

Hearing Officer Determination

Case No. 2017-0311

30-day resolution period ended on 12/16/17. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 15-day continuance, which requires a Hearing Officer Determination (“HOD”) by 2/14/18.

The due process hearing took place on 1/22/18 and 1/29/18, 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 first day of the hearing and on the telephone most of the second day.

Petitioner’s Disclosures, submitted on 1/16/18, contained documents P1 through P40, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 1/16/18, contained documents R1 through R56, which were admitted into evidence without objection.²

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

1. *Educational Advocate* (qualified over objection as an expert in Special Education with an Emphasis on Compliance Monitoring)
2. Parent

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

1. *Special Education Coordinator at Public School* (qualified without objection as an expert in Special Education Programming and Placement)
2. *Progress Monitor at Prior Nonpublic School*

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

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

Issue 1: Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 10/4/17 and/or an inappropriate placement/setting/location of services, as (a) they are insufficiently therapeutic, structured and restrictive, (b) the least restrictive environment (“LRE”) is not being properly implemented, (c) the behavioral support services are insufficient to redress declining attendance and behavior, and (d) the IEP lacks specification of the assistive technology devices that should be used and how. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

² References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages separated by commas). By contrast, Respondent’s documents are consecutively Bates numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number without leading zeros.

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Issue 2: Whether DCPS denied Student a FAPE by failing to implement a 10/4/17 Prior Written Notice (“PWN”) by transferring Student to the separate day school placement identified as appropriate. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to (a) appropriately address declining school attendance and behavior in 2017/18,³ and/or (b) conduct relevant assessments, specifically (i) a Functional Behavioral Assessment (“FBA”) followed by a Behavioral Intervention Plan (“BIP”), and (ii) a comprehensive psychological evaluation, to address attendance and declining behavior. *Petitioner has the burden of persuasion on this issue.*

The relief requested⁴ by Petitioner is:

1. Within 15 business days, DCPS shall devise and implement an appropriate IEP for Student (a) with an appropriately descriptive and narrowly tailored LRE aligned with DCPS’s 10/4/17 PWN, (b) which defines the use of assistive technology, and (c) with appropriate behavioral goals, supports and counseling services.
2. Within 15 business days, DCPS shall (a) update and/or modify Student’s Functional Behavioral Assessment and Behavioral Intervention Plan to redress Student’s declining attendance and behavior, and assess and/or address Student’s school avoidance behaviors, or devise and implement an appropriate attendance intervention plan; or alternatively (b) fund and/or conduct any cognitive, academic and/or clinical testing required to address Student’s academic, behavioral and social-emotional functioning and development; or alternatively (c) convene a Student evaluation plan meeting.
3. Within 10 business days after receiving the final report from the evaluations required in the previous paragraph, DCPS shall convene an IEP team meeting to review the reports with Parent and revise Student’s IEP and placement, and discuss compensatory education as warranted.
4. DCPS shall fund compensatory education, or any assessment necessary to determine compensatory education, for any denial of FAPE.
5. Any other just and reasonable relief.

³ All dates in the format “2017/18” refer to school years.

⁴ At the beginning of the due process hearing, Petitioner expressly withdrew without prejudice what had been the first paragraph of relief requested in the Prehearing Order dated 1/3/18, which was, “Within 5 business days, DCPS shall (a) fund placement and transportation for Student at a full-time, special education, nonpublic day school that can provide educational benefit; or alternatively (b) convene a Multi-Disciplinary Team meeting with Parent and her counsel to discuss and determine an appropriate placement; or alternatively (c) reinstate Student’s placement, funding and transportation to Prior Nonpublic School.”

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Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age, Gender* and in *Grade* at *Nonpublic School*, where Student began in January 2018.⁷ Student previously attended Public School from August to December 2017, after transferring to Public School from Prior Nonpublic School where Student had attended for years.⁸

2. Student's 5/9/17 IEP at Prior Nonpublic School provided for 28.75 hours/week of specialized instruction, with 360 minutes/month of behavioral support services ("BSS"), 240 minutes/month of speech-language pathology and 180 minutes/month of occupational therapy ("OT"), all outside general education.⁹ Student's disability classification was consistently Specific Learning Disability ("SLD").¹⁰ Progress Monitor was concerned that Student was experiencing "learned helplessness" at Prior Nonpublic School and becoming dependent on extra help that was not needed.¹¹

3. Student's IEP was modified on 8/1/17 when Student was headed to Public School, with specialized instruction reduced to 20 hours/week, BSS reduced to 120 minutes/month, speech-language pathology reduced to 120 minutes/month, and OT reduced to 90 minutes/month, all outside general education.¹² These changes were set out in an IEP Amendment Form that Parent authorized by telephone on 8/1/17 and then went to school to review and sign the form in person on 8/4/17.¹³ Progress Monitor testified that Public School was a more rigorous setting in which it was anticipated that Student would receive less support in order to become more independent.¹⁴ Parent had tired of the nonpublic setting and wanted more independence for Student at a public school and into the future.¹⁵

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

⁶ Parent.

⁷ Parent; Progress Monitor.

⁸ Parent.

⁹ P5-1,15.

¹⁰ P3-1; P4-1; P5-1.

¹¹ Progress Monitor.

¹² P4-16.

¹³ R7p18,19; Special Education Coordinator.

¹⁴ Progress Monitor.

¹⁵ *Id.*

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Progress Monitor felt that Prior Nonpublic School had been overserving Student and overbilling DCPS and that this IEP was “right-sized,” and easier to adjust through amendment rather than arguing with Prior Nonpublic School about it.¹⁶

4. When returning to a nonpublic setting, Student’s IEP was modified on 10/4/17 to 28.75 hours/week of specialized instruction, 360 minutes/month of BSS, 120 minutes/month of speech-language pathology and 60 minutes/month of OT, all outside general education.¹⁷ Petitioner’s counsel confirmed at the 12/6/17 RSM that the 10/4/17 IEP is the one IEP at issue in this case, based on the “LRE” not listing a full-time, stand-alone, special education school, and the IEP providing only 120 minutes/month of BSS.¹⁸ Progress Monitor testified that this restoration of hours was due to Student’s lack of progress at Public School.¹⁹

5. Student’s IEPs did not include specific assistive technology services or devices in the assistive technology section of the IEPs, but did include technology support in the Other Classroom Aids and Services section, including a word processor, text-to-speech software, audio books, reading tracker and a calculator.²⁰ Educational Advocate acknowledged that some of the items in that section were assistive technology, but criticized the lack of specificity about the specific products to be used.²¹ Progress Monitor persuasively testified that DCPS does not include the specific brands or models to be used in order to provide more flexibility in procurement.²²

6. Based on the Reynolds Intellectual Assessment Scales (“RIAS”), Student was below average in cognitive functioning, with a Composite Intelligence Index (“CIX”) of 67, which was in the significantly below average range; a Verbal Intelligence Index (“VIX”) of 63, in the significantly below average range; and a Nonverbal Intelligence Index (“NIX”) of 79, in the moderately below average range.²³ Student’s Comprehensive Test of Nonverbal Intelligence, 2nd Edition (“CTONI-2”) found similar results, while the Cognitive Assessment Systems-2 (“CAS-2”) fell in the below average range of cognitive functioning, but with some subtests in the average range.²⁴

7. Academically, based on the Woodcock Johnson-IV Tests of Achievement (“WJ-IV”) in the 3/3/17 Comprehensive Psycho-Educational Evaluation, Student’s overall academic functioning fell in the well below average range, with a Broad Mathematics score of 65,

¹⁶ *Id.*

¹⁷ P3-16; Progress Monitor.

¹⁸ R32p171; P3-16 (in fact, BSS was returned to 360 minutes/month).

¹⁹ Progress Monitor.

²⁰ P3-3,16; P4-3,16; P5-3,15.

²¹ Educational Advocate; Special Education Coordinator (assistive technology in Other Classroom Aids and Services section was recommended for Student to access the curriculum).

²² Progress Monitor.

²³ P8-19.

²⁴ *Id.*

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Broad Reading score of 59, and Broad Written Language score of 69, all of which were in the well below average range.²⁵

8. Prior Nonpublic School was not working adequately for Student by 2016/17; Student had been at Prior Nonpublic School for years, but not progressing, with declines in reading and math and multiple incompletes on classes in 2016/17.²⁶ Student was not interested in college, so needed a placement with strong transition services; Prior Nonpublic School is for college-bound students and lacks adequate transition supports for going directly to work.²⁷

9. At an IEP meeting at Prior Nonpublic School on 5/9/17, concerns were raised about Student's lack of academic progress and lack of access to a transition coordinator to help Student find internships and jobs.²⁸ Parent understood the shortcomings of Prior Nonpublic School and testified with some bitterness that Prior Nonpublic School "cheated" Student out of the education Student should have received, with lack of academic progress.²⁹ Parent felt that Student would not be prepared for real life if Student stayed at Prior Nonpublic School and that removing Student from Prior Nonpublic School was the right decision.³⁰

10. Parent wanted to explore local school options with DCPS; Student agreed.³¹ Strong transition services were one reason for looking at Public School; Public School had a transition coordinator and the opportunity to apply for and work in internships.³² Parent scheduled a 6/5/17 visit to Public School.³³

11. Parent and Student were both eager to have Student enroll at Public School; they were seeking a regular school with regular school students.³⁴ Public School had hesitations, but both Parent and Student confirmed that Student was committed to doing all the work required.³⁵ Parent later testified that she had concerns about Public School and recalled Public School's principal questioning whether Public School was the right decision during

²⁵ P8-19; P11-14 (3/18/11 WJ-III scores fairly evenly divided between low and very low ranges); P26-1 (1/12/17 WJ-IV scores almost all in very low range).

²⁶ Progress Monitor; R32p171; R56p387 (Student had unexplained incompletes in Art 1, Spanish II, Algebra II, and Physical Science in 2017/18, but no incompletes in 2015/16 or 2014/15).

²⁷ Progress Monitor; R32p171.

²⁸ R33p177.

²⁹ Parent.

³⁰ Parent; Special Education Coordinator.

³¹ Progress Monitor; R33p178.

³² Progress Monitor; Special Education Coordinator; R32p171.

³³ R14p52.

³⁴ Special Education Coordinator.

³⁵ *Id.*

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Parent's visit to Public School.³⁶ But after the Public School visit, Parent and Student were both on board and looking forward to Public School in the fall of 2017.³⁷

12. On 8/3/17, a so-called location of services ("LOS") letter naming the Specific Learning Support ("SLS") program at Public School was sent to Parent.³⁸ DCPS recognized that the move was a big transition and that Student would face challenges at Public School, so on 8/4/17 proactively sought to provide academic assistance by authorizing independent tutoring for Student, with 50 hours of reading and 50 hours of math.³⁹ On 8/7/17, Parent officially withdrew Student from Prior Nonpublic School and transferred Student to Public School "to better meet [Student's] needs."⁴⁰

13. Public School did not go well for Student; Parent credibly testified that Student had issues at Public School from the first 2 days there.⁴¹ Special Education Coordinator recognized soon after school began that Student was struggling both academically and socially; Student was running with the wrong crowd and involved in "neighborhood beefs."⁴² Student came to Special Education Coordinator almost in tears admitting that the situation was more challenging than anticipated and asking to return to Prior Nonpublic School, which was a rare thing for a student to do.⁴³

14. On 9/14/17, Public School's social worker called Parent about Student's "declining attendance," with 11 unexcused absences; Parent responded that she did not know about Student's absences and requested automated "ROBO Calls" on her cellphone when Student was absent.⁴⁴ Special Education Coordinator testified that Student's case manager also reached out to Parent and an attendance contract may have been developed.⁴⁵ On 9/18/17, Special Education Coordinator spoke to Parent about absences and Student's desire to return to Prior Nonpublic School; Parent agreed that Student "still needs" a smaller school setting; an IEP team meeting was set for 9/21/17.⁴⁶ As of 10/13/17, Student had been absent from Public School for 29 days.⁴⁷

15. Student's grades were not good at Public School, with 3 "Fs" and 1 "D" as of 10/13/17; most of Student's teachers commented on excessive absences.⁴⁸ Special Education Coordinator credibly testified that Student did not need assistive technology or an

³⁶ Parent.

³⁷ Progress Monitor; R32p171.

³⁸ P21-1.

³⁹ Progress Monitor; P33-9; P33-7.

⁴⁰ R6p16.

⁴¹ Parent.

⁴² Special Education Coordinator.

⁴³ *Id.*

⁴⁴ R14p54.

⁴⁵ Special Education Coordinator.

⁴⁶ R14p54.

⁴⁷ P16-1.

⁴⁸ *Id.*

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assistive technology evaluation and that she would have heard if any of Student's providers thought Student needed assistive technology.⁴⁹ Neither Student nor Parent nor any of Parent's advocates raised any concerns about assistive technology prior to this case being filed.⁵⁰ Special Education Coordinator viewed Student as not needing an FBA, as Student just needed to be placed properly; a regular FBA cannot be conducted without the student being present.⁵¹ Student was always respectful and polite at school, and not angry or disruptive, so did not need a BIP; Student was not always present to meet with the social worker to receive the BSS on Student's IEP.⁵²

16. A 10/4/17 PWN concerning development of a revised IEP noted that per requests from Student and Parent on 9/18/17, Student would be best served by a separate nonpublic day school; Student had stated that Public School was "too much" for Student and had too many distractions; Student didn't think there was anything else that Public School could do to support Student there.⁵³ Public School had been difficult as evident from Student's poor attendance, failing grades, and class avoidance/truancy.⁵⁴

17. A second PWN on 10/4/17 stated that Student's placement was being changed to a more restrictive environment at a separate day school with 28.75 hours/week of specialized instruction, rather than the 20 hours at the "local comprehensive high school," for Student was not successful in the local school.⁵⁵ On 10/4/17, Parent's advocates conveyed an acceptance letter from Prior Nonpublic School and stated that they believed Prior Nonpublic School was appropriate for Student.⁵⁶

18. DCPS did not delay placement, but had to work closely with nonpublic schools' schedules, along with getting Parent and Student onboard and overcoming Petitioner's counsel's ongoing insistence on Student returning to Prior Nonpublic School.⁵⁷ DCPS proposed *Proposed Nonpublic School* soon after the 10/4/17 PWNs, which has one of the strongest transition programs and on-the-job training.⁵⁸ By 10/19/17, Student was scheduled for 4 days of visits to Proposed Nonpublic School beginning on 11/6/17.⁵⁹

19. DCPS authorized transportation for Student's 4-day visit to Proposed Nonpublic School beginning 11/6/17 (at a rate not to exceed \$250/day).⁶⁰ After the first day of Student's visit to Proposed Nonpublic School, Student decided not to go back because other

⁴⁹ Special Education Coordinator.

⁵⁰ Special Education Coordinator; Progress Monitor.

⁵¹ Special Education Coordinator.

⁵² Special Education Coordinator; P4-3,16.

⁵³ R9p37.

⁵⁴ *Id.*

⁵⁵ P18-1.

⁵⁶ P36-4.

⁵⁷ Progress Monitor.

⁵⁸ Educational Advocate; Progress Monitor.

⁵⁹ R14p55.

⁶⁰ R12p45.

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students there did not “look like” Student; Student considered their disabilities as being more apparent; Proposed Nonpublic School returned Student’s file and ended the application process.⁶¹ DCPS couldn’t force Proposed Nonpublic School on Student because Proposed Nonpublic School refuses to take students who have not completed the full visit and been accepted as an adequate fit.⁶² Progress Monitor and Parent next discussed Nonpublic School as an option.⁶³

20. On 11/13/17, Petitioner’s counsel again forwarded Prior Nonpublic School’s acceptance letter of Student and requested an “emergency placement meeting” for Student.⁶⁴ Progress Monitor responded on 11/14/17 that she had been working with Parent and Student to find an appropriate school and Student had visited Proposed Nonpublic School the previous week and was now looking to visit Nonpublic School; Progress Monitor stated that Prior Nonpublic School was not an appropriate location.⁶⁵

21. Transportation was authorized on 11/27/17 for Student to visit Nonpublic School.⁶⁶ On 12/4/17, Petitioner’s counsel faxed a formal letter to the principal of Nonpublic School seeking a placement meeting to discuss Student’s acceptance at Prior Nonpublic School.⁶⁷ By 12/5/17, Nonpublic School had accepted Student and DCPS issued an LOS letter.⁶⁸ DCPS offered Nonpublic School at the RSM meeting on 12/6/17; Student could start the following Monday, 12/11/17.⁶⁹ There were further delays as Student was not comfortable with Nonpublic School so Parent was not on board, but on 1/3/18, Parent reached out to DCPS so that Student could begin at Nonpublic School; Nonpublic School agreed for Student to begin the following week; the bus was set to begin taking Student to Nonpublic School on 1/8/18.⁷⁰

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*

⁶¹ Parent; Progress Monitor; R11p42; R32p171.

⁶² Progress Monitor.

⁶³ Progress Monitor; R14p56.

⁶⁴ P34-3.

⁶⁵ P34-1,2.

⁶⁶ R12p44.

⁶⁷ R30p165.

⁶⁸ R13p47; Progress Monitor.

⁶⁹ P15-1.

⁷⁰ P31-2; R36p192; Progress Monitor.

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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 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*

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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. 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 10/4/17 and/or an inappropriate placement/setting/location of services, as (a) they are insufficiently therapeutic, structured and restrictive, (b) the least restrictive environment (“LRE”) is not being properly implemented, (c) the behavioral support services are insufficient to redress declining attendance and behavior, and (d) the IEP lacks specification of the assistive technology devices that should be used and how. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner did not meet her burden of establishing a prima facie case on this issue, taken as a whole, for the 10/4/17 IEP is about as robust as it could be and DCPS worked diligently to find an appropriate nonpublic school that would provide a FAPE and satisfy Petitioner and Student, as discussed below. Alternatively, if Petitioner had established a prima facie case, Respondent fully met its burden of persuasion on this issue.

The applicable legal standard for analyzing the appropriateness of an IEP is whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. See also *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). The measure and adequacy of the IEP are determined as of the time it was offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered next.⁷¹ See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

The 10/4/17 IEP is the only IEP that Petitioner is challenging in this case and Petitioner’s counsel emphasized at the RSM that was because the IEP did not specify a full-time, stand-alone, special education school, even though there was no indication in this case that there was any disagreement between the parties on what sort of placement was being sought for Student after Public School did not work out. The issue was never whether Student would transfer back from Public School to a full-time nonpublic special education

⁷¹ As an initial matter, a Hearing Officer must determine whether “the State complied with the procedures” set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, quoting *Rowley*, 458 U.S. at 206-07. No such procedural violations were alleged in this case.

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day school, but merely which one and how quickly it could be accomplished. The undersigned is persuaded by the evidence in this case that DCPS did everything it reasonably could to assist Parent and provide the education Student needed.

However, this Hearing Officer does note that what Petitioner's counsel calls the "LRE description" should be specific enough to adequately inform Parent about the plan for Student, as well as allow another district to pick up the IEP and understand the program, supports and setting 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 proposed placement is adequate.' *Stein*, 709 F.Supp.2d at 70"). *See also* 34 C.F.R. 300.320(a)(4),(5),(7); *A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 159 (D.D.C. 2005). Here, where DCPS was working very closely with Parent and Student to try to ensure they were satisfied with a new nonpublic school, there was no doubt that such a placement was the goal of all involved and this Hearing Officer concludes that this was at most a procedural violation that caused no substantive harm.

Petitioner further alleges that there was insufficient BSS provided in the IEP to address declining attendance and behavior, but the 360 minutes/month is quite a significant amount of service and was to be implanted in a new nonpublic school, not at Public School which clearly had not worked out for Student. Petitioner provided no basis for the undersigned to believe that 360 minutes/month would be insufficient.

Finally, Petitioner did not articulate the basis for alleging that Student needed to have specific assistive technology services or devices listed in the assistive technology section of the IEP, since significant technology support was included in the Other Classroom Aids and Services section, including a word processor, text-to-speech software, audio books, reading tracker and a calculator. Petitioner's Educational Advocate acknowledged that some of the items in that section were in fact assistive technology, but criticized the lack of specificity about the specific products to be used. However, DCPS convincingly explained that DCPS does not include the specific brands or models in order to provide greater procurement flexibility.

Respondent prevails on Issue 1.

Issue 2: *Whether DCPS denied Student a FAPE by failing to implement a 10/4/17 Prior Written Notice by transferring Student to the separate day school placement identified as appropriate. (Petitioner has the burden of persuasion on this issue.)*

Petitioner has not met her burden of persuasion on Issue 2. The compelling and unambiguous evidence in this case was that Prior Nonpublic School was not serving Student well, with declines in reading and math and multiple incompletes on classes in 2016/17. Student thus needed a new school. For various reasons, Parent and Student decided for Student to transfer to Public School, where within weeks all agreed that Student had failed both academically and socially, so needed to return to a separate day school placement. The only issue was which one and how quickly a transfer could be achieved. While Student knew and was comfortable with Prior Nonpublic School, there was no doubt that Prior

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Nonpublic School had not worked well for Student and not what Student needed, despite Petitioner's counsel's frequent assertions that Prior Nonpublic School was appropriate for Student and ready to take Student back.

Instead, in a relatively short time after the PWN, DCPS suggested Proposed Nonpublic School for Student, which had the vocational and job training aspects sought by Parent and Student. DCPS set up the lengthy visit required by Proposed Nonpublic School as part of its acceptance process. But after the first day of the required visit to Proposed Nonpublic School, Student decided not to go back because other students apparently looked more disabled and "not like" Student, thereby delaying the process. DCPS and Parent then worked on another option for Student and DCPS set up a visit at Nonpublic School. By 12/5/17, Nonpublic School had accepted Student, DCPS issued an LOS letter, and offered Nonpublic School at the RSM meeting on 12/6/17, proposing that Student start the following Monday. However, there were further delays as Student was not initially comfortable with Nonpublic School, so Parent was not ready to move forward. But on 1/3/18, Parent reached out to DCPS asking that Student begin at Nonpublic School; Nonpublic School agreed for Student to begin the following week.

The clear evidence is that DCPS took reasonable steps to move forward expeditiously after the 10/4/17 PWN to find an appropriate placement that would provide a FAPE. DCPS cannot be faulted for the time it took to set up visits and work through the process with Parent and Student. Respondent prevails on Issue 2.

Issue 3: *Whether DCPS denied Student a FAPE by failing to (a) appropriately address declining school attendance and behavior in 2017/18, and/or (b) conduct relevant assessments, specifically (i) a Functional Behavioral Assessment followed by a Behavioral Intervention Plan, and (ii) a comprehensive psychological evaluation, to address attendance and declining behavior. (Petitioner has the burden of persuasion on this issue.)*

Petitioner has not met her burden on this final issue, which seems to be premised on the notion that Public School was viable for Student as an ongoing setting. As a general matter, the IDEA does require that a school district respond to a student's frequent or extended absences. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009); *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if student was not in school, he could not be said to be receiving "a free appropriate public education"). But this is certainly not a case where Student's absences have been ignored or Student was expected to overcome attendance issues without assistance.

Here, by mid-September 2017 – just weeks after the beginning of school – Public School's social worker called Parent about Student's declining attendance. Student's case manager also reached out to Parent and an attendance contract may have been developed. On 9/18/17, Special Education Coordinator spoke to Parent about Student's absences and Student's desire to return to Prior Nonpublic School. Parent agreed that Student needed the smaller school setting and an IEP team meeting was set for a few days later, leading to the 10/4/17 PWNs and the effort to find a more suitable nonpublic school for Student. The undersigned concludes that DCPS responded to Student's absences and took decisive action

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as soon as it was clear to Parent and Special Education Coordinator (as well as the rest of Student's IEP team) that Public School was not working out and Student needed to return to a nonpublic school.

As for assessments, Special Education Coordinator's testimony was convincing that Student did not need an FBA, but simply to be placed properly, back in a nonpublic school. Moreover, a regular FBA cannot be conducted without the student being present, and Student was often not present at Public School. Special Education Coordinator also testified that Student was always respectful and polite at school, and not angry or disruptive, so did not need a BIP. As for the need for a comprehensive psychological evaluation, Student had just had a Comprehensive Psycho-Educational Evaluation some months prior, in March 2017. Petitioner did not meet her burden of proving that any of the assessments were necessary or that they could have been completed in time to change the course of events in the few weeks that Student was nominally attending Public School prior to the decision that Student needed to return to a nonpublic setting.

ORDER

Petitioner has not prevailed on any of the issues in this case. Accordingly, **it is hereby ordered** that any and all 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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