

**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 26, 2018

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2017-0296
through <i>Parents</i> ,	)	
<i>Petitioners</i> ,	)	Date Issued: 1/26/18
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Date: 1/19/18
("DCPS"),	)	ODR Hearing Room: 404
Respondents.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioners, Student’s Parents, 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’s Individualized Education Program (“IEP”) had not been fully implemented and services had been improperly reduced and were not sufficient. DCPS responded that it did fully implement the IEP which was appropriate.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; 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 10/31/17, the case was assigned to the undersigned on 11/1/17. Respondent filed a response on 11/10/17 and did not challenge jurisdiction. The resolution session meeting was held without success on 12/14/17. The 30-day resolution period ended on 11/30/17. A final decision in this matter

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

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must be reached no later than 45 days following the end of the resolution period, as extended by a 22-day continuance, which requires a Hearing Officer Determination (“HOD”) by 2/5/18.

The due process hearing took place on 1/19/18 and was open to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. One Petitioner was present and the other on the telephone for virtually the entire hearing.

Petitioners’ Disclosures, submitted on 1/11/18, contained documents P1 through P27, which were admitted into evidence without objection. DCPS’s Disclosures, submitted on 1/11/18, contained documents R1 through R16, which were admitted into evidence without objection.

Petitioners’ counsel presented 3 witnesses in Petitioners’ case-in-chief (*see* Appendix A):

1. *Educational Advocate* (qualified without objection as an expert in IEP Programming and Implementation)
2. *Parent*
3. *Compensatory Education Planner* (qualified over objection as an expert in Compensatory Education)

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

1. *Case Manager*
2. *Social Worker* (qualified without objection as an expert in Social Work)
3. *Special Education Teacher* (qualified over objection as an expert in IEP Development and Special Education Programming)

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

**Issue 1:** Whether DCPS denied Student a FAPE by failing to fully implement Student’s IEP during 2016/17,<sup>2</sup> when it failed to provide approximately 160 hours of specialized instruction in writing from the start of 2016/17 until a 4/25/17 IEP meeting. *Petitioners have the burden of persuasion on this issue.*

**Issue 2:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 4/25/17 and/or 10/11/17, when the IEP (a) reduced Student’s specialized instruction significantly despite lack of academic progress, and (b) failed to provide sufficient behavior

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<sup>2</sup> All dates in the format “2016/17” refer to school years.

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support services (“BSS”) to enable appropriate progress. *Respondent has the burden of persuasion, if Petitioners establish a prima facie case.*

Petitioners seek the following relief:

1. DCPS shall convene an IEP team meeting to revise Student’s IEP to provide (a) special education inclusion support in all academic classes, and (b) 240 minutes/month of BSS to work on executive functioning issues in addition to current IEP goals.
2. DCPS shall fund or provide compensatory education for any denial of FAPE and/or fund an evaluation to determine compensatory education.<sup>3</sup>
3. 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; Petitioners are Student’s Parents.<sup>5</sup> Student is *Age* and in *Grade* at *Public School*, where Student began in 2016/17 after moving from *Prior Public School*.<sup>6</sup>
2. Both of Student’s IEPs at issue in this case contain a disability classification of Other Health Impairment (“OHI”) due to Attention Deficit Disorder (“ADD”) or Attention Deficit

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<sup>3</sup> Petitioners’ counsel was put on notice at the prehearing conference that Petitioners 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 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> Parent; P6-10; P7-1.

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Hyperactivity Disorder (“ADHD”).<sup>7</sup> Student initially qualified for special education and related services in 2010, based on OHI.<sup>8</sup>

3. Student’s 5/18/16 IEP provided for 15 hours/week of specialized instruction inside general education (5 hours each of reading, writing and math), along with 30 minutes/month of BSS outside general education and 60 minutes/month of BSS consultation services.<sup>9</sup>

4. Student’s 4/25/17 IEP provided for 8 hours/week of specialized instruction inside general education (4 hours each of reading and math), with the same 30 minutes/month of direct BSS outside general education, but a reduction to 30 minutes/month of BSS consultation services.<sup>10</sup>

5. Student’s 7/5/15 Comprehensive Psychological Evaluation found Student’s cognitive abilities to be solidly in the Average range based on the Kaufman Brief Intelligence Test – Second Edition (“KBIT-2”), and that Student was mostly Average academically, with a few areas Below Average; math was a relative weakness.<sup>11</sup>

6. Case Manager administered an Educational Assessment to Student on 11/17/17 and 11/20/17 and noted in a report dated 11/21/17 that Student had a lack of focus and genuine effort, had general defiance, and did not take testing seriously, so was not able to perform near Student’s potential on this or standardized assessments, including SRI and PARCC.<sup>12</sup>

7. The 11/21/17 Educational Assessment report concluded that Student’s Broad Written Language was Average, Broad Reading was Average, and Math was Low.<sup>13</sup> An 11/20/17 Woodcock-Johnson Tests of Achievement IV (“WJ-IV”) found that Student’s writing scores were at an age-equivalency of more than 10 years above Student’s age, reading was a little over 2 years behind, and math was nearly 5 years behind.<sup>14</sup>

8. Case Manager credibly testified that in 2016/17 Student was getting specialized instruction in 4 courses, Biology, English, World History and Math, for 225 minutes a week (45 minutes on Mondays and 90 minutes each on Tuesday-Thursday or Wednesday-Friday), which totaled 900 minutes/week or the 15 hours/week on Student’s IEP prior to 4/25/17.<sup>15</sup> Special Education Teacher confirmed the timing of class periods in 2016/17, noting the blocks are shorter in 2017/18.<sup>16</sup> At the 10/11/17 MDT meeting, Parents raised concerns

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<sup>7</sup> P6-1; P7-1; R14-1; Parent (Parent is clear that Student has ADD, not ADHD).

<sup>8</sup> P14-11.

<sup>9</sup> P7-13.

<sup>10</sup> P6-12.

<sup>11</sup> P14-1,3,4,12; Social Worker (confirmed).

<sup>12</sup> R4-1; Case Manager.

<sup>13</sup> R4-2.

<sup>14</sup> R5-1.

<sup>15</sup> Case Manager.

<sup>16</sup> Special Education Teacher.

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about lack of implementation of Student's full IEP; DCPS responded that Student had "co-taught" support in English, Chemistry, Math, and World History classes.<sup>17</sup>

9. At the beginning of 2017/18, Petitioners' advocates asked why specialized instruction was reduced given Student's test scores and grades.<sup>18</sup> Student's PARCC scores had declined from Level 2 in both math and ELA in 2015/16 to Level 1 in both areas in 2016/17.<sup>19</sup> Student's grades were not good; in 2016/17, Student received "Fs" in Spanish and Music, a "D" in Algebra I, 5 "Cs" and "C-s" and 4 "Bs" and "B-s."<sup>20</sup>

10. Student's 4/25/17 IEP included a goal for Student to grow 1.5 grade levels in reading comprehension, with the SRI Lexile score to increase from 908 to 971.<sup>21</sup> According to the IEP Progress Report ending on 6/14/17 and Case Manager's comment on 6/13/17, Student "mastered" the goal of reaching 971.<sup>22</sup> Case Manager admitted in her testimony that Student had never reached an SRI level of even 900, but asserted that she had talked to Student's teachers and concluded that the SRI goal was mastered based on their impressions of Student's reading ability.<sup>23</sup>

11. In September 2015, Student had an SRI score of 687.<sup>24</sup> In February 2016, Student had an SRI score of 845.<sup>25</sup> On 5/27/16, Student had an SRI score of 861.<sup>26</sup> On 10/5/16, Student had an SRI score of 635.<sup>27</sup> Prior to 4/25/17, Student had an SRI score of 758, which was 5-6 grades behind where Student should be; Student's 4/25/17 IEP referenced the 758 SRI score but stated that Student was functioning only 2 grades behind.<sup>28</sup> On 9/21/17, Student had an SRI score of 835, which is 5-6 grades behind.<sup>29</sup>

12. The 4/26/17 IEP meeting notes suggest that little was discussed at the meeting; there was no explanation recorded for the reduction in Student's specialized instruction; Parents were unrepresented.<sup>30</sup> Case Manager couldn't explain why the specialized instruction hours had been reduced in the 4/25/17 IEP, but unambiguously testified that Student was still

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<sup>17</sup> P23-1.

<sup>18</sup> P4-3.

<sup>19</sup> P4-1.

<sup>20</sup> P16-1.

<sup>21</sup> P6-6.

<sup>22</sup> P8-2.

<sup>23</sup> Case Manager.

<sup>24</sup> P6-7; R16-1.

<sup>25</sup> P6-7; P7-6; R16-1.

<sup>26</sup> P6-16; R16-1.

<sup>27</sup> R16-1; P18-4.

<sup>28</sup> P6-5; R16-1.

<sup>29</sup> R16-1; P15-4.

<sup>30</sup> R11-1,2.

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receiving 15 (or 16) hours/week of specialized instruction inside general education despite the apparently erroneous reduction to 8 hours on Student's IEP.<sup>31</sup>

13. BSS consultation was reduced from 60 to 30 minutes/month in the 4/25/17 IEP, but there was no record data to support the reduction in services.<sup>32</sup> Social Worker stated that the full 60 minutes of BSS consultation was not needed and that Student would not notice the reduction; Social Worker also stated that she checked in with Student's teachers more than 30 minutes/month and Student was getting what was needed.<sup>33</sup> Teacher input in the 4/26/17 IEP meeting notes stated that Student talked constantly in class, could not stay on task, was on the phone, and would cross right in front of the teacher and copy from other students.<sup>34</sup>

14. At an MDT meeting on 10/11/17, Student informed the team that Student had not taken school seriously in 2016/17, including SRI testing; Student had a self-realization and consciously decided to make a change academically.<sup>35</sup> Student explained about having recently seen a homeless person on the street which brought Student to the decision to take schooling more seriously to avoid future regrets about the consequences of Student's decisions.<sup>36</sup> Student is now passing all classes and the SRI score has increased.<sup>37</sup>

15. Student was also strongly motivated to work on grades based on a desire to play sports at school.<sup>38</sup> Prior to 2017/18, Student's low grades had prevented participation in school sports.<sup>39</sup> Student's grades improved to a GPA of 2.175 in Term 1 of 2017/18 so that Student was eligible for sports, despite an "F" in Spanish II.<sup>40</sup> Student's report card for Term 1 of 2017/18 noted Student's "poor behavior" in 3 of the 4 teacher comments.<sup>41</sup> Student's behavior problems involved talking, disrespecting teachers and not completing work.<sup>42</sup>

16. As of 11/1/17, Student had not received any suspensions, detentions or behavioral referrals to the Dean; Student was frequently off task and talked back and could be disrespectful to teachers.<sup>43</sup> An 11/22/17 FBA focused on Student's disruptive behaviors in the classroom which occurred in most class periods at least 50-70% of the time in class,

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<sup>31</sup> Case Manager.

<sup>32</sup> Educational Advocate.

<sup>33</sup> Social Worker.

<sup>34</sup> R11-1; Educational Advocate (noting similar behavior problems).

<sup>35</sup> R9-2.

<sup>36</sup> P23-2; Parent (testified about same incident).

<sup>37</sup> R9-2.

<sup>38</sup> Parent; Educational Advocate.

<sup>39</sup> Parent.

<sup>40</sup> P15-1; Social Worker.

<sup>41</sup> P15-2.

<sup>42</sup> Educational Advocate.

<sup>43</sup> R6-4,5.

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which was disruptive and considered a significant issue.<sup>44</sup> Student had been receiving BSS to improve attention and focus, respect for authority figures, compliance, academic performance and to reduce impulsivity.<sup>45</sup> In 2 class observations, Student was “extremely” off task and disruptive, as well as physically aggressive; Student “continuously” failed to adhere to classroom rules and had minimal work completion.<sup>46</sup>

17. The 11/22/17 FBA recommended developing and implementing a BIP and continuing counseling sessions with the social worker.<sup>47</sup> A BIP has not been developed for Student at Public School.<sup>48</sup> In the first half of 2017/18, Student had sessions with a social worker intern (while Social Worker was out on maternity leave) and received more services than the 30 minutes/month listed on the IEP; Student worked on remaining on task, beginning tasks, and following adult directives.<sup>49</sup> Social Worker viewed Student as having lots of goals and motivation, noting that Student was maturing socially and emotionally.<sup>50</sup> Special Education Teacher testified that Student’s behavior and attention are getting “better each week” and that she uses positive redirection with Student, rather than punitive measures.<sup>51</sup>

### Conclusions of Law

Based on the Findings of Fact above, the arguments of both 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,

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<sup>44</sup> R7-1.

<sup>45</sup> R7-2.

<sup>46</sup> *Id.*

<sup>47</sup> R7-4.

<sup>48</sup> Educational Advocate.

<sup>49</sup> P23-3; Social Worker.

<sup>50</sup> Social Worker.

<sup>51</sup> Special Education Teacher.

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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, the LEA 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 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).

Petitioners 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 Petitioners establish 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

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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 fully implement Student’s IEP during 2016/17, when it failed to provide approximately 160 hours of specialized instruction in writing from the start of 2016/17 until a 4/25/17 IEP meeting. (Petitioners have the burden of persuasion on this issue.)*

Petitioners failed to meet their burden of proving that DCPS did not implement Student’s IEP. The core of this issue relates to confusion over the amount of specialized instruction being provided to Student inside general education. DCPS provided credible testimony that Student had received the full 15 hours of specialized instruction on the IEP, with support provided in 4 core academic courses throughout the year.

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 v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). 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).

Here, Case Manager persuasive testified that in 2016/17 Student was getting specialized instruction in 4 courses for 225 minutes/week, which totaled 900 minutes or 15 hours/week. The hours were provided prior to 4/25/17 as well as after, as discussed below. The amount of time in the class periods in 2016/17 was confirmed by Student’s special education teacher. The provision of specialized instruction in 4 classes was further bolstered by Educational Advocate’s notes of the 10/11/17 MDT meeting, in which DCPS responded to Parents’ concerns about lack of implementation of Student’s full IEP by explaining that Student received “co-taught support” in 4 classes, meaning that a special education teacher was inside the general education classroom providing Student with the services required by the IEP. Accordingly, this Hearing Officer concludes that Petitioners have not met their burden and DCPS prevails on Issue 1.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 4/25/17 and/or 10/11/17, when the IEP (a) reduced Student’s specialized instruction significantly despite lack of academic progress, and (b) failed to provide sufficient behavior support services to enable appropriate progress. (Respondent has the burden of persuasion, if Petitioners establish a prima facie case.)*

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Petitioners did make a prima facie case, shifting the burden to Respondent which failed to meet its burden of persuasion on either subpart.

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 Petitioners, which are considered below in turn.<sup>52</sup> *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

(a) Reduced Specialized Instruction. There is no dispute that DCPS did reduce Student’s specialized instruction inside general education from 15 to 8 hours/week in the 4/25/17 IEP. However, DCPS asserted that it did so inadvertently and continued to provide Student the full 15 hours/week despite the reduction to 8 hours on the IEP. Student was not doing well academically and needed the full amount of specialized instruction, which DCPS does not deny. An erroneous reduction in hours might well be seen as a mere procedural violation, as Petitioners did not point to substantive harm to Student. However, that was not the only error in Student’s 4/25/17 IEP. The IEP included a goal for Student to grow in reading comprehension from an SRI Lexile score of 908 to 971, even though the record evidence and Case Manager’s testimony reveal that Student had not ever been as high as 900, so could not have started at 908.

That error was compounded by an IEP Progress Report for the period ending on 6/14/17 – as well as Case Manager’s comment on the Progress Report – stating that Student had “mastered” the goal of reaching SRI Lexile 971. Case Manager tried to explain away this apparent error by testifying that she had talked to Student’s teachers and concluded that the SRI goal was “mastered” based on their subjective impressions of Student’s reading ability. The undersigned does not find the explanation credible. Worse, the 4/25/17 IEP referenced Student’s SRI Lexile score as 758 and stated that Student was functioning only 2 grades behind the grade Student was in. According to the SRI proficiency ranges, however, an SRI score of 758 indicated that Student was actually 5-6 grades behind where Student should be, which is no small discrepancy.

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<sup>52</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.

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Considered individually, each of these concerns might be dismissed as passing procedural violations, but together this Hearing Officer concludes that they amount to a substantive violation and denial of a FAPE, as they significantly impede Petitioners' opportunity to understand Student's circumstances and participate appropriately in decision-making regarding the provision of a FAPE to Student. *See* 34 C.F.R. 300.513(a). This contributes to the compensatory education provided below.

(b) Insufficient Behavior Support Services. As for BSS, much attention focused on the reduction of consultation services from 60 to 30 minutes/month. Yet the more critical question is whether Student received sufficient direct BSS services, and the undersigned concludes that Student needed more than 30 minutes/month, given the serious behavioral issues exhibited.

While Student was not receiving suspensions and detentions, and was viewed as steadily improving by some, Student nonetheless had significant behavior issues, including being extremely off task and disruptive, as well as physically aggressive. In classroom observations, Student "continuously" failed to follow classroom rules and completed little work. The 11/22/17 FBA focused on Student's disruptive classroom behaviors which occurred in most class periods for a majority of the class time. Student had been receiving BSS to improve attention and focus, respect for authority figures, compliance, academic performance and to reduce impulsivity, and clearly could use more than the 30 minutes/month on the IEP. The undersigned considers 60 minutes/week or 240 minutes/month to be reasonable.

As for the proper amount of BSS consultation, which was reduced in the 4/25/17 IEP, Social Worker asserted that 60 minutes/month was not really needed on Student's IEP and that Student would not notice the 50% reduction. At the same time, Social Worker testified that she checked in with Student's teachers more than 30 minutes/month, which enabled Student to get what was needed. The undersigned takes Social Worker's dedication in providing extra time to try to provide what Student needed as a clear indication that 30 minutes/month was not sufficient. Indeed, teachers provided information about Student talking constantly in class, not staying on task, being on the phone, and crossing right in front of the teacher in the classroom to copy from other students, demonstrating that an extra 7 minutes a week of consultation, strategizing and coaching is needed along with direct BSS services to provide Student a FAPE. Thus, the order below includes a return to 60 minutes/month of BSS consultation services.

### Remedy

The IDEA gives Hearing Officers broad discretion to provide an equitable remedy for students who have been denied a FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at \*25 (D.D.C. 2016) (IDEA prescribes broad discretion in fashioning relief for educational deprivation).

## Hearing Officer Determination

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Here, as remedy for the denial of FAPE found above, Student's IEP shall be increased (a) from 8 to 16 hours/week of specialized instruction inside general education, (b) from 60 to 240 minutes/month of direct BSS outside general education, and (c) from 30 to 60 minutes/month of consultative BSS, along with an award of compensatory education based on this Hearing Officer's determination of what would be most beneficial to put Student in the position Student should have been in at this point had there been no violations. This determination is impacted by the Compensatory Education Proposal and testimony of Compensatory Education Planner, recognizing that not all claims were found to be a denial of FAPE, so the proposal has been weighted accordingly.

While there is "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D.*, 817 F.3d at 799, that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, "hearing officers are reminded that '[t]he 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*, 401 F.3d at 523-24.

In this case, another factor is significant as well. Respondent's counsel represent at both the beginning and end of the due process hearing that DCPS intended to modify Student's IEP to provide 16 hours/week of specialized instruction inside general education, 240 hours/month of BSS outside general education, as well as 60 hours of independent tutoring and 30 hours of independent counseling for Student, apart from any settlement between the parties. Accordingly, this Hearing Officer considers the tutoring and counseling hours to be a floor in determining compensatory education and, after taking into account all of the factors in this case, concludes that 60 hours of academic tutoring and 30 hours of counseling are the appropriate amount of compensatory education needed to restore Student to the position Student should have been in. All hours are to be used within 12 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on DCPS which may result from compensatory education awards stretching over excessively long timeframes.

### **ORDER**

Petitioners have prevailed in part, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 20 school days, DCPS shall convene Student's IEP team to revise Student's IEP to provide (a) 16 hours/week of specialized instruction inside general education, (b) 240 minutes/month of direct BSS outside general education, and (c) 60 minutes/month of BSS consultation services, consistent with this decision.

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- (2) DCPS shall fund independent providers chosen by Petitioners and provide a letter of authorization within 10 business days of Petitioners' request(s), for (a) 60 hours of academic tutoring, and (b) 30 hours of counseling. All hours are to be used within 12 months; any unused hours will be forfeited.

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

**IT IS SO ORDERED.**

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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

Copies to:

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