parent or a team knowledgeable about Student in the IEP services and placement determination; and (f) could not be implemented in Student’s “current educational program” and was created by DCPS to not be implemented. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

**Issue 2:** Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement prior to 2017/18, as placement in the CES program at Proposed Public School was not appropriate where it (a) was not designed to meet Student’s unique needs based on Student’s disabilities, and (b) did not involve Parent or a team knowledgeable about Student in the placement decision which DCPS delegated to an “LRE team.”<sup>3</sup> *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. A stay-put determination covering tuition and transportation for Nonpublic School.
3. Within 15 business days, DCPS shall reimburse Parent for all amounts paid for the 2017/18 school year for Student at Nonpublic School, including tuition, transportation, ABA or other related services, and any other associated costs.

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<sup>2</sup> An additional issue numbered 3(b) on page 30 of the due process complaint was withdrawn without prejudice at the prehearing conference. In addition, Issue 1(g) in the Prehearing Order relating to Extended School Year (“ESY”) was withdrawn by Petitioner with prejudice by leave of the undersigned at the end of the due process hearing.

<sup>3</sup> Issue 2 combines both issues (c) and (d) from page 31 of the due process complaint. Issue 2 omits the reference to “an appropriate IEP” in issue (d), as the appropriateness of the IEP at issue is challenged in Issue 1 in subparts (a) through (f).

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4. Within 15 business days, DCPS shall issue a Prior Written Notice and place and fund Student at Nonpublic School for the remainder of the 2017/18 school year and continuing until DCPS offers a FAPE to Student.
5. Within 15 school days, Student's IEP shall be revised to include (a) specialized instruction of 31 hours/week outside general education, and (b) an LRE in a separate special education school for students with high functioning autism and similar learning differences. In the alternative, Student's IEP shall be revised to align with the HOD issued in this case.<sup>4</sup>

### Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>5</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>6</sup> Student is *Age*, *Gender* and in *Grade* at Nonpublic School, where Student began in April 2015.<sup>7</sup> Student was younger than usual when beginning Nonpublic School and accepted only with a full-time ABA therapist in place, as Student needed a great deal of help.<sup>8</sup>

2. A comprehensive psychological evaluation of Student was conducted in December 2014, with a report on 1/3/15 which confirmed Student's diagnoses of both Attention Deficit/Hyperactivity Disorder – Combined Type ("ADHD") and an Autism Spectrum Disorder ("autism").<sup>9</sup> Cognitively, Student was in the Average range with varying strengths and weaknesses on subtests on the Woodcock-Johnson ("WJ") Cognitive; on the WJ Achievement Student demonstrated reading and writing skills in the Very Superior range,

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<sup>4</sup> This paragraph incorporates the requested relief in paragraphs 5 and 6 on page 30 of the due process complaint. Further, paragraph 7 on page 30 of the due process complaint seeks compensatory education for any harm to Student from lapse of educational services based on "a failure of the IHO in this case to grant stay put protections following Petitioner's motion." However, no motion for stay-put has been made in this case, so compensatory education is not in issue.

<sup>5</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>6</sup> Educational Advocate.

<sup>7</sup> Educational Advocate; P20-4.

<sup>8</sup> Dean of Students.

<sup>9</sup> P31-11; Psychologist.

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while math was in the High Average range.<sup>10</sup> Autism can negatively impact IQ scores; here, Student is functioning well above IQ scores.<sup>11</sup>

3. Student is “very verbal,” speaking all the time and has emotional affect when talking; Student engages with everyone.<sup>12</sup> Student is at the higher end of the autism spectrum.<sup>13</sup> In multiple observations over time, Psychologist has seen Student reduce fixations on numbers and letters and become more engaged with peers.<sup>14</sup> Student is very smart, such as responding to a retailer’s offer of a free frozen yoghurt for those who can list the 7 states that begin with the letter “M” by informing the retailer that there are 8 such states and promptly listing them.<sup>15</sup> Student is on grade level at Nonpublic School.<sup>16</sup> PE at Nonpublic School with 10 children and 3 faculty is often overstimulating for Student.<sup>17</sup>

4. The IEP at issue in this case was developed at an IEP team meeting on 1/30/17 and finalized on 2/1/17.<sup>18</sup> Prior IEPs had been developed on 1/29/16 and 4/21/15 (with a draft on 12/10/15); each had been challenged and not implemented.<sup>19</sup> Each of the IEPs lists Student’s disability classification as Autism Spectrum Disorder.<sup>20</sup> The 1/30/17 IEP provided 25.5 hours/week of specialized instruction, 120 minutes/month of OT, 120 minutes/month of BSS, 240 minutes/month of speech-language, 30 minutes/month of OT consultation, and 30 minutes/month of BSS consultation, all outside general education.<sup>21</sup>

5. Development of 1/30/17 IEP. A senior DCPS administrator told Petitioner’s counsel to plan for 2 IEP meetings, with the January 2017 meeting to ensure the “IEP remains compliant under IDEA” and addresses Student’s current needs, followed by a second meeting to prepare for summer and 2017/18.<sup>22</sup> Petitioner’s counsel sought an IEP in January 2017 that would embody the requirements of the prior 2 Hearing Officer decisions relating to Student in the 6/24/16 HOD in Case No. 2016-0058 (“June 2016 HOD”) and the undersigned’s Summary Judgment Order of 11/2/16 in Case No. 2016-0214 (“November 2016 Order”) and be implemented at Nonpublic School for the rest of 2016/17; a different IEP could be developed by DCPS later in the year for 2017/18.<sup>23</sup> On the other hand,

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<sup>10</sup> P31-11,13 (several of Student’s scores were in the 140s, with one above 150); Psychologist.

<sup>11</sup> Psychologist.

<sup>12</sup> Psychologist; Head of School.

<sup>13</sup> Psychologist.

<sup>14</sup> *Id.*

<sup>15</sup> Educational Advocate; Program Specialist (Student “very bright” and higher functioning).

<sup>16</sup> Head of School.

<sup>17</sup> *Id.*

<sup>18</sup> P10-1.

<sup>19</sup> P9; P7; P8; P38; P39.

<sup>20</sup> P7-2; P9-1; P10-1.

<sup>21</sup> P10-17.

<sup>22</sup> P2-22.

<sup>23</sup> P2-44; P38; P39.

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Respondent's counsel asserted that the 1/30/17 IEP made a FAPE available and could be implemented immediately if "parent so desires."<sup>24</sup>

6. The IEP team meeting proceeded on 1/30/17; the parties understood that a telephone conference call was not the best way to conduct the meeting, but DCPS, with 11 participants, did not want to go to the suburbs for the meeting; the Nonpublic School personnel felt they should not leave their school duties for the length of time it would have taken to participate in the meeting in DCPS's downtown offices.<sup>25</sup> Both sides experienced the meeting as very contentious, hostile, and disagreeable.<sup>26</sup>

7. The DCPS notes from the 1/30/17 IEP meeting were largely accurate, but not fully so, including the statement that Educational Advocate agreed that there were no changes to the present levels of performance for the Emotional, Social and Behavioral Development section.<sup>27</sup> After the 1/30/17 IEP meeting, Petitioner's counsel emailed DCPS reiterating previous concerns and raising others.<sup>28</sup> Educational Advocate wrote a letter to DCPS listing concerns with the IEP meeting, including issues with related services.<sup>29</sup>

8. Prior to the 1/30/17 IEP meeting, Dean of Students had provided to DCPS on 1/11/17 the email addresses of Student's teachers and administrators at Nonpublic School and indicated how to request official records; Dean of Students did not know whether DCPS contacted anyone.<sup>30</sup> Prior to the IEP meeting, Dean of Students provided work samples which showed Student was on grade level.<sup>31</sup> Dean of Students credibly testified that Nonpublic School was always willing to share documents.<sup>32</sup> Head of School clarified that Nonpublic School sends only the information requested to DCPS.<sup>33</sup> Dean of Students helped arrange an observation of Student by DCPS at Nonpublic School prior to the IEP meeting, but didn't know if the observation occurred.<sup>34</sup> Parent later agreed to DCPS observing Student on 10/19/17.<sup>35</sup> After the 1/30/17 IEP meeting, Clinical Director provided a copy of the latest ABA treatment plan for Student and offered further information.<sup>36</sup>

9. At the 1/30/17 IEP meeting, DCPS sought a copy of Student's daily ABA data sheets or graphs; after initial confusion about what DCPS was seeking, Clinical Director said she couldn't provide them, instead offering Student's behavior plan and also progress

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<sup>24</sup> P2-59.

<sup>25</sup> P2-20,27; P11-2; Head of School; Special Education Specialist.

<sup>26</sup> Special Education Specialist; Educational Advocate; Clinical Director.

<sup>27</sup> P11-3; P10-13.

<sup>28</sup> P2-48.

<sup>29</sup> P2-50,51.

<sup>30</sup> P2-39; Dean of Students.

<sup>31</sup> P2-26; Dean of Students.

<sup>32</sup> Dean of Students.

<sup>33</sup> Head of School.

<sup>34</sup> P2-41,42.

<sup>35</sup> P4-1.

<sup>36</sup> P2-47.

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notes.<sup>37</sup> Special Education Teacher testified that the data was “absolutely important” for developing baselines and interfered with DCPS’s ability to consider ABA for Student.<sup>38</sup> Special Education Specialist testified that DCPS did not receive the progress notes; Clinical Director testified that DCPS never requested the progress notes and did not follow up.<sup>39</sup>

10. The IEP team disagreed about specialized instruction, with DCPS proposing 25.5 hours/week; Educational Advocate stated that 32 hours had been mandated by the HOD.<sup>40</sup> Special Education Specialist testified that there was no discussion in the 1/30/17 IEP meeting about whether lunch and recess in general education were appropriate for Student, as indicated by the 25.5 hours on the IEP.<sup>41</sup> Student’s IEP did not specify its placement on the continuum; 25.5 hours/week plus related services can be implemented in many settings.<sup>42</sup>

11. ABA. The 1/30/17 IEP provided a dedicated aide rather than a 1:1 ABA therapist or “shadow” (who reinforces and prompts Student).<sup>43</sup> The DCPS team rejected the input of Nonpublic School and Educational Advocate that Student needed the ABA shadow and stated they added the dedicated aide “per HOD”; Educational Advocate responded that the shadow had been required by the November 2016 Order.<sup>44</sup> Applied Behavior Analysis (“ABA”) focuses on the science of learning, with extensive research relating to autism, although the ABA learning processes can be used by anyone.<sup>45</sup> There are many types of ABA therapy; the therapy for Student was provided 1:1, with specific programming to reach specific goals under the supervision of a Board Certified Behavior Analyst (“BCBA”).<sup>46</sup> The ABA goals are generally to extinguish or improve specified behaviors.<sup>47</sup> ABA Provider provides ABA services to nonprofits all around the District of Columbia and Baltimore region; ABA Provider and Nonpublic School are owned by the same company.<sup>48</sup>

12. Clinical Director explained at the 1/30/17 IEP meeting that the goal for Student was to fade out ABA services, but that was not possible at that point.<sup>49</sup> Student’s behaviors had increased at the beginning of 2016/17 so Clinical Director developed a new behavior plan,

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<sup>37</sup> P11-6; Clinical Director.

<sup>38</sup> Special Education Teacher.

<sup>39</sup> Special Education Specialist; Clinical Director.

<sup>40</sup> P11-6.

<sup>41</sup> Special Education Specialist.

<sup>42</sup> *Id.*

<sup>43</sup> P2-44.

<sup>44</sup> P11-5,6; Educational Advocate; P39.

<sup>45</sup> Clinical Director.

<sup>46</sup> *Id.*

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

<sup>48</sup> *Id.*

<sup>49</sup> P11-7; Clinical Director.

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which was working; the plan included a lot of “intense components,” so teachers were not able to implement it.<sup>50</sup> ABA Provider’s BIPs for Student are very detailed.<sup>51</sup>

13. Student’s behaviors increased again at the beginning of 2017/18, with the transition to a new class at Nonpublic School, despite having been prepared for the change.<sup>52</sup> Intensive ABA services were provided and then tapered off, ending in late September 2017.<sup>53</sup> Student no longer needs a dedicated aide or ABA shadow; having an aide could cause Student to regress.<sup>54</sup>

14. Location of Related Services. One of the requirements in the Other Classroom Aids and Services in the prior 1/29/16 IEP was to provide all ancillary services (OT, speech-language, BSS) in the classroom setting and not having any pullout ancillary services, which was removed from the 1/30/17 IEP.<sup>55</sup> DCPS had information about Student’s earlier IEP team pushing related services into the classroom from the 2016 due process hearing.<sup>56</sup> At the 1/30/17 IEP meeting, DCPS considered it preferable for the service providers to have flexibility on whether to provide services in the classroom or not, especially considering OT devices and tools.<sup>57</sup>

15. Speech-Language. At the 1/30/17 IEP meeting, Educational Advocate noted that there were “significant changes” in the area of speech-language, that the speech-language data was out of date, and that Student did not receive pullout speech-language services.<sup>58</sup> DCPS made no change to speech-language, stating that DCPS lacked updated information; Educational Advocate responded that the “door is open” for DCPS observations to update speech-language.<sup>59</sup> DCPS had known that Student’s advocates believed Student did not need direct speech-language services from the 2016 due process hearing.<sup>60</sup>

16. In the speech-language area of concern in the 1/30/17 IEP, DCPS removed information about the DCPS observation on 11/17/15 (which noted that Student was able to use language socially for a variety of interactions with adults) and information from Nonpublic School on 11/3/15 (noting that Student is making overall progress in the area of communication skills); DCPS relied on older information from 2/10/15 (stating that overall Student’s receptive and expressive language skills were found below age expectations) and 5/30/14 (concluding that Student presented with significant pragmatic language

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<sup>50</sup> P11-7.

<sup>51</sup> P18; P21.

<sup>52</sup> Head of School.

<sup>53</sup> R5-1; Head of School.

<sup>54</sup> Head of School; Dean of Students.

<sup>55</sup> P9-14; P10-17.

<sup>56</sup> P16-5,15,24.

<sup>57</sup> Speech-Language Pathologist; Occupational Therapist.

<sup>58</sup> P11-3,6.

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

<sup>60</sup> P16-17,24.

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difficulties).<sup>61</sup> DCPS left in the 1/30/17 IEP the statement that Student's "reduced use of oral language" may cause difficulties, with Special Education Specialist testifying that other information was not provided at the IEP meeting.<sup>62</sup> The speech-language baselines in the 1/30/17 IEP were not up to date for Student and were not appropriate.<sup>63</sup>

17. Speech-language services remained on Student's 1/30/17 IEP because speech-language evaluation data suggested a need and Nonpublic School had no data proving otherwise in order to remove it from the IEP.<sup>64</sup> Special Education Specialist could not say why DCPS did not conduct an evaluation.<sup>65</sup>

18. OT. For OT, Educational Advocate noted that the information was outdated and that an outside OT evaluation had been conducted in January 2017, which she would forward when completed.<sup>66</sup> When DCPS obtained the OT evaluation summary, it reached out to the independent OT provider to ask for the "actual report generated" from the evaluation; the OT provider responded that she would "go ahead and prepare a report" that she would send when completed.<sup>67</sup> Educational Advocate was concerned about DCPS ordering work to be done at Parent's expense, rather than conducting its own evaluation.<sup>68</sup> When DCPS reviewed the full OT report, it concluded that additional testing was needed, including a classroom observation and assessment in all areas of concern in the school setting.<sup>69</sup> DCPS's PWN on 2/1/17 indicated that an OT observation of Student should occur, but an observation didn't happen before Occupational Therapist left the team at the end of the summer of 2017.<sup>70</sup> Continuing 120 minutes/month of direct service for Student was found to be appropriate based on the data.<sup>71</sup>

19. Emotional, Social, and Behavioral Development. The 1/30/17 IEP team discussion about the Emotional, Social, and Behavioral Development area of concern frustrated the Nonpublic School team as Clinical Director was attempting to provide information and DCPS's question showed that the DCPS team was not understanding.<sup>72</sup> DCPS asked for the ABA goals for Student, so Clinical Director read the goals being worked on, not understanding what DCPS would do with the information.<sup>73</sup> DCPS included the goals from the ABA behavior plan and expected them to be met in 120 minutes/month (30

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<sup>61</sup> P9-7; P10-11.

<sup>62</sup> P10-12; Special Education Specialist.

<sup>63</sup> Educational Advocate.

<sup>64</sup> Speech-Language Pathologist.

<sup>65</sup> Special Education Specialist.

<sup>66</sup> P11-6.

<sup>67</sup> P2-77; R8.

<sup>68</sup> Educational Advocate.

<sup>69</sup> P37-2; Occupational Therapist.

<sup>70</sup> P12-1; Occupational Therapist.

<sup>71</sup> Occupational Therapist.

<sup>72</sup> Dean of Students; Clinical Director.

<sup>73</sup> Clinical Director.

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minutes/week).<sup>74</sup> Clinical Director explained that a social worker not trained in ABA could not implement the goals and that the process was intended for implementation in “real life” rather than counseling sessions.<sup>75</sup>

20. After offering to DCPS in the 1/30/17 discussion Student’s then-current baselines (at the time of the IEP meeting), Clinical Director provided Student’s baselines before treatment began.<sup>76</sup> In the Emotional, Social, and Behavioral Development area of concern, DCPS removed the 12/10/15 behavior data that was in the present levels of performance from the prior 1/29/16 IEP and inserted the older series of baselines Clinical Director just provided from April 2015 when Student had first arrived at Nonpublic School and was just beginning ABA therapy there.<sup>77</sup> The data DCPS omitted included the “Reduction Percentages” of “Elopement 93%; Aggression 79%; Disruption 97%; Dropping 92%; Tantrum 83%; Wandering 76%.”<sup>78</sup>

21. The specific data for the 6 Emotional, Social, and Behavioral Development baselines from April 2015, on which the goals were premised, were:

- (a) the baseline for goal 1 was that Student engaged in “aggressive behaviors” 7.74 times/hour (hitting, choking, pushing, kicking, punching, grabbing, pulling, scratching);
- (b) the baseline for goal 2 was that Student eloped from class 1.5 times/hour;
- (c) the baseline for goal 3 omitted the numerical rate, but was that Student disrupted class by swiping, knocking over objects, screaming and yelling);
- (d) the baseline for goal 4 was that Student had tantrums 1 time/hour;
- (e) the baseline for goal 5 was that Student was dropping to the classroom/school floor 2.5 times/hour; and
- (f) the baseline for goal 6 omitted the numerical rate for vocal disruption.<sup>79</sup>

22. Student’s problematic behaviors had declined significantly by November 2016 and were even further reduced during the period of the IEP meeting; by the final measuring period ending on 6/1/17, Aggression had dropped from 7.74 times/hour to 0.01; Elopement dropped from 1.51 to 0.05; Disruption dropped from 5.99 to 0.10; Tantrum dropped from 0.65 to 0.06; Dropping to the floor dropped from 2.46 to 0.05; and Vocal Disruption dropped from 9.06 to 0.33 times/hour.<sup>80</sup> Special Education Specialist testified that he never thought Student needed ABA and hadn’t made progress with ABA therapy.<sup>81</sup>

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<sup>74</sup> Special Education Specialist; Special Education Teacher.

<sup>75</sup> Clinical Director.

<sup>76</sup> *Id.*

<sup>77</sup> P10-13; P9-10; P20-4; Clinical Director.

<sup>78</sup> P9-10; *see also* P16-4 (DCPS had prior information that Student’s behaviors had improved from the 2016 DPH, with 79% reduction in aggression per ABA Provider tracking).

<sup>79</sup> P10-13,14; P11-4.

<sup>80</sup> P20-4 (vocal disruption baseline added in April 2016).

<sup>81</sup> Special Education Specialist.

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23. In the 1/30/17 IEP, DCPS included other baseline data that was no longer accurate, such as Student being able to form only 13/26 letters, which the Nonpublic School team told DCPS was not accurate.<sup>82</sup> During the IEP meeting, DCPS refused to accept information from Student's teachers and experts – due to the source – to update the out-of-date information in the IEP which was also expressly from Student's teachers.<sup>83</sup>

24. CES Program. The CES program is a self-contained program for children needing 20 or more hours/week of specialized instruction outside general education due to “significant communication issues and significant behavior issues”; CES classrooms are likely to contain nonverbal students who need applied verbal behavior interventions.<sup>84</sup> The CES program has more students diagnosed with autism than any other disability.<sup>85</sup> Upon being recalled in the due process hearing, Director confirmed that CES programs are primarily for students with severe communications needs and severe behavior or those who are behind academically.<sup>86</sup>

25. The CES program is geared towards students below grade level.<sup>87</sup> In the CES program, the curriculum is modified to meet students' needs and follow their IEPs.<sup>88</sup> If Student attended, grade level curriculum would be made available in the CES classroom.<sup>89</sup> If Student is able to do Common Core academics but needs a smaller setting, Early Learning Support (“ELS”) or Specific Learning Support (“SLS”) programs would be much more appropriate than CES.<sup>90</sup>

26. DCPS has moved away from the term high functioning autism (“HFA”) because of changes in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) which now uses numbered autism levels in place of “high functioning.”<sup>91</sup> Students with what used to be called HFA and who meet specific criteria may be eligible for DCPS's CES-Executive Function program, which may either be inclusion or full-time CES.<sup>92</sup> Assistant Principal testified that DCPS has CES high functioning programs in some locations, but that there is not much distinction because the CES program at Proposed Public School is “all high

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<sup>82</sup> P10-16; Head of School (Student can do letters); Dean of Students (same).

<sup>83</sup> P10-15; Educational Advocate.

<sup>84</sup> P5-5; Director; P6-6 (children need the CES program if they have “significant behavior and/or significant communications needs”).

<sup>85</sup> Director.

<sup>86</sup> *Id.*

<sup>87</sup> Program Specialist.

<sup>88</sup> Director; P6-6.

<sup>89</sup> Program Specialist.

<sup>90</sup> Director.

<sup>91</sup> *Id.*

<sup>92</sup> P43-15; Director (testified about CES-Executive Function – inclusion strategies program).

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functioning too.”<sup>93</sup> Proposed Public School does not have a CES-Executive Function program.<sup>94</sup>

27. DCPS sent a locations of services (“LOS”) letter to Parent on 4/4/17 stating that Student’s service would be at the CES program at Proposed Public School and proposing times for a tour.<sup>95</sup> Another LOS letter was sent to Parent on 6/5/17.<sup>96</sup> Parent and the other non-DCPS members of Student’s IEP team had no input into Student being assigned to a CES program; nor did DCPS indicate whether the program was high functioning or not.<sup>97</sup>

28. In the CES classroom identified for Student at Proposed Public School, there are 7 children in the 3 grades that make up the grade band for the class and none have severe behaviors; 2 of the children are verbal enough that they can be understood; one verbal student is the only child in Student’s grade and is on grade level, the other verbal child is a grade below Student.<sup>98</sup> Educational Advocate visited that CES classroom at Proposed Public School and found the children were lower functioning than Student; the children could respond verbally, but did not initiate conversation.<sup>99</sup> Having good language models is important for Student in the classroom; pragmatic language development needs appropriate peers available for interaction.<sup>100</sup>

29. Lunch, recess or specials in general education would be overstimulating for Student.<sup>101</sup> At Proposed Public School, it is easy to adjust so that lunch and recess can be with general education children or not, as needed, and can shift on a day by day basis.<sup>102</sup> One or both of the verbal CES children in the class at issue tend to go with the ELS class of the same grade band, and that class tends to be with non-disabled children much of the time for lunch and recess, with a total of fewer than 60 children and about 10 staffers at lunch.<sup>103</sup> The 5 nonverbal CES children in the class find the cafeteria overstimulating, so eat in the classroom apart from their non-disabled peers and have separate recess together as a class.<sup>104</sup> Specials are just for the CES class, without any other classes.<sup>105</sup>

30. Student shouldn’t be with nonverbal children as Student needs verbal peers to engage and would acquire the skills of lower functioning peers to Student’s detriment.<sup>106</sup>

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<sup>93</sup> Assistant Principal.

<sup>94</sup> Director.

<sup>95</sup> P2-80,81.

<sup>96</sup> P2-102.

<sup>97</sup> Educational Advocate.

<sup>98</sup> Assistant Principal.

<sup>99</sup> Educational Advocate.

<sup>100</sup> Speech-Language Pathologist; Program Specialist.

<sup>101</sup> Head of School.

<sup>102</sup> Assistant Principal.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Head of School.

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Student needs a higher performing group or will become bored and have more negative behaviors.<sup>107</sup> Student couldn't handle the DCPS high functioning inclusion program; DCPS doesn't have an appropriate CES program for Student now.<sup>108</sup> Student needs a highly structured program with a low student-teacher ratio, classmates who are able to communicate, and a challenging program that is on or above grade level.<sup>109</sup> Student needs OT for ongoing sensory issues, but does not need speech-language beyond social language in the classroom and does not need BSS apart from ABA Provider periodically checking on Student.<sup>110</sup>

31. Student doesn't need what DCPS is offering with a lower functioning situation without academic challenges, but does need a small classroom with a challenging curriculum and support with pragmatic language in a natural setting with constant review of how Student is doing and working in a group, with help dealing with frustration and OT working on Student's self-regulation.<sup>111</sup> The 1/30/17 IEP meeting discussed Student not being on track for a diploma at Proposed Public School, which would cause Student extreme regression if Student were held below Student's potential.<sup>112</sup>

32. At Nonpublic School at the beginning of 2017/18, students focused on "being part of a group" and Student participated in both small-group and whole-group activities; in Nonpublic School's 10/11/17 Progress Report, Student showed tremendous growth in peer interaction during both unstructured and structured activities; Student seeks to interact and engage in topics of conversation of interest.<sup>113</sup>

33. In Psychologist's expert opinion, a CES program would not be appropriate for Student.<sup>114</sup> The ELS or SLS programs may be more appropriate than CES, if Student needs 20 or more hours of specialized instruction outside general education, as children in those programs are generally on grade level and receiving Common Core curriculum.<sup>115</sup>

34. Student does not do well with transitions; it would be very harmful to move Student anywhere midyear, as illustrated by the difficulty transitioning to a new classroom at Nonpublic School at the beginning of 2017/18.<sup>116</sup> Petitioner's counsel emailed Parent's notice of unilateral placement of Student at Nonpublic School for 2017/18 on 7/7/17.<sup>117</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> Educational Advocate.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Dean of Students.

<sup>112</sup> *Id.*

<sup>113</sup> P24-2.

<sup>114</sup> Psychologist.

<sup>115</sup> Director.

<sup>116</sup> Head of School.

<sup>117</sup> P3-1,2,3.

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35. Nonpublic School Is Proper. Nonpublic School works with high-functioning students with autism and other communication deficits who need a small environment to avoid school anxiety and enable social learning; the classes are small and the school has fewer than 60 children in total.<sup>118</sup> Nonpublic School's students are generally able to function at grade level and use Common Core curriculum; not all have IEPs or even disability diagnoses, although all have communications needs.<sup>119</sup> Nonpublic School is located in the suburbs of the District of Columbia and has a state certificate, but has not applied for a certificate from the Office of the State Superintendent of Education ("OSSE").<sup>120</sup> Tuition is about \$40,000 a year for the 10-month program; DCPS funds a few students at Nonpublic School.<sup>121</sup> School at Nonpublic School is 6.5 hours/day (32.5 hours/week).<sup>122</sup>

36. Student is in a class at Nonpublic School with about 10 children, 2 teachers and 2 assistants; part way through 2017/18 the room was evenly divided into 2 classes that are sometimes brought together.<sup>123</sup> Student's classmates are autistic; all are high-functioning.<sup>124</sup> Student's Nonpublic School classroom is meeting Student's needs; Student is no longer eloping, having tantrums, or dropping to the floor, as in the past.<sup>125</sup> As of 1/30/17, Clinical Director viewed Student as "making progress for sure" with ABA and later faded out ABA services.<sup>126</sup> Student's 2016/17 and 2017/18 (term 1) report cards from Nonpublic School indicate growth.<sup>127</sup> In sum, Student is making very good progress at Nonpublic School.<sup>128</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>118</sup> Head of School.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Psychologist.

<sup>125</sup> *Id.*

<sup>126</sup> P11-7; Clinical Director.

<sup>127</sup> P22-1; P24-3.

<sup>128</sup> Educational Advocate.

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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, 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(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘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 Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

**Issue 1:** *Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 1/30/17 which: (a) did not reflect prior Hearing Officer decisions and directly contradicted a 9/1/16 HOD; (b) provided inappropriate related services based on outdated data, including pull-out services for OT, Speech and Language, and Behavioral Support Services; (c) failed to provide sufficient information about Student’s appropriate educational placement/LRE/continuum of services; (d) included a “dedicated aide” instead of a 1:1 ABA shadow under the supervision of a BCBA; (e) did not involve Parent or a team knowledgeable about Student in the IEP services and placement determination; and (f) could not be implemented in Student’s “current educational program” and was created by DCPS to not be implemented. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did establish a prima facie case on this issue, shifting the burden to Respondent which failed to meet its burden of persuasion. The decisions to be made in this case would be more difficult had there not been previous determinations relating to this Student in the recent past. With those decisions in place, however, Petitioner clearly prevails on her IEP claim, in particular the need for an ABA shadow, among other things.

The applicable legal standard for analyzing the appropriateness of an IEP was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was “reasonably calculated to produce meaningful educational benefit” and to permit Student to access the general education curriculum to the extent possible. *See Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEP are routinely determined as of the time it was offered to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Here, in addition to analyzing the IEP when developed, further consideration is given to whether it was appropriate when it might have been implemented prior to the start of 2017/18.

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The appropriateness of Student's IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.<sup>129</sup> See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Impact of Prior Decisions. It is not within the jurisdiction of Hearing Officers as a regular matter to enforce prior decisions that have been rendered, although the substantive issue in the prior decisions may be ruled on again as needed. As Petitioner's counsel argued at the close of the due process hearing, in appropriate circumstances collateral estoppel may be applicable and narrow the issues to be resolved and the testimony required in the case. In the posture here, with all the evidence already heard, the undersigned will simply rule on the merits of the issues as presented in this case, including subpart (d) below.

(b) Related Services on IEP. A great deal of attention was given to the appropriateness of related services on the 1/30/17 IEP, with particular emphasis on speech-language services which Student's advocates had long believed Student did not need and had not been receiving at Nonpublic School. On the other hand, DCPS relied on earlier evaluations that found some speech-language deficits that purportedly required speech-language services to remain on Student's IEP for a full hour a week until Student was properly exited by a speech-language pathologist. Since Student was not receiving services, however, there was no speech-language pathologist involved to say services could stop, resulting in a Catch-22 where DCPS seemed to argue that speech-language services had to begin in order to be stopped.

Even more troubling in the area of speech-language was that DCPS removed more recent data (the 11/17/15 DCPS observation and 11/3/15 information from Nonpublic School) from the present levels of performance in the 1/30/17 IEP, and left older data (information from 2/10/15 and 5/30/14) which made Student appear to be in greater need of the services that DCPS insisted on including in the IEP. Similarly, DCPS left in the 1/30/17 IEP the statement that Student's "reduced use of oral language" may cause difficulties. All of this was done despite the concerns raised in the IEP meeting that there were significant changes needed in the area of speech-language, that the speech-language data was out of date, and that Student did not receive pullout speech-language services. The undersigned is of the view that in these circumstances DCPS should simply have conducted a speech-language evaluation of Student to obtain accurate data from which to make reasonable decisions.

As for OT, DCPS was relying on old data until Parent sought an updated OT assessment that Educational Advocate promised to send to DCPS when completed. When that assessment was sent, DCPS objected to receiving just a summary and sought a more detailed report that incurred additional costs for Parent. Yet even after the more thorough report was done, DCPS considered the OT assessment as being insufficient because it had

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<sup>129</sup> As an initial matter, a Hearing Officer must determine whether "the State complied with the procedures" set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, *quoting Rowley*, 458 U.S. at 206-07. Apart from the concerns about parental participation discussed in Issue 2 below, no explicit procedural violations were alleged in this case.

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not considered issues from the school perspective, so there were “holes” in the report. DCPS’s expert asserted that DCPS could not do its own evaluation within a year due to improper repetition of the testing, but acknowledged to the undersigned that DCPS could have filled the holes in the independent assessment, but had not taken steps to do so. To the extent that disagreement remains between the parties on OT, the undersigned encourages DCPS to complete the evaluation to fill any necessary holes.

Turning to BSS, DCPS included the goals from the ABA behavior plan and expected them to be achieved with 30 minutes/week of BSS, even though they had taken 32 hours/week for the trained ABA shadow to carry out. Of course, as discussed below, the ABA services are no longer needed, so the goals from the behavior plan are not appropriate either. Furthermore, the baselines for the goals are wildly inappropriate as discussed in detail in the Findings of Fact.

Finally, it is worth noting that with Student’s great difficulty in transitions, the 1/29/16 IEP had specified that related services should be provided in Student’s classroom to the extent possible. Yet in the 1/30/17 meeting DCPS appeared entirely unconcerned by the perspectives and views of those who actually know and work with Student. Thus, the prior requirement in Other Classroom Aids and Services to provide all ancillary services (OT, speech-language, BSS) in the classroom setting and not having any pullout ancillary services was removed from the 1/30/17 IEP, despite DCPS having information about Student’s earlier IEP team intentionally pushing related services into the classroom from both the earlier IEP and the 2016 due process hearing.

A DCPS theme at the due process hearing was that the 1/30/17 IEP was adequate since it was based on the best information available, even though DCPS rejected out of hand much of the information that Student’s teachers and experts offered to update provisions – even when some of those IEP provisions expressly stated they were from Student’s teachers – and did an inadequate job of obtaining updated information for the IEP from other sources. In the view of the undersigned, taken together these matters of related services, inadequate present levels of performance and erroneous guidelines deprived Student of educational benefit and impeded Student’s right to a FAPE by misallocating and misdirecting Student’s services and thus are a denial of FAPE pursuant to 34 C.F.R. 300.513(a) and contribute to the remedy below.

(c) Insufficient Information on Placement/LRE. Student’s 1/30/17 IEP did not specify its location on the continuum of alternative placements, and 25.5 hours/week of specialized instruction outside general education plus related services can be implemented in many settings. Indeed, a DCPS witness testified that there was no discussion in the 1/30/17 IEP meeting even about whether lunch and recess in general education were appropriate for Student, although that would be suggested by the 25.5 hours on the IEP. Although the undersigned concludes that this concern is not alone sufficient to be a denial of FAPE, the LRE description should be specific enough to adequately inform Parent about the plan, as well as allow another district to understand the program and supports intended for Student were the IEP to be implemented elsewhere. *See Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25 (D.D.C. 2016) (“the IEP must be ‘specific enough to allow parents to understand what services will be provided and make a determination about whether the

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proposed placement is adequate.’ *Stein*, 709 F.Supp.2d at 70”). *See also* 34 C.F.R. 300.320(a)(5),(7); *A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 159 (D.D.C. 2005).

(d) Dedicated Aide or 1:1 ABA Shadow. One of the ongoing disputes concerned the need for a dedicated aide or a 1:1 ABA shadow. The June 2016 HOD properly considered the ABA shadow as a type of dedicated aide, and was clear that Student needed “this” aide, expressly referring to the ABA shadow (P38-21,27). *See generally L.M.P. on behalf of E.P. v. Sch. Bd. of Broward County, Florida*, 2018 WL 477268, at \*1 (11th Cir. Jan. 19, 2018) (ABA is an applied science for producing significant changes in behavior and provides a broad umbrella under which there are numerous intervention strategies).

During the 1/30/17 IEP meeting, Clinical Director explained that the goal for Student was to fade out ABA services so that the shadow would no longer be required, but that was not possible at that point, although later on it was. At the beginning of 2017/18 with the transition to a new class at Nonpublic School, Student’s negative behaviors increased again, so intensive ABA services with the 1:1 shadow were again provided and then tapered off, ending in late September 2017. Indeed, the documented improvement in Student’s behavior in just over 2 years from the use of ABA was nothing short of remarkable, with incidents of aggression decreasing from 7.74 times/hour to only 0.01 times/hour (that is, once every 100 hours); elopement dropped from 1.51 times/hour to 0.05; disruption dropped from 5.99 to 0.10; dropping to the floor decreased from 2.46 to 0.05; and vocal disruption dropped from 9.06 to 0.33 times/hour. Yet, inexplicably, DCPS viewed ABA as unnecessary for Student and even disputed that Student had made progress with ABA therapy and the ABA shadow.

In light of the above evidence, this Hearing Officer concludes that both at the time the 1/30/17 IEP was created and at the beginning of 2017/18 when the IEP (had it been appropriate) would have been implemented, the record is clear that Student was in need of a 1:1 ABA shadow and could not have accessed the curriculum with a dedicated aide. Moreover, once Student got past the initial challenges of the new classroom in September 2017, there was no longer a need for an ABA shadow and the credible testimony from senior staff at Nonpublic School was that having a dedicated aide could actually have caused Student to regress. The undersigned concludes that failure to include an ABA shadow was a denial of FAPE which contributes to the remedy below.

(e) Parental Involvement. Parent and her advocates were thoroughly involved in discussions about the development of Student’s 1/30/17 IEP and the services needed. Indeed, it is hard to imagine that they could have been any more involved, even though their views often did not prevail. Participation does not constitute veto power or the right to control the IEP team’s ultimate decisions. *See, e.g., Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010).

Educational placement is an entirely separate matter. Parental involvement in the placement discussions and determination is addressed in Issue 2, below.

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(f) IEP Implementation. Petitioner's counsel sought an IEP in January 2017 that would embody the requirements of the June 2016 HOD and the November 2016 Order and be implemented at Nonpublic School for 2016/17, even if a different IEP were developed by DCPS later in the year for 2017/18. Instead, DCPS developed the 1/30/17 IEP at issue here, even though it could not have been implemented in 2016/17 without violating the prior decisions in this case. However Petitioner's counsel has not demonstrated how lack of IEP implementation in January 2017 caused substantive harm, as Student continued to receive education at Nonpublic School as required in the prior decisions, and DCPS is responsible for payment of Nonpublic School. On balance, this Hearing Officer concludes that not having a suitable IEP in place for Student for 2016/17 did not interfere with Student's education or Petitioner's decision-making, so was not a denial of FAPE.

Denial of FAPE. In considering the concerns above, the undersigned is cognizant of the fact that the analysis is not about achieving a perfect IEP, but one that is reasonably calculated to enable Student to make appropriate progress. *Andrew F.*, 137 S. Ct. at 1001. *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at \*21 (D.D.C. 2016) (a "properly developed IEP 'need not guarantee the best possible education or even a potential-maximizing one.'" *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015) (internal quotation marks omitted)). Yet the undersigned is clear that based on the violations found above, the 1/30/17 IEP denied Student a FAPE as it was not reasonably calculated to enable Student to make appropriate progress under the circumstances, which results in the remedy set forth below.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement prior to 2017/18, as placement in the CES program at Proposed Public School was not appropriate where it (a) was not designed to meet Student's unique needs based on Student's disabilities, and (b) did not involve Parent or a team knowledgeable about Student in the placement decision which DCPS delegated to an "LRE team."* (Respondent has the burden of persuasion on this issue, if Petitioner establishes a *prima facie* case.)

Petitioner next challenges the appropriateness of Student's proposed placement in the CES program at Proposed Public School, on which she has made out a *prima facie* case. Respondent did not meet its burden of persuasion, as it is clear to the undersigned that the CES program at Proposed Public School was not an appropriate educational placement for Student.

(a) Designed for Student's Needs. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements). Here, the CES classroom at Proposed Public School was inappropriate in various ways.

Most notable was the concern about Student not having an appropriate peer group and the incompatibility of Student and other children in the CES class. *See, e.g., DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989) (placement may not

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be adequate without “appropriate peer group academically, socially or vocationally”). While Student was described as very verbal, in the proposed CES classroom most of the children were nonverbal. The evidence from DCPS was that only 2 of the 7 children were verbal enough to be understood. One of the verbal children was in Student’s grade and on grade level, while the other was in the grade behind Student. This raises concerns, for experts in the case who know Student testified that Student shouldn’t be with nonverbal children, as Student needs a higher performing group or will become bored and begin having more negative behaviors and might regress by acquiring the skills of lower functioning peers. A classroom of students with differing intellectual, social, and behavioral needs may satisfy the IDEA as long as “a core group [is] operating at an intellectual level sufficiently comparable” to Student’s to permit Student to continue making academic progress. *S.F. v. New York City Dept. of Educ.*, 2011 WL 5419847, at 17 (S.D.N.Y. 2011), quoting *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 133-34 (2d Cir. 1998). But in the CES class at Proposed Public School, it is not at all clear that there was a “core group” at a comparable intellectual level to Student.

Further, credible testimony established that having good language models is important for Student in the classroom, since pragmatic language development needs appropriate peers available for interaction. But there was no indication that having 1 or even 2 verbal peers would be sufficient in an otherwise nonverbal class. *Cf. K.R. ex rel. Matthew R. v. New York City Dept. of Educ.*, 107 F. Supp. 3d 295, 312 (S.D.N.Y. 2015) (4 verbal students in class, with only 1 nonverbal student, should be able to model verbal communications and maintain interaction, conversation and language-based play). Any ambiguity is removed, however, when considering how lunch and recess would play out for Student in the CES classroom, which are times when pragmatic language can be most exercised among peers.

The unambiguous testimony was that lunch or recess in general education would be overstimulating for Student. However, at Proposed Public School the CES children can have lunch and recess with general education children or apart from them depending on the needs of the CES children. Importantly, both of the verbal children in the CES class generally do have lunch and recess with the general education population, while the nonverbal children choose to avoid general education kids and thus eat in their classroom and go to recess as a class apart from general education. Thus, since Student could not be with general education children for lunch and recess, Student would remain with the 5 nonverbal children and without peers to engage in conversation. The undersigned concludes this is clearly insufficient.

Moreover, the testimony of Director of the CES program was noteworthy that the CES program was designed for those with severe communications or severe behavior issues, which does not describe Student. The undersigned found the Director’s conclusion compelling that a child like Student wasn’t a good fit for CES and would be better suited for the ELS or SLS programs.

There was also much focus on the fact that DCPS had previously assigned Student to a high-functioning autism classroom, but did not do so this time despite Student’s functioning level. However, it was not clear whether such an option (under whatever name)

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would be suitable for Student, for many of those classrooms apparently involve an inclusion setting that would not be appropriate for Student at this time.

Respondent failed to carry its burden of persuasion on the proposed placement of Student in the CES program. There was a material failure and discrepancy between the services proposed for the disabled child and the services required by that child's IEP. *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). This was a denial of FAPE and provides an independent basis for the remedy below.

(b) Parental Involvement. The IDEA clearly requires parental involvement in “decisions on the educational placement of their child.” 34 C.F.R. 300.327; 34 C.F.R. 300.116(a)(1) (requiring public agency to ensure that the educational placement decision is made by a group that includes parents); 34 C.F.R. 300.501(c) (same); *Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013); *A.M.*, 933 F. Supp. 2d at 198. *But see Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute veto power over the IEP team's decisions).

Here, there was no doubt that Parent and the other non-DCPS members of Student's IEP team had no input into Student's placement in the CES program, much less any discussion of whether the program was high functioning or not. The clarity that Director brought with her perspective that Student may have been better suited for the ELS or SLS programs helps illustrate why having placement discussed by the IEP team is so important, so that such possibilities can be explored when placement is being decided, rather than many months later in a due process hearing. While DCPS may have been unmoved by Parent's input, and Parent would have had no veto power over the placement decision, Parent does have the right to be part of the group making the education placement decision.

Excluding Parent from the placement decision is a procedural violation of the IDEA, but “[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child,” and is thus a denial of FAPE. 34 C.F.R. 300.513(a). *See Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 24, 29 (D.D.C. 2016) (collaboration is vital). This provides another independent basis for the remedy below.

Moreover, the law is clear that parents are not obliged to put their children into situations that do not appear viable in order to prove a denial of FAPE. As the Court explained in *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 72 (D.D.C. 2010),

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

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district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement").

### Remedy

As the remedy for the denials of FAPE found above, Petitioner seeks reimbursement of payments to Nonpublic School for 2017/18 to date, as well as for Student to be placed and funded at Nonpublic School for the remainder of 2017/18. The requested reimbursement and future funding requested is ordered below, based on the Court's guidance that the essence of equity jurisdiction is "to do equity and to mould each decree to the necessities of the particular case." *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

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

As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement – that is, the parents did not otherwise act "unreasonabl[y]."

Here, the first prong of *Leggett* is met as discussed above, due to the denials of FAPE by DCPS failing to develop an appropriate IEP, offer Student an appropriate placement, and permit parental participation.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student. Here, Nonpublic School was found proper for Student in both the June 2016 HOD and the November 2016 Order. Indeed, Nonpublic School is the only school that has ever been found proper or appropriate for Student. Further, Student's remarkable improvements through ABA therapy and overall progress at Nonpublic School were credibly articulated during the due process hearing by Educational Advocate and others who know and work closely with Student. The undersigned has no doubt that the second prong of *Leggett* is satisfied.

The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioner acted unreasonably. Here there appeared to be a high level of conflict between the 2 parts of the IEP team, which the undersigned views as highly unfortunate but not the direct responsibility of Parent. DCPS did not make a case that the third prong was not satisfied and the undersigned concludes that it is satisfied.

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In addition, Petitioner seeks a revised IEP to include specified provisions sought by Petitioner or to be aligned with this HOD. However, the undersigned does not consider it helpful to try to prescribe the specific IEP details that may be needed to provide FAPE for Student many months in the future in very likely changed circumstances. This Hearing Officer would simply encourage both sides to be as collaborative as possible, setting aside the conflicts of the past in an effort to provide what this child needs in the future. In particular, for future IEP team meetings while Student is at a nonpublic school this Hearing Officer recommends – but does not require – that at least one or more of the DCPS staffers meet in person with the nonpublic school personnel to enhance the communication between the 2 groups even if others need to be on the telephone.

Next, Petitioner included a stay-put determination as requested relief, which the undersigned views as moot in these circumstances where Petitioner has prevailed on the merits of the case and is entitled to ongoing funding of Nonpublic School. Thus, stay-put is not included in the order below, although if it were needed it would have been based on the stay-put order of the undersigned for this Student on 10/21/17 in Case No. 2017- 0277.

The final issue to be considered is how long Student may stay at Nonpublic School pursuant to this Order, which is to say how soon DCPS can newly assert that it has made a FAPE available in the future. There is no factual dispute that Student is very sensitive to any changes in program, as DCPS knows. Student would be significantly harmed if subjected to a mid-year transfer to any other school or program. Accordingly, this Hearing Officer concludes that Student should not be moved (absent agreement by Parent) from Nonpublic School during 2017/18. DCPS is ordered below to fund Student's placement at Nonpublic School for the remainder of 2017/18. *See Lopez-Young*, 211 F. Supp. 3d at 55; *Branham v. Gov't of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (asking whether setting aside remedial order might disrupt child's education). However, DCPS is not required to maintain Student's placement at Nonpublic School beyond 2017/18, if it offers an appropriate public or private school program prior to the beginning of 2018/19. *See, e.g., Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (if an appropriate public school program were available, DCPS would not need to consider nonpublic placement).

### **ORDER**

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

- 1) Upon receipt of documentation of payment by Petitioner, DCPS shall within 15 business days reimburse Parent the costs of Nonpublic School for Student that she has paid for the 2017/18 school year, including tuition, related services, transportation, and any other associated costs.
- 2) In addition, DCPS shall fund Student's placement at Nonpublic School for the remainder of the regular 2017/18 school year, including tuition, related services, transportation, and any other associated costs, and continuing until DCPS offers a FAPE to Student.

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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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