

PO511224 **DISTRICT OF COLUMBIA**
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
January 9, 2015

STUDENT, ¹)	Date Issued: 1/8/15
through his Parents,)	
Petitioners,)	
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	
("DCPS"),)	
Respondent.)	
)	
)	
)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, Student’s parents, filed a due process complaint on 11/4/14, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because DCPS did not provide a sufficiently restrictive placement for Student in light of his severe disabilities and increasing difficulties in school, requiring Petitioners to unilaterally place Student in a nonpublic school, where he is doing well. DCPS responded that it did offer Student a FAPE, as he did not need a full-time placement, much less a nonpublic school.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

¹ Personally identifiable information is provided in Appendix A.

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Procedural History

The due process complaint in this case was filed on 11/4/14 and assigned to this Hearing Officer on 11/5/14. Respondent filed a timely response to the complaint on 11/21/14, with leave of Petitioner's counsel. Respondent made no challenge to jurisdiction.

The resolution meeting took place on 11/18/14, at which time the parties did not resolve the case or prematurely end the resolution period. The 30-day resolution period ended on 12/4/14. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination ("HOD") by 1/18/15. A prehearing conference was held by telephone on 11/26/14 and a Prehearing Order issued on 11/26/14.

The due process hearing, which was closed to the public, took place on 12/15/14 and 12/16/14.

Counsel declined to discuss settlement at the beginning of the hearing. Petitioners were present for the entire hearing. DCPS's Representative, was present for the morning of the first day and for most of the second day of the hearing.

Neither party objected to the testimony of witnesses by telephone. The parties made no admissions and agreed on no stipulations.

Petitioners' Disclosure statement, submitted on 12/8/14, consisted of a witness list of 8 witnesses and documents P1 through P23. Petitioners' Disclosure statement and documents were admitted into evidence without objection.

Respondent's Disclosure statement, submitted on 12/9/14, consisted of a witness list of 7 witnesses and documents R1 through R5. Respondent's Disclosure statement was admitted into evidence without objection.

Petitioners' counsel presented 7 witnesses in Petitioners' case-in-chief (*see* Appendix A):

1. Psychologist – qualified without objection as an expert in Neuropsychology
2. Private Speech-Language Pathologist – qualified without objection as an expert in Speech-Language Pathology and Audiology
3. Nonpublic School Speech-Language Pathologist – qualified without objection as an expert in Speech-Language Pathology
4. Occupational Therapist – qualified without objection as an expert in Occupational Therapy
5. Head of Intermediate Division, Nonpublic School ("Division Head") – qualified without objection as an expert in Special Education

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6. Father
7. Educational Consultant – qualified without objection as an expert in Special Education, with an emphasis in IEP Program and Placement

Respondent’s counsel presented 4 witnesses in its case (*see* Appendix A):

1. Special Education Coordinator at Neighborhood School (“SEC”)
2. Assistant Principal at Neighborhood School (“Assistant Principal”)
3. Social Worker at Neighborhood School
4. Speech-Language Pathologist at Neighborhood School

Petitioners’ 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 for the 2014/15 School Year (“SY”) by proposing an IEP and placement that was not calculated to provide meaningful educational benefit, where an independent battery of assessments indicated that intensive intervention was needed, requiring a highly specialized, full-time, special education placement.

Petitioners seek the following relief:

1. DCPS shall reimburse Parents’ educational expenses at Nonpublic School for the 2014/15 SY.
2. DCPS shall continue Student’s placement at Nonpublic School until it makes an appropriate placement available.

Oral closing arguments were made by counsel for both parties at the end of the due process hearing.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact² are as follows:

² 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. Petitioners are Student's parents ("Parents").³

2. Student is _____ at Nonpublic School; he completed grades 1-4 at Neighborhood School.⁴

3. Student is classified on his most recent DCPS IEP dated 10/20/14 as having a Specific Learning Disability.⁶ Student has many disabilities, including Attention Deficit Hyperactivity Disorder ("ADHD"), Reading Disorder, Mathematics Disorder, Disorder of Written Expression, Developmental Coordination Disorder, and Adjustment Disorder with Mixed Anxiety and Depressed Mood.⁷ In addition, Student has normal hearing, but trouble processing what he hears.⁸ From a speech-language perspective, Student's profile is consistent with diagnosis of Abnormal Auditory Perception, Unspecified; Dyspraxia; Dysnomia; Memory Disturbance; Dysphasia; and Dyslexia.⁹

4. While Student has adequate intelligence, he has very low working memory, performing at the 2nd percentile on Letter-Number Sequencing; on another test he was at the 95th percentile repeating digits in order, but the 5th percentile at reversing the order.¹⁰ With low working memory, Student has great difficulty recalling words.¹¹ DCPS also noted in its April 2014 Speech and Language Re-evaluation that Student has "some difficulty recalling common information and fundamental skills that are the foundations of building additional information and skills."¹²

5. Student has great difficulties writing, both with mechanics and determining what to write, and everything at school involves writing.¹³ In a test in which Student was to write for 15 minutes after preparing for 5 minutes, Student was able to produce only 1 sentence.¹⁴ Student ranked below the 1st percentile with his dominant hand on a test conducted as part of a Neuropsychological Evaluation.¹⁵ Student's writing is nearly unreadable; he performed

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

³ Father.

⁴ Father; R5.

⁵ Father; Educational Consultant.

⁶ P2-1.

⁷ P8-17; Psychologist.

⁸ Private Speech-Language Pathologist.

⁹ P10-20; Private Speech-Language Pathologist.

¹⁰ Educational Consultant; Psychologist; P8-10.

¹¹ Private Speech-Language Pathologist; P10-8.

¹² P13-6.

¹³ Psychologist.

¹⁴ Private Speech-Language Pathologist; P10-16.

¹⁵ P8-7.

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at the 5th percentile on writing a brief essay.¹⁶ Student struggles with the mechanics of handwriting and is one of the worst cases one expert has ever seen.¹⁷

6. Student was
unable to tell time.¹⁹

7. Student was first found eligible for special education at the end of 1st Grade.²⁰ Student was not too far behind in 2nd Grade, but by 4th Grade in the 2013/14 SY had fallen far behind peers in math, reading and writing.²¹ It became clear at Neighborhood School last school year that Student was not at grade level and was getting worse and worse; Student felt that he couldn't do anything right.²² While at Neighborhood School, Student hated school and often was reluctant to attend because of his very significant academic challenges.²³ Student suffered severe chronic stress from attending Neighborhood School, which went on and on, with no end in sight.²⁴ Student felt hopeless and that he was an academic failure and was falling further and further behind.²⁵

8. Bullying by other students increasingly became an issue.²⁶

Student also suffered social isolation.²⁸

9. Student even began talking about suicide, which caused Parents to take action to get help.²⁹ Neighborhood School, where Student's twin attends, is a fine school and Father would be happy for both of his sons to go there, but something had to be done.³⁰

10. DCPS developed an IEP for Student on 6/17/14 and included only 7.5 hours per week of specialized instruction outside general education and another 2.5 hours per week inside general education, along with 4 hours/month of Speech-Language Pathology, and accommodations.³¹

¹⁶ P8-11; P10-16; P11-3; P14-3; P16-11,12.

¹⁷ Occupational Therapist.

¹⁸ P8-9.

¹⁹ P8-9; P14-1.

²⁰ SEC.

²¹ Psychologist; P8-2.

²² Father.

²³ Father; P8-4,13,18.

²⁴ Psychologist.

²⁵ *Id.*

²⁶ Father.

²⁷ *Id.*

²⁸ Psychologist.

²⁹ Father; Educational Consultant.

³⁰ Father.

³¹ P5-16,18.

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11. Following Student's 6/17/14 IEP, Petitioners unilaterally placed Student at Nonpublic School.³² The parties continued to work together to try to reach consensus.³³

12. Another IEP team meeting was held on 10/20/14, but unlike the 6/17/14 IEP meeting, it included no one from DCPS who had worked directly with Student.³⁴ The 10/20/14 DCPS team members insisted on keeping the same level of specialized instruction and the same level of Speech-Language Pathology services as in the 6/17/14 IEP; they were only willing to add Occupational Therapy ("OT") and a few additional goals to the IEP.³⁵

13. Student's 10/20/14 IEP included 7.5 hours/week of specialized instruction outside general education as before, 2.5 hours/week inside general education as before, 4 hours/month of Speech-Language Pathology as before, 2 hours/month of OT which were new, and accommodations.³⁶ DCPS offered to add Behavioral Support that Petitioners did not accept since Student was not having behavioral problems.³⁷

14. Multiple witnesses for both DCPS and Petitioners agreed with the statement made in DCPS's 10/20/14 IEP that Student "cannot access the fourth grade curriculum without him knowing and understanding the basics in math, reading, and writing."³⁸ The parties further agreed that:

- a. Student is "two grade levels below his grade level" in Mathematics.³⁹
- b. Student "cannot work independently on most grade level math and he needs consistent prompts and cues to stay on task."⁴⁰
- c. Student "is most successful when he is in a small group setting or working one on one" in Mathematics.⁴¹
- d. Student is "two grade levels below his grade level" in Reading.⁴²
- e. Student "cannot work independently on most grade level reading and he needs consistent support."⁴³

³² P6-1; Father; R4-2.

³³ P6-1.

³⁴ SEC.

³⁵ SEC; P2-1.

³⁶ P2-17, P3-1.

³⁷ Psychologist.

³⁸ P2-3,9; Educational Consultant.

³⁹ P2-3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² P2-6.

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- f. Student “is most successful when he is in a small group setting or working one on one” in Reading.⁴⁴
- g. Student is “two grade levels below his grade level” in Written Expression.⁴⁵
- h. Student “cannot work independently on most grade level writing and he needs consistent support.”⁴⁶
- i. Student “is most successful when he is in a small group setting or working one on one, and working with a scribe” for Written Expression.⁴⁷

Similar statements are made throughout the 6/17/14 IEP and endorsed by both DCPS and Petitioners.⁴⁸

15. Teachers at Neighborhood School are very good, but Student needed much more intensive help than Neighborhood School could provide.⁴⁹ In the classroom, Student does well 1-on-1 and is very compliant, but is lost without 1-on-1 attention.⁵⁰ Even when part of a small group, Student will often be lost in his thoughts and not focused on the task at hand, as he is very distractible.⁵¹

16. Student needs a full-time special education program for children with complex learning disabilities.⁵² The 7.5 hours of specialized instruction outside general education listed on his IEPs are not enough for Student; he needs a highly specialized learning environment.⁵³ Intensity of intervention at this point is critical for Student’s future.⁵⁴

17. Student needs consistent support in a full-time educational setting around peers who understand him and have similar challenges, so he can relax and not be different or less able than his peers.⁵⁵ Student needs a high level of support even during physical education and lunch.⁵⁶ In P.E., for instance, Student likes soccer but won’t understand all the directions given and, rather than asking for clarification, tries to pretend that he understands.⁵⁷ At

⁴³ *Id*

⁴⁴ *Id.*

⁴⁵ P2-8.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ P5-3,6,8.

⁴⁹ Educational Consultant.

⁵⁰ Occupational Therapist.

⁵¹ *Id.*

⁵² Educational Consultant; P10-17; P9-13; Division Head.

⁵³ Educational Consultant; Psychologist; Father.

⁵⁴ Psychologist; P8-17.

⁵⁵ Private Speech-Language Pathologist; Division Head.

⁵⁶ Nonpublic School Speech-Language Pathologist.

⁵⁷ *Id.*

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Nonpublic School, Student eats lunch in his classroom where he continues to interact with peers in a positive setting.⁵⁸

18. As for related services, DCPS's IEPs included 4 hours/month of speech-language pathology, but Student needs 8 hours/month.⁵⁹ Student needs 6 hours/month of OT to work on handwriting, keyboarding, and other things.⁶⁰ OT for only 2 hours/month, as included in the 10/20/14 IEP, is not enough.⁶¹

19. More OT goals are also needed in the IEP addressing Student's letter reversal and other things.⁶² Additional OT goals were drafted for DCPS, but what DCPS included in the 10/20/14 IEP was not comprehensive enough.⁶³ Goals relating to Attention and Executive Functioning that had been agreed to in June 2014 were not added by DCPS in the 10/20/14 IEP, which was apparently just an oversight.⁶⁴

20. DCPS offered to add Behavioral Support to Student's IEP, but Petitioners did not believe it would be helpful.⁶⁵ However, at the 10/20/14 IEP meeting there was no one present from DCPS who could discuss or add Behavioral Support to the IEP, nor were there any present levels, goals or objectives for Behavioral Support as required in an IEP.⁶⁶ Further, there was no mention of Behavioral Support in the 10/20/14 Prior Written Notice that identified the areas of disagreement over the IEP between DCPS and Petitioners.⁶⁷

21. Nonpublic School is appropriate for Student and has transformed him by addressing skill remediation, providing small class size with individualized attention, and allowing hands-on learning that is tailored to Student.⁶⁸ Student is in a class of 13 students at Nonpublic School with a lead teacher and 2 assistants; Student often receives 1-on-1 or 2-on-1 attention for Reading and Math.⁶⁹ Student has many hands-on activities at Nonpublic School, such as making paper.⁷⁰ He has blossomed at Nonpublic School in just a few

⁵⁸ Nonpublic School Speech-Language Pathologist.

⁵⁹ P10-17; P2-17.

⁶⁰ Occupational Therapist; P11-19.

⁶¹ Occupational Therapist; P2-17.

⁶² Occupational Therapist.

⁶³ Educational Consultant.

⁶⁴ *Id.*

⁶⁵ Assistant Principal.

⁶⁶ *Id.*

⁶⁷ Assistant Principal; P3.

⁶⁸ Division Head; Educational Consultant; Nonpublic School Speech-Language Pathologist; P10-17.

⁶⁹ Nonpublic School Speech-Language Pathologist; Division Head.

⁷⁰ Occupational Therapist.

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months, and has calmed down, relaxed and become willing to take risks in the classroom, such as by volunteering.⁷¹

22. Given the severity of Student's disabilities, it would be difficult for him to be successful with less support than he is receiving at Nonpublic School.⁷² Even when Student receives a lot of support he still struggles, such as trying to write a simple narrative.⁷³ Nothing less than full-time placement is sufficient for Student at this time.⁷⁴

23. Student is developing independence at Nonpublic School and taking care of himself and integrating new skills.⁷⁵ In marked contrast with last year, all the negative problems are gone and Student now has just normal ups and downs about school.⁷⁶ Student has blossomed in a short time at Nonpublic School and now has a future.⁷⁷

24. Nonpublic School has a Certificate of Approval from OSSE, which was renewed in October 2014.⁷⁸ The base cost of attending Nonpublic School is just under \$40,000 and with needed additional services, costs about \$56,000 per year; OSSE approves Nonpublic School's rates.⁷⁹

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).

To provide a FAPE for children with disabilities, "the child's parents, teachers, school officials, and other professionals collaborate in a 'multi-disciplinary team' to develop an individualized educational program (IEP) to meet the child's unique needs. See [20 U.S.C.] § 1414(d)(1)(B)." *D.K. v. Dist. of Columbia*, 983 F. Supp. 2d 138, 141 (D.D.C. 2013). See also *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005); *Dist. of Columbia v. Wolfire*, 10 F.Supp.3d 89, 92 (D.D.C. 2014); *Smith v. Dist. of Columbia*, CV 12-2058 JEB/DAR, 2014 WL 1425737, at *4 (D.D.C. Mar. 14, 2014)

⁷¹ Division Head.

⁷² *Id.*

⁷³ Division Head; P16-13,14.

⁷⁴ Educational Consultant.

⁷⁵ Division Head.

⁷⁶ Father.

⁷⁷ *Id.*

⁷⁸ Division Head; P17-1.

⁷⁹ Division Head; Father.

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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 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

Importantly, DCPS 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.

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.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence 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. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue: *Whether DCPS denied Student a FAPE for the 2014/15 SY by proposing an IEP and placement that was not calculated to provide meaningful educational benefit, where an independent battery of assessments indicated that intensive intervention was needed, requiring a highly specialized, full-time, special education placement.*

Petitioners contend that DCPS's 6/17/14 IEP for Student, which included limited specialized instruction for Student, and DCPS's 10/20/14 IEP, which did not increase specialized instruction, were inappropriate and were not reasonably calculated to provide meaningful educational benefit, given Student's extensive disabilities and the range of assessments and experts clearly stating that Student needed full-time special education services. For the reasons discussed below, this Hearing Officer concludes that Petitioners

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have met their burden of proof on this issue and that DCPS failed to provide Student a FAPE.

To provide a FAPE, DCPS is obligated to devise an IEP for each eligible child, 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); *School Comm. of the Town of Burlington, Mass. v. Department 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).

Here, Student's disabilities were extensive. While Student's IEPs state that he has a Specific Learning Disability, in fact Student has many disabilities, including ADHD, Reading Disorder, Mathematics Disorder, Disorder of Written Expression, Developmental Coordination Disorder, and Adjustment Disorder with Mixed Anxiety and Depressed Mood. From a speech-language perspective, Student's profile is consistent with diagnosis of Abnormal Auditory Perception, Dyspraxia, Dysnomia, Memory Disturbance, Dysphasia, and Dyslexia.

Student's limitations were apparent in testing conducted by Petitioners. For instance, Student has very low working memory, performing at the 2nd percentile on Letter-Number Sequencing; on another test he was at the 95th percentile repeating digits in order, but the 5th percentile at reversing the order. In a test in which Student was to write for 15 minutes after preparing for 5 minutes, Student was able to produce only 1 sentence. Student ranked below the 1st percentile with his dominant hand; he performed at the 5th percentile in writing a brief essay. Even DCPS noted in its April 2014 Speech and Language Re-evaluation that Student has "some difficulty recalling common information and fundamental skills that are the foundations of building additional information and skills."

While Student was not too far behind in 2nd Grade, by 4th Grade he had fallen far behind peers in math, reading and writing, and was getting further and further behind. Student felt that he couldn't do anything right, hated school and was reluctant to attend school because of his very significant academic challenges. Student suffered severe chronic stress from attending Neighborhood School, felt hopeless, was bullied, and suffered social isolation. Student began talking about suicide, which caused Parents to take action and seek help to ensure appropriate schooling for Student.

Petitioners obtained evaluations and opinions from experts that made clear to them and to this Hearing Officer that Student needed substantial support at school and that the 7.5 hours offered in DCPS's IEPs for Student was not sufficient and not reasonably calculated to provide meaningful educational benefit to Student. Indeed, the evidence in this case is that Student needs a full-time special education program for children with complex learning disabilities. Student needs an educational setting with peers who understand him and have similar challenges, so he can relax and not be different or less capable than his peers, and he needs that level of support even during physical education and lunch.

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Further, the related services proposed by DCPS in its IEPs were insufficient, as the evidence from credible experts was that Student needed significantly more speech-language pathology services and much more OT. In addition, while DCPS's 10/20/14 IEP contained more goals than the 6/17/14 IEP, additional OT goals were needed to address Student's letter reversal, among other things, as well as including goals relating to attention and executive functioning that had been agreed to in June 2014 and were inadvertently omitted. *See N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 68 (D.D.C. 2010) (IDEA requires IEP to include measurable annual goals).

DCPS's response in this case was not to demonstrate that the IEP for Student was appropriate in June 2014 or October 2014, but to explain that an IEP is a living document and could be adjusted step by step if Student's IEP was inadequate. But "parents are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school." *N.S.*, 709 F. Supp. 2d at 72 (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2492–93, 174 L. Ed. 2d 168 (2009)); *Dist. of Columbia v. Oliver*, CV 13-00215 BAH/DAR, 2014 WL 686860, at *6-7 (D.D.C. Feb. 21, 2014). Indeed, given DCPS's unwillingness to increase the amount of specialized instruction at all from June to October 2014, despite the information and experts provided by Petitioners, it is not surprising or unreasonable that Petitioners did not wait to see if the IEP might be adjusted in the future.

Moreover, while DCPS emphasized that the hours of specialized instruction in the IEPs it offered could be increased as necessary, IEPs are to be judged as proposed to Petitioners, not as they might be hypothetically improved. *N.S.*, 709 F. Supp. 2d at 72 ("[b]ecause the purpose of the due process hearing is to contest the adequacy of the IEP and the placement, the Hearing Officer should not consider evidence about services not prescribed by the IEP or discussed at the IEP meeting. *See generally A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir.2007) ('In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself.')").

Accordingly, this Hearing Officer finds that neither the 6/17/14 IEP nor the 10/20/14 IEP were reasonably calculated to provide educational benefit to Student, and that DCPS failed to provide Student a FAPE for the 2014/15 SY to date.

Having found an actionable violation of the IDEA, this HOD next considers appropriate equitable relief. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. Dist. of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. Dist. of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir.2005)).

Reimbursement Remedy

When Respondent fails to provide a FAPE, the legal framework for nonpublic school reimbursement was recently set forth as follows:

It is settled that IDEA's "broad remedial reach" encompasses "requir[ing] an LEA to provide tuition reimbursement as compensation when a parent enrolls a

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disabled child in a private school due to the LEA's deficiencies in providing a FAPE." *L.R.L. ex rel. Lomax v. Dist. of Columbia*, 896 F.Supp.2d 69, 76 (D.D.C.2012) (citation omitted); *see also Oliver*, 2014 WL 686860, at *5 ("[T]he remedial authority for which the Act provides 'includes tuition reimbursement for parents who unilaterally place their child in private school [.]'" (citing 20 U.S.C. § 1412(a)(10)(C)(ii)); *cf. Dist. of Columbia v. Vinyard*, 971 F.Supp.2d 103, 115 (D.D.C.2013) ("Tuition reimbursement for private school tuition when the school district denied a child a FAPE was first recognized by the Supreme Court as part of the courts' broad authority to 'grant such relief as the court determines [is] appropriate.'" (quoting *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)) (citation omitted).

However, this Court has commented that "parents who unilaterally place their child at a private school without the consent of school officials [do] so at their own financial risk." *K.E. v. Dist. of Columbia*, No. 13-0084, — F.Supp.3d —, —, 2014 WL 242986, at *5 (D.D.C. Jan. 23, 2014) (citation omitted). "Parents in such situations may be reimbursed only if 'the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.'" *Id.* (citations omitted); *see also* 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that reimbursement may be appropriate if "the agency had not made a free appropriate public education available to the child in a timely manner prior to [the private-school] enrollment"). Put another way, "[t]he reviewing court may grant tuition reimbursement if: '(1) the public placement violated the IDEA and (2) the private school placement was proper under the Act.'" *Jalloh v. Dist. of Columbia*, 968 F.Supp.2d 203, 210 (D.D.C.2013) (citation omitted); *see also Oliver*, 2014 WL 686860, at *5 ("[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits []'—the same standard by which the appropriateness of a public school's IEP is assessed.") (citation omitted). Thus, parents are not entitled to tuition reimbursement where "the educational program and site proposed by DCPS comply with IDEA's FAPE requirement." *James v. Dist. of Columbia*, 949 F.Supp.2d 134, 139 (D.D.C.2013); *see also Walker v. District of Columbia*, 2014 WL 3883308, at *5 (D.D.C. Aug. 6, 2014).

Pinto v. Dist. of Columbia, CV 12-01699 DAR, 2014 WL 4809841, at *6-7 (D.D.C. Sept. 29, 2014). In short, tuition reimbursement may be appropriate if DCPS did not offer Student a FAPE (as found above) and Nonpublic School is proper and appropriate under the IDEA.

In conducting this analysis, "courts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private

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school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *See Rowley*, 458 U.S. at 202, 102 S. Ct. 3034 (noting that 'sufficient educational benefit' will vary from child to child)...” *Branham*, 427 F.3d at 12. These considerations are analyzed in turn to determine whether Nonpublic School is appropriate for Student:

a. Nature and Severity of Student's Disability: The evidence in this case establishes that Student has a broad range of disabilities that were causing him to fall further and further behind and become more and more frustrated with school to the point that he began talking about suicide. While Student's IEP states that he has a Specific Learning Disability, Student actually has many disabilities, including ADHD, Reading Disorder, Mathematics Disorder, Disorder of Written Expression, Developmental Coordination Disorder, and Adjustment Disorder with Mixed Anxiety and Depressed Mood. Also, from a speech-language perspective, Student's profile was consistent with diagnosis of Abnormal Auditory Perception, Dyspraxia, Dysnomia, Memory Disturbance, Dysphasia, and Dyslexia.

b. Student's Specialized Educational Needs: The evidence in this case leaves no doubt that Neighborhood School was not meeting Student's educational needs and the IEPs DCPS proposed were not sufficient. The evidence is that Student needs a full-time special education program for children with complex learning disabilities. Student needs to be with peers who understand him and have similar challenges, so he can relax and not be different or less capable than his peers. Student needs that level of support even during physical education and lunch.

c. Link Between Student's Needs and the Services Offered by Private School: It is clear from the experience Student has already had at Nonpublic School that it is a good fit for him. Nonpublic School has transformed Student by providing skill remediation, providing him a small class with individualized attention, and allowing hands-on learning that is tailored to him. Student is in a class of 13 students at Nonpublic School with a lead teacher and 2 assistants; Student often receives 1-on-1 or 2-on-1 attention in Reading and Math. Student has blossomed at Nonpublic School in just a few months, and has calmed down, relaxed and become willing to take risks in the classroom such as volunteering.

d. Cost of Placement at Private School: Nonprofit School is on OSSE's list of approved nonpublic day schools, and Nonpublic School's rates are approved by OSSE. DCPS did not question Nonprofit School's rates and offered no evidence that the cost of placement at Nonpublic School would be higher than at other local private schools serving students with similar disabilities.

e. Least Restrictive Environment: While DCPS stressed the large difference between the 7.5 hours proposed in the DCPS IEPs for Student and full-time placement, it is clear to this Hearing Officer that the gap was caused by DCPS's unwillingness to increase the hours in its IEPs. Experts for Petitioners were convincing in their clarity that Student needs full-time services and that intensive services are critical at this stage to adequately address Student's needs. Moreover, persuasive evidence was presented that it is important for Student to be with other disabled peers even during lunch and physical education in order to

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receive the services he needs and avoid the bullying and isolation he experienced at Neighborhood School. A placement such as Nonpublic School, where Student has no interaction with non-disabled peers, is the least restrictive environment for Student at this time. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) (“[i]n determining the least restrictive environment, consideration is given to the types of services that the child requires,” *citing* 34 C.F.R. 300.552(d)); *N.T. v. Dist. of Columbia*, 839 F. Supp. 2d 29, 35 n.3 (D.D.C. 2012) (Hearing Officer could consider whether private school was the least restrictive environment in evaluating whether private placement was the proper remedy).

Consider all of the factors above, it is the conclusion of this Hearing Officer that Nonpublic School is a proper and appropriate placement for Student.

Finally, since “placement decisions implicate equitable considerations, moreover, courts may also consider the parties’ conduct. *Reid*, 401 F.3d at 524.” *Branham*, 427 F.3d at 12. Here, while both parties have worked together collaboratively – and may well need to do so in the future – this Hearing Officer concludes that the equities support reimbursement of Petitioners by DCPS for the cost of Nonpublic School paid by Petitioners to date, along with continued funding by DCPS of Nonpublic School as Student’s placement until such time as DCPS may offer Student a FAPE and make another appropriate placement available. “Once a Court finds that a public school district has failed to offer a FAPE, the Court is authorized to ‘grant such relief as the court determines is appropriate.’ 20 U.S.C. § 1415(i)(2)(C)(iii). ‘Under this provision, equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing.’ *Florence County*, 510 U.S. at 16, 114 S.Ct. 361 (internal quotation marks and citations omitted).” *N.S.*, 709 F. Supp. 2d at 73.

ORDER

Petitioners have met their burden of proof in this case as set forth above. Accordingly, **it is hereby ordered that:**

(1) Within 60 calendar days, DCPS shall reimburse Petitioners for tuition and related expenses paid to date for Student’s enrollment at Nonpublic School during the 2014/15 SY, subject to Petitioners providing proper documentation and receipts for tuition and expenses incurred; and

(2) DCPS shall continue and fund Student’s placement at Nonpublic School until it makes another appropriate placement available.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat
Keith L. Seat, Esq.
Hearing Officer

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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).