

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

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

OSSE
Office of Dispute Resolution
February 10, 2019

<i>Student,</i> ¹)	Case No.: 2018-0229
through <i>Parents,</i>)	
<i>Petitioners,</i>)	Date Issued: 2/10/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 1/28/19 & 1/31/19
("DCPS"),)	ODR Hearing Room: 423
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, Student's Parents, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student had not been provided an appropriate Individualized Education Program ("IEP") and placement on a timely basis. DCPS defended its proposed IEP and placement.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 9/5/18, the case was assigned to the undersigned on 9/6/18. Respondent filed a response on 9/17/18, which did not challenge jurisdiction. An amended due process complaint was filed on 11/13/18 pursuant to the Order of the undersigned. An amended response to the amended complaint was filed on 1/10/19. A resolution meeting took place on 9/25/18, but the parties neither settled the case

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

Hearing Officer Determination

Case No. 2018-0229

nor terminated the 30-day resolution period; the resolution period following the amended complaint ended on 12/13/18. 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 14-day continuance, which requires a Hearing Officer Determination (“HOD”) by 2/10/19.

The due process hearing took place on 1/28/19 and 1/31/19 and was closed to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. One or both Parents participated in the entire hearing.

Petitioners’ Disclosures, submitted on 1/18/19, contained documents P1 through P41, all of which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 1/18/19, contained documents R1 through R20, and R21 and R22 were added during the due process hearing, all of which were admitted into evidence without objection.

Petitioners’ counsel presented three witnesses in Petitioners’ case-in-chief (*see* Appendix A):

1. *Neuropsychologist* (qualified without objection as an expert in Neuropsychology)
2. *Director of Education at Nonpublic School* (qualified without objection as an expert in Special Education Programming and Instruction)
3. Parent

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

1. *School Psychologist at Public School*
2. *Principal of Public School*
3. *Resolution Specialist*

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

Issue 1: Whether DCPS denied Student a FAPE by failing to propose an appropriate IEP and/or placement for 2018/19.² *Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to have an updated IEP in place for the start of 2018/19. *Petitioners have the burden of persuasion on this issue.*

² All dates in the format “2018/19” refer to school years.

Hearing Officer Determination

Case No. 2018-0229

Issue 3: Whether DCPS denied Student a FAPE by delaying completion of updated evaluations of Student. *Petitioners have the burden of persuasion on this issue.*

Issue 4: Whether DCPS denied Student a FAPE by delaying sending a copy of the finalized IEP from the 9/25/18 IEP meeting and failing to send any other documentation following the meeting. *Petitioners have the burden of persuasion on this issue.*

Issue 5: Whether Nonpublic School is a proper placement for Student. *Petitioners have the burden of persuasion on this issue.*

The relief requested by Petitioners is:

- DCPS shall place and fund Student for the 2018/19 school year at Nonpublic School and reimburse Parents for tuition and related services already paid.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a resident of the District of Columbia; Parent is one of Student's Parents and one of the Petitioners in this case.⁴ Student is *Age*, *Gender* and in *Grade*.⁵ Student began at Nonpublic School at the beginning of 2018/19, after attending Public School for one year in 2017/18; Student attended PCS prior to Public School.⁶ Student was found eligible for special education services in December 2015 with a disability classification of Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD").⁷

2. Evaluations. After Parents were unable to get prompt assessment from Public School of Student's reading deficits, Neuropsychologist conducted a neuropsychological evaluation of Student at Parents' request on 1/22/18 and 2/7/18, with a report prepared on 2/28/18.⁸ The neuropsychological evaluation diagnosed ADHD, Combined Presentation;

³ 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.

⁴ Parent; P1.

⁵ Parent; R2-1.

⁶ Parent; Neuropsychologist.

⁷ R2-1,2; P3 (2016 draft); R16 (10/20/17 IEP).

⁸ Parent; Neuropsychologist; P7-1.

Hearing Officer Determination

Case No. 2018-0229

Developmental Coordination Disorder with Dysgraphia; Specific Learning Disability with Impairment in Reading (Dyslexia); and Unspecified Anxiety Disorder.⁹ In a report dated 4/5/18, School Psychologist reviewed the neuropsychological evaluation and reported her psychological evaluation of Student.¹⁰ In the psychological evaluation, School Psychologist concluded that various factors suggested a Specific Learning Disability (Dyslexia), along with ongoing classification as OHI due to significant executive functioning weaknesses.¹¹ School Psychologist also conducted a psychological reevaluation dated 5/29/18 to test Student's writing skills at Parents' request.¹²

3. Student has solidly average cognitive abilities, across both verbal and nonverbal skills.¹³ Student's premature birth (between 33 and 34 weeks) and family history of dyslexia have significantly impacted aspects of self-regulation, behavioral control, emotional regulation, and foundational literacy skills.¹⁴

4. Reading and Written Expression. Student has had persistent struggles with reading and writing.¹⁵ Student has difficulty with decoding, comprehension, and fluency; Student struggled and did not truly begin reading until 2016/17.¹⁶ Testing with the Feifer Assessment of Reading ("FAR") suggested struggles with multiple aspects of reading and the presence of Mixed Dyslexia, a more severe type of reading disability.¹⁷ The FAR results were generally consistent with the neuropsychological evaluation.¹⁸

5. The Woodcock-Johnson IV Tests of Achievement ("WJ-IV") found Student's overall reading skills to be in the Low Average range.¹⁹ Student's reading skills were a standard deviation below expectations and had Borderline performance on word attack and oral reading; reading comprehension skills were at the 9th percentile and single word reading skills were at the 12th percentile.²⁰ Student's reading comprehension went from 385 to 485 to 624 as assessed by Reading Inventory ("RI") at the beginning, middle and end of year in 2017/18, which moved Student from Far Below grade level to merely Below grade level.²¹

⁹ R2-4,9.

¹⁰ R2-1.

¹¹ R2-10,11; R3-3.

¹² R3-1.

¹³ P7-15,16; R2-3.

¹⁴ P7-15,16.

¹⁵ P7-15; R2-6 (ANET – reading and writing – remained far below grade level; Reading Inventory's reading proficiency measures of Student show a two-grade deficit).

¹⁶ R2-2,9 (Parent also noted that Student did not read at all until 2016/17).

¹⁷ R2-9.

¹⁸ Neuropsychologist.

¹⁹ R2-3.

²⁰ P7-15.

²¹ R17-3,4; Principal.

Hearing Officer Determination

Case No. 2018-0229

Parent testified that Public School told her that they read the questions to Student on the reading test; DCPS witnesses were unsure whether that occurred as an accommodation.²²

6. As Student ages, Student is losing the opportunity to get to average levels of reading fluency, and needs more than 15 hours/week of specialized instruction; Student can't progress with reading in large classes.²³ Neuropsychologist observed the special education class at Public School on 12/4/18, but the special education teacher was absent so the six or seven special education children were included in the general education classroom for a class of 28.²⁴ Neuropsychologist testified that Student would not benefit from a general education classroom, and would struggle in general education specials (art, music, gym), given Student's weaknesses.²⁵

7. Student's special education teacher at Public School, who retired at the end of 2017/18 and did not testify, reported to the evaluator that Student arrived at Public School in 2017/18 as a "nonreader" because Student's previous school had read to Student to avoid emotional outbursts from Student, but once the Public School special education teacher "strongly encouraged" Student to read and removed the option of reading assignments to Student, that Student "has been able to read and comprehend grade level text without difficulty."²⁶ The special education teacher further asserted that Student had "inherently strong reading skills" and that any weaknesses should be attributed to skills not being taught by PCS or Student not being required to practice the skills.²⁷ Parent disagreed that PCS had not been teaching Student skills.²⁸ The undersigned is not persuaded of the truth of the special education teacher's assertions that Student merely needed her strong encouragement to begin reading at grade level without difficulty, as that is contradicted by the scores on testing instruments. In the view of the undersigned, these statements harm the credibility of the special education teacher's other statements, such as asserting that Student had grown from writing one sentence upon arriving at Public School in 2017/18 to writing multiple paragraphs by Springtime.²⁹

8. While Student's written expression was in the Average range on the WJ-IV, that assessment was not representative of what is required in the classroom; at Parent's request further assessment was done with subtests of the Wechsler Individual Achievement Test – Third Edition ("WIAT-III"), which found both Spelling and Sentence Composition in the Below Average range.³⁰ School Psychologist reported in her evaluation that it was difficult

²² Parent; Principal.

²³ Neuropsychologist.

²⁴ Neuropsychologist; P30-1. As of 12/16/18, the special education teacher who would have taught Student at Public School had resigned and the school was seeking a replacement. P31-1.

²⁵ Neuropsychologist.

²⁶ R2-5.

²⁷ *Id.*

²⁸ R4-1.

²⁹ R2-5.

³⁰ R3-1,2.

Hearing Officer Determination

Case No. 2018-0229

to determine if Student's issues included Dysgraphia as well as Dyslexia, but that Student clearly met the criteria for Specific Learning Disability and would benefit from specialized instruction in both reading and writing.³¹ A paragraph of Student's handwriting, which is very nearly illegible, is included in the record with other work samples.³² The team at the IEP meeting on 6/13/18 agreed that Student was not where Student should be going into a higher level in 2018/19.³³

9. Behavior. Student was described as easily frustrated and at times acting out behaviorally.³⁴ Student's special education teacher at Public School reported that Student's difficulties modulating emotions truly impeded learning and that Student had several outbursts per week which were not related to academic frustration.³⁵ An FBA was conducted on 6/15/18 due to Student's history of disruptive and oppositional behaviors in various school settings, with verbal and physical aggression towards peers and staff.³⁶ Student was noted to most likely remain in the academic environment when feeling confident and the academic task was manageable.³⁷ On 8/21/18 a DCPS evaluation summary report concluded that "technically" Student qualified for an Emotional Disturbance classification, but the examiner believed that was premature at that time and Student should simply receive a BIP.³⁸ A BIP-Level II was developed on 8/24/18 at Public School.³⁹

10. Student has not needed a behavior plan at Nonpublic School.⁴⁰ Neuropsychologist credibly testified that it was Student being frustrated that caused negative behaviors to increase.⁴¹ Student does not need behavior supports at Nonpublic School, as behavior is not an issue when Student is with other appropriate peers.⁴²

11. Timing of Assessments/IEP Meetings. Parent texted the Public School social worker on 10/24/17 to ask if Public School could test Student for dyslexia; the social worker responded that she would have School Psychologist contact Parent; the social worker set up a meeting in a day or two.⁴³ School Psychologist testified that she remembered meeting Parent in December 2017 and it was possible Parent raised the issue sooner; School Psychologist recalled responding affirmatively in December to a question about whether she

³¹ R3-3.

³² P41-10.

³³ R4-4.

³⁴ P7-15.

³⁵ R2-5.

³⁶ P14-1.

³⁷ P14-2.

³⁸ P19-5.

³⁹ P24.

⁴⁰ P40-7 (Student has not warranted an individual intervention plan; Nonpublic School has positive behavior intervention and support initiatives and activities).

⁴¹ Neuropsychologist.

⁴² *Id.*

⁴³ P21-1.

Hearing Officer Determination

Case No. 2018-0229

was qualified to test Student for dyslexia, but School Psychologist did not regard that inquiry as a request for testing by Parent.⁴⁴ Parent later wrote that she had approached School Psychologist, special education teacher and social worker in December 2017 for testing and was told that Student “simply wants to act that way.”⁴⁵

12. On 1/22/18, Parent emailed Student’s special education teacher to follow up on a conversation earlier in January about having Student tested for dyslexia; Parent then talked to School Psychologist and understood that the testing would result in a report in early March 2018.⁴⁶ School Psychologist stated that Parent’s request was in January 2018 for an evaluation based on “longstanding concerns” about Student’s reading and spelling, especially her belief that Student’s skills were several grade levels below expectation and concern about dyslexia; the team agreed to test Student’s reading skills.⁴⁷ Parent signed the consent to evaluate form on 1/29/18.⁴⁸ School Psychologist stated that her testing of Student’s reading was completed in February 2018.⁴⁹

13. On 3/22/18, the Public School social worker texted Parent that School Psychologist had confirmed plans to provide the evaluation report to Parent in March; Parent responded that she didn’t know if there was a need anymore, as Parents had Student independently tested and just reviewed the report and sent it to Principal.⁵⁰ On 3/30/18, School Psychologist emailed Parent asking for a copy of the evaluation that Parents had done; School Psychologist received the report on 4/2/18 and noted that Neuropsychologist’s evaluation was very comprehensive and that School Psychologist’s data corroborated Neuropsychologist’s findings.⁵¹ At the due process hearing, School Psychologist testified that she “absolutely” agreed with Neuropsychologist.⁵²

14. At a 6/13/18 IEP meeting, Parents requested that the team meet before school started for 2018/19 to revise Student’s IEP, so they could decide if the IEP was appropriate and whether to keep Student at Public School.⁵³ Parent continued to seek to meet, but Public School delayed, e.g. by Principal declining to even discuss the timeline for an IEP meeting with the summer team until after receiving a re-formatted IEP from OSSE.⁵⁴ Scheduling slipped to 7/27/18 with apologies from DCPS, but even then efforts went back and forth

⁴⁴ School Psychologist; P21-1.

⁴⁵ P21-9.

⁴⁶ P21-3.

⁴⁷ R2-1.

⁴⁸ R1-1.

⁴⁹ R3-1.

⁵⁰ P21-2,4.

⁵¹ P21-5.

⁵² School Psychologist.

⁵³ R4-5.

⁵⁴ P21-7,8.

Hearing Officer Determination

Case No. 2018-0229

with no meeting until 8/24/18, after school began on 8/20/18, which was not substantive due to Public School's failure to properly provide documents in advance of the meeting.⁵⁵

15. Draft IEPs. Principal emailed a draft IEP to Parent and counsel on 6/20/18 which contained a listed "meeting date" of 8/13/18.⁵⁶ That 8/13/18 IEP contained only 10 hours/week of specialized instruction outside general education; Resolution Specialist testified that it was intended to provide the same 15 hours/week as the prior IEP in 2017/18; the 8/13/18 IEP also contained 120 minutes/month of Behavioral Support Services ("BSS") inside general education and 120 minutes/day of BSS outside general education, although two hours a day was a mistake that was finally modified to 120 minutes/month by the final 9/25/18 IEP; the 8/13/18 IEP contained no area of concern for written expression.⁵⁷

16. The 8/13/18 IEP contained an identical lengthy passage about reading pasted into page R5-5 (the math section), R5-11 (the reading section), and R5-14 (the socio-emotional behavior section) which overflowed the available space on each page; the passage was word-for-word from School Psychologist's review of Neuropsychologist's neuropsychological evaluation at R2-9.⁵⁸ Parent immediately sought a corrected draft IEP, which she requested multiple times, but the error was never fully corrected and remained once (improved from three times) even in the finalized 9/25/18 IEP, where it remained in the wrong area of concern.⁵⁹

17. Parents received another draft IEP the night before the 8/24/18 IEP meeting – apparently at 10:20 p.m. – and so were not prepared to go forward with the meeting at 9:30 a.m.⁶⁰ The 8/24/18 IEP contained a written expression area of concern, and contained the overly long passage about reading pasted in once after the socio-emotional behavioral area of concern.⁶¹ The 8/24/18 IEP did increase to 15 the hours/week of specialized instruction outside general education, but continued to include 120 minutes/day of BSS outside general education.⁶²

18. Principal testified that "to her knowledge" the final 9/25/18 IEP for Student was the same as had been provided on 6/20/18, although she acknowledged on cross-examination that written language was supposed to be included and was not.⁶³ The substantive IEP meeting was finally held on 9/25/18 but DCPS would not increase above 15 the number of

⁵⁵ Parent; R11; R12-1 (proposing 8/24/18 and promising an updated IEP prior to the meeting); R13-1 (confirming 8/24/18 and promising draft IEP, FBA/BIP and final eligibility documents prior to the meeting); Administrative Notice (DCPS school calendars).

⁵⁶ R5-1.

⁵⁷ R5-13,16,17.

⁵⁸ R5-5,11,14.

⁵⁹ P27-10.

⁶⁰ P21-8; R13-1.

⁶¹ P22-6,9.

⁶² P22-11.

⁶³ Principal.

Hearing Officer Determination

Case No. 2018-0229

hours of specialized instruction.⁶⁴ After the 9/25/18 IEP meeting, Parents' counsel had to ask to receive a copy of the final IEP on 10/31/18, 11/2/18 and 11/5/19; the final IEP was provided to Parents for the first time on 11/9/18.⁶⁵

19. Suitability of Nonpublic School. Student will continue to require special education services, with a science-based reading program that is multi-sensory, systematic, and phonics-based.⁶⁶ Student requires a low student-teacher ratio throughout the day and numerous accommodations.⁶⁷ The reading programs being used at Public School were not sufficient for Student's level of disability and Student did not make appropriate progress at Public School in 2017/18.⁶⁸ Student was reported to be progressing on most IEP goals at Public School in 2017/18, but did not meet any of them.⁶⁹

20. Neuropsychologist's expert opinion was that Student's challenges will in fact increase over time, so that Student is unlikely to be able to return to general education.⁷⁰ Parents gave written notice to DCPS that they were unilaterally placing Student at Nonpublic School on 8/6/18, which DCPS acknowledged was 10 business days prior to the beginning of 2018/19.⁷¹

21. Nonpublic School is a very small nonpublic full day school that is certified by OSSE.⁷² Nonpublic School serves students who are average or above average cognitively, with classes of eight or fewer students, except for reading where classes are no larger than four students.⁷³ Nonpublic School is not for children with significant behavior issues, so with Student's FBA/BIP at Public School, Nonpublic School required a two-day visit by Student to determine whether behavior issues were a result of academic needs not being met; Student did very well on the visit.⁷⁴ Student has had no emotional outbursts at Nonpublic School.⁷⁵

22. Nonpublic School provides small, structured classes all day, which is the appropriate education for Student and is Student's least restrictive environment ("LRE").⁷⁶ Nonpublic

⁶⁴ Parent; P27-12.

⁶⁵ P26-1,2; P27-1; Parent.

⁶⁶ P7-16.

⁶⁷ P7-16,17.

⁶⁸ Neuropsychologist (comprehension measurement has the least predictive validity compared to fluency and decoding); R17-3.

⁶⁹ P11; Resolution Specialist (not aware of Student meeting any goals at Public School).

⁷⁰ Neuropsychologist.

⁷¹ P15-1; P17-1.

⁷² Director of Education.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Neuropsychologist; Director of Education; P32; P33.

Hearing Officer Determination

Case No. 2018-0229

School is not overly restrictive for Student; Student is flourishing and learning.⁷⁷ Student is getting top grades at Nonpublic School, with term final grades of “As” and “A+s.”⁷⁸ Student has friends at Nonpublic School and feels that other kids there are like Student.⁷⁹ DCPS emphasized in testimony that it was willing to reimburse out of pocket tuition and transportation costs for 2018/19 at Nonpublic School to date, and fund the remainder of the year.⁸⁰

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.’” *Endrew 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.” *Endrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew 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.” *Endrew 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*

⁷⁷ Director of Education; Parent (Student connects readily with typically developing kids in the neighborhood).

⁷⁸ P37.

⁷⁹ Neuropsychologist; Director of Education.

⁸⁰ Resolution Specialist.

Hearing Officer Determination

Case No. 2018-0229

Columbia, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Endrew F.*, 137 S. Ct. at 1001.

In addition, the LEA 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; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

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).

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

Issue 1: *Whether DCPS denied Student a FAPE by failing to propose an appropriate IEP and/or placement for 2018/19. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners established a prima facie case on this issue based on testimony and the neuropsychological evaluation, shifting the burden of persuasion to DCPS, which failed to prove that the IEP and placement proposed for Student were appropriate.

The applicable legal standard for analyzing the appropriateness of the IEP at issue was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was

Hearing Officer Determination

Case No. 2018-0229

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

The measure and adequacy of the IEP are determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving a perfect IEP, but one reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA “stops short of requiring public schools to provide the best possible education”). *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). As for placement, the IDEA requires “school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student’s IEP.” *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018), *citing O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP”). The appropriateness of Student’s IEP and placement is analyzed by considering the specific concerns raised by Petitioners, which are considered below in turn.⁸¹ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

The heart of this dispute is whether Student needed a full-time IEP in a day school or could make sufficient progress with only 15 hours/week of specialized instruction at Public School. Student has had persistent struggles with reading and writing, with difficulties in decoding, comprehension, and fluency. Student did not truly begin reading until 2016/17, far later than expected with Student’s solidly average cognitive abilities.

DCPS claimed that Student’s reading comprehension went from 385 to 485 to 624 as assessed by Reading Inventory at the beginning, middle and end of year in 2017/18, which was progress in moving Student from Far Below grade level to merely Below grade level. But Parent testified that Public School had told her that they read the questions to Student on the reading test and DCPS witnesses were unsure if that occurred as an accommodation. Taken as true, this entirely undercuts DCPS’s argument that Student made good progress in 2017/18 with the 15 hours/week of specialized instruction in place.

Neuropsychologist credibly testified that as Student ages, Student is losing the opportunity to achieve average levels of reading fluency, and needs much more than 15

⁸¹ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Here, specific procedural violations are discussed in Issues 2, 3 and 4, below.

Hearing Officer Determination

Case No. 2018-0229

hours/week of specialized instruction. Student can't progress with reading in large classes and would not benefit from a general education classroom. Neuropsychologist persuasively explained that Student would even struggle in general education specials – such as art, music, gym – given Student's weaknesses. Student requires a low student-teacher ratio throughout the day, numerous accommodations, and better reading programs than were being used at Public School given Student's level of disability. Student did not make appropriate progress at Public School in 2017/18 so needed a significant increase in the level of service.

School Psychologist conducted a writing evaluation at Parents' request and reported that it was difficult to determine if Student's issues included Dysgraphia as well as Dyslexia, but that Student clearly met the criteria for Specific Learning Disability and would benefit from specialized instruction in both reading and writing. The team at the IEP meeting on 6/13/18 agreed that Student was not where Student should be going into a higher level in 2018/19, but the DCPS IEP maintained Student's specialized instruction at the same level as previously.

The need to provide full-time specialized instruction is confirmed by Student's behavior at Public School compared to Nonpublic School. Student's special education teacher at Public School reported that Student's difficulties modulating emotions truly impeded learning. Student was reported as having several outbursts per week which were not related to academic frustration. An FBA was conducted on 6/15/18 due to Student's history of disruptive and oppositional behaviors in school settings, which included verbal and physical aggression towards peers and staff. In fact, a DCPS evaluation summary report on 8/21/18 concluded that "technically" Student qualified for an Emotional Disturbance classification, but the examiner felt that was premature at that time and suggested a BIP instead.

By contrast, Student has not needed a behavior plan at Nonpublic School at all. Nonpublic School is not for children with significant behavior issues, so with Student's behavior at Public School, Nonpublic School required a two-day visit by Student to determine whether behavior issues were a result of academic needs not being met. Student did very well on the visit and with an appropriate IEP and placement, Student has had no emotional outbursts at Nonpublic School in the months there. Neuropsychologist credibly testified that it was Student being frustrated that caused negative behaviors at Public School. Student does not need behavior supports at Nonpublic School, as behavior is not an issue when Student is with other appropriate peers.

This Hearing Officer concludes that 15 hours/week of specialized instruction in the DCPS IEP was not sufficient for Student's needs. Neither the 9/5/18 DCPS IEP nor any earlier draft IEP was reasonably calculated to enable Student to make appropriate progress in Student's circumstances in 2018/19, based on the need for greatly increased or full-time specialized instruction hours. This is a substantive violation and a denial of FAPE, leading to the remedy discussed below. As for placement, there was a material failure in the ability of Public School to provide the services required by the greatly increased or full-time IEP that Student needed. Maintaining Student at Public School would not have afford Student the opportunity to make appropriate progress in Student's particular circumstances. *See*

Hearing Officer Determination

Case No. 2018-0229

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 placement failure is also a substantive violation and a denial of FAPE, with the remedy discussed below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to have an updated IEP in place for the start of 2018/19. (Petitioners have the burden of persuasion on this issue.)*

Petitioners demonstrated a violation of the IDEA, but showed no denial of FAPE here. The IDEA is clear that DCPS must have “an IEP in place for each student with a disability ‘[a]t the beginning of each school year.’” *Leggett v. Dist. of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015), *citing* 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. §§ 300.322(a), 300.323(a). Here, as recounted in detail above, DCPS did not have a finalized IEP in place for Student until 9/25/18, well after the beginning of the school year on 8/20/18.

DCPS argued that an IEP might have been finalized right at the beginning of the school year if only Parents had been willing to participate in the 8/24/18 IEP meeting without taking time to review the documents for the meeting. As an initial matter, that is incorrect because school began on 8/20/18 for Public School, as it did for other DCPS schools on the traditional calendar. Moreover, D.C. Code § 38-2571.03(3) requires that DCPS provide parents a copy of the documents to be discussed at IEP meetings at least five business days prior to the meeting. Here, the documents were just transmitted to Petitioners the night before the meeting, apparently not until at 10:20 p.m., in advance of the meeting at 9:30 the next morning. DCPS cannot blame the need for a later meeting on Parents.

However, not having an updated IEP in place at the beginning of the school year is not the end of the inquiry. Procedural violations are a denial of FAPE only if the violation impeded Student’s right to a FAPE, significantly impeded Parents’ opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). Here, Petitioners’ counsel did not assert any of these grounds, and none are apparent, for Student had been enrolled in Nonpublic School in advance of the school year, so the lack of an IEP at the beginning of DCPS’s school year made no practical difference to Student. Accordingly, this Hearing Officer concludes there was no denial of FAPE from this procedural violation.

Issue 3: *Whether DCPS denied Student a FAPE by delaying completion of updated evaluations of Student. (Petitioners have the burden of persuasion on this issue.)*

Petitioners have not proved a denial of FAPE from any delay in completing evaluations of Student. While there are many facts and details asserted by the parties on this issue, the big picture is that ultimately the IEP team at Public School concluded that no more services were needed for Student as a result of the evaluations, so any delay made no difference to the outcome. Further, Parents unilaterally placed Student at Nonpublic School, so there was no impact on Student from the lack of services at Public School, and the evaluations were completed by the time Nonpublic School needed them for programing. Finally, the neuropsychological evaluation was no doubt most helpful to Parents in determining their course, and that independent evaluation was completed at Parents’ direction in February.

Hearing Officer Determination

Case No. 2018-0229

Wading into the details, the timing requirements for DCPS evaluations become unclear. The undersigned is unaware of a 45-day deadline for evaluations imposed by law, as DCPS suggested, or of a 60-day deadline as Petitioners suggested, for D.C. Code § 38-2561.02(a)(2) only applies to initial evaluations and only shifted to 60 days from 120 days as of 7/1/18. The IDEA does not set a timeframe within which a public agency must conduct an evaluation that is not an initial evaluation upon receiving a request from a child's parent, although it is clearly less than the 120 days that the District of Columbia provided for an initial evaluation prior to 7/1/18. *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)). Thus, with the newly shortened timeframe for initial evaluations, it seems that subsequent evaluations certainly should take no longer than 60 days, and maybe less depending on the circumstances.

Here, the date of request could arguably be late October 2017 or December 2017, but clearly no later than Parent's signing of the consent to evaluate on 1/29/18. Sixty days from then would be 3/30/18, and Parent was promised on 3/22/18 that the report would be completed in March. School Psychologist's report was not provided in March and the delay was caused by the neuropsychological evaluation, which School Psychologist understandably wanted to incorporate into her analysis. While there are no exceptions to evaluation timelines for such circumstances, the undersigned does note that the neuropsychological evaluation had been completed for a full month before it was provided to Public School and School Psychologist, so the undersigned concludes that there was not even a procedural violation here. In any case, this Hearing Officer concludes that there was no denial of FAPE as there was no practical impact, as discussed in the initial paragraph of this section. Specifically, DCPS's failure to complete the evaluation in 60 days or other reasonable timeframe did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2).

Issue 4: *Whether DCPS denied Student a FAPE by delaying sending a copy of the finalized IEP from the 9/25/18 IEP meeting and failing to send any other documentation following the meeting. (Petitioners have the burden of persuasion on this issue.)*

Petitioners demonstrated that after the final 9/25/18 IEP meeting, Parents' counsel had to ask repeatedly for a copy of the final IEP and it was not provided to Parents until 11/9/18, more than six weeks after the meeting. D.C. Code § 38-2571.03(4)(A) requires that within five business days after a meeting where an amended IEP has been agreed upon, DCPS must provide a copy of the revised IEP to the parents, although if more time were needed to complete the IEP DCPS could provide a draft and the final IEP no later than 15 business days after the meeting, which was also violated here.

Hearing Officer Determination

Case No. 2018-0229

However, this is a mere procedural violation, for as Petitioners' counsel acknowledged in Petitioners' closing argument, it made no actual difference to Parents, since Student had by that time already been attending Nonpublic School for an extended period. DCPS's failure to provide the revised IEP to Parents did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). Therefore, in the view of the undersigned there is no denial of FAPE for this procedural violation.

Issue 5: *Whether Nonpublic School is a proper placement for Student. (Petitioners have the burden of persuasion on this issue.)*

Petitioners met their burden on this final issue. Nonpublic School provides small, structured classes which are the appropriate education for Student and are Student's LRE. Nonpublic School is not overly restrictive and Student is flourishing with other children there who are like Student, receiving high grades, and making friends. Importantly, Student's behavior issues have significantly moderated, with no emotional outbursts at Nonpublic School compared to several per week at Public School, the apparent result of meeting Student's academic needs at Nonpublic School. The undersigned concludes that Nonpublic School is a proper and appropriate placement for Student.

Remedy

As the remedy for the denials of FAPE concerning Student's IEP and placement, Petitioners seek reimbursement of their payments to Nonpublic School for 2018/19 to date, and for DCPS to place and fund Student for the remainder of the school year. Judge Colleen Kollar-Kotelly recently confirmed that "if there is no public school which is suitable, the school district 'must pay the cost of sending the child to an appropriate private school.'" *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005). *See also Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (if a public school program were available to enable student to receive educational benefits, DCPS would not need to consider nonpublic placement).

Under the IDEA, however, 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 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]."

Hearing Officer Determination

Case No. 2018-0229

Here, the first prong of *Leggett* is met due to the denials of FAPE by DCPS failing to provide Student an appropriate IEP and placement, as discussed in Issue 1, above.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student. Petitioners readily demonstrated that Nonpublic School is proper and appropriate for Student and DCPS did not seriously dispute the case. The legal standard for proper placement is the same for school districts and for parents. *Leggett*, 793 F.3d at 70. Under *Endrew F.*, 137 S. Ct. at 1001, the question is now whether Parents' unilateral private placement was reasonably calculated to enable Student to make appropriate progress given Student's circumstances. *Cf. Leggett*, 793 F.3d at 71, *quoting Rowley*, 458 U.S. at 207, 102 S. Ct. 3034. *See also Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994); *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008). Petitioners' witnesses convincingly testified that Student was being appropriately educated at Nonpublic School, which is a good place for Student to learn and making progress appropriate for Student's circumstances. 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 Petitioners acted unreasonably. Here, Parents interacted reasonably with DCPS and provided all documentation requested during the evaluation and IEP processes. There was no serious assertion by DCPS that the third prong is not satisfied.

Accordingly, this Hearing Officer concludes that Parents should be reimbursed for Student's tuition and related services at Nonpublic School for 2018/19 and funded there for the remainder of the school year. This meets 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*, 401 F.3d at 523-24.

ORDER

Petitioners have prevailed on the central issues in this case, as set forth above. Accordingly, **it is hereby ordered that:**

Upon receipt of documentation of payment by Petitioners, DCPS shall within 30 days (a) reimburse Petitioners for tuition and related services paid to date for Student at Nonpublic School for the 2018/19 school year, and (b) fund tuition and related services for Student at Nonpublic School for the remainder of the 2018/19 school year.

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

Hearing Officer Determination

Case No. 2018-0229

NOTICE OF RIGHT TO APPEAL

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

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

Contact.resolution@dc.gov