

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

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

OSSE
Office of Dispute Resolution
January 26, 2016

<i>Student</i> , ¹)	Date Issued: 1/23/16
through his <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Case No.: 2015-0368
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 1/12/16 & 1/13/16
("DCPS"),)	Hearing Location: ODR Room 2004
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s father, filed 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 DCPS did not provide an IEP and placement that was sufficiently restrictive when Student needed a full-time therapeutic placement, and did not implement an earlier IEP. DCPS responded that it had not denied Student a FAPE because he is making progress in school and that he would refuse to leave *Public School* for any other placement.

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, including terms initially stated in italics.

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Procedural History

Following the filing of the due process complaint on 11/13/15, the case was assigned to the undersigned on 11/17/15. DCPS's response to the complaint was timely filed on 11/19/15 and did not challenge jurisdiction.

The resolution session meeting took place on 11/24/15, but the parties neither settled the case nor terminated the 30-day resolution period early, which ended on 12/13/15. 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 1/27/16.

The due process hearing took place on 1/12/16 and 1/13/16. The hearing was closed to the public. Petitioner was represented by *Petitioner's Counsel*. DCPS was represented by *Respondent's Counsel*. Counsel discussed settlement near the beginning of the hearing without success. Petitioner was present for the entire first day of the hearing, but was excused the second day due to his work obligations.

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

Petitioner's Disclosure statement, submitted on 1/5/16, consisted of a witness list of 9 witnesses and documents P1 through P27, which were admitted into evidence without objection. Respondent's objection to a lawyer from Petitioner's Counsel's firm testifying as a fact witness was overruled.

Respondent's Disclosure statement, submitted on 1/5/16, consisted of a witness list of 6 witnesses and documents R1 through R16, which were admitted into evidence without objection, except for R3, which was admitted over objection based on relevance and authenticity, and R15, which was admitted over objection based on relevance.

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

1. *Licensed Psychologist*, who was qualified without objection as an expert in Special Education Programming and Placement
2. *Principal* of Nonpublic School
3. *Educational Advocate*
4. *Compensatory Education Planner* ("Planner"), who was qualified over objection as an expert in Special Education Programming, IEP Development and IEP Implementation
5. Parent
6. *Meeting Advocate*

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Respondent's Counsel presented 2 witnesses in Respondent's case (*see* Appendix A):

1. *School Psychologist* at Public School, who was qualified without objection as an expert in School Psychology
2. *Teacher* at Public School

Petitioner's Counsel did not call any rebuttal witnesses.

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

Issue 1: Whether DCPS denied Student a FAPE by failing to provide enough specialized instruction in a therapeutic setting outside general education in his 10/22/15 IEP in light of his lack of educational progress, ongoing behavior problems and current evaluations.

Issue 2: Whether DCPS denied Student a FAPE by failing to provide a placement/location of services on 10/22/15 with full time specialized instruction in a separate therapeutic special education day school due to his lack of educational progress, ongoing behavior problems and current evaluations.

Issue 3: Whether DCPS denied Student a FAPE by failing to properly implement his 7/27/15 IEP by not providing the required 15 hours per week of specialized instruction outside general education from the start of the 2015/16 school year.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. DCPS shall convene a multidisciplinary team meeting within 10 business days to develop an appropriate IEP for Student providing full time specialized instruction in a separate therapeutic special education day school.
3. DCPS shall fund a separate therapeutic special education day school or convene a multidisciplinary team meeting within 10 business days to determine an appropriate placement/location of services for Student.
4. Compensatory education for any denial of FAPE.
5. Any other relief that is just and reasonable.

Oral opening statements and closing statements were made by Petitioner's Counsel and Respondent's Counsel. The parties were permitted to submit legal citations after the hearing; Petitioner's Counsel did so on 1/14/16.

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Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.³ Student is *Age* and in *Grade*; he has repeated each of the 2 previous grades.⁴

2. Student was classified on 10/22/15 as having Multiple Disabilities, with the addition of Emotional Disturbance ("ED") to his previous classification of OHI (Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD")).⁵ The new classification was based on the 9/23/15 Comprehensive Psychological Evaluation (the "2015 Evaluation") of Student, which diagnosed him with ADHD, Combined Type; Mood Disorder Not Otherwise Specified; and Oppositional Defiant Disorder.⁶

3. The cognitive testing of Student in the 2015 Evaluation using the WISC-IV revealed a wide range of results from Extremely Low on Perceptual Reasoning to Average on Verbal Comprehension.⁷ Student's verbal reasoning abilities are much better developed than his nonverbal abilities.⁸

4. All aspects of Student's academic functioning in the 2015 Evaluation was at the low end of the scale, with Broad Reading at the 6th percentile compared to peers and Broad Math at the 1st percentile.⁹ Writing Fluency was at the 6th percentile, while Spelling was at the 16th percentile.¹⁰ Student's academic functioning is well below his age and grade level, ranging from 2 to 6 grades behind, even though he has been retained twice in recent years.¹¹ Parent sees no progress by Student toward his goals and is concerned about his academics.¹²

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

³ Parent.

⁴ Parent; P13-4.

⁵ R11-1; P9-1,6; P8-1; Educational Advocate.

⁶ P13-19,18.

⁷ P13-7.

⁸ P13-17.

⁹ P13-10.

¹⁰ P13-12.

¹¹ P13-17,4.

¹² Parent.

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5. According to his IEPs, Student is performing “significantly” below grade level in math; his strongest area of math is 4 grade levels behind; he scored 20% on the first unit assessment and 28% on the second unit assessment, both of which are below basic.¹³ Student is performing “drastically” below grade level in reading, with 15% on his first unit assessment and 6% on his second unit assessment; his reading is approximately 3 grade levels behind.¹⁴ Student is below average in written expression.¹⁵

6. Student received very poor grades in 2014/15.¹⁶ In the first term of 2015/16, Student’s grades were more mixed with a B+ in English and Cs in Science and Art, as well as a D in Math and Fs in Spanish and U.S. History & Geography.¹⁷ Student’s teachers note that he is much more capable academically than his grades reflect.¹⁸

7. IEPs and Placement. From the beginning of his schooling, Student has had a long history of problems that have impeded his learning and participation in school.¹⁹ Student’s first IEP was not developed until 3/9/15, and provided 4 hours/week of specialized instruction out of general education and 120 minutes/month of behavioral support services.²⁰ Student’s IEP was next updated on 7/27/15, just before a 7/29/15 due process hearing concerning Student in Case No. 2015-0225, and provided 15 hours/week of specialized instruction out of general education and 240 minutes/month of behavioral support services.²¹

8. Student’s IEP team met on 10/22/15 to review the 2015 Evaluation, which had been ordered in the 8/27/15 HOD in Case No. 2015-0225.²² The 2015 Evaluation recommended a full-time therapeutic program and stated that it was “imperative” for Student to receive intensive academic and support services.²³ School Psychologist reviewed the 2015 Evaluation for DCPS and accepted it with reservations.²⁴ School Psychologist was cautious about some of the recommendations in the 2015 Evaluation because the evaluator did not observe Student in the lunchroom, just his classroom.²⁵ School Psychologist concluded that Student is able to access full-time specialized instruction and related services in a self-contained setting within DCPS.²⁶

¹³ P6-3; P8-3; P9-3; R2-3.

¹⁴ P6-4; P8-4; P9-4; R2-4.

¹⁵ P8-5; P9-5; R2-5.

¹⁶ All dates in the format “2014/15” refer to school years. P18-1, P19-1.

¹⁷ P20-1,2.

¹⁸ R4-5.

¹⁹ R4-1.

²⁰ P6-1,7; R4-1.

²¹ P8-1,8.

²² School Psychologist.

²³ P13-19.

²⁴ School Psychologist.

²⁵ *Id.*

²⁶ R15-5; School Psychologist.

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9. At the 10/22/15 IEP team meeting, DCPS refused to change Student's IEP to full-time, on the rationale that a jump from 4 hours/week to full-time was too great, as they try to increase restrictiveness in an IEP step by step; but they agreed to increase the IEP to 20 hours/week.²⁷ At that meeting, the team recommended that Student be placed in a self-contained classroom to receive more intensive and comprehensive services to address his academic and emotional needs.²⁸ DCPS told Parent (and his advocates) that Public School would provide 20 hours/week and could not provide "Specials" or electives outside general education.²⁹ However, the IEP finalized by DCPS after the 10/22/15 meeting provided only 15 hours/week (with behavioral support services remaining at 240 minutes/month), to which Parent strongly objected.³⁰

10. The Public School special education coordinator explained to Parent's advocate on 10/26/15 that DCPS had just realized that the 7/27/15 IEP had already increased Student to 15 hours/week, but that DCPS could not increase services to 20 hours/week without first going through an internal LRE review.³¹ DCPS did not respond to a written inquiry on 10/27/15 asking whether Student's 15-hour IEP was being implemented.³² DCPS offered an Amended IEP on 1/5/16 which provided 20 hours/week of specialized instruction outside general education, with behavioral support services remaining at 240 minutes/month.³³ Public School considers 20 hours/week or more on an IEP to be "full-time."³⁴

11. The LRE review recommended that Student's academic and behavioral needs could be better addressed in a self-contained setting.³⁵ Recess is built in for the self-contained students and is not with general education peers.³⁶ Specials – Art, Science, Social Studies, and Spanish – are provided for the self-contained class outside general education, with an educational assistant or paraprofessional trained in special education, but with teachers who are not special education certified.³⁷ The documented understanding of Petitioner's advocates that Specials were provided in the general education setting was not correct, but was not corrected by anyone at Public School.³⁸

12. Behavior and Discipline. Student has suffered much trauma, as his best friend was stabbed 15 times and died in February 2014 and another friend was shot and killed in the

²⁷ School Psychologist; Meeting Advocate.

²⁸ P9-6.

²⁹ P10-2; R6 (DCPS notes agreeing to increase on 10/22/15).

³⁰ Parent; P9-8; P11-1; Educational Advocate.

³¹ Meeting Advocate; School Psychologist.

³² Meeting Advocate; P22-1.

³³ R2-10.

³⁴ School Psychologist.

³⁵ R3-6; School Psychologist.

³⁶ School Psychologist.

³⁷ School Psychologist; Teacher.

³⁸ School Psychologist; P10-2.

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neighborhood.³⁹ Student has high distractibility, non-compliance and difficulty managing his emotions, and has had gang involvement and engaged in fire setting.⁴⁰ Student has a history of significant behavioral challenges resulting in suspensions.⁴¹ Student was suspended for 50 days for assaulting a teacher, from 3/4/15 to 5/26/15.⁴² Student had been suspended for a week and a half immediately prior to the 10/22/15 IEP team meeting.⁴³ On 11/6/15 and/or 11/16/15 (records show both dates) Student was brought to school by police officers who cited him for truancy.⁴⁴ Student was suspended for 2 days on 11/18/15 for leaving school without permission.⁴⁵

13. A Functional Behavioral Assessment (“FBA”) was prepared on 11/16/15.⁴⁶ During classroom observations, Student was appropriate and engaged 20% of the time, non-compliant or disruptive 30% of the time, and disengaged the remaining 50% of the time.⁴⁷ Student was engaged when the special education teacher was able to give him 1:1 instruction and support.⁴⁸ Student was much more compliant and attentive when instructed with no more than 8 students and reduced external stimuli.⁴⁹ A Behavioral Intervention Plan (“BIP”) for Student was developed at a team meeting on 11/20/15, which noted the desirability of more 1:1 academic support from his teacher and a smaller and more supportive setting.⁵⁰

14. The 2015 Evaluation recommended ongoing medication management with Student’s consulting psychiatrist.⁵¹ Student has been irregular in taking his medications and Parent can’t always monitor the process due to his work schedule.⁵² Public School wants Student to take his medications while at school, which is acceptable to Parent and is about to be implemented.⁵³ Student could particularly benefit from his medications in the afternoon at school, so it may be helpful to take them then.⁵⁴ Public School is hopeful this may improve Student’s academics and behavior at school.⁵⁵

³⁹ P14-2.

⁴⁰ P6-5; P8-6.

⁴¹ P8-6.

⁴² P16-1,2.

⁴³ P10-1.

⁴⁴ P4-1,4.

⁴⁵ R4-1.

⁴⁶ R4.

⁴⁷ R4-3.

⁴⁸ *Id.*

⁴⁹ R4-4.

⁵⁰ R1-1,4; R4-3.

⁵¹ P13-19.

⁵² Parent; R4-5.

⁵³ Parent.

⁵⁴ School Psychologist.

⁵⁵ *Id.*

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15. Self-Contained Classroom. Student was shifted from inclusion to a self-contained classroom about 11/30/15, but was very resistant to the change.⁵⁶ Student was upset to the point of crying when first assigned to the self-contained classroom.⁵⁷ Student refused to attend school the entire first week after being moved, not beginning until about 12/7/15.⁵⁸ Student has adjusted, but believes he is in the self-contained classroom on a temporary basis; he very much wants to return to his old inclusion class.⁵⁹

16. Student is 1 of 7 in the self-contained classroom with 4 adults: a teacher, an assistant and 2 behavior specialists; in addition, the class is supported by counselors/social workers, a wrap care coordinator and School Psychologist.⁶⁰ Student and the self-contained class have lunch with their general education peers for purposes of socialization.⁶¹ Student does pretty well at lunch with general education students and has not had behavior problems at lunch.⁶² The self-contained class is also involved in other social activities with the rest of Grade, including a recent Christmas Dance, which was popular.⁶³ Student has a good time with his peers.⁶⁴

17. After making the change to the self-contained class, Teacher has seen “vast improvement” in Student in a short time.⁶⁵ Student is now easy to redirect and is no longer having outbursts.⁶⁶ There are a lot of incentives and rewards in the self-contained classroom, with achievable rewards for both academics and behavior; getting to play basketball is a basic reward that Student likes.⁶⁷ Student has been involved in no altercations and had no suspensions since moving to the self-contained classroom.⁶⁸ Parent agrees that Student’s behavior is better recently and that he’s doing well in the self-contained class.⁶⁹

18. In the short time that Student has been in the self-contained setting, he has shown promising progress academically, increasing in Mid-Unit Assessments from 0% to 75% in math and 0% to 90% in English compared to his scores in the inclusion setting.⁷⁰ Student

⁵⁶ School Psychologist; Teacher.

⁵⁷ School Psychologist.

⁵⁸ Teacher.

⁵⁹ School Psychologist.

⁶⁰ School Psychologist; Teacher.

⁶¹ School Psychologist.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Teacher.

⁶⁶ School Psychologist; Teacher.

⁶⁷ School Psychologist.

⁶⁸ *Id.*

⁶⁹ Parent.

⁷⁰ Teacher; R16-1,2.

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was rewarded for his progress and was very proud of himself.⁷¹ A state-created English test that Student took the week of the due process hearing was still being graded, but Student answered all questions compared to leaving many blank when he took the test last semester, and is showing improvement.⁷²

19. Student's Perspective. Student is extremely popular as one of the “cool” kids at school and his peers like him.⁷³ Student is very social; his favorite part of the school day is going to the cafeteria to talk with his friends; his favorite activities outside school include hanging out with his friends.⁷⁴

20. Student is self-conscious about his disability and does not want to attend a separate day school, as he wants to be with his friends at Public School.⁷⁵ Student has stated repeatedly that he would refuse to go to a private school and School Psychologist believes him.⁷⁶ Student is very strong-willed.⁷⁷ When transportation was added to his IEP, Student stated many times that “he is not taking the cheese bus,” and has not done so.⁷⁸ Student does not want everyone to think he is “retarded.”⁷⁹

21. Student very much wants to complete the school year at Public School because his buddies are there.⁸⁰ Student loves Public School and its staff, although he doesn't like being away from his general education class, and wants to take the regular bus to school.⁸¹ Student would not go to Nonpublic School even if ordered to attend; Teacher believes him based on the battles to get him to attend school in the past.⁸²

22. It is important to take Student's feelings into account in making placement decisions, especially when Student has shown his absolute refusal to attend school if dissatisfied.⁸³ School Psychologist is very concerned about making sure that Student will actually attend school somewhere, as staying home would no doubt lead him into getting into serious trouble over time.⁸⁴

⁷¹ Teacher.

⁷² *Id.*

⁷³ School Psychologist.

⁷⁴ R4-5; Parent.

⁷⁵ Educational Advocate.

⁷⁶ School Psychologist.

⁷⁷ School Psychologist; Parent.

⁷⁸ P10-1; Licensed Psychologist; Parent.

⁷⁹ Parent.

⁸⁰ *Id.*

⁸¹ School Psychologist; Teacher.

⁸² Teacher.

⁸³ School Psychologist.

⁸⁴ *Id.*

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23. Student may not be a good fit at Nonpublic School as his disabilities may be less severe than others there; he might be influenced by the bad behaviors of children with more severe emotional difficulties.⁸⁵ School Psychologist doesn't think that Student needs a therapeutic placement, as Public School has staff that can assist Student.⁸⁶ Transferring Student to a new placement in the middle of the semester would be difficult, as the current term has only a few more weeks before getting into lengthy preparations for testing, PARCC testing, field trips and the like.⁸⁷ Student is particularly sensitive to change.⁸⁸

24. Other IEP Issues. The math goals in Student's 10/22/15 IEP have inappropriate baselines (Student "struggles with this standard" and "struggles with rational numbers"), as they are not concrete and measurable so that appropriate goals can be developed.⁸⁹ Similarly, in reading, the baselines (Student "struggles with main idea" and "struggles to make inferences") are not measurable.⁹⁰ The baselines are exactly the same in one IEP after the other, but should change if Student is making any progress at all.⁹¹

25. The present levels of performance in Student's IEPs are identical from one IEP to the next. Student is performing "significantly" below grade level in math; his strongest area of math is 4 grade levels behind; he scored 20% on the first unit assessment and 28% on the second unit assessment, both of which are below basic.⁹² Student is performing "drastically" below grade level in reading, with 15% on his first unit assessment and 6% on his second unit assessment; his reading is approximately 3 grade levels behind.⁹³ Student is below average in written expression.⁹⁴

26. Neither the 10/22/15 IEP nor the 1/5/16 draft IEP contain statewide assessment accommodations, although the IEPs state that they do.⁹⁵

27. Compensatory Education Issues. Considering the period from 8/24/15 (the first day of school in 2015/16) to 1/12/16 (the first day of the due process hearing), Planner calculated 88 days of missed services; she proposed 215 hours of specialized tutoring, 100 hours of counseling, and 100 hours of mentoring.⁹⁶ At the time she drafted the Compensatory Education Plan, Planner did not know that an FBA was being prepared or

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ P11-1; P8-3; P9-3 (repeated); R2-3 (repeated).

⁹⁰ P11-2; P8-4; P9-4 (repeated); R2-4 (repeated).

⁹¹ Educational Advocate.

⁹² P6-3; P8-3 (repeated); P9-3 (repeated); R2-3 (repeated).

⁹³ P6-4; P8-4 (repeated); P9-4 (repeated); R2-4 (repeated).

⁹⁴ P8-5; P9-5 (repeated); R2-5 (repeated).

⁹⁵ P11-2; P9-10; R2-12; R10-1 (listing State Testing Accommodations); Educational Advocate.

⁹⁶ P24-6,7; Planner.

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take the FBA into consideration.⁹⁷ Planner testified that knowing about the FBA would not have impacted her Compensatory Education Plan.⁹⁸

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 [FAPE] 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").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *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 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. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] 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).

In addition, 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

⁹⁷ Planner.

⁹⁸ *Id.*

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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 1: *Whether DCPS denied Student a FAPE by failing to provide enough specialized instruction in a therapeutic setting outside general education in his 10/22/15 IEP in light of his lack of educational progress, ongoing behavior problems and current evaluations.*

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide a placement/location of services on 10/22/15 with full time specialized instruction in a separate therapeutic special education day school due to his lack of educational progress, ongoing behavior problems and current evaluations.*

Petitioner has met his burden of proving a denial of FAPE on Issues 1 and 2,⁹⁹ by demonstrating that Student needed a more restrictive IEP/placement than 15 hours/week outside general education, which was the result of the 10/22/15 IEP team meeting. Indeed, DCPS agreed that Student needed more support than that, as it agreed to 20 hours/week, while Petitioner sought a full-time placement.

The legal issue is whether Student's IEP was sufficient to enable him to advance appropriately toward attaining his annual goals pursuant to 34 C.F.R. 300.320(4) or whether his IEP needed to be more restrictive. To determine whether a FAPE has been provided through an IEP, a hearing officer must determine, “First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive

⁹⁹ Issues 1 and 2 are considered together, for a “student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP.” *S.S. by & through St. v. Dist. of Columbia*, 68 F. Supp. 3d 1, 18 (D.D.C. 2014), *citing Roark*, 460 F. Supp. 2d at 44.

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educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” *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, Petitioner has not alleged that DCPS failed to comply with the IDEA’s administrative procedures on Issues 1 and 2, so the analysis begins with the second part of the inquiry, where the measure and adequacy of the IEP is determined as of the time it was offered to Student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The suitability Student’s IEP and the adequacy of his ongoing placement at Public School is analyzed by considering his (i) academic performance, (ii) behavior, and (iii) 2015 Evaluation.

First, Student’s academic functioning is very low, with his Broad Reading at the 6th percentile compared to peers and Broad Math at the 1st percentile. Writing Fluency was also at the 6th percentile, while Spelling was at the 16th percentile. Student’s academic functioning is well below his age and grade level, ranging from 2 to 6 grades behind, even though he has been retained twice in recent years. Parent is concerned about Student’s academics and sees no progress.

Student is performing “significantly” below grade level in math; his strongest area of math is 4 grade levels behind; in assessments he scored below basic. Student is performing “drastically” below grade level in reading, by approximately 3 grade levels. Student is also below average in written expression. Student’s grades are poor, although his teachers believe that he is much more capable academically than his grades reflect.

Second, behaviorally Student has high distractibility, non-compliance and difficulty managing his emotions. Student’s records indicate that he has had gang involvement and engaged in fire setting; he has a history of significant behavioral challenges resulting in suspensions. Student was suspended for 50 days in March 2015 for assaulting a teacher. Student had been suspended for a week and a half immediately prior to the 10/22/15 IEP team meeting.

Third, the 2015 Evaluation, conducted by an evaluator selected by DCPS, recommended a full-time therapeutic program and stated that it is “imperative” for Student to receive intensive academic and support services. DCPS’s review of the 2015 Evaluation concluded that Student can access full-time specialized instruction and related services in a self-contained setting within DCPS and can get the support he needs at Public School.

Based on the above, this Hearing Officer concludes that it was a substantive violation of the IDEA and a denial of FAPE for DCPS not to offer Student an IEP with more than 15 hours/week outside general education, which was the outcome of the 10/22/15 IEP team meeting. However, following completion of DCPS’s LRE review, as well as the FBA completed on 11/16/15 and BIP developed on 11/20/15, DCPS shifted Student from his inclusion setting to a self-contained classroom on about 11/30/15, which this Hearing Officer concludes is an appropriate full-time setting in which Student can receive the individualized support that he needs in a smaller and more supportive setting. The delay of

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more than 5 weeks between the IEP team meeting and shifting Student to the self-contained classroom contributes to the award of compensatory education discussed following Issue 3.

Petitioner did not convince this Hearing Officer that a therapeutic placement at Nonpublic School is required to provide Student a FAPE, for several reasons. First, this Hearing Officer finds the self-contained class to be Student's least restrictive alternative at this time. *See* 34 C.F.R. 300.114. Student appears to be doing fine in his interactions with general education peers and is not having trouble at lunch, which is the only part of the school day when he is with general education children. *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 nonpublic school was the least restrictive environment in evaluating whether nonpublic placement was the proper remedy). Second, School Psychologist convincingly testified that it would be difficult for Student to transfer to a new school at this point in the school year and that Student is particularly sensitive to change. Third, this Hearing Officer was not persuaded that Nonpublic School would necessarily be a good fit for Student, as his ED does not prevent him from being social and very popular at Public School. Shifting to a very small school with children who may have more severe needs might well be difficult for Student. Finally, both Parent and Public School agree that Student is very strong-willed and he has made it abundantly clear that he will not attend a private school and wants to continue at Public School, which appears to be the best setting for him in any case. *See Branham v. Dist. of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (placement awards must be tailored to meet the child's specific needs).

Much confusion was caused in this case by Public School including only 20 hours/week outside general education in Student's IEP but providing a full-time setting in the self-contained classroom, where – except for lunch – Student is with special education peers (and not with general education students) all day long, including Specials and recess. Public School attempts to bridge this issue by calling 20 or more hours/week “full-time,” but that only increased the confusion. Apparently, this issue is not easily remedied by merely increasing the hours on Student's IEP because the teachers for Specials are not special education certified, even though the paraprofessionals in the class are trained for special education. Thus, DCPS counsel urged that no increase be made in Student's nominal IEP service hours at risk of forcing Student out of Public School, where he very much wants to be, and out of a program that seems – on limited data – to be well-suited to Student. On the other hand, when Student goes on to his next school, which may well occur at the end of this school year, it needs to be clear that Student has a full-time IEP. Thus, the intent of the Order below is to keep Student in the self-contained program at Public School, while making his IEP sufficiently clear that Parent will not have to struggle to get Student the support he needs in a new school.

Further, in an exercise of discretion to provide equitable remedies, this Hearing Officer concludes that while Student's IEP is being amended as discussed above, the IEP team also shall update Student's present levels of performance, baselines, goals, and accommodations for statewide assessments. *See* 34 C.F.R. 300.320(a)(1), 300.320(a)(2),

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300.320(a)(4), 300.320(a)(6); *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). For instance, the math goals have inappropriate baselines (Student “struggles with this standard” and “struggles with rational numbers”), which need to be concrete and measurable. Similarly, in reading, the baselines (Student “struggles with main idea” and “struggles to make inferences”) are not measurable. Also, the baselines are exactly the same in one IEP after another and must be updated. Moreover, the present levels of performance in Student’s IEPs are identical from one to the next and must be updated. Finally, statewide assessment accommodations must be added since both the 10/22/15 IEP and the 1/5/16 draft IEP assert that they are included.

Issue 3: *Whether DCPS denied Student a FAPE by failing to properly implement his 7/27/15 IEP by not providing the required 15 hours per week of specialized instruction outside general education from the start of the 2015/16 school year.*

Petitioner has also met his burden of proving a denial of FAPE on Issue 3 by failing to fully implement Student’s 7/27/15 IEP from the beginning of school on 8/24/15 until at least 10/26/15, when DCPS realized that Student’s 3/19/15 IEP was not current. *See* 34 C.F.R. 300.323, 300.324; *Banks ex rel. D.B. v. Dist. of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student’s IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007).

Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

Here, Petitioner did not dispute that Student was receiving 4 hours/week as required by his March 2015 IEP, so was missing 11 of 15 hours/week, or more than 70% of his specialized instruction, which this Hearing Officer concludes is clearly a material deviation from Student’s IEP. This contributes to the award of compensatory education below, for the materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail.” *Walker v. Dist. of Columbia*, 2014 WL 3883308, at *5 (D.D.C. 2014). *See also Turner*, 952 F. Supp. 2d at 40 (“[s]ignificantly, a plaintiff does not have to prove a resulting harm caused by the failure to implement”), *quoting Wilson*, 770 F. Supp. 2d at 275.

Compensatory Education Request

Petitioner seeks an award of compensatory education to compensate for the denials of FAPE discussed above. The IDEA gives Hearing Officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a

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FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir.2005). The proper amount of compensatory education, if any, depends on how much more progress a student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he would have occupied but for DCPS's violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid*, 401 F.3d 516.

The challenge of determining what additional educational benefits would have accrued, if DCPS had provided all the special education and related services appropriate for Student does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *See Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, Planner testified as an expert for Petitioner about the Compensatory Education Plan she prepared to remedy DCPS's failures. Considering the period from 8/24/15 (the first day of school in 2015/16) to 1/12/16 (the first day of the due process hearing), Planner calculated 88 days of missed services. Based on Planner's summation of the educational deficits suffered by Student, Planner proposed a compensatory education award of: (a) 215 hours of specialized tutoring to address Student's academic deficits; (b) 100 hours of counseling to assist with social and life skills, including coping strategies; and (c) 100 hours of mentoring to help Student identify and use his strengths and become more insightful and confident.

Based on the entire record herein, this Hearing Officer conclude that DCPS failed to: (a) implement Student's July IEP from the beginning of school on 8/24/15 to at least 10/26/15, a period of about 8 weeks, during which Student missed 11 hours/week of specialized instruction (88 total hours); and (b) provide an appropriate placement from 10/22/15 to 11/30/15, a period of about 5 weeks, during which Student missed some 12.5 hours/week of specialized instruction (62.5 total hours, comparing 15 hours to 27.5 hours), and his IEP still needs to be modified.¹⁰⁰ While the compensatory education awarded herein is not hour-for-hour, the scope of services missed does help provide some sense of the loss suffered by Student. *See Reid*, 401 F.3d 516.

Considering the equities, along with the facts and circumstances above, in an exercise of broad discretion, this Hearing Officer concludes that it is appropriate for DCPS

¹⁰⁰ In addition, DCPS represented during the 7/29/15 due process hearing that it would conduct an FBA and develop a BIP at the "beginning" of 2015/16, but did not complete them until mid-November. HOD in Case No. 2015-0225 (8/27/15) at 4.

The Compensatory Education Plan is based in part on the lack of an FBA, which Planner did not know was being prepared. Nonetheless, Planner testified that the completion of the FBA would not have impacted her Plan in any way, negatively impacting her credibility.

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to fund a total of 175 hours of tutoring, counseling, and mentoring as set forth below. Specific awards are made for tutoring, counseling, and mentoring, with an additional block of hours to be allocated by Parent, in consultation with his advocates and the service providers, based on what would be most useful for Student in light of how he responds to each service and each provider.

ORDER

Petitioner has met his burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS shall convene an IEP team meeting within 20 school days to develop an appropriate IEP for Student which: (a) provides full-time specialized instruction in a self-contained setting outside general education, without changing Student's current placement/location of service; (b) updates present levels of performance, baselines, and goals; and (c) includes accommodations as needed for statewide assessments.
- (2) Compensatory education for the denial of FAPE found herein shall consist of DCPS funding, at DCPS's customary rates for independent providers to be chosen by Petitioner, and providing letters of authorization within 10 business days of Petitioner's request(s), for 175 hours of services as follows: (a) 50 hours of tutoring; (b) 25 hours of mentoring; (c) 25 hours of counseling; and (d) 75 additional hours divided between tutoring, mentoring, and/or counseling, as determined by Petitioner. All compensatory education hours are to be used within 1 year; any unused hours will be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

Counsel of Record (Appendix A, by email)

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