

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

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

OSSE
Office of Dispute Resolution
February 26, 2018

<i>Student</i> , ¹)	Case No.: 2017-0330
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 2/8/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 1/26/18
("DCPS"),)	ODR Hearing Room: 112
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 Student was not provided an appropriate placement, Student’s Individualized Education Program (“IEP”) was not fully implemented, and Student was not evaluated as needed. DCPS responded that the placement was appropriate, the IEP largely implemented, and evaluations would be conducted.

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 12/12/17, the case was assigned to the undersigned on 12/13/17. Respondent filed a response on 1/10/18 and did not challenge jurisdiction. The resolution session meeting (“RSM”) was held on 1/5/18. The

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

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30-day resolution period ended on 1/11/18. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 2/25/18.

The due process hearing took place on 1/26/18 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout the hearing.

Petitioner’s Disclosures, submitted on 1/19/18, contained documents P1 through P44, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 1/17/18, contained documents R1 through R11, which were admitted into evidence without objection.

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. *Psychologist* (qualified without objection as an expert in Clinical Psychology)
2. *Educational Advocate* (qualified without objection as an expert in Special Education Programming and Implementation of IEPs)
3. Parent

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see Appendix A*):

1. *Assistant Principal at Proposed Public School B* (qualified over objection as an expert in Special Education Programming and Placement)
2. *Special Education Coordinator at Public School* (qualified without objection as an expert in Special Education Programming and Placement)

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of services on 10/6/17 and/or 10/10/17 when it proposed placement in a CES program for autistic and non-verbal students at *Proposed Public School A* and then Proposed Public School B for which Student is not a good fit and which could harm Student, rather than a separate, therapeutic, special education day school. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to fully implement Student’s 12/15/16 IEP during 2017/18,² when it did not provide the requisite hours of (a)

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

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speech-language therapy (240 minutes/month), and/or (b) occupational therapy (180 minutes/month). *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to reevaluate Student upon the request of Parent on 9/29/17 for (a) a comprehensive psychological reevaluation, (b) an occupational therapy (“OT”) reevaluation, and (c) a speech-language reevaluation, which were needed to determine appropriate placement/location of service. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall convene a meeting to determine an appropriate placement.³
3. Within 10 business days, DCPS shall fund (a) an independent comprehensive psychological evaluation, (b) an occupational therapy evaluation, and (c) a speech-language evaluation.
4. DCPS shall fund compensatory education for any denial of FAPE.⁴
5. Any other just and reasonable relief.

Findings of Fact

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

³ At the beginning of the due process hearing, Petitioner expressly withdrew without prejudice the requested relief of “fund an appropriate placement for Student in a separate day school,” which had been part of this second paragraph of relief requested.

⁴ 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 at the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE were found.

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.

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age, Gender* and in *Grade* at Public School, where Student began in 2017/18.⁷ Student arrived at Public School by way of the lottery for a seat in the school, aided by a sibling preference; Student was aging out of Prior School, so needed to go somewhere.⁸

2. Student has had a seizure disorder since a very young age and had to wear a helmet daily until the seizures reportedly stopped in 2015/16.⁹ Student's seizures resulted in delayed academic development.¹⁰ A 7/14/16 Psycho-Educational Reevaluation stated that Student continued to experience a significant level of seizure activity, which can alter brain functions and lead to deterioration of inherent intellectual potential.¹¹ In an email on 10/25/17, Educational Advocate indicated that Student continues to experience a significant level of seizure activity.¹²

3. Student has been eligible for special education and related services for several years with a disability classification of Other Health Impairment ("OHI") due to epilepsy.¹³ Student's most recent amended IEP, dated 10/11/17, provides for 25.75 hours/week of specialized instruction outside general education, 240 minutes/month of speech-language pathology outside general education, and 180 minutes/month of OT inside general education.¹⁴

4. In late spring/early summer of 2016, Student's MDT team noticed a decrease in Student's intelligibility and overall coordination, resulting in the MDT team deciding on comprehensive Psychoeducational, Speech Therapy, and OT Evaluations to determine Student's levels of functioning.¹⁵ Student's 7/20/16 OT Evaluation found signs of regression in several areas.¹⁶

5. Student's IQ is low; cognitive scores usually remain relatively constant.¹⁷ A Comprehensive Developmental Evaluation of Student on 12/1/12 used the Kaufman Assessment Battery for Children ("KABC") and found a knowledge index of 68, which is in the Depressed range.¹⁸ A 7/14/16 Psycho-Educational Reevaluation found that Student's

⁶ Parent.

⁷ *Id.*

⁸ *Id.*

⁹ P9-2; Psychologist (epilepsy).

¹⁰ P9-2.

¹¹ P8-1,2.

¹² P34-16.

¹³ P11; P12; P13, P14; P16.

¹⁴ P16-1,11.

¹⁵ P9-2.

¹⁶ P9-2,9.

¹⁷ Educational Advocate.

¹⁸ P5-1,6; Psychologist.

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nonverbal cognitive ability fell within the Very Low range with a score of 63 based on the Primary Test of Nonverbal Intelligence (“PTONI”).¹⁹

6. Student has significant communication deficits and weaknesses; Student is difficult to understand unless the listener is experienced with Student.²⁰ Student’s earlier IEPs recognized significant communication delays in overall articulation skills, as well as expressive and receptive language skills.²¹ More recent IEPs state that Student’s communication skills are years behind (despite Student’s young age) and affected by slurred speech.²² A Speech and Language Evaluation of Student on 7/14/16 found that lack of communication skills greatly impacts Student’s ability to function in the general education classroom as Student’s skills are significantly below chronological age; Student is not able to follow directions and follow along with same age peers in the general education classroom.²³ Student continued to qualify for speech-language services, with 240 minutes/month recommended.²⁴

7. Academically, Student displayed Below Average skills in answering general fact questions and on Achievement Composite Student scored a 60 on the Young Children’s Achievement Test (Educational Skills).²⁵ As of 10/6/17, Student was reading 2 years below grade; Parent noted that she had held Student back one grade, so the deficit would otherwise have been 3 years below grade.²⁶ Student was failing classes in the first term of 2017/18 and had weak social skills.²⁷

8. Evaluation Requests. Petitioner’s counsel made a formal request for reevaluation of Student on 9/29/17, seeking comprehensive psychological, OT and speech-language evaluations.²⁸ Parents both signed a consent to evaluate and for release of educational records of Student by 10/10/17.²⁹ Based on Student’s seizures, on 10/25/17 Petitioner requested a neuropsychological evaluation of Student.³⁰ Since epilepsy impacts the brain, a neuropsychological evaluation would be helpful to determine what is going on with Student.³¹

¹⁹ P8-1,3,5; Psychologist.

²⁰ Psychologist; Educational Advocate (Student’s communications concerns go beyond speech).

²¹ P12-2; P13-2.

²² P14-3; P16-2.

²³ P7-14.

²⁴ *Id.*

²⁵ P8-4,5; Psychologist.

²⁶ P15-2.

²⁷ Psychologist; P21-1.

²⁸ P33-3.

²⁹ P17-6; P26-1; Parent.

³⁰ P34-16.

³¹ Psychologist.

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9. During the RSM, DCPS stated that Student would be reevaluated once moved to a new school setting; the issue was not whether Student would be reevaluated, but when.³² Psychologist credibly testified that conducting evaluations in the ongoing school that Student would be attending is preferable to evaluation while at a school temporarily, if that doesn't cause too long a delay.³³

10. Public School completed an Educational Evaluation prior to the due process hearing and let Educational Advocate know the results were back the evening before the due process hearing, but did not provide the results to Petitioner's advocates.³⁴ The Educational Evaluation is insufficient by itself, as it will simply reveal where Student's academic skills are.³⁵

11. Schools. Parent gave Student's full-time IEP to Special Education Coordinator on the first day of school at Public School in 2017/18.³⁶ Special Education Coordinator immediately recognized that Public School would not be able to implement the full-time IEP and immediately contacted DCPS's Central Office for help.³⁷ Special Education Coordinator noted that Public School had been "upfront" with Parent about not being able to implement Student's IEP there.³⁸

12. Student did not have behavior problems before beginning at Public School; Student had never been suspended.³⁹ Since starting at Public School in 2017/18, Student began displaying very aggressive behaviors toward peers and staff; Student was biting, kicking, spitting, roaming, choking and improperly hugging and kissing; a Safety Plan was developed for Student on 9/26/17.⁴⁰ Student has particular difficulty with transitioning and needs a full-time self-contained setting with minimal transitions.⁴¹

13. At Public School, Student spent the entire day in the resource room, so was away from general education students all day; Student walked with the resource teacher to pick up other children for their time in the resource room, but got to the point that Student wouldn't walk with the teacher, but ran away or caused other problems.⁴²

14. DCPS proposed CES programs for Student, first at Proposed Public School A and then at Proposed Public School B.⁴³ The CES program is for children with behavior and

³² Educational Advocate.

³³ Psychologist.

³⁴ Educational Advocate.

³⁵ *Id.*

³⁶ Parent.

³⁷ Special Education Coordinator.

³⁸ P17-6; Educational Advocate (Public School said not able to meet Student's needs).

³⁹ Educational Advocate; Parent.

⁴⁰ P34-16; P18-1,2; Psychologist.

⁴¹ Psychologist.

⁴² Parent.

⁴³ Psychologist.

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communication problems, which often includes children with an autism spectrum disorder or an intellectual disability.⁴⁴ Educational Advocate acknowledged that the CES program is not solely for children with autism.⁴⁵ Applied Behavior Analysis (“ABA”) is often used with those on the autism spectrum, but Proposed Public School B did not say that ABA would be used for Student.⁴⁶

15. At Proposed Public School A, the CES class takes specials, lunch and recess with non-disabled peers.⁴⁷ Parents did not agree with Student being enrolled at Proposed Public School A, as Parents and advocates sought a full-time program, including lunch, recess and specials out of general education.⁴⁸

16. The CES class proposed for Student at Proposed Public School B has a “grade band” with 3 grades in the same classroom.⁴⁹ Educational Advocate observed that classroom, which has 5 students (1 was absent), 1 teacher and 2 assistants; Educational Advocate did not ask whether the students were verbal or nonverbal, but only saw 1 of the 4 students speaking during the observation.⁵⁰ The abilities of the children in the class varied notably, so the instructional levels varied.⁵¹ Parent also observed the CES class and saw the teacher speaking to the children, but never saw the children speak back.⁵² Parent understood from Assistant Principal that all the CES students were autistic, but was told that she wouldn’t be able to tell and Parent agreed that she couldn’t.⁵³ Psychologist understands that Proposed Public School B CES students are generally autistic or ID with a range of abilities; communication deficits are the key factor in common.⁵⁴

17. Assistant Principal credibly testified that there are 5 students in the CES classroom and that they have a mix of disabilities, as not all are autistic.⁵⁵ Four of 5 (80%) of the CES students are verbal and able to hold a conversation.⁵⁶ All the CES students are well-behaved and participate in their education, even up to grade level.⁵⁷ Assistant Principal noted that the teacher in the CES classroom is “amazing.”⁵⁸ Given her position and knowledge of the

⁴⁴ *Id.*

⁴⁵ Educational Advocate.

⁴⁶ *Id.*

⁴⁷ P15-2; P17-4; P34-16.

⁴⁸ P34-14, 16.

⁴⁹ Parent.

⁵⁰ Educational Advocate.

⁵¹ *Id.*

⁵² Parent.

⁵³ *Id.*

⁵⁴ Psychologist.

⁵⁵ Assistant Principal.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

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program, the undersigned finds Assistant Principal's testimony about the CES classroom to be more credible than the observers' information where it is in conflict.

18. The Proposed Public School B CES class was full-time self-contained and all of their transitions were as a group; there were no specials, lunch or recess periods with general education students.⁵⁹ Proposed Public School B can implement Student's full-time IEP without modification.⁶⁰

19. Related Services. Student did not receive OT after starting at Public School on 8/21/17; Public School did not have an OT provider at the school.⁶¹ As of 11/21/17, Student had not received any OT services while at Public School.⁶² There were no OT service trackers in the record and the IEP Progress Report for 2017/18 did not include OT.⁶³ Special Education Coordinator acknowledged that Public School didn't have an occupational therapist and missed services through November 2017, but that the Central Office was to send out a plan to make up services.⁶⁴ More recently, Student has been receiving OT services and learned to tie Student's shoes.⁶⁵

20. Service Trackers for speech-language services indicated in August 2017 that there were no services the first week of school; Student received 60 minutes of services the next week.⁶⁶ In September 2017, the Speech-Language Service Trackers showed that the provider missed 60 minutes and that Student was unavailable for 60 minutes; 15 minutes was made up on 9/26/17, and another 120 minutes of services was provided.⁶⁷ In October 2017, Student missed 3 speech-language sessions due to "refusal to attend"; provider was able to make up 105 minutes with longer sessions on other days, for a total of 285 minutes during the month.⁶⁸ The IEP Progress Report for speech-language indicated that Student was progressing on the goals that had been introduced by that point.⁶⁹

21. Compensatory Education. Educational Advocate prepared a detailed and qualitative Compensatory Education Proposal which calculated that the missing OT could be made up with 10 hours of extra OT services.⁷⁰

⁵⁹ Assistant Principal; Educational Advocate; Parent.

⁶⁰ Assistant Principal; P19-2; Educational Advocate (concurrent).

⁶¹ P34-16; Educational Advocate (Public School lacked OT).

⁶² P19-2; P20-2.

⁶³ P23-4,5.

⁶⁴ P19-2; P20-2.

⁶⁵ Parent.

⁶⁶ P22-1.

⁶⁷ P22-2.

⁶⁸ P22-4,5.

⁶⁹ P23-5,6,7.

⁷⁰ P35-5,6.

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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").

"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

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achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

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

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

Issue 1: *Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of services on 10/6/17 and/or 10/10/17 when it proposed placement in a CES program for autistic and non-verbal students at Proposed Public School A and then Proposed Public School B for which Student is not a good fit and which could harm Student, rather than a separate, therapeutic, special education day school. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

The central issue in this case is Student's placement, for Petitioner's counsel clarified during the due process hearing that Student's IEP is not at issue. The placement case turns on whether CES classrooms at DCPS are limited to children on the autism spectrum or whether the classrooms are also appropriate for other children with serious communication needs. Petitioner did establish a prima facie case on this issue, but DCPS met its burden of demonstrating that placement in the CES program at Proposed Public School B was appropriate for Student.

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, there were concerns about the CES classroom at Proposed Public

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School B, but upon careful consideration, the undersigned concludes that it was appropriate.⁷¹

As a fundamental issue, Petitioner was concerned that the CES program is limited to autistic children, but Assistant Principal persuasively testified that the CES classroom is for students with serious communications issues whether they have autism or not. Indeed, Assistant Principal testified that those in the class now at Proposed Public School B are not all on the autism spectrum. Student does have serious communications deficits and needs, and is difficult to understand, so may actually be a good fit for the CES classroom. Petitioner raised related concerns about a lack of verbal children in the CES classroom, but Assistant Principal's testimony was that 4 of the 5 children are verbal, which is the exact number and ratio that the court found satisfactory in *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).

Further, Assistant Principal stated that there is a range of academic abilities in the CES class which at the high end included being on grade level. Student is not on grade level, with reading at least 2 years behind and other challenges. So here as well, Student may find a suitable niche and compatibility among the other children in the CES classroom. *See, e.g., DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989) (placement may not be adequate without "appropriate peer group academically, socially or vocationally").

Importantly, the Proposed Public School B CES class is a full-time self-contained setting in which all the transitions by the class are as a group and there are no specials, lunch or recess with general education students. That is exactly what Parent and her advocates sought – a full-time program, including lunch, recess and specials out of general education – which is why Proposed Public School A was not acceptable to Parents and why DCPS moved on to propose Proposed Public School B. As DCPS affirmatively declared and Educational Advocate concurred at the due process hearing, Proposed Public School B can implement Student's full-time IEP without modification. The low student to adult ratio (6:3 with Student in the class, which is 2:1) and the "amazing" teacher should make this setting suitable for Student.

Finally, this conclusion is reinforced by the fact that Student's current situation at Public School is not viable, even though Student has been there for over half the school year, despite DCPS's efforts to place Student elsewhere. Student needs to be in a more supportive setting, which may work out much better than Parent fears. In any case, evaluations should be completed promptly, which will provide important data about

⁷¹ Petitioner was also concerned about whether the CES program at Proposed Public School A was appropriate. As discussed in the text, DCPS agreed that Proposed Public School A was not suitable as the CES children there were in specials, lunch and recess with general education students, so DCPS changed its proposal to Student being in the CES classroom at Proposed Public School B, which is the focus of this analysis.

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Student's needs. As discussed below, an MDT meeting should then be held at which point the team can assess how Student is doing at Proposed Public School B and whether any further adjustments are needed.

This Hearing Officer concludes that DCPS carried its burden of persuasion on the proposed placement of Student in the CES classroom at Proposed Public School B, as there was not 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).

Issue 2: *Whether DCPS denied Student a FAPE by failing to fully implement Student's 12/15/16 IEP during 2017/18, when it did not provide the requisite hours of (a) speech-language therapy (240 minutes/month), and/or (b) occupational therapy (180 minutes/month). (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on the issue of missing related services as to OT, but not speech-language. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See 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 v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), 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). Notably, there is "no requirement that the child suffer educational harm in order to find a violation" in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Here, DCPS acknowledged that Public School didn't have an occupational therapist for a significant period of time and missed Student's OT services. Central Office was to send out a letter about how to make up the services, but there was no evidence that it did so or that any services were made up. Instead, the credible evidence was that Student had not received required OT services from the beginning of school on 8/21/17 and continuing through November 2017, a period of more than 3 months. Educational Advocate's Compensatory Education Proposal asserted that services were missed in December as well, but Petitioner did not provide supporting evidence for December, and Petitioner bears the burden of proof. Since no OT services were provided by DCPS during that period, the proportion of missed services was 100% which certainly was not a minor discrepancy, but is a violation of IDEA and a denial of FAPE.

Speech-language services are a different matter. Solid evidence of speech-language services exists in both Service Trackers and the IEP Progress Report, showing that while Student was to receive an hour a week, the large majority of services were provided. Services not provided were due to Student's unavailability or refusal to attend, and the occasional scheduling conflict by the speech-language provider, but the provider was

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working to make up the missed sessions. Specifically, in August 2017 there were no services the first week of school, but Student received 60 minutes the next week. In September 2017, the speech-language Service Tracker showed that the provider missed 60 minutes and that Student was unavailable for 60 minutes; 120 minutes of services was provided and another 15 minutes was made up. In October 2017, Student missed 3 speech-language sessions due to “refusal to attend,” but provider was able to make up 105 minutes with longer sessions on other days, for a total of 285 minutes provided during the month. While the undersigned would like to have seen additional Service Trackers, Petitioner’s counsel did not raise any significant concerns about their absence and the trend was toward providing all required service plus making up past missed services. The IEP Progress Report for speech-language indicated that Student was progressing on the goals that had been introduced by that point. In sum, Petitioner failed to meet her burden of persuasion on the claim for missing speech-language services.

Issue 3: *Whether DCPS denied Student a FAPE by failing to reevaluate Student upon the request of Parent on 9/29/17 for (a) a comprehensive psychological reevaluation, (b) an occupational therapy reevaluation, and (c) a speech-language reevaluation, which were needed to determine appropriate placement/location of service. (Petitioner has the burden of persuasion on this issue.)*

Finally, the reevaluation issue is less clear, as DCPS asserted that it had not refused to conduct the requested reevaluations of Student, but that it was simply a matter of timing. This view was reinforced by Petitioner’s expert, Psychologist, who credibly testified that conducting evaluations in the permanent school Student will be attending is preferable to evaluating Student in a temporary school, if that doesn’t cause too much delay. Here, all agree that Public School was not a suitable setting for Student, as it cannot implement Student’s IEP. DCPS certainly intended for Student to move on to a more suitable school promptly, but as discussed above, the CES programs DCPS proposed as suitable were seen by Petitioner as entirely unacceptable. As a result, months have gone by with only an Educational Evaluation having been completed just before the due process hearing.

The lack of clarity on this issue is heightened by the fact that the IDEA does not set a time frame within which a public agency must conduct a reevaluation after receiving a request from a child’s parent, although it is clearly less than the 120 days that the District of Columbia provides for an initial evaluation. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at *3 (D.D.C. 2010) (120-day period for initial evaluations does not apply to reevaluations), *quoting Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005). Lacking statutory guidance, *Herbin* concluded that “[r]evaluations should be conducted in a ‘reasonable period of time,’ or ‘without undue delay,’ as determined in each individual case.” *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)).

Here, more than 120 days have now passed since the initial request on 9/29/17, which could be viewed as the outer limit in reevaluation timing. But in these circumstances where Psychologist confirmed the reasonableness of trying to wait until Student is situated in a proper setting before moving forward with reevaluations, the undersigned declines to find a violation. Nonetheless, now that Student’s school has been clarified in this decision,

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based on DCPS's assertions this Hearing Officer expects – but does not order – DCPS to move forward expeditiously with the reevaluations sought: (1) a comprehensive psychological reevaluation (other than the academic portion just completed), (2) an OT reevaluation, and (3) a speech-language reevaluation. In addition, given this Student's history with seizures, this Hearing Officer would also recommend that DCPS move forward to conduct or authorize a neuropsychological evaluation. Further, this Hearing Officer expects that within 45-60 days of this decision that an MDT meeting can be convened to review the evaluation reports and make whatever adjustments in Student's IEP and placement/setting are appropriate at that time.

Compensatory Education

As for compensatory education for the missed OT services, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D.*, 817 F.3d at 799, but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid*, 401 F.3d at 523-24.

Here, with 180 minutes/month of required OT services for 3 months plus a third of August, DCPS missed about 600 minutes or 10 hours of services. This Hearing Officer also takes into account the Compensatory Education Proposal prepared by Petitioner's expert, which the undersigned adjusted to fit the limited denial of FAPE found in this case. Carefully considering the areas of OT concern for Student in the 7/20/16 OT evaluation, the undersigned is persuaded that additional time beyond that missed may be required to put Student in the position Student would have been had the OT services been delivered on a timely basis last year. Accordingly, 14 hours of OT is ordered below to be provided by an independent provider of Petitioner's choice (or directly from DCPS if Petitioner prefers and DCPS has the capacity to provide the extra services).

All compensatory education hours are to be used within 18 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner has prevailed on the claim for missing OT services, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) As compensatory education for the denial of FAPE found above, DCPS shall provide a letter of authorization for 14 hours of Occupational Therapy from an

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independent provider chosen by Petitioner, with such letter to be provided within 10 business days after Petitioner's request. All hours are to be provided and used within 18 months; any unused hours will be forfeited.

(2) 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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