

**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 13, 2020

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2019-0271
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 2/13/20
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates (Room): 1/28/20 (423) &
("DCPS"),	)	1/29/20 (423)
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to lack of an appropriate Individualized Education Program (“IEP”) with close to full-time services and additional related services, and with an appropriate placement. DCPS responded that appropriate changes were made to the IEP based on an independent educational evaluation (“IEE”) and other data and that Student made progress, so there was no denial of FAPE.

**Subject Matter Jurisdiction**

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

**Procedural History**

Following the filing of the due process complaint on 11/1/19, the case was assigned to the undersigned on 11/4/19. On 11/14/19, Respondent filed a response and did not challenge jurisdiction. A resolution meeting was held on 12/4/19, but did not resolve the

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

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case. The 30-day resolution period ended on 12/1/19. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by an 30-day continuance, which requires a Hearing Officer Determination (“HOD”) by 2/14/20.

Following the prehearing conference on 1/10/20 and issuance of the Prehearing Order that same day, the due process hearing took place on 1/28/20 and 1/29/20 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present in person for only part of the hearing.

Petitioner’s Disclosures, submitted on 1/21/20, contained documents P1 through P41, all of which were admitted into evidence without objection, except for P40-51,52,53,54 which were withdrawn due to being illegible. Respondent submitted Disclosures on 1/21/20 and a supplemental Disclosure on 1/22/20, with an additional resume to which Petitioner’s counsel expressly did not object, containing documents R1 through R30, which were all admitted into evidence without objection.<sup>2</sup>

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

1. *Occupational Therapist* (qualified, without any position taken by DCPS, as an expert in Occupational Therapy)
2. *Psychologist* (qualified, without any position taken by DCPS, as an expert in Psychology, Autism, and Evaluations and Recommendations for Students with Special Needs)
3. Parent
4. *Tutor*
5. *Speech-Language Pathologist* (qualified, without any position taken by DCPS, as an expert in Speech-Language Pathology)
6. *Educational Advocate* (qualified, without any position taken by DCPS, as an expert in Special Education Programming and Placement)

Respondent’s counsel presented 3 witnesses in Respondent’s case (*see* Appendix A):

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<sup>2</sup> References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page number (or numbers, separated by commas) Respondent’s documents are consecutively page numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the page number(s).

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1. *Manager of Specialized Instruction at Public School* in 2018/19<sup>3</sup> (qualified without objection as an expert in Special Education Programming)
2. *Special Education Teacher at Public School*
3. *Special Education Coordinator at Public School* (qualified without objection as an expert in Special Education Programming)

Petitioner's counsel did not present any rebuttal witnesses.

The issue to be determined in this Hearing Officer Determination is:

**Issue:** Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of service at meetings on 5/29/19 and 6/10/19, as Student needed (a) full-time or close to full-time services outside general education, (b) placement in an appropriate autism program, (c) 240 minutes/month of speech-language services, and (d) 240 minutes/month of occupational therapy services, in light of Student's lack of progress and ongoing behavior issues. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

The relief requested by Petitioner is:

1. DCPS shall convene an IEP team meeting and develop, finalize and implement an appropriate IEP that provides for (a) an appropriate amount of services to be provided, (b) a full-time or close to full-time setting outside general education, and (c) proper placement of Student.
2. DCPS shall place and/or fund Student being placed in an appropriate program that can implement the IEP.
3. DCPS shall fund any necessary evaluations, compensatory education, and/or speech-language, occupational therapy or counseling services provided to Student.
4. Any other just and reasonable relief.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact<sup>4</sup> are as follows:

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<sup>3</sup> All dates in the format "2018/19" refer to school years.

<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age*, *Gender* and in *Grade* at Public School.<sup>6</sup> Student has a history of deficits in cognitive abilities, social functioning, speech-language, and fine motor skills, as well as academic underachievement.<sup>7</sup>

2. IEPs. Student was first identified for special education services in 2012 with the classification of Developmentally Delayed, which was changed to Specific Learning Disability ("SLD"), and then changed in Student's 5/16/18 IEP to Autism Spectrum Disorder ("ASD" or "Autism").<sup>8</sup> Student's most recent IEP dated 6/10/19 (finalized on 7/18/19) ("2019 IEP") maintained the ASD classification and provided 10 hours/week of specialized instruction outside general education, 120 minutes/month of speech-language pathology outside general education, 120 minutes/month of occupational therapy outside general education, and 120 minutes/month of Behavioral Support Services ("BSS") outside general education, along with a lengthy list of Other Classroom Aids and Services.<sup>9</sup> Apart from BSS added to address the shift to ASD, Student's prior IEPs dated 5/16/18 and 10/11/17 contained the same services as the 2019 IEP, including the same list of Other Classroom Aids and Services.<sup>10</sup>

3. Autism. Student met the criteria for ASD in a 10/24/17 comprehensive psychological evaluation as Student exhibited difficulty relating to others, deficits in functional communication, and rarely participated in classroom discussions, among other things.<sup>11</sup> In 2017, Parent reported that Student presented with behavioral characteristics of Autism and that Autism runs in the family.<sup>12</sup> In 2019, Parent noted that Student continued to exhibit the same ASD symptoms, did not have friends and complained that peers did not understand Student.<sup>13</sup> The 4/19/19 comprehensive psychological IEE ("2019 IEE") concluded that Student likely had a "mild form" of ASD and is high-functioning, but which adversely impacted academic functioning based on persistent deficits in functional communication, difficulty with social interaction, problems with emotional and social reciprocity, difficulty adjusting to changes in routines and poor adaptive skills.<sup>14</sup>

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taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> Parent; P27-1.

<sup>6</sup> *Id.*

<sup>7</sup> P8-1,5.

<sup>8</sup> P22 (5/16/18 IEP); P21 (10/11/17 IEP); P8-1,5.

<sup>9</sup> P27-1,16; P40-1 (finalization).

<sup>10</sup> P22-1,8; P21-1,9; Special Education Coordinator; Manager of Specialized Instruction.

<sup>11</sup> P8-1.

<sup>12</sup> P8-4.

<sup>13</sup> P8-4,5.

<sup>14</sup> P8-15; P25-2; Psychologist.

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4. Student is quiet and eager to learn and has no behavior issues at school.<sup>15</sup> Since Student is not a behavior problem at school, Student is easily overlooked.<sup>16</sup> Student laughs and jokes with peers and teachers; Student has no social issues with peers.<sup>17</sup> Student learns with peers and works with them on group projects, where the only concern by peers is about Student's frequent absences.<sup>18</sup>

5. Psychologist proposed that Student "might be better served" in a higher-functioning Autism program with optimal support because Student was not making significant progress.<sup>19</sup> Those who work with Student at school believe Student does not need a more restrictive setting or an Autism program; Student is progressing and should be with general education peers as Student might regress if in an Autism program with children who may be lower-functioning.<sup>20</sup> Student has been doing fine in the current setting; teachers did not raise concerns about Student in 2018/19, which would have been brought to Manager of Specialized Instruction's attention.<sup>21</sup> Student should participate in a social skills group which will provide time for Student to interact with peers and learn appropriate peer relationships.<sup>22</sup> DCPS's school psychologist agreed with a social skills group; Psychologist recommended sessions a minimum of once a week.<sup>23</sup>

6. Cognitive Abilities. A 11/7/11 psychological evaluation of Student using the Wechsler Preschool and Primary Scale of Intelligence – Third Edition ("WPPSI-III") found that Student's Full Scale IQ ("FSIQ") was 87, which is in the Low Average range; Verbal IQ was 90 (Average) and Performance IQ was 96 (Average).<sup>24</sup> The 10/24/17 comprehensive psychological evaluation of Student using the Woodcock-Johnson ("WJ") found Student's General Intellectual Ability ("GIA") score was 63, which is in the Very Low range, significantly lower than the prior testing in 2011.<sup>25</sup> In the 2019 IEE, the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V") found that Student's FSIQ and GIA scores were both 67, which is in the Extremely Low range.<sup>26</sup> The 2019 results are comparable to 2017, but very different from 2011; it was not clear why there was such a change since there was no neurocognitive insult/injury.<sup>27</sup> Cognitive abilities are expected to be stable, so it is difficult to understand Student's decline, which could be from a plateau in learning at home and at school, or lack of cognitive enrichment, which could be

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<sup>15</sup> Special Education Teacher.

<sup>16</sup> Psychologist.

<sup>17</sup> Special Education Teacher.

<sup>18</sup> *Id.*

<sup>19</sup> P8-15; P25-2; Psychologist.

<sup>20</sup> Special Education Coordinator; Manager of Specialized Instruction.

<sup>21</sup> Manager of Specialized Instruction.

<sup>22</sup> P8-18.

<sup>23</sup> P33-2.

<sup>24</sup> P5-4,7; P8-5.

<sup>25</sup> P8-1,6.

<sup>26</sup> P8-8,10.

<sup>27</sup> P8-9,16.

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impacted in part by chronic truancy.<sup>28</sup> Student is likely to struggle significantly with problem solving and demands of daily functioning.<sup>29</sup>

7. Academic Achievement. The 2017 comprehensive psychological evaluation noted that Student's academic abilities were much higher than predicted given Student's cognitive abilities.<sup>30</sup> The 2019 IEE stated that Student's academic skills were significantly deficient and well below Student's expected grade level, but commensurate with Student's cognitive abilities; Psychologist testified that Student was academically "pretty good."<sup>31</sup> Student's written language abilities are notable academic strengths compared to other academic skills.<sup>32</sup> In the 2019 IEE, the WJ-IV indicated that Student's Broad Reading was a standard score of 76 (Grade Equivalent ("GE") of 3.4) in the Low range; Broad Mathematics was 70 (GE 3.2) in the Low range, and Broad Written Language was 91 (GE 5.0) in the Average range.<sup>33</sup> In 2018/19, Student's iReady math assessment at Beginning of Year ("BOY") was 433 (4 years below Student's grade), Middle of Year ("MOY") was 424, while End of Year ("EOY") was much higher at 459 (2 years below grade).<sup>34</sup> In 2018/19, Student's Reading Inventory assessment at BOY was 460 (4 years below Student's grade), while EOY declined to 403 (5 years below grade); Student often rushes to complete assignments and assessments, which could be the cause of academic decline.<sup>35</sup> The present levels of performance for written expression noted that Student's handwriting is legible and understandable most of the time; Student provided well thought out and descriptive responses.<sup>36</sup>

8. Services and Placement. Student receives specialized instruction by being pulled from general education for math (in a group of 11 students) and English (in a group of 10-12 students).<sup>37</sup> In 2018/19, Student's math support class contained 17 students with two adults; Student was observed maintaining focus through a great deal of distraction in class.<sup>38</sup> Student's math class was 6 students with 1 teacher; Student behaved well but had difficulty comprehending the material.<sup>39</sup> At the 2019 IEP team meeting, Parent's advocates sought more specialized instruction to improve reading and math skills and a different placement; DCPS did not believe more hours were warranted.<sup>40</sup> The IEP team agreed to add written expression as an area of concern on Student's 2019 IEP.<sup>41</sup> The latest IEP Progress Report as

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<sup>28</sup> Psychologist.

<sup>29</sup> P8-9,16.

<sup>30</sup> P7-14.

<sup>31</sup> P8-13; Psychologist.

<sup>32</sup> P8-12.

<sup>33</sup> P8-11,12,13; P25-1.

<sup>34</sup> P27-4; P33-5.

<sup>35</sup> P27-5.

<sup>36</sup> P27-6.

<sup>37</sup> Special Education Coordinator.

<sup>38</sup> P8-7.

<sup>39</sup> *Id.*

<sup>40</sup> P8-16; P25-2; P33-5.

<sup>41</sup> P40-10.

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of 5/17/19 prior to drafting the IEP indicated that Student was making progress towards meeting academic goals in math and reading.<sup>42</sup>

9. Speech-Language. The 2017 comprehensive psychological evaluation found significant impairment in functional communications and expressive language skills (unclear speech, pointing to objects to avoid talking).<sup>43</sup> In the 2017 speech-language reassessment Student scored in the Below Average to Significantly Below Average range on speech-language subtests; Student was in the Average range on the ROWPVT-4.<sup>44</sup> Pragmatic skills were found to be appropriate in 2017 as Student demonstrated the ability to: use language for social functions, maintain eye contact, participate in back-and-forth conversation, and introduce new topics; Student was reportedly well-liked by peers and could maintain positive peer relationships.<sup>45</sup>

10. In 2019, Student reportedly displayed very limited conversational skills and presented with notably impaired speech and at times was difficult to understand.<sup>46</sup> A speech-language screener on 1/7/19 indicated that Student neither passed nor failed, but that information would be added to Student's baseline and present levels of performance; the screener was reviewed by the IEP team on 6/10/19 which concluded that Student passed.<sup>47</sup> Student had not mastered speech-language goals but did make growth toward future mastery.<sup>48</sup> Working in a social skills group will assist with speech-language concerns, including deficits of functional communication, social interaction, social reciprocity and adapting to change in routine.<sup>49</sup> Psychologist concluded that Student needed continued speech-language therapy, apparently at the same level of 120 minutes/month, with which DCPS's school psychologist agreed.<sup>50</sup> The IEP team determined eligibility for speech-language services at 120 minutes/month, despite Parent's advocate urging 240 minutes/month and different services and supports.<sup>51</sup> Student's 65 absences in 2018/19 "significantly factored" into the amount of direct speech-language services that could be rendered, but growth occurred despite the chronic absences.<sup>52</sup>

11. Occupational Therapy. On 11/8/18 DCPS's occupational therapist stated that Student had improved written communication and writing was legible.<sup>53</sup> On the 1/26/19 occupational therapy reassessment report, Student's fine motor skills, visual motor skills,

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<sup>42</sup> R13p71.

<sup>43</sup> P8-4.

<sup>44</sup> P14-5.

<sup>45</sup> *Id.*

<sup>46</sup> P8-6,17; Psychologist.

<sup>47</sup> P15-1; P33-3; P26-1.

<sup>48</sup> P33-4.

<sup>49</sup> Speech-Language Pathologist.

<sup>50</sup> P8-17; P25-3.

<sup>51</sup> P14-6; P26-1; P27-16.

<sup>52</sup> P27-9; Manager of Specialized Instruction (ST making some progress in speech-language).

<sup>53</sup> P23-2.

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and visual perception skills were determined to be Below Average; delays in these areas have a negative impact on the ability to perform written tasks, keep up with classroom demands, and make academic progress.<sup>54</sup> The assessment results were used by the IEP team to determine whether school-based occupational therapy services continued to be necessary for Student to achieve educational goals.<sup>55</sup> Psychologist concluded that Student needed continuing occupational therapy, apparently at the same level of 120 minutes/month, with which DCPS's school psychologist agreed.<sup>56</sup> At the IEP team meeting, the DCPS occupational therapist added cursive and keyboarding to the services provided and recommended a continuation of 120 minutes/month of direct services to enable Student to focus on academics in the classroom as much as possible.<sup>57</sup>

12. Absences. The 2017 comprehensive psychological evaluation noted that Student had averaged 20 days of absences each year for the previous 3 years, despite having no chronic illness.<sup>58</sup> DCPS contacted Parent about Student's absences.<sup>59</sup> Educational Advocate testified that 20 days of absences a year was not significant.<sup>60</sup> As of 11/8/18, Student had 16 absences of which 14 were excused.<sup>61</sup> As of Term 3 in 2018/19, Student had 57 absences of which 24 were unexcused.<sup>62</sup> By the end of 2018/19, Student had 65 absences and 8 tardies.<sup>63</sup> Parent testified that Student was absent due to some health issues and was using sickness as an excuse to avoid school; there was no indication that absences were due to disability apart from passing mention by Psychologist.<sup>64</sup> Parent noted that Student was counted absent for the day if picked up before 2:00 p.m. or if Student missed 2 classes in a day.<sup>65</sup> DCPS emphasized in this case that Student does not need services increased, but simply needed to attend school to benefit from the services already provided.<sup>66</sup> If Student is frustrated by school there should be a conversation between Student, teachers and Parent.<sup>67</sup> Student is still making progress despite 65 absences in a year.<sup>68</sup>

13. Prior HOD. On 3/20/19 in a prior due process hearing between the parties, Hearing Officer Peter Vaden found a denial of FAPE due to DCPS failing to provide an appropriate IEP since March 2017 and to conduct a sufficiently comprehensive psychological

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<sup>54</sup> P11-1,9.

<sup>55</sup> P11-9.

<sup>56</sup> P8-17; P25-3.

<sup>57</sup> P26-1; P33-4.

<sup>58</sup> P7-11.

<sup>59</sup> R12p62.

<sup>60</sup> Educational Advocate.

<sup>61</sup> P23-5.

<sup>62</sup> R13p71.

<sup>63</sup> P27-9.

<sup>64</sup> Parent; Psychologist.

<sup>65</sup> Parent.

<sup>66</sup> Manager of Specialized Instruction.

<sup>67</sup> *Id.*

<sup>68</sup> Special Education Coordinator.

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reevaluation in the Fall of 2017, among other things.<sup>69</sup> Mr. Vaden ordered that once the IEE authorized by DCPS was completed, Student's IEP team must promptly convene to review the IEE and review and revise Student's IEP and educational placement as appropriate.<sup>70</sup>

### Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"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, 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); *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 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

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<sup>69</sup> P14-21.

<sup>70</sup> P4-21,22.

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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, 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; *Andrew 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*, No. 17-cv-2455, 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).

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); *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:** *Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of service at meetings on 5/29/19 and 6/10/19, as Student needed (a) full-time or close to full-time services outside general education, (b) placement in an appropriate autism program, (c) 240 minutes/month of speech-language services, and (d) 240 minutes/month of occupational therapy services, in light of Student’s lack of progress and ongoing behavior issues. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue through expert testimony and documents, shifting the burden to Respondent, which met its burden of persuasion, as discussed below.

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

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whether it was “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 for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” 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 is 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). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered in turn.<sup>71</sup> *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

Specialized Instruction and Placement. Petitioner first challenges the fact that Student’s 2019 IEP provides only 10 hours/week of specialized instruction outside general education, along with related services, which remained unchanged despite shifting Student’s disability classification from SLD to Autism in 2018. This was the key focus of the 2019 IEE which resulted in a detailed report from Psychologist who simply asserted that Student “might be better served” in a higher-functioning Autism program with optimal support, because Student was not making significant progress in Public School. This recommendation did not impress the undersigned as a ringing endorsement in support of a great deal more specialized instruction – much less full-time in a more restrictive setting such as a self-contained Autism program.

By contrast, DCPS witnesses persuasively testified that Student did not need a more restrictive setting or an Autism program, as Student was progressing and should remain with general education peers. DCPS raised concerns that Student might well regress in an Autism program with other children who could well be lower-functioning than Student. According to Psychologist and the 2019 IEE, Student has a “mild form” of ASD and is high-functioning. Those who worked with Student testified that Student did well in the general education setting and that teachers did not raise concerns about Student in 2018/19. Moreover, as noted above, to comply with the law on least restrictive environment, DCPS must ensure that Student is not removed from children who are nondisabled, if possible. *Endrew F.*, 137 S. Ct. at 1000.

One change that did occur during the 2019 IEP team meeting was the addition of a social skills group to provide Student time to interact with nondisabled peers and learn appropriate peer relationships. DCPS’s school psychologist agreed with the social skills group and Psychologist recommended scheduling Student for a minimum of one session a week to implement it.

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<sup>71</sup> 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. Procedural violations were not specifically alleged in this matter.

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At the 2019 IEP team meeting, Parent's advocates sought more specialized instruction to improve reading and math, as Student's skills are far lower than desired. But reading and math are the very areas in which Student already receives 10 hours/week of specialized instruction. Thus, DCPS did not believe more hours were warranted. Further, Student's skill levels may appear artificially low, as it was noted that Student often rushes to complete assignments and assessments, so testing may not reflect Student's true abilities. The latest IEP Progress Report available when the parties met to draft the 2019 IEP indicated that Student was making progress towards meeting academic goals in math and reading.

A troublesome aspect of this case is that Student's cognitive scores have fallen over time even though cognitive levels are expected to be stable, so expectations of Student's abilities may need to be adjusted accordingly. Student's cognitive standard score of 67 in the 2019 IEE was comparable to the 63 in 2017, but much lower than Student's 2011 FSIQ of 87. Psychologist had no explanation for this decline since there was no neurocognitive injury, but noted that Student is likely to struggle significantly. Thus, the 2019 IEE noted that even though Student's academic skills were significantly deficient they were commensurate with Student's cognitive abilities, and Psychologist testified that academically Student was "pretty good."

On balance, this Hearing Officer concludes that Respondent met its burden of demonstrating that 10 hours/week of specialized instruction outside general education was appropriate and that it would not be Student's least restrictive environment to place Student in an Autism program given Student's mild form of Autism and ability to progress in the general education setting. DCPS has provided Student "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). Petitioner failed to convince the prior Hearing Officer to order DCPS to place Student in a program for students with Autism less than a year ago, and is no more successful now as the evidence still does not support Student's need for such a restrictive program.

Related Services. As a general matter, "related services" must be provided if required to assist a student with a disability to benefit from special education. See 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). In this case there is no question that related services will be provided. The dispute is over the amount of services needed and whether with only 120 minutes/month instead of 240, Student's IEP was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, so that Student was able to access the curriculum to advance toward meeting Student's annual goals pursuant to 34 C.F.R. § 300.320(a)(4). See *Damarcus S.*, 190 F. Supp. 3d 35; *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013). Related services, as with any other service in an IEP, are determined on an individual basis by the student's IEP team. See *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46663.

Speech-Language Pathology. Petitioner asserted that 240 minutes/month of speech-language pathology were required to assist Student in benefiting from special education, and

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that 120 minutes/month were not sufficient. The record evidence is divided, as the 2017 speech-language reassessment found Student's pragmatic skills to be appropriate and that Student could maintain positive peer relationships. But in 2019, Psychologist reported that Student displayed very limited conversational skills, had notably impaired speech, and at times was difficult to understand.

Psychologist concluded in the 2019 IEE that Student needed ongoing speech-language therapy, apparently at the same level of service, with which DCPS's school psychologist agreed. A speech-language screener on 1/7/19 was reviewed by the IEP team which concluded that Student passed. Student had not mastered speech-language goals but did make growth toward mastery despite the impact of a substantial number of absences, which were not connected to Student's disability. Notably, a social skills group was added to Student's IEP, which will assist with speech-language concerns, including deficits of functional communication, social interaction, social reciprocity and adapting to change in routine. On balance, this Hearing Officer concludes that Respondent demonstrated that no more than 120 minutes/month of speech-language services were required for Student to access the curriculum and benefit from special education.

Occupational Therapy Services. Petitioner similarly asserted that 240 minutes/month of occupational therapy services were required for Student to benefit from special education, and that 120 minutes/month were not sufficient. DCPS's occupational therapy provider noted on 11/8/18 that Student had improved in written communication and Student's writing was legible, although the 1/26/19 occupational therapy reassessment report noted that Student's fine motor skills, visual motor skills, and visual perception skills were all found to be Below Average, which can impact academics.

Psychologist concluded in the 2019 IEE that Student needed ongoing occupational therapy, apparently at the same level of service, with which DCPS's school psychologist agreed. Student's IEP team determined that 120 minutes/month of occupational therapy services were sufficient based on the DCPS occupational therapist's recommendation, despite adding cursive and keyboarding. One point in maintaining the lower level of service was to keep Student focused on classroom academics by not pulling Student out for related services that were not strictly necessary. Further, Student's absences certainly impacted receipt of occupational therapy, just as it did speech-language services. The undersigned on balance concludes that Respondent demonstrated that no more than 120 minutes/month of occupational therapy services were required for Student to access the curriculum and benefit from special education.

FAPE. In carefully considering the concerns raised above individually and as a group, the undersigned is cognizant of the fact that the analysis is not about achieving perfection. Instead, an IEP and placement simply need to be reasonably calculated to enable Student to make appropriate progress in the circumstances. *Andrew 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*, No. 14-cv-1893, 2016 WL 4506972, at \*21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). DCPS also reasonably emphasized that Student needs to attend school to benefit from special education and related services that are already being provided. On balance,

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this Hearing Officer concludes that DCPS met its burden of persuasion by a preponderance of the evidence that Student's 2019 IEP was reasonably calculated to enable Student to make appropriate progress in Student's circumstances.

**ORDER**

Petitioner has not prevailed on any claim in this case. Accordingly, 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:

Counsel of Record (Appendix A, by email)

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

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov