

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

Office of Dispute Resolution
1050 First Street, N.E., 4th Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
January 25, 2018

<i>Student</i> , ¹)	Case No.: 2017-0282
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 1/19/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 1/9/18, 1/10/18,
(“DCPS”),)	1/11/18 & 1/12/18
Respondent.)	ODR Hearing Room: 2006
)	

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”) because Student had been provided Individualized Education Programs (“IEPs”) with insufficient services, among other things. DCPS responded that the IEPs were adequate as Student was making appropriate progress.

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 10/11/17, the case was assigned to the undersigned on 10/12/17. DCPS filed a response on 10/24/17, and did not challenge jurisdiction. The resolution session meeting (“RSM”) took place on 10/26/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 11/10/17. A final decision in this matter must be reached no later than 45 days following

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

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the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 12/25/17, which the parties agreed to extend by a 30-day continuance to 1/24/18.

The due process hearing took place on 1/9/18, 1/10/18, 1/11/18 and 1/12/18 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout the hearing.

Petitioner’s Disclosures, submitted on 1/2/18, contained documents P1 through P37, which were admitted into evidence over specified objections. Respondent’s Disclosures, submitted on 1/2/18, contained documents R1 through R26, which were admitted into evidence without objection.

Petitioner’s counsel presented 5 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. Parent
2. *Special Education Consultant* (qualified over objection as an expert in Special Education Programming and Placement)
3. *Speech-Language Director at Nonpublic School* (qualified without objection as an expert in Speech-Language Pathology)
4. *Educational Advocate* (qualified over objection as an expert in Special Education Placement and Programming and the Development of Compensatory Education Plans)
5. *Academic Dean at Nonpublic School* (qualified over objection as an expert in Special Education Programming)

Respondent’s counsel presented 7 witnesses in Respondent’s case (*see Appendix A*):

1. *School Psychologist at Public School* (qualified without objection as an expert in School Psychology)
2. *Principal of Public School* (qualified without objection as an expert in Elementary Education and Administration)
3. *General Education Teacher at Public School* (qualified over objection as an expert in Elementary Education with an Emphasis in Specialized Instruction in the Inclusion Environment)
4. *Tutor from Public School* (qualified without objection as an expert in Elementary Education with an Emphasis on Providing Specialized Instruction in Reading and Writing in an Inclusion Setting)
5. *Reading Interventionist at Public School* (qualified without objection as an expert in Special Education Programming and Placement)

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6. *Speech-Language Pathologist* at Public School (qualified without objection as an expert in Speech-Language Pathology)
7. *LEA Representative* (qualified without objection as an expert in Special Education Programming and Placement)

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

Issue 1: Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 3/17/16 which: (a) failed to provide sufficient special education services, and/or (b) lacked suitable baseline information.² *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 8/11/16 which: (a) failed to provide sufficient special education services, (b) lacked suitable baseline information, and/or (c) failed to provide Assistive Technology and related accommodations.³ *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 3: Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 6/7/17 which: (a) failed to provide sufficient special education services, (b) lacked suitable baseline information, (c) failed to provide Assistive Technology and related accommodations, and/or (d) failed to provide speech and language services.⁴ *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 4: Whether DCPS denied Student a FAPE by failing to offer an appropriate placement from 3/17/16 on, where: (a) the placement could not provide the supports and environment described in Student's IEPs, and/or (b) suitable placements were not offered prior to the start of 2016/17 or 2017/18.⁵ *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.

² Subpart (b) of Issue 1 as stated in the Prehearing Order was "failed to include written expression goals," which was withdrawn without prejudice at the beginning of the due process hearing.

³ Subpart (b) of Issue 2 as stated in the Prehearing Order was "failed to include written expression goals," which was withdrawn without prejudice at the beginning of the due process hearing.

⁴ Subpart (b) of Issue 3 as stated in the Prehearing Order was "failed to include written expression goals," which was withdrawn without prejudice at the beginning of the due process hearing.

⁵ Issue 4 combines both issues 4 and 5 from page 20 of the due process complaint, except that issue 4.a from the due process complaint is included in Issues 1(a), 2(a) and 3(a) above.

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2. DCPS shall reimburse Parent for the 2016/17 and 2017/18 school years at Nonpublic School through the date of decision, including tuition, transportation, related services and any other associated costs.
3. Within 15 days, DCPS shall issue a Prior Written Notice placing and funding Student at Nonpublic School for the remainder of the 2017/18 school year, including 45 minutes/week of direct speech and language pathology services, and continuing until DCPS offers a FAPE to Student.⁶
4. DCPS shall provide compensatory education for any denial of FAPE, from the beginning of the 2015/16 school year to the present.⁷
5. Any other just and equitable relief.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁸ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁹ Student is *Age*, *Gender* and in *Grade* at Nonpublic School, where Student began in 2016/17. Student attended *Public School* from 2012/13 through 2015/16.¹⁰

2. Student's older sibling also attended Public School, Student had friends there, and both children loved the school; Parent thinks Nonpublic School is a "terrific" school and wanted Student to be there.¹¹ Public School is an "inclusion" school that provides special

⁶ This paragraph includes the relief requested in paragraphs 3, 4 and 5 on pages 18-19 of the due process complaint.

⁷ Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged at the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁸ 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.

⁹ Parent.

¹⁰ *Id.*

¹¹ *Id.*

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education services within the general education classroom or with some pull-out, but generally does not have special education classes outside general education.¹²

3. Parent heard from Public School that Student was having educational problems as early as 2012/13 and 2013/14.¹³ To address the concerns, Parent sought assistance for Student from all possible sources, including Public School, a physician, psychiatrist, tutors and other specialists.¹⁴

4. IEPs. Each of Student's DCPS IEPs¹⁵ listed Student's disability classification as Specific Learning Disability ("SLD") and nothing more.¹⁶ Student had also been diagnosed with ADHD, which was emphasized in some of Student's IEPs.¹⁷

5. Student's initial 5/5/15 IEP provided 60 minutes/week of specialized instruction inside general education for reading, along with a number of accommodations for the classroom as well as statewide assessments.¹⁸

6. Student's 3/17/16 IEP also provided 60 minutes/week of specialized instruction inside general education for reading, but no specialized instruction for writing and the 3 writing goals that were added; that IEP included a human scribe or Assistive Technology as additional accommodations for statewide assessments.¹⁹

7. Student's 8/11/16 IEP provided 60 minutes/week of specialized instruction for reading inside general education, and added 120 minutes/week of specialized instruction for reading outside general education, 60 minutes/week of specialized instruction inside general education for writing and 45 minutes/week of specialized instruction inside general education for math.²⁰ Other Classroom Aids and Services were greatly increased, with extensive input from Special Education Consultant, while accommodations were increased slightly.²¹ Goals were added in math and additional process goals were added in reading and writing at Special Education Consultant's suggestion; Special Education Consultant's suggestions to increase the amount of specialized instruction were rejected.²²

8. Public School stated that the outside general education time for reading on Student's 8/11/16 IEP was to focus on the reading system that Student had been receiving in a small

¹² Principal.

¹³ Parent.

¹⁴ *Id.*

¹⁵ All mentions of IEPs herein are DCPS IEPs unless otherwise noted.

¹⁶ P7-1; P8-1; P9-12; P13-1; P37-5 (initial SLD eligibility on 4/24/15).

¹⁷ P9-14; P13-3,6,11,12.

¹⁸ P7-3,4,5.

¹⁹ P8-3,4,5,6,8.

²⁰ P9-22.

²¹ P9-22; R16-10; R14-13.

²² P11-1; R16-10; Special Education Consultant.

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group outside general education in 2015/16.²³ The additional time inside general education in the 8/11/16 IEP reflected what Student had already been receiving through Public School's co-teaching approach in Student's class in 2015/16.²⁴ The Other Aides and Services added to the 8/11/16 IEP were already being provided to Student prior to the IEP being formulated.²⁵ If Student had attended Public School in 2016/17, Student would have been in a general education class of at least 24 children with 1 teacher.²⁶

9. Student's 6/7/17 IEP provided the same amount of specialized instruction as the 8/11/16 IEP, and added 60 minutes/month of direct Behavioral Support Services ("BSS") outside general education and 15 minutes/week of BSS consultation to address Student's newly-added emotional, social and behavioral development goals.²⁷ The lengthy Other Classroom Aids and Services section in the 6/7/17 was virtually unchanged from the 8/11/16 IEP; Parent testified that she had no concerns with this list and no recollection of her advocates seeking anything additional for the list that was not added.²⁸ Student's accommodations in the 6/7/17 IEP were modified and somewhat reduced.²⁹

10. Evaluations. By the end of 2013/14, Public School conducted academic assessments of Student.³⁰ The psychologist at Public School at that time completed an initial psychological evaluation of Student on 6/15/14 due to Student's documented deficits, with particular concerns about reading and phonemic awareness.³¹ The Public School psychologist found that Student presented with "strong cognitive abilities," with a Superior IQ on both the Verbal Comprehension ("VCI") and Perceptual Reasoning ("PRI") indices of the Wechsler Intelligence Scale for Children – Fourth Edition ("WISC-IV"), while Student's Processing Speed Index ("PSI") was in the High Average range and Working Memory Index ("WMI") was Average.³² Special Education Consultant did not see high processing speeds by Student during her later assessment of Student; Special Education Consultant noted that Student performed "at an extremely slow pace in everything"; testing took almost twice as long as normal.³³

11. DCPS's 6/15/14 evaluation used the Wechsler Individual Achievement Test - Third Edition ("WIAT-III") to test academic achievement and concluded that all of Student's scores were Average (although Spelling, Student's lowest score except for Word Reading, was erroneously marked Low Average and corrected by School Psychologist during her

²³ P14-12; General Education Teacher.

²⁴ General Education Teacher; Principal.

²⁵ General Education Teacher.

²⁶ P11-1.

²⁷ P13-11,12,13,14.

²⁸ P13-14; Parent.

²⁹ P13-17.

³⁰ P2-11.

³¹ R3-1.

³² P3-6,9,12.

³³ P28-2,17; Special Education Consultant.

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testimony).³⁴ The Public School psychologist concluded that there was no underlying deficit in phonemic awareness or decoding, with which Special Education Consultant later disagreed, stating that Student has dyslexia.³⁵ The 6/15/14 evaluation noted that Student had recently been diagnosed with ADHD combined type and had begun medication.³⁶ On 3/5/15, Public School contacted Parent to repeat the academic testing from a year earlier to see where Student was at that time.³⁷

12. Outside Tutoring and Specialists. Parent was prepared to do whatever was necessary to ensure Student obtained the necessary foundation in reading and Student's education generally, including repeating Student's grade in 2013/14, after learning on 3/11/14 that Student was at risk of receiving a "1" (Below Basic – performing significantly below grade level) on Student's upcoming report card.³⁸ In March 2014, Parent was working with a psychiatrist for Student.³⁹

13. On 2/18/14, Parent had contacted Public School staff seeking recommendations for a tutor to help Student with homework and math; Public School responded with a list of over 20 contacts and programs, about half of which were Public School teachers.⁴⁰ On 9/3/14, Public School provided another list of tutors to Parent.⁴¹ Parent began using a tutor for Student in 2013/14 and then began using Tutor in 2014/15 for homework and reading, with 2 (and sometimes 3) sessions/week.⁴² Tutor had taught Student's sibling and was the sibling's favorite teacher.⁴³

14. On 6/20/14, after the Public School psychologist reviewed her assessment report with Parent, the psychologist stated that it would be "extremely beneficial" to continue tutoring supports during the summer, suggesting 2-3 times per week, to continue working on word reading, reading comprehension, and continued phonemic awareness development.⁴⁴

15. On 9/14/15, Parent emailed LEA Representative and the Public School psychologist stating that Tutor was doing a marvelous job but Parent wanted to ramp up her efforts for Student and sought recommendations for local specialists who work with children with reading disabilities and the phonetic issues that Student was having.⁴⁵ By 9/29/15, Parent emailed Tutor to say she was trying out a specialist to help Student "zero in" on the phonetic

³⁴ R3-12.

³⁵ R3-9; P28-2.

³⁶ R3-9.

³⁷ P3-16.

³⁸ P2-13,14; Parent.

³⁹ P2-7,8,9; Parent.

⁴⁰ P2-2.

⁴¹ P3-3.

⁴² P3-6,7,8,9,11,12; P4-2,3.

⁴³ Parent.

⁴⁴ P3-1.

⁴⁵ P4-7.

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issues.⁴⁶ Parent acknowledged being a little stressed and upset about Student starting to say Student was “stupid” and “can’t do” the work as Student seemed really frustrated by lack of capacity to decipher vowel combos.⁴⁷

16. As of 12/6/15, Parent reported that she had a specialist for Student once a week, but it was not working out and she would try to find someone else.⁴⁸ On 12/15/15, Parent reported to Student’s teachers and Tutor that she was starting Student with a new specialist that day as Student was still struggling with basic spelling concepts; the specialist’s organization recommended literacy tutoring twice a week based on a series of informal assessments administered to Student.⁴⁹ At that time, Student was 2 levels behind on Fountas & Pinnell.⁵⁰

17. At the RSM, Tutor stated that during 2014/15 she provided support mostly with homework and projects, which she did not consider “specialized instruction,” while in 2015/16 she focused on reading skills like decoding.⁵¹ Tutor credibly testified that she did not hold back any of her skill or expertise in tutoring Student and that Parent was not overreacting in her serious concerns for Student.⁵²

18. Special Education Consultant persuasively testified that if Student was being tutored by trained teachers with expertise then the outside tutoring should be considered as part of the specialized instruction that Student needed to perform at a given level.⁵³ Special Education Consultant asked for additional hours on Student’s IEP at the 8/11/16 meeting and discussed the tutoring hours as help that Student needed but was not getting at school.⁵⁴ Compared to the services on the 8/11/16 IEP, Student was receiving more support outside the classroom with tutors that Parent was paying out of pocket.⁵⁵

19. Loss of Confidence in Public School. Student’s 5/5/15 IEP stated that Student had “extensive intervention” for 2 years but remained below expected levels in reading.⁵⁶ Student’s 3/17/16 IEP stated that Student had “extensive intervention” for 3 years but remained below expected levels in reading.⁵⁷ Student’s 8/11/16 IEP stated that Student took longer than other children to complete reading assignments and tasks.⁵⁸

⁴⁶ P4-8.

⁴⁷ P4-8; Parent.

⁴⁸ P4-11.

⁴⁹ R4-16,23,25.

⁵⁰ P4-25.

⁵¹ P6-7.

⁵² Tutor.

⁵³ Special Education Consultant.

⁵⁴ *Id.*

⁵⁵ Parent.

⁵⁶ P7-3.

⁵⁷ P8-3.

⁵⁸ P9-16.

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20. Parent checked with Student's teacher on 12/6/15 as it seemed that Student was "still struggling A LOT" in writing basic phonetic combinations and basic spelling.⁵⁹ Student's teachers responded on 12/10/15 that Student had been inconsistent in spelling and that writing was challenging.⁶⁰ Parent asked Student's teachers what interventions were being taken to counter the issues.⁶¹

21. Parent was very concerned about a formal Mid-Term Progress Report she received in January 2016 stating that Student was presenting some "academic difficulty" in reading and was performing below grade level.⁶² By that point Parent felt that Student's deficits were not improving and Student was falling further and further behind and just wasn't "getting it"; Student was miserable and unmotivated at school.⁶³ Parent was required to sign and return the Progress Report; Parent added at the bottom that she was paying for 2 tutors for Student and asked what interventions the school was making to support Student's learning.⁶⁴

22. Parent emailed the Progress Report to Principal, LEA Representative and Student's teachers, stating that she had "followed all the intervention advice" of Public School by putting Student on medication, sending Student to a therapist, and having Student work with tutors 4 days a week after school; Parent went on to state that she had "queried previously" and was writing to ask again what interventions Public School was taking to get Student to reading level.⁶⁵ LEA Representative responded that Student's teachers were "very satisfied with and proud of how well" Student was doing as Student was just a little below grade level, "but catching up steadily."⁶⁶ LEA Representative asserted that the Progress Report was a "miscommunication" that didn't provide any new information and that Student was "certainly not at risk of 'failing.'"⁶⁷

23. On 2/1/16, Parent emailed LEA Representative to set up a meeting to understand what Public School was doing to support Student's IEP and get Student caught up in reading, noting that she continued to support after school tutors and specialists, as well as a therapist.⁶⁸ LEA Representative responded that parent teacher conferences were occurring later in the month and for Parent to schedule a meeting if that didn't make the school's support clearer.⁶⁹

⁵⁹ P4-11 (emphasis in original); Parent.

⁶⁰ P4-10.

⁶¹ P4-12; Parent.

⁶² P4-30; Parent.

⁶³ Parent.

⁶⁴ P4-30; Parent.

⁶⁵ P4-29.

⁶⁶ P4-35.

⁶⁷ P4-36.

⁶⁸ P4-35.

⁶⁹ P4-34.

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24. Student was well aware of classmates doing much better as Student fell further behind and was miserable and experiencing “severe distress.”⁷⁰ While normally a very hard worker, Student began to refuse to work and said Student was “stupid” and “dumb”; it was a miserable time for all involved.⁷¹ Student was pulled from all extra-curricular activities to have more time for tutors and specialists; Parent was paying \$1,000/month for tutors; the psychiatrist’s charges were mostly covered by insurance.⁷²

25. The 3/17/16 IEP was the “tipping point” for Parent, as that IEP seemed to just be “more of the same.”⁷³ Parent did not know how the special education system worked and was not legally represented until after the 3/17/16 IEP meeting; Parent quickly began gathering information from other parents and found evaluators and legal counsel.⁷⁴

26. Need for Nonpublic School and Specialized Instruction. At the beginning of 2016/17, Student was 2 years behind in reading (or nearly so) and had “holes” in Student’s math learning, taking a very disorganized approach to answers.⁷⁵ Soon after arriving at Nonpublic School in 2016/17, Student drafted the following writing sample (about someone important and why) during three 40-minute writing periods: “My mom. She is allwas thar for me. She helps me get throe things. Aspeshale wen thay are hard. She macs me laf wene I am sad. She plas with me. And gets me evore thing I ned. I love my mom vary much!!!”⁷⁶ Student’s writing sample near the end of 2016/17 had greatly improved production, organization, contextual spelling and idea development.⁷⁷ At the beginning of 2017/18, Special Education Consultant found the lack of “production” in a third writing sample to be “staggering” and nowhere near what Student should be able to produce; Special Education Consultant explained that Student’s difficulty with spelling is so great it is hard to write.⁷⁸

27. At the beginning of 2017/18 based on the Read Naturally benchmark, Student was still reading at the middle of the previous year’s grade level.⁷⁹ Measure of Academic Progress (“MAP”) QRI is used by Nonpublic School and found Student’s reading to be a year behind.⁸⁰ As of May 2017 when Student took the WADE, Student was a year behind and only able to spell 26% of words with learned spelling patterns and only 25/72 sight words.⁸¹ At the end of 2016/17, Student completed an end-of-year reading reflection in

⁷⁰ Parent.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Academic Dean; P19-3.

⁷⁶ P19-6; P21-3.

⁷⁷ P20-6.

⁷⁸ Special Education Consultant; P35-13.

⁷⁹ Academic Dean; P35-3.

⁸⁰ P14-1.

⁸¹ P13-5,9; P18-9 (spelling sample).

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which Student stated that one hard thing at the start of the year that was now easy was “site werds.”⁸²

28. Student’s 6/7/17 IEP noted that Student has a “continued need for phonetic based instruction” and benefits from scaffolding and teacher check-ins during independent tasks, as well as small group instruction.⁸³ Student has trouble learning in larger classes, so needs more small group instruction.⁸⁴ In teacher comments in a 2015/16 report card, the DCPS teacher noted the benefit to Student from working one-on-one with a teacher to practice fluency, work on blend patterns, and the like.⁸⁵

29. Special Education Consultant and Educational Advocate each credibly testified that the amount of specialized instruction included in the DCPS IEPs was not sufficient to meet Student’s needs.⁸⁶ Student’s 8/11/16 IEP significantly increased Student’s number of goals, with 5 math goals (none in the past), 9 reading goals (compared to 3) and 6 writing goals (compared to 3), but did not greatly increase the amount of specialized instruction.⁸⁷

30. Testing. Student’s Public School report cards indicated weakness in English Language Arts (“ELA”) and reading over a number of years:
Received “2s” (Basic – approaches expectations) in all 4 terms in ELA in 2012/13.⁸⁸
Received “2s” in reading in all 4 terms in 2013/14.⁸⁹
Received “2s” in terms 1, 2 and 3, with a “3” (Proficient – meets expectations) in term 4 in reading in 2014/15.⁹⁰
Received “2s” in terms 2 and 3, with “3s” in terms 1 and 4 in reading in 2015/16.⁹¹

31. In PARCC, Student scored in Level 4 (met expectations) for both math and ELA near the end of 2015/16, although the written expression subpart was “below” expectations.⁹² Student only reached grade level on PARCC testing with accommodations.⁹³ Student received all the accommodations on Student’s IEP for PARCC testing, which may have included extra time, having things read aloud, opportunity to ask about directions, and a human scribe.⁹⁴

⁸² P24-60.

⁸³ P13-5,11,12.

⁸⁴ Special Education Consultant; P28-18.

⁸⁵ R23-5,6.

⁸⁶ Special Education Consultant; Educational Advocate; P28-1; Academic Dean (later IEPs).

⁸⁷ P9; P8.

⁸⁸ R23-21.

⁸⁹ P17-11.

⁹⁰ R23-9.

⁹¹ R23-1.

⁹² P17-33,35,36.

⁹³ Educational Advocate.

⁹⁴ Educational Advocate; Principal; P4-46.

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32. Student is a gifted child with learning disabilities and ADHD who needs specialized instruction to bring up basic skills to Student's cognitive level.⁹⁵ Student's profile is atypical in that scores on tests measuring higher-level skills were higher than tests measuring basic skills.⁹⁶ Student's presentation in math was significantly atypical in which Student found a way to solve problems conceptually and to "bypass the number system" and use algorithms.⁹⁷ Parent was seeking an environment where Student could learn to read well and handle math concepts, which required a different style of teaching, whether at Nonpublic School or elsewhere.⁹⁸ Parent would "love" Student to be in a general education school and looks forward to Student returning to the regular curriculum when Student is reading better and able to cope with general education.⁹⁹

33. School Psychologist concluded from Student being at or above grade level in all academic areas that Student should not receive special education services and that the MDT team should consider the exit guidelines to dismiss Student from special education services.¹⁰⁰ In Special Education Consultant's testing, Student's scores were average or higher in many areas, but Student does not function on that level in school, so relying on those scores to make educational decisions would be a mistake.¹⁰¹ Nonpublic School stated in Student's 5/22/17 Nonpublic School IEP that Student may be a strong test taker who performs very well on multiple-choice assessments, but that Student would not actually be able to read independently at the Lexile level reported.¹⁰²

34. Baselines. Student's 3/17/16 IEP contained 3 goals for reading, including a goal for decoding listed "vowel digraphs" with 90% accuracy, but had no entries in the corresponding "baseline" boxes; the present levels of performance for reading included a great deal of information, but did not contain specific details relating to the goals from which progress could be measured.¹⁰³ Some information in the present levels did appear to relate to the goals, but not in ways permitting progress to be measured, as the present levels stated that "[s]tarting in November, [Student] has mastered . . . short vowels, digraphs . . ."¹⁰⁴

35. In Student's 3/17/16 IEP, written expression was added as an area of concern, with 3 additional goals, none of which had any stated baseline; the statements in the present levels of performance did not contain specific details relating to the goals from which progress could be measured.¹⁰⁵ Some information in the present levels did appear to relate to the

⁹⁵ P28-4; Special Education Consultant.

⁹⁶ Special Education Consultant; P28-4.

⁹⁷ P28-8; Special Education Consultant; Parent.

⁹⁸ Parent.

⁹⁹ *Id.*

¹⁰⁰ School Psychologist; R3-15.

¹⁰¹ P28-17; Special Education Consultant.

¹⁰² P20-3.

¹⁰³ P8-3,4.

¹⁰⁴ P8-3.

¹⁰⁵ P8-4,5.

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goals but not in a way permitting progress to be measured, as Student was already able to “produce multiple paragraphs about a story” while Student’s goal was to write a “multi-paragraph passage” to develop a topic.¹⁰⁶ Some measurable background was provided about Student’s ability to spell words, but the present levels information did not fully match the goal.¹⁰⁷

36. In Student’s 8/11/16 IEP, math was added as a third area of academic concern and 5 goals were stated, for each of which baseline information was provided, although not always in ways that were helpful to measure progress.¹⁰⁸ For math goals 1, 3 and 4, the baselines referred to tests on which Student scored 100%, but also noted that further baselines would be developed.¹⁰⁹ For math goal 2, the baseline was a test on which Student scored a 94%, leaving little room for improvement.¹¹⁰ For math goal 5, the baseline stated that Student was already successful.¹¹¹

37. In the 8/11/16 IEP, Student had 9 reading goals and more attention was given to baselines; however the baseline for reading goal 1 was simply “good mastery” of a subset of words that did not match the goal; the baseline for reading goal 2 was mastery of categories that apparently did not match the goal; no baselines were provided for reading goals 3, 4, 5, 6, 7 and 8, as they were to be provided at the beginning of the school year; and the baseline for reading goal 9 was blank.¹¹²

38. Student’s 8/11/16 IEP included 6 writing goals; no baselines were provided for writing goals 1, 4, 5 and 6, as they were to be provided at the beginning of the school year; the baseline for writing goal 2 contained general information that would not help in measuring progress; the baseline for writing goal 3 again stated that Student was already able to “produce multiple paragraphs about a story” while Student’s goal was again to write a “multi-paragraph passage” to develop a topic.¹¹³

39. In the 6/7/17 IEP, Student had 5 math goals; the baseline for goal 1 was the same as goal 2 on the 8/11/17 IEP, which was the test on which Student scored a 94%; the baseline for math goal 2 stated that Student had “reached mastery” per a progress report; the baseline for math goal 3 simply stated that Student was “unable” to explain Student’s work as required by the goal; the baseline for math goal 4 was that Student was “developing this skill”; and the baseline for math goal 5 was that the goal had not been introduced.¹¹⁴

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ P9-14,15.

¹⁰⁹ *Id.*

¹¹⁰ P9-14.

¹¹¹ P9-15.

¹¹² P9-16,17,18.

¹¹³ P9-19,20,21.

¹¹⁴ P13-3,4,5.

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40. In the 6/7/17 IEP, Student had 9 reading goals; the baselines for reading goals 1 and 2 were that the goals had not been introduced; the baseline for reading goal 3 was not measurable and stated that Student had reached “developing level”; the baselines for reading goals 4 and 5 were to be established in the new school year; the baseline for reading goal 6 stated that Student had “reached mastery” with cues, apart from the evidence requirement of “sighting [citing] text evidence”; the baseline for reading goal 7 was blank; the baseline for reading goal 8 merely provided background information about Student’s deficit; and the baseline for reading goal 9 did not provide any measurable information.¹¹⁵

41. In the 6/7/17 IEP, Student had 8 writing goals; the baselines for writing goals 1 and 4 were to be established in the new school year; the baselines for writing goals 2, 5, 6 and 7 were that Student was “developing” or “reached developing level”; the baseline for writing goal 3 again stated that Student was already able to “produce multiple paragraphs about a story” while Student’s goal was again to write a “multi-paragraph passage” to develop a topic; and the baseline for writing goal 8 states that Student continued to make spelling errors “with learns (sic) [Student] has learned in isolation.”¹¹⁶

42. Emotional, Social, and Behavioral Development was added as an additional area of concern in Student’s 6/7/17 IEP, which included 5 goals; the baselines for goals 1, 2 and 3 were all “developing” without any measurable detail; and the baselines for goals 4 and 5 were blank.¹¹⁷

43. Assistive Technology. None of Student’s DCPS IEPs provided for Assistive Technology in the Assistive Technology box on the second page of each IEP.¹¹⁸ The Other Classroom Aids and Services section was enhanced in the 8/11/16 IEP to provide a range of support, including keyboarding devices to support spelling and spell check, computer software and applications to support academic skill development, audio materials in a variety of formats, a sound/picture chart for reading and spelling, and manipulatives for math.¹¹⁹ As noted above, Parent testified that she was satisfied with the Classroom Aids and Services section as she did not request any additions to the section and did not think her advocates had sought additions that had not been made.¹²⁰

44. At the 8/11/16 IEP meeting, Special Education Consultant requested an Assistive Technology evaluation to determine if Assistive Technology could benefit Student.¹²¹ LEA Representative testified that Public School would be willing to conduct an Assistive

¹¹⁵ P13-6,7,8.

¹¹⁶ P13-9,10,11.

¹¹⁷ P13-11,12.

¹¹⁸ P7-2; P8-2; P9-13; P13-2.

¹¹⁹ P9-22.

¹²⁰ Parent.

¹²¹ P9-13; P5-1.

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Technology evaluation as Parent requested, but that Student would have to return to DCPS and be observed in a DCPS school for it to be meaningful.¹²²

45. Speech-Language Needs. A speech-language pathologist at Nonpublic School completed a comprehensive speech-language assessment of Student on 9/23/16 and concluded that Student had a scattered linguistic profile with scores from above average to poor.¹²³ The pathologist noted that on some measures Student's average scores masked functionally vulnerable or deficient skills.¹²⁴ The pathologist diagnosed an expressive language disorder and a specific learning disorder, with impairment in both reading and writing, and recommended one 45-minute individual session per week.¹²⁵

46. Speech-Language Pathologist formally reviewed the 9/23/16 speech-language assessment of Student and concluded that Student did not meet the DCPS guidelines for a student with a Speech and Language Impairment because Student demonstrated speech and language skills that were within the average range of functioning.¹²⁶ Student had a relative weakness in reading, which Speech-Language Pathologist testified could be addressed by specialized instruction in reading.¹²⁷ Speech-Language Pathologist credibly testified that any other speech-language deficits did not have an academic impact on Student, so there was no need for speech-language services.¹²⁸ The formal determination of Student's lack of speech-language eligibility was made by Student's IEP team.¹²⁹

47. Student needed integrated speech-language services.¹³⁰ Nonpublic School provides integrated speech-language services as part of its support for all students.¹³¹

48. "Proper" Nonpublic School. Nonpublic School is a private special education day school that focuses on students with SLD and ADHD who are average or above average cognitively, so Nonpublic School is a very good fit for Student.¹³² Parent's original counsel gave notice on 6/14/16 that Parent intended to enroll Student at Nonpublic School for 2016/17 based on the need for a more intensive special education placement.¹³³ Parent's counsel reiterated at the end of the 8/11/16 IEP meeting that Student would be attending Nonpublic School in the fall; Student was formally withdrawn from Public School on

¹²² LEA Representative; P5-1.

¹²³ P29-13.

¹²⁴ *Id.*

¹²⁵ P29-15.

¹²⁶ Speech-Language Pathologist; R4-5.

¹²⁷ Speech-Language Pathologist; R4-5; P14-1.

¹²⁸ Speech-Language Pathologist.

¹²⁹ Speech-Language Pathologist; R4-5; P13.

¹³⁰ P28-18; Special Education Consultant.

¹³¹ P19-1; P20-1.

¹³² Special Education Consultant; Academic Dean.

¹³³ P4-52; Parent.

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8/22/16.¹³⁴ For 2017/18, Parent's counsel gave notice that Student would not return to Public School and would continue at Nonpublic School by letter dated 8/7/17.¹³⁵

49. DCPS relied on Student's "progress and mastery of goals" at Nonpublic School during 2016/17 in developing the 6/7/17 IEP.¹³⁶ DCPS's observation of Student at Nonpublic School on 5/16/17 found that there were no concerns with regard to Student's behavior and that Student was reported to be making good progress in academic classes.¹³⁷ Student's MAP in reading increased from a RIT score in the 50th or 51st percentile in December 2016 to the 63rd percentile in May 2017, although Student continued to have "many holes" in Student's learning; math also improved.¹³⁸

50. Parent credibly testified that the move to Nonpublic School was "transformational" for Student.¹³⁹ After falling further and further behind at Public School, Student rediscovered Student's love of learning at Nonpublic School.¹⁴⁰ Student is on the Nonpublic School swim team and in an art program at an art school with general education children.¹⁴¹

51. Parent has paid the full tuition for 2016/17 and 2017/18 at Nonpublic School for Student; Parent is not seeking reimbursement for after school care at Nonpublic School (which she also has paid), nor for private tutoring and specialists while at Public School.¹⁴² Nonpublic School is certified by OSSE and included on OSSE's list of approved nonpublic day schools.¹⁴³

52. Credibility. The undersigned generally found Special Education Consultant quite credible in key areas of her testimony and evaluation, although this Hearing Officer did not credit certain statements by Special Education Consultant, such as Student needing full-time special education services for every minute of the school week, including lunch and recess.

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,

¹³⁴ P11-2; P5-1.

¹³⁵ P5-25.

¹³⁶ P12-1.

¹³⁷ P15-1.

¹³⁸ P20-3,7; P24-61.

¹³⁹ Parent.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Parent; P36-1,2.

¹⁴³ P31-6; Academic Dean.

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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, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an

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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); *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.

Analysis

The heart of this case in many ways is whether it is sufficient to rely on standardized academic testing and conclude that as long as Student was average or above on testing there was nothing about which to be particularly concerned, or on the other hand whether there were basic foundational skills that Student was missing which – if not addressed – would prevent Student from achieving appropriately in Student's circumstances. Extensive discussion focused on whether Student's superior IQ should be the basis for expecting more than average academic results from Student. This question was clarified in large measure in the view of the undersigned by the Supreme Court's significant emphasis on the “child's individual circumstances” in *Andrew F.*, 137 S. Ct. at 994, 1001. Nor was this approach new, for other courts have long concluded that an IEP's benefit must depend on the student's potential, as in *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 185 (3d Cir. 1988) (IEP benefit “must be gauged in relation to the child's potential”), and *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (when students display considerable intellectual potential, the IDEA requires more).

Further, in considering these issues, the undersigned is cognizant of the fact that the analysis is not about achieving a perfect IEP, but one that is reasonably calculated to enable Student to make appropriate progress. *Andrew F.*, 137 S. Ct. at 1001. *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016) (a “properly developed IEP ‘need not guarantee the best possible education or even a potential-maximizing one.’” *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015) (internal quotation marks omitted)). However, in the view of the undersigned, Petitioner did establish a prima facie case on each of the issues in this case, shifting the burden of persuasion to Respondent, which did not meet its burden of proving by a preponderance of the evidence that Student's IEPs and placement were appropriate. Nonetheless, Respondent did prevail on the issue of speech-language eligibility and services.

Issue 1: *Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 3/17/16 which: (a) failed to provide sufficient special education services, and/or (b) lacked suitable baseline information. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

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The applicable legal standard for analyzing the appropriateness of an IEP was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was “reasonably calculated to produce meaningful educational benefit” and to permit Student to access the general education curriculum to the extent possible. See *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEPs are to be determined as of the time they were offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

The appropriateness of Student’s IEPs is analyzed by considering the specific concerns raised by Petitioner, which are considered in turn for each IEP, although there is some overlap.¹⁴⁴ See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Sufficiency of Special Education Services. The basic question in Issue 1 is whether providing Student with specialized instruction of only 60 minutes/week – 12 minutes a day – inside general education was a sufficient amount of specialized instruction given Student’s deficits. In the context of not providing any increase in specialized instruction since the initial 5/5/15 IEP and all that had occurred by the time of the 3/17/16 IEP, to pose the question is very near to answering it.

Parent was prepared to do whatever was necessary to ensure Student obtained the necessary foundation in reading – and education generally – including repeating Student’s grade in 2013/14, if necessary for Student to gain an adequate footing in school. Student’s teachers at Public School had reported concerns about Student to Parent as early as 2012/13 and 2013/14, and by the end of 2013/14 Public School conducted a psychological evaluation due to Student’s documented deficits, with particular concerns about reading and phonemic awareness. The evaluation found Student to be superior in the cognitive areas of verbal comprehension and perceptual reasoning, but average academically, so Student was not found eligible for special education services until 5/5/15, when Student’s initial IEP provided for 60 minutes of specialized instruction inside general education to address reading.

Parent began using tutors for Student in 2013/14, gradually increasing the services she was privately providing for Student. After the 6/20/14 DCPS evaluation which did not result in special education eligibility, the Public School psychologist stated that it would be “extremely beneficial” to continue tutoring supports for Student over the summer, suggesting 2-3 times per week, to continue working on word reading, reading comprehension, and continued phonemic awareness development.

¹⁴⁴ As an initial matter, a Hearing Officer must determine whether “the State complied with the procedures” set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, quoting *Rowley*, 458 U.S. at 206-07. No such procedural violations were alleged in this case.

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In 2015/16, Parent began pressing Public School to do more as Student was still struggling in writing basic phonetic combinations and basic spelling. Parent asked Student's teachers what interventions were being taken at school to counter the issues. A formal Mid-Term Progress Report in January 2016 highlighted Student's academic difficulty in reading and below grade level performance. By that point Parent felt that Student's deficits were not improving and Student was falling further and further behind and just wasn't "getting it." Student was miserable and unmotivated at school.

Student's 3/17/16 IEP stated that Student had received "extensive intervention" for 3 years but remained below expected levels in reading. Yet the IEP did not increase specialized instruction beyond the 5/5/15 level of 60 minutes/week of specialized instruction inside general education for reading, even though it added writing as an additional academic area of concern with accompanying writing goals. With only 12 minutes/school day for both reading and writing inside general education, this Hearing Officer concludes there was an insufficient level of specialized instruction and a denial of FAPE.

(b) Baseline Data. As a DCPS witness emphasized during her testimony, the IDEA does not expressly require "baselines" in IEPs. However, the IDEA does require a description of how progress toward meeting a student's IEP goals will be measured, 34 C.F.R. 300.320(a)(3). That measurement is typically in the form of baselines stating the level at which a child begins so one can determine whether the special education services provided were sufficient to bring about the desired improvement. Indeed, had that requirement been carried out more rigorously in this case, there might well be more data – and less argument – over Student's progress toward critical academic goals.

Here, Student's 3/17/16 IEP contained 3 goals for reading but no entries in the corresponding "baseline" boxes. The present levels of performance for reading included a great deal of information, but did not contain specifics relating to the goals from which progress could be measured. Even when information in the present levels did appear to relate to the goals, it did not permit progress to be measured. For instance, the present levels stated that Student "has mastered . . . short vowels, digraphs . . ." which appears to differ from the goal of decoding listed "vowel digraphs" with 90% accuracy. Of course, to the extent that data does relate to the goal for "vowel digraphs," it raises the question why goals that have been "mastered" are included in a new IEP. Similarly, written expression had 3 goals, none of which had any stated baselines. Statements in the present levels did not contain specific details relating to the goals from which progress could be measured. And when the present levels did appear to relate in some way to goals they did not permit progress to be measured. For instance, Student was already able to "produce multiple paragraphs about a story" while Student's goal was to write a "multi-paragraph passage" to develop a topic. It is not clear how these two statements relate and this again raises questions about whether the goal has already been mastered and is thus not needed in the IEP. Some measurable background was provided about Student's ability to spell words, but the present levels information did not fully match the goal.

This Hearing Officer concludes that there was a violation of 34 C.F.R. 300.320(a)(3), and that lack of baselines – or other means of measuring progress – seriously deprived Parent of her participation rights by not providing relevant information about how

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Student was progressing and whether the IEP services provided were sufficient to meet Student's goals, which may also have impacted Student's education. *See* 300 C.P.R. 300.513(a); *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015), *citing Lesesne ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). This is a further denial of FAPE that bolsters the denial of FAPE in subpart (a) due to lack of specialized instruction. Compensatory education was not sought by Petitioner for this issue, but this Hearing Officer considers it appropriate compensatory education for Issue 1 independently to support the reimbursement of costs of Nonpublic School for 2016/17 and 2017/18 as ordered below.

Issue 2: *Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 8/11/16 which: (a) failed to provide sufficient special education services, (b) lacked suitable baseline information, and/or (c) failed to provide Assistive Technology and related accommodations. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

The same legal analysis applies to this issue as to Issue 1 above, with the addition of Assistive Technology as an additional subpart.

(a) Sufficiency of Special Education Services. Parent credibly testified that the 3/17/16 IEP had been the tipping point, after which she realized she must be more proactive to obtain the help Student needed. Parent quickly began gathering information from other parents and found Special Education Consultant to evaluate Student, as well as legal counsel to ensure that Student's rights were protected.

DCPS, and School Psychologist in particular, concluded from Student being at or above grade level in academic areas that Student did not need many – if any – special education services, putting significant emphasis on Student meeting expectations in PARCC at the end of 2015/16, even though the written expression subpart was below expectations, and Student achieved results only with accommodations. By contrast, Special Education Consultant found in her testing that even when Student's scores were average (or higher) in many areas, Student did not function on that level in school, so relying on those scores to make educational decisions was a mistake. Student's profile was atypical in that scores on tests measuring higher-level skills were sometimes higher than tests measuring basic skills. Similarly, Student's math skills were significantly atypical in that Student found a way to solve problems conceptually by bypassing the number system. Nonpublic School confirmed in Student's 5/22/17 Nonpublic School IEP that Student may simply be a strong test taker who performs very well on multiple-choice assessments, but would not actually be able to read independently at the levels reported.

The 8/11/16 IEP that DCPS offered Student stated that Student took longer than other children to complete reading assignments and tasks. The 8/11/16 IEP was improved over the 3/17/16 IEP in that in addition to 60 minutes/week of specialized instruction inside general education for reading, DCPS added 120 minutes/week of specialized instruction for reading outside general education, 60 minutes/week of specialized instruction inside general education for writing and 45 minutes/week of specialized instruction inside general

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education for math. Math was a new area of concern with 5 goals, and additional process goals were added in reading and writing at Special Education Consultant's suggestion.

However, Special Education Consultant's suggestions to increase the amount of specialized instruction in the 8/11/16 IEP were rejected. Thus, with significant increases in the number of Student's goals, with 5 math goals (none in the past), 9 reading goals (compared to 3) and 6 writing goals (compared to 3), there was not a significant increase in specialized instruction. Even more problematic was that Public School explained that the new service levels on the IEP were simply providing what Student had been receiving during 2015/16, when Student had not achieved the desired goals. Thus, the reading outside general education on the 8/11/16 IEP was simply to continue the reading system that Student had received in a small group outside general education in 2015/16. Similarly, the additional time inside general education in the 8/11/16 IEP reflected what Student had already been receiving through Public School's co-teaching approach in Student's class in 2015/16.

Moreover, this Hearing Officer concurs with Petitioner that DCPS erred in not taking into account the significant amount of tutoring and specialist assistance that Parent was privately obtaining for Student to assist in meeting educational goals, which exceeded the amount of services proposed in the 8/11/16 IEP, not to mention exceeding by some multiple the 60 minutes/week provided by Public School in the 2 previous IEPs. Thus, in the absence of a notable increase in the level of special education services provided, there was no basis to expect that things would improve and this Hearing Officer concludes that the 8/11/16 IEP was not reasonably calculated to enable appropriate progress in Student's circumstances and is a denial of FAPE.

(b) Baseline Data. As noted above, 34 C.F.R. 300.320(a)(3) requires a description of how progress toward meeting a student's IEP goals will be measured, which is typically by means of providing baselines. In Student's 8/11/16 IEP, math was added as a third area of academic concern with 5 goals, each of which received baseline information, although not in ways that were helpful to measure progress, as detailed in the Findings of Fact above. In the 8/11/16 IEP, Student had 9 reading goals and more attention was given to baselines but they remained insufficient. Similarly, the IEP included 6 writing goals, mostly without baselines or with inadequate information. As discussed above, this is also a denial of FAPE.

(c) Assistive Technology. Issue 2 adds the additional subpart of Assistive Technology, for none was included in the appropriate section of the 8/11/16 IEP. However, the Other Classroom Aids and Services section was enhanced in the 8/11/16 IEP to provide a range of support, including keyboarding devices to support spelling and spell check, computer software and applications to support academic skill development, audio materials in a variety of formats, a sound/picture chart for reading and spelling, and manipulatives for math. Parent testified that she had no concerns with this list and no recollection of her advocates seeking anything additional for the list that was not included. At the 8/11/16 IEP meeting, Special Education Consultant requested an Assistive Technology evaluation to determine if Assistive Technology could benefit Student. LEA Representative testified that Public School would be willing to conduct an Assistive Technology evaluation as Parent requested, but that Student would need to return and be observed in a DCPS school for it to

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be meaningful, which seems reasonable. Accordingly, the undersigned concludes that there was no denial of FAPE due to a lack of Assistive Technology or related accommodations.

Issue 3: *Whether DCPS denied Student a FAPE by providing an inappropriate IEP on 6/7/17 which: (a) failed to provide sufficient special education services, (b) lacked suitable baseline information, (c) failed to provide Assistive Technology and related accommodations, and/or (d) failed to provide speech and language services. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

The same legal analysis applies to this issue as to Issue 2 above, with the addition of speech-language services as an additional subpart.

(a) Sufficiency of Special Education Services. Student's 6/7/17 IEP provided the same amount of specialized instruction as the 8/11/16 IEP, and simply added 60 minutes/month of direct BSS outside general education and 15 minutes/week of BSS consultation to address Student's newly-added emotional, social and behavioral development goals. There was no evidence that Student's need for specialized instruction had lessened notably between 8/11/16 and 6/7/17, or that the addition of BSS was necessary or even helpful. Special Education Consultant and Educational Advocate each credibly testified that the amount of specialized instruction included in the DCPS IEPs was not sufficient to meet Student's needs. Thus, this Hearing Officer concludes that the service levels in the 6/7/17 IEP remain insufficient for all the reasons discussed with the 8/11/16 IEP.

(b) Baseline Data. As discussed above, IEPs require a baseline or other description of how progress toward meeting a student's IEP goals will be measured. The 6/7/17 IEP had 5 math goals, with a variety of inadequate baselines as detailed in the Findings of Fact above. Similarly, the IEP contained 9 reading goals which lacked adequate baselines for multiple reasons, as set forth above. The IEP contained 8 writing goals, with baselines that mostly stated that Student was "developing," which doesn't permit measurement. Finally, the added area of emotional, social, and behavioral development included 5 goals, but the baselines for most merely referenced "developing," while the remainder were blank.

(c) Assistive Technology. The claim of Assistive Technology is no different for the 6/7/17 IEP than the 8/11/16 IEP, discussed above. The lengthy Other Classroom Aids and Services section in the 6/7/17 IEP was virtually unchanged from the 8/11/16 IEP, and there was no indication that Student's need for Assistive Technology had increased over the intervening year, so the Assistive Technology claim does not support a FAPE violation.

(d) Speech and Language Services. Speech-language impairment is defined in 34 C.F.R. 300.8(c)(11) as "a communication disorder . . . that adversely affects a child's educational performance." The comprehensive speech-language assessment of Student on 9/23/16 by a speech-language pathologist at Nonpublic School concluded that Student had a scattered linguistic profile with scores from above average to poor, with some of Student's average scores masking functionally vulnerable or deficient skills. The pathologist diagnosed an expressive language disorder and a specific learning disorder with impairment in both reading and writing. On the other hand, Speech-Language Pathologist credibly

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concluded that Student did not meet the DCPS guidelines for a speech-language impairment because Student's speech and language skills were within the average range and Student's relative weakness in reading could be addressed by specialized instruction in reading. Speech-Language Pathologist testified that any other speech-language deficits did not have an academic impact on Student, so there was no need for speech-language services, which was the ultimate conclusion of Student's IEP team. To the extent Student needed integrated speech-language services (as Special Education Consultant testified), Nonpublic School provided integrated speech-language services as part of its support for all its students. The undersigned concludes on balance that DCPS met its burden of persuasion on this issue and that there was no denial of FAPE based on speech-language services not being added to Student's 6/7/17 IEP.

Issue 4: *Whether DCPS denied Student a FAPE by failing to offer an appropriate placement from 3/17/16 on, where: (a) the placement could not provide the supports and environment described in Student's IEPs, and/or (b) suitable placements were not offered prior to the start of 2016/17 or 2017/18. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Finally, Petitioners challenge the appropriateness of Student's proposed placement for all 3 challenged IEPs, for which the standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements). Here, the 3 IEPs at issue have been successfully challenged on the basis of Student needing more special education services than any of the IEPs offer, although it is not determined herein what the necessary level of support would be. However, since Public School is an "inclusion" school (generally without special education classes outside general education) it seems unlikely that it would be able to support the needs of Student as found above. The undersigned concludes that Respondent failed to carry its burden of proof on this issue; the placement proposed for Student was not appropriate and is a denial of FAPE. *See N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), *quoting James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016). This issue also supports the ordered reimbursement below.

Remedy

As the remedy for the denials of FAPE found above, Petitioner seeks reimbursement of payments to Nonpublic School for 2016/17 and 2017/18 to date, as well as placement for Student at Nonpublic School for the remainder of 2017/18. Reimbursement for 2016/17 and 2017/18 is ordered below, based on the Court's guidance that the essence of equity jurisdiction is "to do equity and to mould each decree to the necessities of the particular case." *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Under the IDEA, parents who unilaterally place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed.

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2d 284 (1993) (*quoting Burlington*, 471 U.S. at 374). The D.C. Circuit Court explained in *Leggett*, 793 F.3d 59, 66–67, that,

As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement – that is, the parents did not otherwise act “unreasonabl[y].”

Here, the first prong of *Leggett* is met as discussed in detail above, due to the denials of FAPE by DCPS failing to offer Student appropriate IEPs and placement.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student. Here, the undersigned was persuaded that Nonpublic School is proper for Student by the progress made there as found by the DCPS observation and testing, along with the credible testimony of Academic Dean that Student has made “definite progress” and received educational benefits at Nonpublic School. The second prong of *Leggett* is satisfied.

The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioner acted unreasonably. Here Parent worked as collaboratively with Public School as possible, following the suggestions and guidance of Public School until it became clear that Student was not receiving the support needed and that Parent could no longer wait for Public School to take needed action without risking severe harm to her child. In these circumstances, the undersigned has no doubt that the third prong is satisfied. An Order is issued below covering reimbursement for both 2016/17 and 2017/18, as well as possible future funding if a FAPE is not provided prior to the beginning of 2018/19.

ORDER

Petitioner has largely prevailed on the issues in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- 1) Upon receipt of documentation of payment by Petitioner, DCPS shall within 30 days reimburse Petitioner for the costs of Nonpublic School she has paid for the 2016/17 and 2017/18 school years for tuition, transportation, and any other associated educational costs.
- 2) DCPS shall place Student at Nonpublic School for the remainder of the 2017/18 school year and fund Student at Nonpublic School until DCPS offers a FAPE to Student, including tuition, transportation, any future related services and any other associated costs.

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

IT IS SO ORDERED.

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Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

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