

**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 31, 2018

<i>Student</i> , ¹)	Case No.: 2017-0285
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 1/31/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 1/17/18 & 1/18/18
("DCPS"),)	ODR Hearing Room: 404
Respondent.)	
)	

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 found eligible and provided an Individualized Education Program (“IEP”) in a timely matter, along with an appropriate placement. DCPS responded that the IEP and placement were appropriate and timely.

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 10/19/17, the case was assigned to the undersigned on 10/20/17. Respondent filed a response on 10/30/17 and did not challenge jurisdiction. The resolution session meeting (“RSM”) took place on 11/6/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended

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

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on 11/18/17. 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 continuance of 30 days, which requires a Hearing Officer Determination (“HOD”) by 2/1/18.

The due process hearing took place on 1/17/18 and 1/18/18 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 1/8/18, contained documents P1 through P49, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 1/2/18, contained documents R1 through R8, which were admitted into evidence without objection.

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Special Education Consultant* (qualified over objection as an expert in Special Education Programming and Placement)
2. *Academic Dean at Nonpublic School* (qualified over objection as an expert in Special Education Instruction, with an Emphasis on Curriculum and Learning Disabilities)
3. Parent
4. *Speech-Language Director at Nonpublic School* (qualified without objection as an expert in Speech-Language Pathology)

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

1. *Principal at Public School*
2. *Speech-Language Pathologist A* (qualified without objection as an expert in Speech-Language Pathology)
3. *Special Education Teacher at Public School* (qualified without objection as an expert in Special Education Programming and Placement)
4. *Speech-Language Pathologist B* (qualified without objection as an expert in Speech-Language Pathology)

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

Issue 1: Whether DCPS denied Student a FAPE by failing to comply with its affirmative Child Find obligations on a timely basis by evaluating Student and determining

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that Student was eligible in 2016/17² for an IEP, and eligible in 2017/18 for speech-language services and Extended School Year (“ESY”), where (a) DCPS had actual knowledge that Student was not meeting academic standards and DCPS was providing de facto special education to Student 3 days a week without an IEP, (b) DCPS had actual knowledge of the need for assessment, as Student’s teacher completed behavior rating scales for a private evaluation, and/or (c) DCPS agreed in September 2016 that Student required a significant amount of special education services, but did not propose an IEP.³ *Petitioner has the burden of persuasion on this issue.*

Issue 2: Whether DCPS denied Student a FAPE by failing to propose an appropriate placement for 2017/18, as Proposed Public School was not capable of implementing Student’s IEP and in any case is not appropriate. *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 preventing meaningful parental participation in the school selection process and failing to provide reasonable notice of the location of services. *Petitioner has the burden of persuasion.*

The relief requested by Petitioner is:

1. DCPS shall reimburse Parent for the private psychological evaluation in 2016.
2. DCPS shall reimburse Parent for the 2016/17 school year, Extended School Year during the summer of 2017, and the 2017/18 school year at Nonpublic School through the date of decision, including tuition, related services (with speech-language) and transportation.
3. DCPS shall maintain Student at Nonpublic School until DCPS makes an appropriate placement available.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

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

³ Issue 1 combines issues (1), (2), (4) and (5) from pages 5 and 6 of the due process complaint.

⁴ 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.

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age, Gender* and in *Grade* at Nonpublic School, where Student began in 2016/17.⁶ Student attended *Prior Public School* from 2013/14 through 2015/16.⁷

2. Student received an initial IEP on 6/5/17 with the classification of Multiple Disabilities ("MD"), with both Specific Learning Disability ("SLD") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD").⁸ The 6/5/17 IEP provided for 30 hours/week of specialized instruction outside general education, 120 minutes/month of Behavioral Support Services ("BSS") inside general education and 360 minutes/month of OT outside general education; the IEP did not provide for speech-language services or ESY.⁹ Parent and DCPS agreed on everything in the IEP except for Student not qualifying for speech-language and ESY.¹⁰

3. Student had a long history of academic struggle; Student's difficulties were first evident in 2014/15 both academically and otherwise, as Student could not master numbers, letters and basic phonics and Parent worked with the Prior Public School principal to modify Student's schedule to try to address the emotional trauma Student was experiencing.¹¹ Student apparently failed to secure a foundation of early academic readiness skills and in 2015/16 displayed difficulties in math and struggled with basic reading, reading fluency and spelling.¹² Student's learning difficulties were further compromised by excessive motor activity, inattention, and weak executive functions.¹³ While making progress during 2015/16, Student also experienced anxiety, with vomiting before and after school and other somatic symptoms.¹⁴

4. By 9/24/15, Parent received notification from the Prior Public School assistant principal that Student had been identified as a child who would benefit from additional instruction in a few areas; on 9/29/15, Parent received notification from another staffer that Student needed additional reading support; Student began exhibiting high levels of stress and anxiety relating to school failure and excessive scolding during the remedial math and reading classes.¹⁵ Late in 2015, the Prior Public School special education coordinator recommended a provider for Parent to get a Neuropsychological Evaluation; Parent got on

⁵ Parent.

⁶ *Id.*

⁷ *Id.*

⁸ P2-1.

⁹ P2-15,18.

¹⁰ P3-1.

¹¹ P8-1; P33-13; Parent.

¹² P33-13.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ P8-1; R3-2; Parent.

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the schedule for the Neuropsychological Evaluation that was finally conducted in May 2016.¹⁶

5. On 1/29/16 a special education teacher at Prior Public School emailed Parent to introduce herself as the “intervention teacher” and say that she would be pulling Student from the classroom 3 mornings a week at 9:05 a.m. for a small group focused on reading, writing and working with words.¹⁷ Parent hired a private tutor for Student in February 2016.¹⁸ On 3/14/16, Parent emailed Prior Public School stating that Student was very upset by the before-school math tutorial in which Student felt the male teacher was yelling at Student, so Parent “dis-enrolled” Student indefinitely.¹⁹

6. Early in 2015/16, Student began grinding teeth through the enamel at school, biting nails down to the nailbed causing bleeding, vomiting, having insomnia and school-based anxiety every night and at the end of the weekend.²⁰ While there were issues at home leading to the separation of Student’s parents in August 2016, Student’s teeth grinding only occurred at school; vomiting typically occurred 3 days a week, usually on the days of the before-school classes.²¹ Sometimes the vomiting was so frequent Student couldn’t get to school.²² Student’s anxiety increased in October 2015 and by early February 2016 Student was having gastrointestinal issues requiring Student to leave school repeatedly.²³ Parent took Student in for a gastrointestinal work up on 3/1/16 and then on 5/9/16 Student saw a gastroenterologist about a gastric ulcer.²⁴ All somatic symptoms resolved when Student left Prior Public School.²⁵

7. The Neuropsychological Evaluation of Student was conducted in May 2016 and took 3 weeks to write up; the evaluation, which had to be scheduled 6 months earlier, cost \$3500.²⁶ The Neuropsychological Evaluation found a number of diagnoses: Phonological Disorder; Expressive Language Disorder; Specific Reading Disorder; Disorder of Written Expression; Mathematics Disorder; Developmental Coordination Disorder; ADHD, Combined Type; Executive Dysfunction; and Chronic Adjustment Disorder Unspecified.²⁷

8. The Neuropsychological Evaluation found that Student demonstrated high average overall intellectual ability, high average verbal ability, average fluid reasoning, average

¹⁶ Parent.

¹⁷ P9-1.

¹⁸ P8-1; P10-1.

¹⁹ P12-1.

²⁰ Parent; P8-1; R3-2.

²¹ Parent.

²² *Id.*

²³ *Id.*

²⁴ Parent; P10-1; P13-1,2.

²⁵ Parent; R8-3; P37-1.

²⁶ Parent.

²⁷ P32-9.

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visual-spatial ability and high average general abilities.²⁸ On the Woodcock-Johnson IV (“WJ-IV”), Student’s overall achievement in reading, math and writing fell in the Average to Low Average range, with the scores being significantly lower than Student’s general cognitive ability.²⁹ Student was working below grade level in basic reading, reading fluency, math computation, and written expression; progress was made with intervention, but Student remained behind academically and required 1:1 support.³⁰ The Neuropsychological Evaluation specified a number of needed accommodations, including 50% extended time on tests, a relaxed and distraction-free testing environment, and not being required to take more than one test a day, among others.³¹

9. The Neuropsychological Evaluation recommended that a meeting be set up with the school to begin the formal process for getting Student the support needed.³² The day Parent received the report, 6/8/16, she called the Prior Public School principal and called again and emailed the principal the next day to see how quickly an IEP could be implemented to obtain specialized instruction for Student through DCPS; a meeting was set for the next week with the principal and special education coordinator.³³ Parent also promptly pursued the application process at Nonpublic School for 2016/17.³⁴

10. Parent emailed the Prior Public School principal and others on 8/2/16 expressing concern about not having heard anything back about Student’s special education needs and the path to an IEP since their meeting on 6/15/16, as school was starting in 19 days.³⁵ On 8/16/16, Prior Public School replied that the school team didn’t work over the summer and planned to provide next steps at a meeting on 8/23/16, shortly after the beginning of the school year.³⁶

11. On 8/8/16, Parent emailed and hand delivered a formal letter to Prior Public School stating that with 2016/17 beginning in 2 weeks and no plan of support for Student, Parent was unilaterally placing Student at Nonpublic School and intended the placement to be at public expense.³⁷ The letter explained that despite the school’s knowledge of Student’s high stress and anxiety, including vomiting, teeth grinding and nail biting, and Parent’s provision of interventions including tutoring, Prior Public School never initiated child-find

²⁸ P32-4 (Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”): FSIQ=113, VCI=113, FRI=109, VSI=108, GAI=113); R3-2; P33-11.

²⁹ P32-7,8; P33-12.

³⁰ P33-12.

³¹ P32-10.

³² P32-9,10.

³³ P14-1,3,4; Parent.

³⁴ Parent.

³⁵ P15-1,2.

³⁶ P15-1.

³⁷ P8-1.

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procedures; even after Parent obtained a Neuropsychological Evaluation and provided it to school staff, Prior Public School did not implement the child-find process.³⁸

12. On 10/29/16, Special Education Consultant conducted an Educational Evaluation of Student, with a report dated 11/27/16, in which she identified Student's severe dyslexia and noted that based on the many diagnosis of the Neuropsychological Evaluation and the information from Parent, teachers, and tutor, Student needed intensive and targeted intervention.³⁹ Student was below grade level in all academic areas and falling further behind peers from the beginning of 2015/16 on.⁴⁰

13. DCPS notes from a 8/23/16 meeting to review the Neuropsychological Evaluation stated that Student was far below in math and writing and below in reading.⁴¹ On 11/14/16, the IEP team met and found Student eligible for special education and related services; the DCPS notes stated that an IEP meeting had been planned as well, but DCPS asserted that Special Education Consultant asked for only the eligibility portion to be held; Special Education Consultant credibly testified that she simply didn't have all the data and never tried to slow the IEP team.⁴² DCPS's draft IEP prepared for the early IEP meeting differed greatly from Student's eventual IEP as it contained 4.5 hours/week of specialized instruction inside general education, as opposed to 30 hours/week outside general education, among many other changes throughout; Special Education Consultant reviewed and suggested numerous modifications that were incorporated into the DCPS IEP.⁴³ At the eligibility meeting, the DCPS school psychologist reviewed information and concluded that Student met the DCPS requirements for SLD, OHI, and MD.⁴⁴

14. The 9/26/16 meeting which had been rescheduled by Prior Public School due to technical system difficulties was scheduled for 10/19/16, but rescheduled again because a service provider was unable to attend.⁴⁵ The IEP meeting was held at Prior Public School to review an OT report and suggested changes to the draft IEP.⁴⁶ An OT evaluation was needed, but DCPS did not have an OT expert available, so in December 2016 an

³⁸ P8-1,2.

³⁹ Special Education Consultant; P37-1,2.

⁴⁰ Special Education Consultant; P37-3.

⁴¹ R2-1.

⁴² R4-23 (document dated 9/26/16, apparently in error); Special Education Consultant; Parent. The record contains contradictory dates for Student's eligibility meeting, with formal DCPS meeting notes dated 9/26/16 (along with another document with an agenda and various materials for a 9/26/16 meeting) at R4-2,22. On the other hand, P16-1 clearly indicates that the 9/26/16 meeting was rescheduled by Prior Public School due to technical system difficulties, and the 11/14/16 date is memorialized in Special Education Consultant's report at P37-4,5, and confirmed in testimony from Special Education Consultant and Parent.

⁴³ R4-15; P2-15; Special Education Consultant.

⁴⁴ R4-24; P33-11,12,13.

⁴⁵ P16-1; P17-1; Parent.

⁴⁶ Special Education Consultant.

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independent OT evaluation was authorized, which was conducted on 2/21/17 with a report on 3/13/17.⁴⁷

15. After further scheduling challenges, Prior Public School was able to meet on 4/24/17 and the team agreed on a full-time IEP with 30 hours/week of specialized instruction plus OT and BSS; Special Education Consultant understood that the DCPS team was agreeing with Student being at Nonpublic School, since DCPS didn't have a 30-hour full-time program.⁴⁸ There was good collaboration between DCPS and those supporting Student, including an exchange on 4/17/17 about the Nonpublic School IEP that was being passed on to assist in developing the DCPS IEP for Student.⁴⁹

16. The next step was for the packet to go to OSSE for placement.⁵⁰ Petitioner's counsel followed up on 5/18/17 to check on the status of the process to see if the file had been "sent to OSSE for placement/location of service?"⁵¹ As of 5/22/17, the DCPS process was stuck because the IEP had to be finalized before it could "go to Locations" and there was still disagreement over speech services.⁵²

17. At 4:30 p.m. on Thursday, 8/17/17, DCPS emailed Parent a LOS letter (also dated 8/17/17) informing her that Proposed Public School had been identified for Student so Student could attend the Specific Learning Support ("SLS") classroom at Proposed Public School.⁵³ Although not mentioned in the letter, school began the follow following Monday, 8/21/17.⁵⁴ Special Education Consultant went to observe Proposed Public School for Parent on 9/13/17 and 9/20/17, a school Special Education Consultant knows well from other cases, and found that the staff at Proposed Public School had not received Student's IEP.⁵⁵

18. Special Education Consultant had significant concerns about the SLS program and the ability of Proposed Public School to implement a 30 hour/week IEP.⁵⁶ Proposed Public School told Special Education Consultant that staff there would "make it work" even though a 30-hour program didn't exist.⁵⁷ Principal testified that she had no concerns about implementing Student's 30-hour IEP with fidelity at Proposed Public School; Principal testified that all services were available now as well as at the beginning of 2017/18.⁵⁸

⁴⁷ P19-1; P40; Parent.

⁴⁸ P25-1; Special Education Consultant.

⁴⁹ P28-1; Special Education Consultant.

⁵⁰ Special Education Consultant.

⁵¹ R29-1.

⁵² P30-1.

⁵³ P5-1, P6-1.

⁵⁴ P6-1; Parent; DCPS 2017/18 School Calendar.

⁵⁵ Special Education Consultant.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Principal; Special Education Teacher (no concerns about implementation).

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19. Student would be the only child not to have lunch in the general education setting at Proposed Public School, but Special Education Consultant was told that other children would be brought into the classroom, so Student would not be alone at lunch.⁵⁹ Principal testified that Student would not be isolated and could “invite” other children to lunch.⁶⁰ Recess outside general education could also be scheduled, although Student’s IEP team might decide to relook at Student’s needs if attending Proposed Public School, which could also open up other options for Student to engage with a general education classroom as an additional “home base.”⁶¹ The SLS teacher was back from maternity leave and another experienced full-time teacher had been hired for SLS.⁶² Parent also had the opportunity if desired to increase the challenges for Student with DCPS enrichment units.⁶³ Further, while Student’s IEP ensures no exposure to general education, all the SLS children were in general education for specials, based on their IEPs.⁶⁴ There are no special education classes for specials currently, but Proposed Public School would adjust as Student’s IEP dictated; Principal would expect Student to be in specials classes that were 1:1, but where Student was not alone as others would be in the same room doing other things.⁶⁵

20. Special Education Consultant was particularly concerned about the compatibility of Student and the other students in the SLS class who seemed to have severe disabilities and behavioral problems that the teacher and aides were not able to manage adequately; when students raised concerns like not being able to see from their seats, they were simply told to sit down; when students used non-standard English, the teacher made no intervention to correct it.⁶⁶ Nor did any of the SLS students appear to be on Student’s academic level.⁶⁷ On the other hand, Special Education Teacher was confident that Student could fit in the SLS class and have an appropriate peer group.⁶⁸

21. Parent had not been part of any conversation about Proposed Public School and had received nothing about Proposed Public School prior to the 8/17/17 letter, which came as a shock.⁶⁹ Parent made arrangements and visited Proposed Public School on 9/26/17.⁷⁰ Parent had many concerns about the students in the SLS classroom; Parent was particularly concerned about the quality of the aides, which she found “horrifying.”⁷¹ OT is extremely important for Student, and there are 360 minutes/month on the IEP, but the separate OT room at Proposed Public School was a small office about 12’ x 14’ that seemed not to be

⁵⁹ Special Education Consultant.

⁶⁰ Principal.

⁶¹ *Id.*

⁶² Principal; Special Education Teacher.

⁶³ Principal.

⁶⁴ Special Education Consultant.

⁶⁵ Principal.

⁶⁶ Special Education Consultant.

⁶⁷ *Id.*

⁶⁸ Special Education Teacher.

⁶⁹ Parent.

⁷⁰ *Id.*

⁷¹ *Id.*

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dedicated to OT and Parent couldn't imagine being sufficient.⁷² Parent viewed Proposed Public School as inappropriate and expects that Student would be vomiting again within a couple of days if required to attend Proposed Public School.⁷³

22. Speech-Language Pathologist B conducted a Comprehensive Speech Language Evaluation of Student on 9/1/16 and issued a report on 9/12/16; among the various subtests there were relative weaknesses but no revealed disorders.⁷⁴ In Word Discrimination, Student scored just below the average range, indicating a mild deficit that could be worked on with reading intervention.⁷⁵ Overall, Student presented with communication scores ranging from average to above average and has average intelligibility.⁷⁶ Speech-Language Pathologist B conducted a classroom observation to compare Student to peers and found that Student was fine; Speech-Language Pathologist B had no speech-language concerns at all about Student being able to access the curriculum.⁷⁷

23. Student did not meet DCPS's requirements to qualify for speech-language services.⁷⁸ Student has neither a disabling oral communication disorder nor any resulting inability to access or benefit from the general education curriculum, both of which are required to be eligible as a student with a Speech Language Impairment.⁷⁹ The IEP team reviewed the speech-language report in the Fall of 2016; Special Education Consultant unsuccessfully urged the team to look beyond the standard scores, as Student was close with an 87 in one area, while the standard score is 85-115.⁸⁰

24. The Neuropsychological Evaluation made numerous recommendations for Student across the board, including psychotherapeutic intervention and OT, but did not recommend speech-language.⁸¹ Parent paid for Nonpublic School out of pocket, including significant amounts for OT services, but chose not to pay for speech-language services, which would have been \$3750 for the school year.⁸² Nonpublic School has integrated speech-language as part of its program for all students.⁸³

25. DCPS did not qualify Student for ESY in the IEP because it found there was "not enough" evidence of regression provided by Nonpublic School.⁸⁴ Nonpublic School completed ESY Eligibility Worksheets for Student in math and writing and provided work

⁷² *Id.*

⁷³ *Id.*

⁷⁴ R3-1,6; Speech-Language Pathologist A; Speech-Language Pathologist B.

⁷⁵ Speech-Language Pathologist A; R3-16.

⁷⁶ R3-17.

⁷⁷ Speech-Language Pathologist B.

⁷⁸ P3-1.

⁷⁹ R3-17; P36-8.

⁸⁰ R4-26; Special Education Consultant.

⁸¹ P32.

⁸² Parent; Speech-Language Director.

⁸³ Academic Dean.

⁸⁴ P3-1.

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samples for each subject.⁸⁵ Academic Dean credibly testified that Student needed ESY as it is “super important” for children with learning disabilities as their skills are fragile and that the necessary documents were prepared to obtain ESY for Student in 2017.⁸⁶

26. Student is making good progress at Nonpublic School, which is a private special education day school that focuses on students with SLD and ADHD who are average or above average cognitively.⁸⁷ Student has gained confidence and is no longer afraid to read or tackle math problems.⁸⁸ In 2016/17 at Nonpublic School, Student grew more than a year in reading, a year in math, and improved in writing, but still has challenges with spelling.⁸⁹ Nonpublic School remains “very” appropriate for Student in 2017/18 as Student still has severe learning deficits and huge OT needs.⁹⁰ Nonpublic School is appropriate for Student, as Student’s ADHD and many other needs can be met at Nonpublic School.⁹¹ DCPS school psychologist recognized that Nonpublic School is a setting where Student feels academically successful and which has promoted Student’s self-confidence.⁹² Nonpublic School has a current Certificate of Approval from OSSE.⁹³

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).

⁸⁵ P45-1,5.

⁸⁶ Academic Dean.

⁸⁷ Academic Dean; Special Education Consultant; Speech-Language Director.

⁸⁸ Parent.

⁸⁹ Academic Dean.

⁹⁰ *Id.*

⁹¹ Academic Dean; Special Education Consultant; Speech-Language Director.

⁹² P33-13.

⁹³ Academic Dean; P46-1,2,3.

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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 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.

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Issue 1: *Whether DCPS denied Student a FAPE by failing to comply with its affirmative Child Find obligations on a timely basis by evaluating Student and determining that Student was eligible in 2016/17 for an IEP, and eligible in 2017/18 for speech-language services and Extended School Year, where (a) DCPS had actual knowledge that Student was not meeting academic standards and DCPS was providing de facto special education to Student 3 days a week without an IEP, (b) DCPS had actual knowledge of the need for assessment, as Student's teacher completed behavior rating scales for a private evaluation, and/or (c) DCPS agreed in September 2016 that Student required a significant amount of special education services, but did not propose an IEP. (Petitioner has the burden of persuasion on this issue.)*

The Court of Appeals for the District of Columbia recently emphasized in *DL v. Dist. of Columbia*, 860 F.3d 713, 717 (D.C. Cir. 2017), that Child Find is among the most important IDEA requirements, in order to identify, locate and evaluate every child in need of special education. *See* 34 C.F.R. 300.111. DCPS's Child Find obligations are triggered either by awareness of the child's circumstances or by parental request. *See Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 57 (D.D.C. 2011). DCPS's awareness of Student's circumstances and parental requests are both at issue in this case. As discussed below, Petitioner met her burden of persuasion on both IEP eligibility and ESY, but not on speech-language eligibility.

(a) IEP Eligibility in 2016/17. As an initial matter, it seems abundantly clear to the undersigned that DCPS should have found Student eligible for special education and related services and developed an IEP for Student much sooner than it did, for there were numerous signs of both academic challenges and worrisome somatic problems.

While Student's challenges were evident as early as 2014/15, by 2015/16 Student displayed difficulties in math and struggled with basic reading, reading fluency and spelling. Student also had excessive motor activity, inattention, and weak executive functions, and increasingly serious somatic symptoms. Early in 2015/16, Student began grinding teeth at school through the enamel, biting nails causing bleeding, vomiting frequently, having insomnia and other school-based anxiety. Student's anxiety increased and by early February 2016 Student was having numerous gastrointestinal issues, requiring care from a gastroenterologist for a gastric ulcer.

Prior Public School did identify Student as a child in need of additional services, but did not begin child-find procedures. Instead, in September 2015 Parent was contacted about Student's need for additional academic instruction, so Student began remedial math and reading classes before school at Prior Public School. By January 2016 a special education teacher at Prior Public School got involved to pull Student from the classroom 3 mornings a week, and in February Parent hired a tutor.

Further, the Prior Public School special education coordinator recommended a provider to Parent who could conduct a Neuropsychological Evaluation. Parent got on the schedule for a Neuropsychological Evaluation that was finally conducted in May 2016. But even that did not trigger child-find action by Prior Public School.

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Parent did obtain the Neuropsychological Evaluation, which she immediately conveyed to Prior Public School with considerable urgency, but Prior Public School took little action and were out of communication as they shut for the summer. This Hearing Officer has no doubt that this is a denial of FAPE for 2016/17, with an appropriate remedy discussed below.

(b) Speech-Language Eligibility in 2017/18. Speech-language is a different matter, as DCPS conducted a comprehensive speech-language evaluation and observed Student in the classroom. Student did not meet DCPS's requirements to qualify for speech-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." Here, Speech-Language Pathologist B conducted a Comprehensive Speech Language Evaluation of Student in which Student presented with communication scores ranging from average to above average and with average intelligibility. While there were some relative weaknesses, Student had no disorders. In one area, Student scored just below the average range, indicating a mild deficit, but Speech-Language Pathologist A testified that it could be worked on with reading intervention. Importantly, Speech-Language Pathologist B conducted a classroom observation to compare Student to peers and found that Student was fine, so Speech-Language Pathologist B had no speech-language concerns at all about Student being able to access the curriculum.

Student had neither a disabling oral communication disorder nor any resulting inability to access or benefit from the general education curriculum, both of which are required to be eligible as a student with a Speech Language Impairment. Special Education Consultant unsuccessfully urged the IEP team to look beyond the standard scores where Student was close to the line during the team's review of the speech-language report in the Fall of 2016. But the IEP Team did not deviate from the conclusions in the evaluation, and this Hearing Officer has not been persuaded to overrule the IEP team.

(c) ESY Eligibility in 2017/18. ESY is necessary to provide a FAPE under 34 C.F.R. 300.106(a) when the benefits a disabled child gains during a regular school year will be "significantly jeopardized" if the child is not provided with an educational program during the summer months. *Johnson v. Dist. of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012), quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002); see also *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008) (adopting standard from *MM*). However, the "mere fact of likely regression" is not a sufficient basis for finding ESY eligibility, for all students may regress to some extent during lengthy breaks; ESY is required only when regression will substantially thwart the goal of "meaningful progress." *Johnson*, 873 F. Supp. 2d at 386, quoting *MM*, 303 F.3d at 538.

DCPS did not find that Student qualified for ESY in the summer of 2017 because it concluded that there was "not enough" evidence of regression provided by Nonpublic School. Nonpublic School completed ESY Eligibility Worksheets for Student in math and writing and provided work samples for each subject. DCPS argued that Nonprofit School could not prove that it had ever provided the documents to DCPS, and Petitioner's witness on the issue could not swear that the documents had been received by DCPS. In resolving

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this question, however, the undersigned relies on DCPS's statement in its PWN that there was "not enough" evidence from Nonpublic School to conclude that the Worksheets from Nonpublic School apparently were received by DCPS, because otherwise logic suggests there would have been "no" evidence from Nonpublic School (rather than "not enough"). Further, Academic Dean persuasively testified that ESY is "super important" for children with learning disabilities as their skills are fragile and that Student needed ESY in 2017. This Hearing Officer concludes that the ESY Eligibility Worksheets combined with Academic Dean's testimony on the issue are sufficient to conclude that Student should have been eligible for ESY for the summer of 2017 to continue meaningful progress, the remedy for which is addressed below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to propose an appropriate placement for 2017/18, as Proposed Public School was not capable of implementing Student's IEP and in any case is not appropriate. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner next challenges the appropriateness of Student's proposed placement in the SLS program at Proposed Public School, on which she has made out a prima facie case, and Respondent has just failed to meet its burden of persuasion. The legal 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, Student had a 30-hour/week IEP, which would apparently be unique in the school, and a credible Principal with lots of experience and a can-do attitude who was intent on making it work, despite the lack of special education classes for specials or any arrangements for lunch or recess.

In the absence of special education specials classes, Principal offered to create individual specials for Student, just as in *N.W.*, 253 F. Supp. 3d at 17, where the Court concluded that a "class of one" just for specials was problematic enough to make the selected public school inappropriate in light of the student's needs. Here, Student's social needs may not be as great as in *N.W.* and Principal suggested that Student could have class in close proximity to others – for better or worse – which the undersigned views as not entirely satisfactory. These same considerations apply to lunch, where Principal suggested that Student might invite others to join, but that would then reduce their opportunities to interact with general education peers. Recess may be even more challenging. As Principal suggested in her testimony, it might be helpful for Student's IEP team to reconsider the restrictiveness of the IEP for implementation at Proposed Public School, which points to the great difficulty of fully implementing Student's current IEP at Proposed Public School.

Further, there was concern about the compatibility of Student and the other children in the SLS class who seemed to have severe disabilities and behavioral problems. A classroom of students with differing intellectual, social, and behavioral needs may satisfy the IDEA as long as "a core group [is] operating at an intellectual level sufficiently comparable" to Student's to permit Student to continue making academic progress. *S.F. v. New York City Dept. of Educ.*, 2011 WL 5419847, at 17 (S.D.N.Y. 2011), *quoting Walczak*

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v. Fla. Union Free Sch. Dist., 142 F.3d 119, 133-34 (2d Cir. 1998). But in the SLS class at Proposed Public School, it is not clear that there was a “core group” at a comparable intellectual level to Student.

The undersigned concludes that on balance Respondent has failed to carry its burden of proof on this issue; the placement proposed for Student was not appropriate and is a denial of FAPE. There was a material failure and “discrepancy between the services a school provides to a disabled child and the services required by that child’s IEP.” *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 addressed in the remedy section, below.

Moreover, the law is clear that parents are not obliged to put their children into situations that do not appear viable in order to prove a denial of FAPE. As the Court explained in *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 72 (D.D.C. 2010),

[P]arents are not required to wait and see a proposed IEP [or placement] in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2492–93, 174 L. Ed. 2d 168 (2009) (holding that parents may be reimbursed for private-school placement when a school district fails to provide a FAPE even where the student has never received instruction in the public school); *see also Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (“a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child’s parents expressed unwillingness to accept that placement”).

Issue 3: *Whether DCPS denied Student a FAPE by preventing meaningful parental participation in the school selection process and failing to provide reasonable notice of the location of services. (Petitioner has the burden of persuasion.)*

Petitioner met her burden of proving that DCPS improperly prevented her meaningful participation in determining Student’s educational placement, which impacted Parent’s ability to participate in educational decision-making for Student.

The IDEA clearly requires parental involvement in “decisions on the educational placement of their child.” 34 C.F.R. 300.327; 34 C.F.R. 300.116(a)(1) (requiring public agency to ensure that the educational placement decision is made by a group that includes parents); 34 C.F.R. 300.501(c) (same); *Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013); *A.M.*, 933 F. Supp. 2d at 198. *But see Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power over the IEP team’s decisions). Here, Special Education Consultant believed that placement had been discussed and that the entire IEP team had reached agreement on Student continuing in the current setting at Nonpublic School. Instead, Parent was shocked to learn that Student had been placed by DCPS at a somewhat different point along the continuum to be in the SLS program in a DCPS school. While Parent has no veto power over such a decision, she does have the right to be part of the

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group making such education placement decisions, as noted above. This Hearing Officer concludes that this is also a denial of FAPE that contributes to the remedy below.

As to the failure to provide reasonable notice of Proposed Public School to Parent, the *N.W.* case is again instructive. There, the Court rejected parents' concerns about not being informed about school options at the IEP meeting and having to wait one week, where the circumstances did not render the parent's choice illusory through unreasonable delay. Here, by contrast, Student was found eligible for special education services no later than November 2016, and an IEP was finally developed on 6/5/17, yet Proposed Public School was still not proposed for more than 10 weeks after the IEP, right before school started. With the notification coming late on Thursday afternoon before school began the following Monday morning, Parent had no chance to visit the school, consider the options, take care of the paperwork, and have Student ready to go on the first day of school.

Remedy

As the remedy for the denials of FAPE found above, Petitioner seeks reimbursement of payments to Nonpublic School for 2016/17, ESY in 2017, and 2017/18 to date, as well as for Student to be maintained at Nonpublic School for the remainder of 2017/18. In addition, Petitioner seeks reimbursement for the cost of the Neuropsychological Evaluation in May 2016, which is denied because there was no indication that Parent asked DCPS to evaluate Student and that DCPS refused. Apart from that, all reimbursement requested is ordered below (without any speech-language, as no speech-language service costs were incurred), 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. 2d 284 (1993) (quoting *Burlington*, 471 U.S. at 374). The Court of Appeals for the District of Columbia explained in *Leggett v. Dist. of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015), 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 above, due to the denials of FAPE by DCPS failing to find Student eligible on a timely basis and offer Student an appropriate placement, among other things specified above.

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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 found by Academic Dean, Special Education Consultant, and Speech-Language Director, and by the fact that Student's ADHD and many other needs can be met at Nonpublic School. Even DCPS school psychologist recognized that Nonpublic School is a setting where Student feels academically successful and which has promoted Student's self-confidence. 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 collaboratively with Public School and there was no assertion by DCPS that the third prong is not satisfied.

ORDER

Petitioner has prevailed on most of 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 and the summer program (ESY) for 2017 for tuition, transportation, related services (OT, but not speech-language) and any other associated costs.
- 2) DCPS shall maintain Student at Nonpublic School for the remainder of the 2017/18 school year and until DCPS offers a FAPE to Student, including tuition, transportation, related services (OT, but not speech-language unless agreed to by DCPS) and any other associated costs.

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).

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