

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

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

OSSE  
Office of Dispute Resolution  
January 21, 2018

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2017-0287
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 1/21/18
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates: 1/4/18 & 1/8/18
("DCPS"),	)	ODR Hearing Room: 2003
Respondent.	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been provided a suitably restrictive IEP and placement, among other things. DCPS responded that it had proposed a new IEP and placement that were calculated to provide 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 10/25/17, the case was assigned to the undersigned on 10/26/17. Respondent filed a response on 11/3/17 and did not challenge jurisdiction. The resolution session meeting (“RSM”) was held on 11/7/17, but the parties did not settle the case or shorten the 30-day resolution period, which ended on

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

## Hearing Officer Determination

Case No. 2017-0287

11/24/17. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 14-day continuance, which requires a Hearing Officer Determination (“HOD”) by 1/22/18.

The due process hearing took place on 1/4/18 and 1/8/18, and was open 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 12/21/17, contained documents P1 through P48, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 12/27/17, contained documents R1 through R24, which were admitted into evidence without objection.

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

1. *Special Education Advocate* (qualified over objection as an expert in Special Education as It Relates to IEP Development, LRE and Placement)
2. *Observer* (qualified without objection as an expert in Special Education Services and Programming)
3. *Private Psychologist* (qualified without objection as an expert in Psychology)
4. Parent
5. *Director of Admissions at Nonpublic School*

Respondent’s counsel presented 6 witnesses in Respondent’s case (*see Appendix A*):

1. *Special Education Teacher A at Public School*
2. *School Social Worker* (qualified without objection as an expert in Clinical Social Work and Behavioral Interventions for Children with Disabilities)
3. *LEA Representative at Proposed Public School*
4. *Special Education Teacher B* (qualified over objection as an expert in Special Education Programming and IEP Development)
5. *LEA Representative at Public School* (qualified over objection as an expert in Social Work and Behavioral Interventions for Children with Disabilities)
6. *School Psychologist* (qualified without objection as an expert in School Psychology)

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

## Hearing Officer Determination

Case No. 2017-0287

**Issue 1:** Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of services on or after 9/26/17, where Student needed (a) a more restrictive setting with an increase in services and additional services, (b) updated goals, performance data and baseline data, and (c) a location of services able to meet Student's needs. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

**Issue 2:** Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP during 2016/17<sup>2</sup> and 2017/18, and/or comply with a 12/24/16 HOD which required Student to have a special education teacher in all classes involving reading and writing, where (a) Student received only 11 of 23 hours required by the IEP following the 12/24/16 HOD, and (b) Student is not receiving instruction in "specials" that involve reading and writing. *Petitioner has the burden of persuasion on this issue.*

**Issue 3:** Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by conducting an assistive technology assessment as requested at the 9/26/17 IEP meeting. *Petitioner has the burden of persuasion on this issue.*

**Issue 4:** Whether DCPS denied Student a FAPE by failing to develop or update a behavior intervention plan ("BIP") for Student after completing a functional behavioral assessment ("FBA") in September 2017, despite the team's findings at a 9/26/17 IEP meeting. *Petitioner has the burden of persuasion on this issue.*

**Issue 5:** Whether DCPS denied Student a FAPE by failing to provide full access to educational records in response to Parent's request, including service trackers and standardized tests such as PARCC. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 5 business days, DCPS shall revise Student's IEP to provide for (a) an increase of services and placement in a full-time (100%) outside general education setting, (b) change in disability classification, (c) a social skills group, (d) typing goals, and (e) updated baseline data and goals.
3. Within 5 business days, DCPS shall identify a suitable location of services for implementing Student's IEP or fund a private placement identified by Parent.
4. DCPS shall conduct or fund an assistive technology assessment for Student, beginning the assessment or authorizing funding within 10 business days.
5. DCPS shall fund compensatory education for any denial of FAPE.<sup>3</sup>

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<sup>2</sup> All dates in the format "2015/16" refer to school years.

<sup>3</sup> Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of

## Hearing Officer Determination

Case No. 2017-0287

6. Any other just and reasonable relief.

### Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age*, *Gender* and in *Grade* at Public School, where Student began in October 2016; Student previously attended *Prior Public School*.<sup>6</sup>
2. Student's initial IEP on 9/8/16 and subsequent IEPs contained a disability classification of Specific Learning Disability ("SLD").<sup>7</sup> Student's 9/8/16 IEP provided for 5 hours/week of specialized instruction inside general education and 7 hours/week outside general education, along with 60 minutes/month of BSS inside general education and another 60 outside general education.<sup>8</sup>
3. Student's IEP was revised on 1/24/17 to incorporate the requirements of a 12/24/16 HOD concerning Student; the IEP provided for 16 hours/week of specialized instruction inside general education along with the 7 hours/week outside general education, the same BSS (60 minutes/month inside general education and 60 outside general education), and the addition of 120 minutes/month of Occupational Therapy ("OT") outside general education.<sup>9</sup>
4. Student's final IEP (to date) was dated 12/11/17 and changed Student's specialized instruction to 20 hours/week outside general education, increased BSS to 240

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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.

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

<sup>5</sup> Parent.

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

<sup>7</sup> P15-1.

<sup>8</sup> P15-8.

<sup>9</sup> P2-1,9; P1.

## Hearing Officer Determination

Case No. 2017-0287

minutes/month outside general education, and maintained OT at 120 minutes/month outside general education.<sup>10</sup>

5. Student received an independent Comprehensive Psychological Reevaluation in March 2017, with a report dated 5/31/17; DCPS formally reviewed the Reevaluation in a report dated 9/22/17.<sup>11</sup> Cognitively, Student performed in the Average range on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”); academically, Student performed in the Extremely Limited to Very Limited range on the Woodcock-Johnson Tests of Achievement IV (“WJ-IV”).<sup>12</sup> Student’s teachers reported that Student was making some progress academically and behaviorally, although the progress was inconsistent.<sup>13</sup> Overall, Student struggles with basic fundamental skills, especially in reading and writing.<sup>14</sup>

6. The Comprehensive Psychological Reevaluation found an Unspecified Neurodevelopmental Disorder, a conclusion that DCPS’s review disputed; the DCPS review did agree that Other Health Impairment (“OHI”) would be appropriate based on Attention Deficit – Hyperactivity Disorder (“ADHD”), and Student should be classified as having Multiple Disabilities (“MD”) due to OHI in addition to SLD.<sup>15</sup>

7. Behavioral Issues. When Student initially transferred to Public School in October 2016, Student “destroyed” everything in the classroom and peer relations were “very explosive”; Student would walk up and kick peers for no reason, got into fights, and was disrespectful.<sup>16</sup> Student had trouble with transitions for lunch and recess early in 2016/17, but incidents with peers lessened over time.<sup>17</sup> Student’s behavior improved by December 2016.<sup>18</sup> By March 2017 Student had “come a long way,” but the general education classroom was still not suitable; on the other hand, Student did not belong with Intellectual Disability (“ID”) students or in a Behavior & Education Support (“BES”) classroom since Student’s behavior had improved.<sup>19</sup>

8. On the day of observation for the Reevaluation (3/21/17), Student got on top of a radiator at school threatening to jump out the window and to make a “devil robot” to kill everyone; the social worker stated that such behaviors had not been seen in a long time.<sup>20</sup> Observer spoke with Special Education Teacher A, Student’s general education teacher and

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<sup>10</sup> R17-1,10.

<sup>11</sup> P1-1; R9-1.

<sup>12</sup> R9-7; P1-11,13,16.

<sup>13</sup> R9-4.

<sup>14</sup> P1-14.

<sup>15</sup> R9-8,9; P1-18.

<sup>16</sup> P1-4; Special Education Consultant; Special Education Teacher A.

<sup>17</sup> R9-5.

<sup>18</sup> P1-4; Special Education Teacher A.

<sup>19</sup> P1-5; Special Education Teacher A.

<sup>20</sup> P1-5; Special Education Teacher A; Observer (ST knew observation was occurring); Special Education Consultant.

## Hearing Officer Determination

Case No. 2017-0287

social worker and all confirmed that Student's behavior had improved.<sup>21</sup> The IEP Progress Report on 6/7/17 reported that Student had shown improvement using coping skills when frustrated.<sup>22</sup>

9. At the beginning of 2017/18, School Psychologist made additional classroom observations for the DCPS review of the Reevaluation and saw no inappropriate behavior by Student.<sup>23</sup> Problematic behaviors had decreased generally as of 9/26/17; recess behavior had decreased as well, although having recess with older kids "took some getting used to."<sup>24</sup> As of 9/26/17, Student was generally not having problems in "specials" – Art, Music, PE, Spanish, Library – despite lack of specialized instruction or other support.<sup>25</sup> In the Fall of 2017 School Social Worker pushed in during Library for Student's BSS where there were reportedly some difficulties; there had been no other mention of difficulties during specials.<sup>26</sup>

10. Special Education Teacher B testified that in the Fall of 2017 Student was having behavioral issues at lunch and recess, where Student was sometimes bullying other children and fighting; Student's behavior inside the classroom was improving, especially compared to 2016/17.<sup>27</sup> Student said more than once that there was no need to follow teachers' directions, as Student would soon be going to a new school.<sup>28</sup>

11. With a decrease in Student's behavioral issues by 9/26/17, DCPS felt that Student's academics could finally be monitored accurately.<sup>29</sup> Student's team agreed to reconvene at the end of the first quarter of 2017/18 (near the end of October) to discuss Student's progress and review an updated BIP.<sup>30</sup>

12. DCPS agreed on 9/26/17 to update Student's BIP and send it to Parent.<sup>31</sup> DCPS agreed that the BIP needed to be updated even though behaviors in the existing BIP were still relevant, since new teachers at Public School needed to participate in the BIP as well.<sup>32</sup> The BIP-Level II ("BIP 2") was prepared by School Social Worker on 10/4/17 and transmitted to Petitioner's counsel for review at the RSM; DCPS had sought an earlier meeting, but it had not happened.<sup>33</sup> The "draft" BIP 2 was implemented for Student from

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<sup>21</sup> Observer.

<sup>22</sup> P19-5.

<sup>23</sup> School Psychologist; R9-5.

<sup>24</sup> P10-3; Special Education Consultant.

<sup>25</sup> P10-2.

<sup>26</sup> School Social Worker.

<sup>27</sup> Special Education Teacher B.

<sup>28</sup> *Id.*

<sup>29</sup> R10-5; Special Education Teacher B.

<sup>30</sup> LEA Representative at Public School; R10-7.

<sup>31</sup> R10-6.

<sup>32</sup> P10-4.

<sup>33</sup> R12-1; School Social Worker.

## Hearing Officer Determination

Case No. 2017-0287

10/4/17 until 11/7/17, when the final version was adopted.<sup>34</sup> The BIP 2 noted that Student had off task and distracted behaviors that could become physically aggressive with peers; Student's disruptive and disengaged behaviors occurred "daily" – at least at the beginning of 2017/18 – and were evident during unstructured times such as transitions, lunch and recess.<sup>35</sup>

13. School Social Worker credibly testified that she was "not allowed" – apparently due to this litigation – to reach out to Parent earlier to consult with her about BIP 2 changes.<sup>36</sup> Student's team considered the BIP 2 suggestions made by Petitioner's counsel and Parent at the RSM but did not accept them, such as a concern about including suspensions as being punitive, even though Student had not been suspended all year.<sup>37</sup> Petitioner's advocates also raised concerns about the need for the BIP 2 to address sensory and emotional dysregulation issues; the BIP 2 called for fidget toys, which would include stress balls and other tactile strategies, along with self-regulation tools like deep breathing, access to safe spaces and breaks.<sup>38</sup>

14. Academic Performance. Student's teachers reported that Student was "far below" grade level in March 2017; Student's teacher thought Student would perform better in a different classroom with more intensive instruction, as did Special Education Teacher A.<sup>39</sup>

15. Student's final 2016/17 report card showed that Student was not doing well academically, with a preponderance of "1s" (Below Basic – performing significantly below grade level) across the school year.<sup>40</sup> Student's work habits, personal and social skills did show improvement over the year.<sup>41</sup>

16. PARCC testing for 2016/17 indicated that Student was at Level 1 for both math and English Language Arts ("ELA"), scoring better than only 2% of DC students in Student's grade in math and 17% in ELA.<sup>42</sup> As of early 2017/18, Student was found to be more than 4 years behind grade in reading.<sup>43</sup> In Math, Student's 9/1/17 iReady test results were well below grade level; Student regressed from the 2/4/16 iReady on at least 3 of the 4 domains.<sup>44</sup>

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<sup>34</sup> R12-2; R14-1.

<sup>35</sup> R12-2,3.

<sup>36</sup> School Social Worker.

<sup>37</sup> *Id.*

<sup>38</sup> School Social Worker; R12-4.

<sup>39</sup> P1-4,5; Special Education Teacher A.

<sup>40</sup> R6-1.

<sup>41</sup> *Id.*

<sup>42</sup> P21-15,16; P22-1,2.

<sup>43</sup> P23-1,2.

<sup>44</sup> P25-1; P26-1.

## Hearing Officer Determination

Case No. 2017-0287

17. The present levels of performance on Student's 12/11/17 IEP indicated that Student was about 3 years behind grade level in math, 4 years behind in reading, and 4 years behind in writing.<sup>45</sup> Parent believes that Student wants to learn, but needs more support.<sup>46</sup>

18. IEP Goals, Performance and Baselines. DCPS provided a draft IEP prior to the 12/11/17 IEP meeting, but received no feedback from Petitioner's team.<sup>47</sup> DCPS invited input on the goals at the 12/11/17 IEP meeting; Petitioner's advocates provided detailed suggestions/criticisms on 12/14/17, after the final IEP.<sup>48</sup> The goals in Student's 12/11/17 IEP were updated from the prior IEP, or repeated if still needed due to lack of mastery; math goals 1 and 2 were still needed, math goal 3 was new; reading goal 1 was added, reading goal 2 was changed, and reading goal 3 maintained; the single writing goal was changed.<sup>49</sup>

19. The performance levels in Student's 12/11/17 IEP are based on the WJ-IV given to Student in March 2017 (covering multiple areas of academic concern), iReady math assessment given on 9/1/17, and Reading Inventory on 8/31/17.<sup>50</sup> Student's 12/11/17 IEP includes revised baselines that are clear and measurable in math, but less measurable in reading and writing.<sup>51</sup>

20. IEP Implementation. Special Education Teacher A testified that when Student's IEP was revised in January 2017 to increase specialized instruction she revised her hours right away and provided more services to Student.<sup>52</sup> Special Education Teacher A stated that she consistently followed her schedule as shown on R5.<sup>53</sup> Special Education Teacher A's Revised Schedule indicates push-in for Student 13 hours/week and pull-out 8 hours/week.<sup>54</sup> Special Education Teacher A pushed in Spanish and other specials, but not Library.<sup>55</sup>

21. At the RSM on 11/7/17, Special Education Teacher A stated that she had pushed in 16 hours/week, with no mention of pull-out; Petitioner's advocate's notes indicated that Special Education Teacher A had stated fewer hours at a previous meeting; Special Education Teacher A previously told Parent that Special Education Teacher A couldn't provide all the hours due to her duties with other students; Special Education Teacher A replied that at the beginning it was hard to provide all the hours, but her schedule was changed.<sup>56</sup> Special Education Teacher A testified that she had not told Parent that she

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<sup>45</sup> R17-3,5,6.

<sup>46</sup> Parent.

<sup>47</sup> LEA Representative at Public School.

<sup>48</sup> P9-3; P45-1,2,3.

<sup>49</sup> Special Education Teacher B; R17-3,4,5,6; P12-3,4,5,6.

<sup>50</sup> R17-3,5,6.

<sup>51</sup> P17-4,5,6,7.

<sup>52</sup> Special Education Teacher A.

<sup>53</sup> Special Education Teacher A; R5-1.

<sup>54</sup> R5-1 (based on compilation by the undersigned).

<sup>55</sup> Special Education Teacher A.

<sup>56</sup> P48-1.

## Hearing Officer Determination

Case No. 2017-0287

couldn't implement Student's IEP.<sup>57</sup> The Comprehensive Psychological Reevaluation reported that Special Education Teacher A pushed in 6 hours/week and pulled out 7 hours/week.<sup>58</sup>

22. Observer's classroom observation noted that Special Education Teacher A was present some, but not the entire class period as she was supposed to be for Student; Student's math teacher stated in the Reevaluation report that "there is not too much push-in in his class" as Student did not feel comfortable with it.<sup>59</sup> Special Education Teacher A testified that during push-in she stayed with Student the entire class except when leaving for her lunch or planning period (11:10 a.m. to 12:40 p.m.). Special Education Teacher A was Student's special education teacher only in 2016/17.<sup>60</sup>

23. In 2017/18, Special Education Teacher B had Student on her caseload; Special Education Teacher B was with Student inside general education for math, reading, science and social studies, and with Student outside general education in a resource room with a total of 1-3 students.<sup>61</sup>

24. Assistive Technology. Petitioner's counsel requested an assistive technology evaluation on 9/26/17, although she did not suggest a specific area of concern; DCPS did not see any need, but agreed to request an assistive technology consult.<sup>62</sup> On 9/26/17, DCPS requested an Assistive Technology Consideration Review and Consultation, noting that Student may benefit from assistive technology.<sup>63</sup>

25. A DCPS Assistive Technology Specialist stated that she reviewed Student's records and recommended particular software for Student which staff was encouraged to try with Student to see how it worked, after which the assistive technology team could be contacted for "more individualized support."<sup>64</sup> Petitioner was not opposed to the assistive technology software but still sought an assistive technology evaluation, which DCPS testified was scheduled for 1/18/18 (the week after the due process hearing concluded).<sup>65</sup>

26. Documents from DCPS. Petitioner's advocates repeatedly requested documents relating to Student.<sup>66</sup> DCPS responded with many documents.<sup>67</sup> LEA Representative at

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<sup>57</sup> Special Education Teacher A.

<sup>58</sup> P1-5.

<sup>59</sup> Observer; P1-5.

<sup>60</sup> Special Education Teacher A.

<sup>61</sup> Special Education Teacher B; School Social Worker.

<sup>62</sup> LEA Representative at Public School; R10-3.

<sup>63</sup> R11-1,3.

<sup>64</sup> P32-1,2.

<sup>65</sup> P48-1; LEA Representative at Public School.

<sup>66</sup> P38-1 (9/21/17 formal records request letter); P36-1 (9/21/17); P10-1 (9/26/17); P35-1 (9/26/17); P34-2 (10/3/17); P34-1 (10/16/17); P9-3 (12/11/17).

<sup>67</sup> R23-1 (9/25/17); R23-1 (11/2/17); R15-1 (11/7/17); R19-1 (12/11/17); P9-2 (12/11/17: iReady sent on 11/7/17, but not received).

## Hearing Officer Determination

Case No. 2017-0287

Public School testified that Public School send documents to Petitioner's counsel and then re-sent them when again requested.<sup>68</sup>

27. Proposed Public School and Nonpublic School. In the 1/24/17 IEP meeting with DCPS, Petitioner's counsel and Parent sought a self-contained program for Student with 20 hours/week of specialized instruction; DCPS responded that it could accommodate Student's needs at Public School.<sup>69</sup> On 9/26/17, Petitioner's counsel requested a full-time program for SLD; DCPS responded that Public School lacked a Specific Learning Support ("SLS") class, which DCPS agreed Student needed.<sup>70</sup>

28. DCPS emailed a Location of Services ("LOS") letter dated 12/26/17 to Petitioner's counsel on 12/27/17 informing Parent that the SLS program at Proposed Public School had been identified as Student's program and LOS.<sup>71</sup> At Proposed Public School Student would be the 10<sup>th</sup> child in the SLS class, with 1 teacher and 1 aide.<sup>72</sup> Proposed Public School can provide the Student's IEP services of 20 hours/week of specialized instruction outside general education.<sup>73</sup> An aide takes the SLS class to specials; the aide takes the class as a group to lunch, where the principal, gym teacher, and often 2 other teachers are present for lunch with about 40-50 children total.<sup>74</sup>

29. Student received 360 hours of compensatory education pursuant to the 12/24/16 HOD and is receiving regular tutoring in 2-hour sessions 4 days a week after school.<sup>75</sup> Observer oversees Student's tutoring and testified on 1/4/18 that Student had used about 40% of the 360 hours of compensatory education awarded.<sup>76</sup>

30. Nonpublic School serves children with challenging behaviors; most have an Emotional Disturbance ("ED").<sup>77</sup> There is no suggestion that Student is ED; Student can socialize with non-disabled peers.<sup>78</sup> School Social Worker believes that full-time removal from a general education environment would be detrimental to Student and social-emotional development.<sup>79</sup> Special Education Teacher B credibly testified that it would be a disservice to Student not to try a more restrictive placement like the SLS program before placing Student in a nonpublic school.<sup>80</sup>

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<sup>68</sup> LEA Representative at Public School.

<sup>69</sup> P14-4.

<sup>70</sup> P10-5.

<sup>71</sup> R20-1,2.

<sup>72</sup> LEA Representative at Proposed Public School.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> P46-4; Observer.

<sup>76</sup> Observer.

<sup>77</sup> Director of Admissions.

<sup>78</sup> LEA Representative at Public School; School Psychologist.

<sup>79</sup> School Social Worker.

<sup>80</sup> Special Education Teacher B.

## Hearing Officer Determination

Case No. 2017-0287

31. Credibility. Special Education Consultant undermined her credibility somewhat by making incorrect statements in her testimony and exhibiting little concern when corrected on cross-examination, such as testifying that Student needed Extended School Year (“ESY”) which was not on the IEP when it actually was (R17-13), as Special Education Consultant later acknowledged without apparent surprise or concern. Similarly, Special Education Consultant testified that the IEP present levels of performance were not up to date, but stated that she was referring to the draft IEP rather than the final IEP only after it was pointed out on cross-examination that new information on present levels was clearly included in the IEP. Further, Special Education Consultant testified that two IEP goals were the same from the January to December IEPs, even though one referred to 10 words at one reading level and the other referred to 50 words at a different reading level; on cross Special Education Consultant acknowledged the goal was “reworded,” but continued to assert it that was “pretty much the same thing.”

### Conclusions of Law

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

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

“The IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, 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*

## Hearing Officer Determination

Case No. 2017-0287

*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 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.

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of services on or after 9/26/17, where Student needed (a) a more restrictive setting with an increase in services and additional services, (b) updated goals, performance data and baseline data, and (c) a location of services able to meet Student's needs. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

No one disagreed that Student has made insufficient progress at Public School, so the central issue in this case is whether DCPS took the remedial steps necessary to propose an appropriate IEP on 12/11/17 and placement at Proposed Public School. Petitioner established a prima facie case on this issue, but DCPS met its burden of persuasion and prevails on the facts of this case.

## Hearing Officer Determination

Case No. 2017-0287

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 IEP are to be determined as of the time it was 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 IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.<sup>81</sup> *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) More Restrictive Setting/Increase in Services. Special education services for Student have increased fairly rapidly from an initial IEP on 9/8/16 which provided for 5 hours/week of specialized instruction inside general education and 7 hours/week outside general education, to a 1/24/17 IEP providing for 16 hours/week of specialized instruction inside general education along with the 7 hours/week outside general education, to Student’s 12/11/17 IEP at issue in this case which provided 20 hours/week of specialized instruction outside general education, and doubled Student’s BSS to 240 minutes/month. Petitioner’s counsel argued that specialized instruction was being reduced by going from a total of 23 to 20 hours/week, but the undersigned is clear that 20 hours/week in a self-contained SLS classroom is significantly more restrictive than the prior 16 hours inside general education and 7 outside. Further, a DCPS witness credibly testified that there is support from aides for the SLS program who assist the SLS class with specials in general education and there are multiple adults at lunch for only 40-50 children, although it is a matter of some concern to the undersigned for those supports not to be included on the face of Student’s IEP.

Petitioner’s counsel further asserted that 20 hours/week in an SLS program was not sufficient and sought an IEP/placement for Student at Nonpublic School. However, Nonpublic School serves children with challenging behaviors, most of whom are ED, while there was no suggestion that Student is ED, which would be an apparent mismatch that could leave Student less able to focus on academics. Student can socialize with non-disabled peers and both School Social Worker and Special Education Teacher B persuasively testified that it would be detrimental to Student not to try the SLS program at Proposed Public School before being placed in any nonpublic school separated from typically developing peers. *See* 34 C.F.R. 300.114; *Endrew F.*, 137 S. Ct. at 1000. The undersigned concludes that Student’s IEP is appropriately restrictive.

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<sup>81</sup> 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.

## Hearing Officer Determination

Case No. 2017-0287

(b) Updated Goals, Performance Data, Baseline Data. DCPS provided the draft IEP to Petitioner's team prior to the 12/11/17 IEP meeting, but received no feedback. DCPS invited input on goals during the IEP meeting, but Petitioner's advocates only provided detailed suggestions and criticisms on 12/14/17, after the IEP was finalized. While too late to incorporate in the 12/11/17 IEP, some of the suggestions may enhance Student's IEP and might well be considered by the IEP team and incorporated to the extent appropriate.

DCPS gave suitable attention to the IEP goals, present levels of performance and baselines. The goals in Student's 12/11/17 IEP were updated from the prior IEP, or repeated if still needed due to lack of mastery. Math goals 1 and 2 were still needed, while math goal 3 was new. Reading goal 1 was added, reading goal 2 was changed, and reading goal 3 maintained. The single writing goal was changed. The performance levels in the IEP were based on the WJ-IV given to Student in March 2017 (covering all areas of academic concern), the iReady math assessment given on 9/1/17, and the Reading Inventory on 8/31/17. Student's 12/11/17 IEP includes revised baselines that are clear and measurable in math, although less measurable in reading and writing.

The undersigned finds no violation based on the IEP goals, present levels of performance and baselines.

(c) Location of Services. DCPS concurred that Public School's general education classes were not appropriate for Student and determined, even though Student needed a self-contained setting, that the BES and Independence & Learning Support ("ILS") classrooms at Public School were also not appropriate. Instead, on 12/27/17 DCPS sent an LOS letter listing Proposed Public School and its SLS program. The issue here is whether the SLS classroom at Proposed Public School is an appropriate setting for Student, for 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). While Petitioner raised concerns about the hours when Student is not receiving specialized instruction, the undersigned is persuaded that Proposed Public School can give Student the level of support needed and enable Student to make appropriate progress. By contrast, as noted above, the undersigned is concerned that Nonpublic School would not be appropriate for Student.

In sum, this Hearing Officer concludes that DCPS prevails on Issue 1 as Student's IEP and placement are reasonably calculated to enable Student to make appropriate progress in Student's circumstances.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP during 2016/17 and 2017/18, and/or comply with a 12/24/16 HOD which required Student to have a special education teacher in all classes involving reading and writing, where (a) Student received only 11 of 23 hours required by the IEP following the 12/24/16 HOD, and (b) Student is not receiving instruction in "specials" that involve reading and writing. (Petitioner has the burden of persuasion on this issue.)*

## Hearing Officer Determination

Case No. 2017-0287

Petitioner failed to meet her burden of proving that DCPS did not adequately implement Student's 1/24/17 IEP which required 16 hours/week of specialized instruction inside general education and 7 outside, for any missed hours are *de minimis*.

With a failure to implement claim, the IDEA is only violated 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*, 962 F. Supp. 2d at 268, 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). Notably, there is "no requirement that the child suffer educational harm in order to find a violation" in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

In the case at hand, there was a great deal of conflicting information over how many hours of specialized instruction were actually provided after the increase in Student's 1/24/17 IEP to 16 hours/week inside general education and 7 outside, through the end of 2016/17. Special Education Teacher A provided all of Student's specialized instruction in 2016/17 and testified that when Student's IEP was revised in January 2017 she increased her hours right away to provide more services to Student and consistently followed her schedule at R5. That schedule indicated push-in for Student of 13 hours/week and pull-out of 8 hours/week, which is close to the hours required, with 3 too few push-in hours, but 1 extra pull-out hour (which might have been more valuable than a push-in hour). At the RSM on 11/7/17, Special Education Teacher A stated that she had pushed in 16 hours/week, suggesting that all services may have been provided, although nothing was recorded about pull-out. *See Savoy v. Dist. of Columbia*, 844 F. Supp. 2d 23, 34 (D.D.C. 2012).

However, Petitioner's advocate noted at the RSM that Special Education Teacher A had stated fewer hours at a previous meeting and had previously told Parent that Special Education Teacher A couldn't provide all the hours due to her duties with other students. Special Education Teacher A replied at the RSM that at the beginning it was hard to provide all the hours, but her schedule was changed. Special Education Teacher A also testified that she had not told Parent that she couldn't implement Student's IEP. Importantly, if Parent had learned that services were not being provided, Parent had counsel who surely would have objected in writing early on while the deficiency could be easily remedied so Student would not miss services.

In addition, the Comprehensive Psychological Reevaluation reported that Special Education Teacher A pushed in only 6 hours/week and pulled out 7 hours/week, while Observer's classroom observation noted on that day that Special Education Teacher A was present for only a portion of the push-in class period, while Student's math teacher stated in the Reevaluation report that there wasn't "too much" push-in in his class as Student did not feel comfortable with it. However, Special Education Teacher A testified that during push-

## Hearing Officer Determination

Case No. 2017-0287

in she stayed with Student the entire class, except when leaving for her lunch or planning period.

For 2017/18, Petitioner asserted that Student was not receiving support in specials as allegedly required by the 12/24/16 HOD, but did not claim a deficiency in the number of hours. The language in the HOD (at R1-21) is quite clear that all “academic classes that involve reading and writing” must include a special education teacher. Further, the HOD expressly stated that there was “no requirement” that Student be taught by a special education teacher in specials like art or music and that DCPS could elect to deliver such courses inside or outside general education. That context made it clear to the undersigned that the HOD’s ordering paragraph is referring only to academic classes and not specials when stating that “academic instruction that involves reading and writing” needs a special education teacher. In any case, Petitioner’s counsel has provided no authority for the position that prior HODs are enforceable through subsequent due process complaints.

In sum, this Hearing Officer does not doubt Special Education Teacher A’s basic credibility on the 2016/17 hours provided and concludes that, on balance, Petitioner did not meet her burden of proof on this issue.

**Issue 3:** *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by conducting an assistive technology assessment as requested at the 9/26/17 IEP meeting. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden on the issue of failure to conduct an assistive technology assessment after it was requested on 9/26/17, for Public School did take the request seriously and immediately took action to follow DCPS’s internal protocol. That protocol sought to provide prompt benefit to Student by incorporating assistive technology software for Student’s reading and writing, based on the DCPS assistive technology specialist’s review of Student’s record. If that initial assistive technology solution was not sufficient to address Student’s needs then DCPS would move on to a formal assistive technology evaluation, which DCPS scheduled for the week after the hearing.

Petitioner’s counsel argued that Petitioner was entitled under the law to an evaluation rather than “putting the cart before the horse” by trying to implement a solution promptly as the first step. *See* 34 C.F.R. 300.304(c)(4) (a child is to be “assessed in all areas related to the suspected disability”). Petitioner’s counsel further asserted that providing software to Student prior to a formal evaluation might be harmful in some way, but provided no testimony – much less expert testimony – to corroborate such a concern. On the other hand, Respondent’s counsel argued that an assistive technology evaluation was not legally required at all, as it was less than a year since Student’s prior reevaluation and that LEAs are not required to conduct every evaluation sought by parents in any case. *See* 34 C.F.R. 300.303(b) (a reevaluation may “occur not more than once a year” unless otherwise agreed); *cf. James*, 194 F. Supp. 3d at 143.

This Hearing Officer does not find a FAPE violation where DCPS sought to promptly provide assistive technology to benefit Student’s severe deficits in reading and

## Hearing Officer Determination

Case No. 2017-0287

writing, and then was proceeding with an evaluation in due course to see if other assistive technology benefits should be provided.

**Issue 4:** *Whether DCPS denied Student a FAPE by failing to develop or update a behavior intervention plan for Student after completing a functional behavioral assessment in September 2017, despite the team’s findings at a 9/26/17 IEP meeting. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden on this issue, as a detailed BIP was developed the week after being promised at the 9/26/17 meeting. DCPS argued that as a matter of law there was no need for a BIP, based on appellate courts from around the country. But the undersigned holds that even accepting the broad language of cases from this jurisdiction, DCPS met its obligation to work with Student’s behavioral issues at Public School by updating a BIP, among other things. *See, e.g., Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011) (the IDEA recognizes that the quality of a student’s education is inextricably linked to behavior); *Beckwith v. Dist. of Columbia*, 208 F. Supp. 3d 34, 57 (D.D.C. 2016).

The credible testimony in this case was that DCPS sought to review the 10/4/17 BIP with Parent, but was unable to schedule an earlier meeting so ultimately reviewed the BIP at the RSM. Parent and her advocates made suggestions that were not incorporated into the final BIP on 11/7/17, but not having suggestions accepted does not mean that Parent did not have an opportunity for meaningful input. *See, e.g., Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (IDEA’s parental right to participate does not constitute veto power over the IEP team’s decisions); *Schoenbach v. Dist. of Columbia*, 2006 WL 1663426, at \*5 (D.D.C. 2006).

**Issue 5:** *Whether DCPS denied Student a FAPE by failing to provide full access to educational records in response to Parent’s request, including service trackers and standardized tests such as PARCC. (Petitioner has the burden of persuasion on this issue.)*

Finally, Petitioner did not prevail on the issue of access to records. Petitioner did not prove that the documents highlighted in her complaint were not provided, although she did show that DCPS failed to provide some other documents, such as the IEP Progress Reports for each term (to see quarterly teacher comments). The undersigned is mindful that the importance of such documents may not always be clear without being able to examine them. However, if the documents have the potential to impact Student substantively, the undersigned would expect them to be included in the due process complaint and the Prehearing Order with which Petitioner’s counsel concurred.

Moreover, the right under the IDEA is simply to inspect and review education records, but Petitioner made no assertion that her right to inspect and review was blocked. *See* 34 C.F.R. 300.501(a) (opportunity to “inspect and review” all educational documents), 300.613(a) (right to “inspect and review” records). *See Jalloh ex rel. R.H. v. Dist. of Columbia*, 535 F. Supp. 2d 13, 21 (D.D.C. 2008) (“parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records”). Here, DCPS cooperated by actually providing most of the documents Petitioner sought. Indeed,

**Hearing Officer Determination**

Case No. 2017-0287

during the prehearing conference, DCPS's counsel committed to assist with any missing documents and there was no assertion at the due process hearing that he did not do so.

**ORDER**

Petitioner has not prevailed on any of the issues in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

**IT IS SO ORDERED.**

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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

Copies to:

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