

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

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

OSSE
Office of Dispute Resolution
July 11, 2016

<i>Student</i> , ¹)	Date Issued: 7/11/16
through her <i>Parent</i> ,)	
<i>Petitioner</i>)	Case No.: 2016-0108
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 6/29/16
("DCPS"),)	Hearing Location: ODR Room 2006
Respondent)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s mother, 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”) was not fulltime out of general education, her IEP did not describe her least restrictive environment (“LRE”) and placement, and DCPS did not involve Parent in the placement decision. DCPS responded that Student’s IEP was appropriate when developed, a more restrictive setting has been identified for Student for the upcoming school year, and she is making educational progress.

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 4/29/16, the case was assigned to the undersigned on 5/2/16. DCPS filed an untimely response on 5/12/16 and did not

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

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challenge jurisdiction. The resolution session meeting took place on 5/20/16, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 5/29/16. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 7/13/16.

The due process hearing took place on 6/29/16, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present during the entire hearing.

Petitioner’s Disclosures, submitted on 6/21/16, contained documents P1 through P37, which were admitted into evidence without objection.

Respondent’s Disclosures, submitted on 6/22/16, contained documents R1 through R14, which were admitted into evidence without objection.

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

1. *Director of Compensatory Education Provider*
2. *Legal Assistant*
3. *Director of Admissions at Nonpublic School*
4. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
5. Parent
6. *Educational Advocate* (qualified without objection as an expert in Special Education Programming)

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see Appendix A*):

1. *Special Education Coordinator at Proposed Public School* (qualified over objection as an expert in School Psychology and Special Education Programming and Placement)
2. *LEA Representative at Public School*

Petitioner’s counsel recalled Parent as a rebuttal witness.

The issue to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 3/25/16 to address her lack of educational progress and regression in reading, as (a)

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her IEP failed to provide specialized instruction in a fulltime outside general education setting; (b) her IEP failed to indicate her appropriate least restrictive environment (“LRE”) and type of placement needed; and (c) DCPS improperly delegated the placement decision to its LRE team, rather than involve the IEP team, including Parent.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. DCPS shall either develop an IEP for Student, or convene an IEP team meeting within 10 school days to develop an IEP for Student, which provides for specialized instruction in a fulltime outside general education setting and states that Student’s LRE is a separate special education day school.
3. DCPS shall fund placement in a separate special education day school or convene a meeting to determine an appropriate placement.
4. DCPS shall fund compensatory education² for any denial of FAPE from 3/25/16 to the present.
5. Any other relief that is just and appropriate.

The parties were permitted to submit legal citations after the hearing, which neither party did.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

² Petitioner’s counsel was put on notice during the Prehearing Conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Similarly, Respondent was encouraged to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

³ 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.⁴ Student is *Age* and in *Grade* at Public School.⁵ Parent is very involved in Student's education and is concerned that her child is being "left behind."⁶

2. Student is classified as having a Specific Learning Disability ("SLD") in reading, written expression, and mathematics.⁷ Student has recently been diagnosed with dyslexia, which Parent raised 3 years ago with Public School.⁸

3. Student received 15 hours/week of specialized instruction outside general education in her 3/16/15 IEP, which was increased to 22.5 hours/week in her 3/25/16 IEP, which is at issue herein.⁹ Student had no related services on her IEP in 2015, but received 30 minutes/week of behavioral support services ("BSS") in her 3/25/16 IEP.¹⁰ Student's 3/25/16 IEP did not discuss her LRE or placement other than listing her hours and stating that Student would "benefit from a small group setting with reduced distractions."¹¹

4. Student received a General Intellectual Ability score of 81 in 2013, which is in the Low Average range.¹² A WISC-V in 2016 similarly indicated (with proper analysis) that her cognitive abilities are in the Low Average or Average range.¹³ Student has significant academic deficits, with particular problems in reading, in which she is over 4 years behind her grade.¹⁴ Student has regressed in reading, with a 30-point regression between her 2013 KTEA and 2016 Woodcock Johnson tests in some areas, such as Letter Word ID.¹⁵ Reading is critical and impacts everything, including math; unless addressed, the gap between Student and her grade-level peers will continue to increase.¹⁶ Student's grades generally have declined over the past 2 years.¹⁷ Parent feels that Student has made only minimal

⁴ Parent.

⁵ *Id.*

⁶ *Id.*

⁷ P6-1,2; R3; P11-8 (2013); Clinical Psychologist.

⁸ Clinical Psychologist; P8-1.

⁹ P5-7; P7-7; Clinical Psychologist.

¹⁰ P5-7; P7-7.

¹¹ P7-8.

¹² P11-4.

¹³ P13-26.

¹⁴ P7-4; P28-1,2 (GORT reading scores over 4 years behind); P34; P12-1,2 (Woodcock Johnson IV); P7-3 (math is a relative strength, but she is "significantly below grade level"); P23-1 (math iReady well below grade level); P7-5 ("unable to independently put her thoughts into writing"); P5-5 (all written expression scores fall below average); P11-5.

¹⁵ Clinical Psychologist (KTEA and Woodcock Johnson tests can be compared as their standard scores use the same unit of measure); P25-1 (DIBELS Level G in 2013/14, Level E in 2015/16, with Fluency score dropping from 57 to 19, where goal is 111); P18-4.

¹⁶ Clinical Psychologist; Director of Compensatory Education Provider.

¹⁷ P15-1 (2013/14); P16-1 (2014/15); P19-1 (2015/16).

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progress in either reading or math.¹⁸ The record contains some indications of progress; Student's IEP Progress Reports show that by the end of 2015/16¹⁹ she had mastered 2 elements, and is progressing in all others.²⁰

5. At the 3/25/16 IEP meeting, Student's IEP team increased her specialized instruction from 15 to 22.5 hours/week, which Parent's Educational Advocate understood "constitutes a full time placement in a self-contained classroom" for Student.²¹ As for her LRE, Educational Advocate understood that apart from her core classes in the self-contained classroom, Student "will be with her nondisabled peers for recess, lunch, and specials."²² Student's IEP team believed that interaction with her nondisabled peers was important for her socialization, so did not increase her specialized instruction outside general education above 22.5 hours/week.²³ A fulltime special education day school would take Student entirely away from her nondisabled peers.²⁴ At Proposed Public School Student can be in a self-contained Specific Learning Support ("SLS") program and still participate in field trips, parties and other events with her nondisabled peers, which is helpful for building self-esteem.²⁵ The IEP is a "living document" to which adjustments can be made at a 30-day review after the beginning of the new school year.²⁶

6. When Student's specialized instruction hours were increased on 3/25/16, Public School could not accommodate her IEP so a new placement was required.²⁷ Educational Advocate attempted to discuss placement at the 3/25/16 IEP meeting and raised the possibility of nonpublic school, but Public School principal refused to discuss placement and explained that "the LRE Team will make all decisions on placement," reiterating after the IEP meeting that "the LRE Team will make all decisions."²⁸ DCPS's notes from the 3/25/16 meeting confirmed the role of the LRE Team, as did the 4/21/16 Prior Written Notice ("PWN"), which stated that the "LRE team will make a decision involving the

¹⁸ Parent.

¹⁹ All dates in the format "2015/16" refer to school years.

²⁰ LEA Representative; R2; R13; P21; P20; P7-4 ("improvement in her ability to sound out words" with reading program); P18-4, P19-1 (moving from Level E to Level G in reading in 2015/16); R2-3 ("Lexia Scores show improvement in her ability to read fluently and comprehend").

²¹ P8-1; P9-5 (DCPS notes confirmed that Student's hours were increased so she "could qualify to be moved to an appropriate placement that could meet her individual needs").

²² P8-1; P9-3 (DCPS notes confirm). Student's LRE was also referenced in the 4/21/16 Prior Written Notice at R7-1 (the increase in hours will "still allow her to be among her school-aged peers").

²³ LEA Representative; Educational Advocate.

²⁴ Special Education Coordinator.

²⁵ *Id.*

²⁶ Educational Advocate.

²⁷ Parent.

²⁸ P8-1; Educational Advocate.

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appropriate placement.”²⁹ Parent wanted to be involved in determining Student’s new placement, but neither Parent nor her representatives were contacted about another meeting after 3/25/16.³⁰

7. The LRE Team had conducted an observation and recommended on 3/15/16, prior to the 3/25/16 IEP meeting, that Student would benefit from a more restrictive school setting that could address her academic and behavioral needs; the IEP team was encouraged to consider educational and emotional harm in moving Student right before the end of the school year, especially given her many years at Public School.³¹

8. Parent followed up on the 3/25/16 increase in service hours with the Public School principal, with LEA Representative, and by going to Public School in person, before she received a call about an option to move Student to another school for 2 months, where she could not continue beyond the end of 2015/16.³² No one recommended that Student go through 2 school transitions in quick succession, so Student was not able to begin receiving her additional services.³³ In the expert opinion of Clinical Psychologist, the educational benefits would have outweighed the possible harms in moving Student as soon as possible to a suitable placement.³⁴ Parent would have agreed to move Student had a suitable placement been available that would not have required a second transition after 2 months.³⁵ Educational Advocate explained to DCPS in a letter dated 4/29/16 that a 2-month placement and a second transition would be extremely detrimental to Student, both emotionally and academically, to which DCPS did not respond.³⁶

9. DCPS did not provide Parent with options or alternatives for Student’s ongoing education, nor discuss with Parent what would meet Student’s needs, until it sent Parent a letter dated 4/25/16 stating that Proposed Public School had been identified for Student for the next school year.³⁷ The letter explained that Proposed Public School was the closest school to Student’s home with space in an SLS classroom in her grade and that it had programming in place to meet Student’s IEP needs.³⁸ DCPS did not further explain what could be done for Student at Proposed Public School or offer to meet or discuss placement

²⁹ P9-3; P9-5 (“LRE team decision of placement and all questions concerning placement will be handled by them”); R7-1. P8-1 mentions a Placement Meeting, about which the IEP team was to be notified after consideration by the LRE Team, but no record evidence suggests that such a meeting was scheduled or in fact occurred.

³⁰ Parent; Educational Advocate.

³¹ P14-5,6.

³² Parent.

³³ Parent; Educational Advocate.

³⁴ Clinical Psychologist.

³⁵ Parent.

³⁶ P31-2; Educational Advocate.

³⁷ R1-1; Parent; Educational Advocate.

³⁸ R1-1.

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at Proposed Public School, but did provide a contact for questions or concerns.³⁹ Parent could have visited Proposed Public School and met with the principal, assistant principal, and social worker, as well as other team members upon request.⁴⁰ Neither Parent nor her representatives asked for a meeting or visited Proposed Public School.⁴¹ Parent's representative had a telephone conversation with the Special Education Coordinator about the SLS program and the reading intervention programs at Proposed Public School.⁴²

10. The SLS program is for children not making progress in an inclusion program.⁴³ The SLS program at Proposed Public School had two small classes in 2015/16, with a teacher and paraprofessional for each, one of which had 5 students and the other 7.⁴⁴ In 2016/17 there will be 3 SLS classes at Proposed Public School, each with a teacher and paraprofessional; there are currently only 7 students to be divided among the 3 classes, so they are likely to be very small.⁴⁵ In addition, Proposed Public School has a school psychologist, 2 social workers, a Department of Behavioral Health clinician and a wrap care coordinator to provide any additional services needed by Student and her family.⁴⁶

11. Proposed Public School would provide Student with intensive services for reading to ensure she gains the fundamentals, after closely reviewing her record, analyzing her disability, and focusing on the underlying reasons why she is not reading, in order to determine what interventions are needed.⁴⁷ New assessments relating to speech/language, occupational therapy, and possibly others may be conducted to ensure that Proposed Public School has a good understanding of what Student needs.⁴⁸

12. Student has increasing behavior issues at school, including physical aggression against peers.⁴⁹ Student was given 30 minutes/week of BSS on her 3/25/16 IEP, but may need 60 minutes/week.⁵⁰ Student is very social and has done well in activities at Public School with her nondisabled peers, including a girls' group, the school dance team, and a Lion King production, which have had positive effects on her self-confidence and self-esteem.⁵¹

³⁹ R1-1; Parent.

⁴⁰ Special Education Coordinator.

⁴¹ Parent; Educational Advocate.

⁴² P32-1; Parent; Legal Assistant.

⁴³ Special Education Coordinator.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ P13-27; P13-9 (hitting a female peer and slapping a male peer, among other things); P21-2 ("increase in her maladaptive behaviors"); P14-4; R2-1.

⁵⁰ Clinical Psychologist.

⁵¹ LEA Representative; P11-3.

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13. Based on a diagnostic learning evaluation administered to Student by *Compensatory Education Provider*, the Provider proposed 200-240 hours of initial instruction to develop Student's language and literacy skills as compensatory education.⁵² Compensation Education Provider would use a multi-sensory approach to address Student's sensory cognitive functioning.⁵³ An award of a lower number of hours could still be used to good purpose by Compensation Education Provider, but would mean reduced goals for Student.⁵⁴ Student has recently received a few months of tutoring from a DCPS tutor trained in the Orton-Gillingham approach, which has resulted in some improvement in her reading.⁵⁵ Student is comfortable with the tutoring services she is receiving, which are soon to end.⁵⁶

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").

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

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

As discussed below, the Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S.

⁵² P34-5.

⁵³ Director of Compensatory Education Provider.

⁵⁴ *Id.*

⁵⁵ Parent.

⁵⁶ *Id.*

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176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, 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.

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

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue : *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 3/25/16 to address her lack of educational progress and regression in reading, as (a) her IEP failed to provide specialized instruction in a fulltime outside general education setting; (b) her IEP failed to indicate her appropriate LRE and type of placement needed; and (c) DCPS improperly delegated the placement decision to its LRE team, rather than involve the IEP team, including Parent.*

(a) Petitioner failed to meet her burden of proving a denial of FAPE on subpart (a) when DCPS did not increase the level of Student's specialized instruction to fulltime outside general education, but did increase her specialized instruction from 15 to 22.5 hours/week.

The applicable legal standard is whether the 22.5 hours/week in Student's IEP was "reasonably calculated to produce meaningful educational benefit" and advance toward meeting her annual goals pursuant to 34 C.F.R. 300.320(a)(4). See *Damarcus S. v. Dist. of Columbia*, 2016 WL 2993158, at *12 (D.D.C. May 23, 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

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and adequacy of the IEP are to be determined as of 3/25/16, the time the IEP 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 suitability of Student's IEP is analyzed by considering the concerns raised by Petitioner about the amount of specialized instruction and the adequacy of Proposed Public School, which is not a separate special education day school as desired by Petitioner. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

There is no dispute that Student was not doing well in school and not progressing adequately. Thus, at the 3/25/16 meeting Student's IEP team increased her specialized instruction from 15 to 22.5 hours/week outside general education in a self-contained classroom, although she would be with her nondisabled peers for recess, lunch, and so-called specials. The question here is whether that increase in specialized instruction was sufficient and whether it is appropriate for Student to be with her nondisabled peers for recess, lunch, and specials.

Student's IEP team believed that some interaction with her nondisabled peers was important for Student's socialization, so limited her specialized instruction outside general education to 22.5 hours/week, covering all her core academic courses, but leaving Student with her nondisabled peers for recess, lunch, and specials. Special Education Coordinator convincingly testified as an expert in special education programming and placement that a downside of a separate special education school is that Student would be separated from her nondisabled peers entirely, while at Proposed Public School she can be in a self-contained SLS program and still participate in field trips, parties, and other events with her nondisabled peers, which is helpful for building self-esteem. Student has begun having more behavioral issues at school, but she is very social and has done well in activities at Public School with nondisabled peers, including a girls' group, the school dance team, and a Lion King production, which have had positive effects on her self-confidence and self-esteem, according to the undisputed testimony of the LEA Representative.

DCPS sent Parent a letter dated 4/25/16 stating that Proposed Public School had been identified for Student for 2016/17 because it was the closest school to Student's home with space in an SLS classroom in her grade and had programming in place to meet Student's IEP needs. Special Education Coordinator testified that the SLS program is for children who are not making progress in an inclusion program and has small classes, with a teacher and paraprofessional for each class, one of which had 5 students and the other 7 students in 2015/16. In 2016/17 there will be 3 SLS classes, each with a teacher and paraprofessional. There are only 7 students at present who will be divided among the 3 classes, so they are likely to be very small. In addition, Proposed Public School has a school psychologist, 2 social workers, a Department of Behavioral Health clinician and a wrap care coordinator to provide any additional services needed by Student and her family.

Special Education Coordinator persuasively testified that Proposed Public School would provide Student with intensive services in reading to ensure she gains the fundamentals, after closely reviewing her record, analyzing her disability, and focusing on the root causes to determine what interventions are needed. New assessments in

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speech/language, occupational therapy, and possibly others may be conducted to ensure that Proposed Public School has a good understanding of what Student needs.

Petitioner's advocacy put considerable weight on the particular types of reading programs desired and whether they were available at Proposed Public School. However, as the Court recently explained in *Damarcus S.*, 2016 WL 2993158, at *13, even if Petitioner demonstrated that a particular program might be better for Student than those offered by DCPS, the lack of specific programs is not a denial of FAPE for "the IDEA does not require the District to 'maximize each handicapped child's potential.' See *Rowley*, 458 U.S. at 199, 102 S. Ct. 3034." As to the hours of specialized instruction, Clinical Psychologist's expert testimony was that a fulltime IEP was needed that would cover specials outside general education due to the extent of Student's regression in reading. However, this testimony failed to overcome the evidence marshalled by DCPS, including some evidence of progress, including IEP Progress Reports, and did not persuade this Hearing Officer that the 50% increase in specialized instruction on 3/25/16 was not sufficient. The impact of Clinical Psychologist's testimony was lessened in part by her dismissing the increase in specialized instruction as a modest step that she repeatedly characterized as a 6 hour/week increase, rather than the full 7.5 hours, which this Hearing Officer views as a substantial increase over Student's 3/16/15 IEP.

Clinical Psychologist did credibly make the point that Student needs different approaches to be applied, for simply continuing to use the same techniques will likely bring the same poor results. However, this Hearing Officer is persuaded that Proposed Public School will provide new techniques and seek to apply reading and educational methods that will work for Student going forward. School districts are expected to walk a fine line, providing IEPs that are sufficiently restrictive without exceeding the LRE. Indeed, parents may bring claims when they feel that the setting chosen is too restrictive, as in *Damarcus S.*, 2016 WL 2993158, at *12 (parents asserted that DCPS failed to provide their child with an LRE and "instead it allowed him to interact with non-disabled children only during lunch, when he could have satisfactorily participated in mainstream classes like science or gym").

This Hearing Officer concludes that Petitioner did not make the case that Student needed any additional specialized instruction, much less a fulltime outside general education setting. While the question of specialized instruction may be closer for specials involving academic courses, it is hard to see any basis for Student being separated from nondisabled peers at lunch and recess in a separate special education school. The IDEA of course requires Student to be with nondisabled peers as much as possible as her LRE. 34 C.F.R. 300. 114. Moreover, as Educational Advocate acknowledged, an IEP is a "living document" and adjustments may be made if needed at a 30-day review in the new school year.

(b) Petitioner did meet her burden in subpart (b) by proving that DCPS failed to include Parent in placement discussions, and failed to include the requisite detail about Student's placement and LRE in her 3/25/16 IEP, thereby denying Student a FAPE. The legal standard is made clear in the Court's recent decision in *Brown v. Dist. of Columbia*, 2016 WL 1452330, at *9 (D.D.C. Apr. 13, 2016), which found a student's IEP legally

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deficient because it failed to include a discussion of student's LRE and type of placement needed along the continuum of alternative placements. *See also* 34 C.F.R. 320(a)(5),(7); *A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 159 (D.D.C. 2005). The insufficient IEP in *Brown*, 2016 WL 1452330, at *9, n.2, merely included the hours per week of specialized instruction and behavioral support, but omitted a sufficient description of student's LRE and placement, just as here. Student's 3/25/16 IEP did not discuss her LRE or placement other than listing her service hours and stating that Student would "benefit from a small group setting with reduced distractions." The undersigned concludes that this minimal statement does not meet the legal standard set forth in *Brown*.

Failure to include the necessary detail about LRE and alternative placements in the IEP was assumed by the Court in *Brown* to be a procedural violation of the IDEA, *id.* at n.3, and not an automatic denial of a FAPE. Thus the issue is whether that failure amounted to a substantive violation under 34 C.F.R. 300.513(a) by significantly impeding Parent's opportunity to participate in decision-making regarding a FAPE, by impeding Student's right to a FAPE, or by depriving Student of educational benefit. *Brown*, 2016 WL 1452330, at *7, quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F.Supp.2d 57, 67 (D.D.C. 2010).

Student's IEP team increased her specialized instruction on 3/25/16 from 15 to 22.5 hours/week, which Parent's Educational Advocate understood "constitutes a full time placement in a self-contained classroom" for Student. As for her LRE, Educational Advocate understood that apart from her core classes in the self-contained classroom, Student "will be with her nondisabled peers for recess, lunch, and specials." It was clear at the 3/25/16 meeting that Public School could not accommodate Student's revised IEP, so Educational Advocate attempted to discuss placement on behalf of Parent and raised the possibility of nonpublic school, but the Public School principal refused to discuss the issues, explaining that "the LRE Team will make all decisions on placement" and reiterated after the IEP meeting that "the LRE Team will make all decisions."

Parent sought to be involved in determining Student's new placement and wanted prompt implementation of Student's new IEP, but was not able to discuss these matters as she should have been able to. *Brown*, 2016 WL 1452330, at *9. Instead she was told that it was up to the LRE Team, of which Parent was not a part. In the days following the 3/25/16 IEP, Parent nonetheless followed up with the Public School principal, with LEA Representative, and by going to Public School in person, and finally received a call offering to move Student to another school for the remainder of 2015/16, which was by then only 2 months away. No one thought it would be desirable for Student to transition twice in short order, so Student remained at Public School through 2015/16 and was not able to begin to get the additional services she needed under her new IEP. Beyond that, DCPS did not provide Parent with options or alternatives for Student's education, nor discuss with her what would meet Student's needs, until the 4/25/16 letter was sent to Parent stating that Proposed Public School had been identified for Student for the next school year.

As the Court emphasized in *Brown*, 2016 WL 1452330, at *9, it is critical for Parent to be able to "engage in the collaborative process" to create an IEP tailored to Student's specific needs. But Parent was not permitted to do so here. Accordingly, just as the Court

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held in *Brown*, this Hearing Officer concludes that this failure rises to the level of a substantive violation by impeding Parent's ability to participate in decision-making relating to her child's placement and education. As a result of this denial of FAPE, DCPS is ordered below to amend Student's IEP to include a sufficient description of her LRE and placement. This denial of FAPE also contributes to the award of compensatory education discussed below, although in the view of the undersigned the violation here is less serious than in *Brown*, as it was understood at the 3/25/16 IEP meeting that Student's LRE would include lunch, recess and specials with nondisabled peers, and her placement would be in some sort of self-contained class.

(c) Finally, Petitioner also met her burden in subpart (c) by proving that DCPS denied Student a FAPE by failing to include Parent in the placement decision. The IDEA could not be clearer about requiring parental involvement in "decisions on the educational placement of [her] 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).

As discussed above, however, the staff at Public School which comprised the IEP team refused to talk with Parent or her Educational Advocate about placement and repeatedly made clear that placement was delegated to the LRE Team, of which Parent was not a part. Specifically, as noted above, Educational Advocate attempted to discuss placement at the 3/25/16 IEP meeting and raised the possibility of nonpublic school, but Public School principal refused to engage, stating that "the LRE Team will make all decisions on placement," and reiterated after the IEP meeting that "the LRE Team will make all decisions." This was also confirmed in DCPS's notes from the 3/25/16 meeting, along with the 4/21/16 PWN, which stated that the "LRE team will make a decision involving the appropriate placement."

Excluding Parent from the placement decision is undeniably a procedural violation of the IDEA. Nor can there be any doubt that it "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child," and is thus a substantive violation and a denial of FAPE. 34 C.F.R. 300.513(a). Since Parent could not participate in decision-making for her child when she was excluded from the team, Parent was not able to provide input into the various programs that may have been considered for Student and did not have the opportunity to understand the various elements that may have gone into the placement decision that was made. Instead, Parent was simply told that the SLS program had been selected for Student, without the collaboration that is a vital aspect of IEPs. See *Brown*, 2016 WL 1452330, at *9.

This denial of FAPE results in DCPS being ordered below to convene an IEP meeting to discuss placement with Parent, if Parent wishes to engage in such a discussion at this point. If held, the discussion should be genuine and in good faith, and provide an opportunity for Parent both to express her views and concerns and to have an opportunity to better understand DCPS's perspective on placement. See *Brown*, 2016 WL 1452330, at *11 ("ordering the IEP team to convene a meeting is sensible given that this sort of collaborative

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dialogue sits at the core of the IDEA”). However, this HOD does not require any particular outcome from the discussion if the IEP team decides not to make a substantive change. Parent simply needs to be able to meaningfully participate, just as if the discussion had occurred in a timely fashion, even if DCPS is not persuaded to change its position. *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). This denial of FAPE also contributes significantly to the award of compensatory education discussed next.

Compensatory Education

The IDEA gives Hearing Officers “broad discretion” to award compensatory education as 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). The proper amount of compensatory education, if any, depends on how much more progress Student might have shown if she had received the required special education services, and the type and amount of services that would place Student in the same position she would have occupied but for DCPS’s violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid*, 401 F.3d 516. In short, “compensatory education aims to put a student . . . in the position [s]he would be in absent the FAPE denial.” *B.D.*, 817 F.3d at 798.

The Circuit Court for the District of Columbia recently made plain that “compensatory education awards require a ‘flexible approach’ tailored to the facts of each case, and, as we made clear in *Reid*, a mechanical award of services identical to those wrongly denied is inappropriate. *Reid*, 401 F.3d at 524.” *B.D.*, 817 F.3d at 799. 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,” *id.*, 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.” *See Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Based on careful consideration of the facts and circumstances resulting in the denial of FAPE found above, along with the undisputed testimony that Student has done well with 1-on-1 tutoring, which Parent believes is responsible for Student’s recent progress, this Hearing Officer awards 100 hours of tutoring by Student’s existing DCPS tutor (or a similar tutor) or by Compensatory Education Provider, at the option of Parent. *See Brown*, 2016 WL 1452330, at *10 (relative success that student has achieved with remedy makes it sensible for compensatory education). The hours awarded are based on (a) the failure of DCPS to include Parent in Student’s placement determination and delays in providing a more restrictive setting that may have resulted, and (b) the failure of DCPS to include LRE and placement descriptions in Student’s IEP, both of which might have impacted the

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decisions made for Student. This award of tutoring is to be completed within one year in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent that result from compensatory education awards stretching over excessively long timeframes.

ORDER

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

- (1) If requested in writing by Petitioner within 10 business days, DCPS shall convene an IEP team meeting within 10 business days after receiving such request to discuss appropriate placement for Student. Whether or not such meeting is requested, DCPS shall amend Student's IEP to include a sufficient description of her LRE and placement within 60 days from the date of this Order.
- (2) Compensatory education for the denial of FAPE shall consist of DCPS funding or providing 100 hours of tutoring by Student's current DCPS tutor (or a similar tutor) or by Compensation Education Provider, at Petitioner's option. DCPS shall authorize such services within 10 business days after Petitioner's written election of provider. All tutoring hours are to be used within 1 year from the date of authorization; any unused hours will be forfeited.

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat
Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

Counsel of Record (Appendix A, by email)
OSSE-SPED (due.process@dc.gov)
ODR (hearing.office@dc.gov)
Contact.resolution@dc.gov

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