

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

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

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Office of Dispute Resolution  
June 01, 2020

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<i>Student,</i> <sup>1</sup>	)	Case No.: 2020-0074
through <i>Parent,</i>	)	
<i>Petitioner,</i>	)	Date Issued: 6/1/20
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates: May 18-19, 2020
("DCPS"),	)	Video Platform: Microsoft Teams
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") due to an Individualized Education Program ("IEP") with insufficient specialized instruction and no Extended School Year ("ESY") services. DCPS responded that Student was receiving all appropriate services.

**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 3/19/20, the case was assigned to the undersigned on 3/20/20. Respondent filed a response on 3/30/20 and did not challenge jurisdiction. A resolution meeting was held on 3/30/20, which did not resolve the dispute or shorten the 30-day resolution period, which ended on 4/18/20. A final decision in

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

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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 6/2/20.

The prehearing conference was held on 4/28/20 and the Prehearing Order was issued on 4/29/20, which addressed the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 5/18/20 and 5/19/20 using the MS Teams platform and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present by videoconference for a portion of the hearing.

Petitioner’s Disclosures, submitted on 5/11/20, contained documents P1 through P58, which were all admitted into evidence without objection. Respondent’s Disclosures, submitted on 5/11/20, contained documents R1 through R21, which were all admitted into evidence without objection.

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. Parent
2. *Educational Advocate* (qualified without objection as an expert in Special Education Programming and Placement)

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

1. *Case Manager* and Special Education Teacher at *Prior Public School*
2. *School Psychologist* (qualified without objection as an expert in School Psychology)
3. *Assistant Principal of Public School* (qualified without objection as an expert in Special Education Programming and Planning)

Petitioner’s counsel did not present any rebuttal witnesses.

The issue<sup>2</sup> to be determined in this Hearing Officer Determination is:

**Issue:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 1/23/20 with (a) sufficient specialized instruction due to Student’s lack of progress in standardized testing, low class grades and retention, being far behind peers, and low evaluation scores in November 2019; and/or (b) provision of ESY services due to

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<sup>2</sup> A second issue was withdrawn by Petitioner without prejudice at the beginning of the due process hearing: “Whether DCPS denied Student a FAPE by failing to allow Parent access to education records upon written request.”

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regression. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

The relief requested<sup>3</sup> by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall develop an appropriate IEP increasing Student's specialized instruction to 20 hours/week outside general education and placing Student in a full-time specific learning disability program.
3. DCPS shall fund or provide compensatory education to make up for the inappropriate 1/23/20 IEP.<sup>4</sup>
4. Any other just and reasonable relief.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact<sup>5</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>6</sup> Student is *Age*, *Gender* and in *Grade* at Public School since February 2020, after

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<sup>3</sup> Along with withdrawing Issue 2, Petitioner at the start of the due process hearing withdrew the second paragraph of relief requested in the Prehearing Order, which was, "DCPS shall provide Petitioner a copy of all education records requested."

<sup>4</sup> With regard to any request for compensatory education, Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

<sup>5</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>6</sup> Petitioner.

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transferring from a more rigorous dual-language immersion program at Prior Public School.<sup>7</sup>

2. IEPs. Student's initial IEP was created on 3/16/17 based on the disability classification Specific Learning Disability ("SLD") and provided 8 hours/week of specialized instruction outside general education (and no other services).<sup>8</sup> That IEP was amended on 11/2/17 at Prior Public School to shift specialized instruction from outside to inside general education (and divide out specific hours for reading and math).<sup>9</sup> Student's next IEP on 3/15/18 continued the same service level, with a total of 8 hours/week of specialized instruction inside general education.<sup>10</sup> Student's 3/4/19 IEP again provided 8 hours/week of specialized instruction inside general education without any division into subjects.<sup>11</sup>

3. Student's 1/23/20 IEP – the only IEP at issue in this case – was finalized on 1/30/20 and provided 6 hours/week of specialized instruction inside general education and 8 hours/week of specialized instruction outside general education, along with 60 minutes/month of behavioral support services ("BSS") inside general education, 60 minutes/month of occupational therapy ("OT") outside general education, and another 30 minutes/month of OT consultation.<sup>12</sup> For the first time, the 1/23/20 IEP provided a significant number of Other Classroom Aids and Services, including small group instruction (from prior IEPs), independent and instructional level texts, grade level material read aloud in the general education setting, math manipulatives, printed out PowerPoints/class notes, checklists, and more.<sup>13</sup> The 1/23/20 IEP also significantly expanded the Classroom Accommodations from Student's prior IEPs.<sup>14</sup>

4. Evaluations. Student's 11/29/19 comprehensive psychological evaluation and addendum found that Student continued to demonstrate processing deficits in math and reading, along with cognitive deficits in visual spatial reasoning, crystallized (verbal) knowledge, and fluid reasoning; Student had shown similar difficulties within foundational skill sets and demonstrated discrepancies within abilities to work fluently with math facts fluency, calculation, and overall reading abilities, but that was consistent with Student's cognitive abilities and consistent with continued present levels within classroom functioning.<sup>15</sup> Student's present levels were also consistent with Student's academic levels; Student's observed behaviors were having an adverse impact on academic performance,

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<sup>7</sup> Petitioner; Educational Advocate; Case Manager.

<sup>8</sup> P12-1,7.

<sup>9</sup> P11-1,7; Educational Advocate.

<sup>10</sup> P10-1,7.

<sup>11</sup> P8-1,6.

<sup>12</sup> P6-1,17.

<sup>13</sup> P6-17; Case Manager.

<sup>14</sup> P6-19; P8-8; Case Manager.

<sup>15</sup> P19; P20-5.

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which could assist in strengthening Student's overall academic and socio-emotional development.<sup>16</sup>

5. In the comprehensive psychological evaluation, the Wechsler Intelligence Scale for Children, Fifth Edition ("WISC-V") found Student to be in the Extremely Low range in Visual Spatial (score 57), Fluid Reasoning (67), and Full Scale IQ ("FSIQ") (66), while Processing Speed (92) was in the Average range.<sup>17</sup> Student's initial evaluation in February 2017 found that Student's FSIQ score was 76.<sup>18</sup> School Psychologist could only speak to the recent evaluation she conducted and warned against putting too much emphasis on the FSIQ and that it was important to consider the child holistically when viewing IQ regression.<sup>19</sup> In the recent evaluation, the Kaufman Tests of Educational Achievement, Third Edition ("KTEA-3") noted that Student was Average in both Written Language Composite (score 86) and Written Expression (103).<sup>20</sup>

6. Development of 1/23/20 IEP. The 1/23/20 IEP is much more restrictive than in the past, with 8 hours/week of specialized instruction outside general education, compared to none in the past at Prior Public School, when all specialized instruction was inside general education.<sup>21</sup> The blend of specialized instruction was to keep Student engaged in an inclusive setting, but allowing enough time outside general education to address some of the foundational deficits to reach closer to the general education curriculum.<sup>22</sup> The school team wanted Student to get supports in the classroom instead of pulling Student out of general education entirely.<sup>23</sup> Parent's team asked for a full-time IEP, but agreed when school suggested reevaluating the blend in the next couple of months, see how Student was progressing and come back to the table.<sup>24</sup>

7. The team suggested a broad range of goals, services, and accommodations that went well beyond the increase in specialized instruction to help Student achieve progress in the existing school setting.<sup>25</sup> The team proposed the additions and changes to address Student's strengths and deficits in a holistic way.<sup>26</sup> The team considered the results of the KTEA-3 for academic testing, the WISC-V for cognitive testing, and the Connors-3 and Behavior Rating Inventory of Executive Functions, Second Edition ("BRIEF -2") for psychological/behavioral assessment.<sup>27</sup> The team also considered formal and informal

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<sup>16</sup> P20-5.

<sup>17</sup> P6-3; P19-8.

<sup>18</sup> P19-2.

<sup>19</sup> R2-45.

<sup>20</sup> P19-6.

<sup>21</sup> Case Manager.

<sup>22</sup> R4-54.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> R2-42.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

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assessments including i-Ready, SRI, A-Net, classroom diagnostics, PARCC scores, work samples, teacher observations, previous progress reports, and report cards.<sup>28</sup>

8. Student's team based the 1/23/20 IEP on working with Student and determining what Student is able to do; Student is able to be successful in the general education classroom.<sup>29</sup> Student's math teacher stated that Student was making a lot of progress and was asking for help; Student was a little low on mathematical ability, but not significantly; Student had "basic computation" but on an informal math test on foundational skills, Student had 36% accuracy.<sup>30</sup> Student had growth in reading over the 2019 summer and liked to read outside school; Student had solid reading fluency.<sup>31</sup> When engaged, Student had ELA proficiency that allowed access to the curriculum.<sup>32</sup> Student's strength was creative writing.<sup>33</sup> Reading present levels of performance in the IEP noted that an informal progress monitoring assessment showed Student had 0% accuracy on foundational reading skills at Beginning of Year ("BOY") 2019/20,<sup>34</sup> while other assessments indicated Student was 2 to 4 years below grade level in reading.<sup>35</sup>

9. With supports, Student can be pretty successful inside general education.<sup>36</sup> The 1/23/20 IEP present levels of performance conclude that when fully engaged Student can grasp math concepts with some supports.<sup>37</sup> The present levels of performance state that Student displayed decent English proficiency when fully engaged.<sup>38</sup> As for written expression, the present levels of performance state that Student shows strength in writing creativity.<sup>39</sup> According to teacher observations, when fully engaged and feeling supported, Student was able to grasp content and would be able to progress with continued supports.<sup>40</sup> At the hearing, much effort was spent considering the Continuum of Special Education Services Matrix on which Student probably would reach no more than 15 points, which would permit up to 10 hours/week of specialized instruction outside general education.<sup>41</sup> Assistant Principal explained that the matrix was no longer being used by DCPS and had never been mandatory.<sup>42</sup>

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

<sup>29</sup> Case Manager.

<sup>30</sup> P6-3; R4-52.

<sup>31</sup> R4-53.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> All dates in the format "2019/20" refer to school years.

<sup>35</sup> P6-8.

<sup>36</sup> Case Manager.

<sup>37</sup> P6-4.

<sup>38</sup> P6-8.

<sup>39</sup> P6-12.

<sup>40</sup> P6-13.

<sup>41</sup> P53-8,9; Assistant Principal; Educational Advocate (urged full-time outcome).

<sup>42</sup> Assistant Principal.

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10. School Psychologist credibly testified that Student did not need a full-time IEP because Student is not low functioning, but does well when redirected and “can do” general education.<sup>43</sup> Assistant Principal testified that he was in “solid agreement” with the specialized instruction hours and accommodations on Student’s IEP, based on the data; Student does not need a more restrictive environment and does not need a full-time IEP as Student is making great progress.<sup>44</sup> Going from no pull-out for specialized instruction to full-time could be detrimental to Student’s socio-emotional well-being.<sup>45</sup>

11. Grades. Student attended summer school in 2019 but didn’t pass, so wasn’t promoted to Grade in 2019/20 until after Term 1, once Student caught up.<sup>46</sup> Student experienced some challenges with the transition to Grade in the middle of the year.<sup>47</sup> Student’s grades were poor in Terms 1 and 2 of 2019/20 at Prior Public School, with several “Ds” and “Fs.”<sup>48</sup> Student’s grades improved at Public School in the Term 3 progress report, with the only “F” in Art, and grades of “A-,” “B,” “B-,” and “C” in academic classes.<sup>49</sup> Assistant Principal testified that Student’s final Term 3 grades were 2 “As,” 2 “Bs” (or a “B” and “B-”), and a “C” in Art as Student pulled up the “F.”<sup>50</sup> In 2019/20, Student had algebra at Prior Public School, and Grade math at Public School.<sup>51</sup>

12. Behavior. Student began having behavioral issues in 2019/20.<sup>52</sup> Student was overwhelmed at Prior Public School, which is a dual-language, advanced placement school; Public School is not dual-language or advanced placement.<sup>53</sup> Petitioner was concerned about Student’s academic ability in English, so wondered about Student putting in the time needed to learn Spanish, but Case Manager explained that dual-language was a requirement of Prior Public School.<sup>54</sup> Student shut down if felt Student could not complete a task or was not receiving enough support; positive reinforcements were recommended by the IEP.<sup>55</sup> Case Manager explained that general education is easier if not dual-language; Student’s IEP might be sufficient to support Student at Public School, even if it were not enough at Prior Public School.<sup>56</sup>

13. Student expressed frustration and became “disinterest” in attending Prior Public School because Student was retained at the beginning of 2019/20, and didn’t advance to

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<sup>43</sup> School Psychologist.

<sup>44</sup> Assistant Principal.

<sup>45</sup> *Id.*

<sup>46</sup> Petitioner; Educational Advocate.

<sup>47</sup> P13-7.

<sup>48</sup> P26; R15.

<sup>49</sup> R8-94,95,97,98.

<sup>50</sup> Assistant Principal.

<sup>51</sup> P26-1; R9-099.

<sup>52</sup> P22-8.

<sup>53</sup> Educational Advocate; Case Manager.

<sup>54</sup> R3-45.

<sup>55</sup> P6-2.

<sup>56</sup> Case Manager.

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Grade until after Term 1; Student wanted to attend a different school that would provide help.<sup>57</sup> Student said Student “hates” Prior Public School and that the school administration did not treat Student right.<sup>58</sup> As of 10/3/19, Petitioner had been looking into other schools for Student.<sup>59</sup>

14. A thorough Functional Behavioral Assessment-II (“FBA-II”) completed on 11/27/19 revealed that Student could appropriately engage in the classroom setting 47% of the time and was off-task 53%.<sup>60</sup> The FBA recommended incorporating identified academic supports, including increased participation in the classroom, peer support, and 1:1 instructional time.<sup>61</sup> A Behavioral Intervention Plan-II (“BIP-II”) was completed on 1/7/20 which targeted Student not completing assignments, not engaging in instruction, and not remaining in the classroom.<sup>62</sup> A Strengths and Difficulties Questionnaire (“SDQ”) on 10/9/19 showed that Student had Very High ratings on hyperactivity and concentration difficulties, difficulties getting along with other children, and impact of any difficulties in life, and Very Low ratings for kind and helpful behavior.<sup>63</sup>

15. Specific Learning Support/Public School. Student’s academic and social functioning is too high for a Specific Learning Support (“SLS”) classroom.<sup>64</sup> An express goal of the SLS program is to promote inclusion by transitioning students to the general education setting once they are determined ready by the IEP team.<sup>65</sup> When Student arrived at Public School in February 2020, Assistant Principal developed a schedule and initially put Student in the lower level math class based on the iReady scores, but when he saw Student was in Algebra at Prior Public School, he switched Student to the higher level math class at Public School.<sup>66</sup>

16. ESY. Student’s team did not find Student eligible for ESY in 2020 based on the lack of regression in a critical skill.<sup>67</sup> Many children have a “summer slide” with some regression, but Educational Advocate asserted that Student suffered more significant regression.<sup>68</sup> School Psychologist testified about Student’s difficulty in keeping up with foundational skill sets.<sup>69</sup> The school explained that “critical skills” for purposes of ESY analysis are basic skills that allow student to be independent in the school setting; the 2 sides disagreed on ESY and decided to revisit the issue in March 2020; the school planned to pull

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<sup>57</sup> P22-1,2,8.

<sup>58</sup> P22-8.

<sup>59</sup> P38-2.

<sup>60</sup> P6-14.

<sup>61</sup> P22-11.

<sup>62</sup> P21-1,2.

<sup>63</sup> P6-14.

<sup>64</sup> Case Manager.

<sup>65</sup> P53-2.

<sup>66</sup> Assistant Principal.

<sup>67</sup> *Id.*

<sup>68</sup> Educational Advocate.

<sup>69</sup> School Psychologist.



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End of Year (“EOY”) data to check the extent of regression.<sup>70</sup> Educational Advocate considered a critical skill to be math, reading or written expression, so that a child could understand and master the curriculum.<sup>71</sup> Assistant Principal explained that basic math skills can be a critical skill, but not algebra.<sup>72</sup>

17. A 3/10/11 memorandum from the Acting State Superintendent of Education explained that the point of ESY is to provide a FAPE, not to provide additional resources or to maximize programming.<sup>73</sup> The benefits gained during the regular school year must be significantly jeopardized for a student to receive ESY services.<sup>74</sup> The 3 criteria for determining ESY eligibility are: (1) whether the break in service will jeopardize one or more critical skills, based on student data; (2) the likelihood of “significant regression” in any jeopardized critical skill, based on student data, recognizing that most students experience some natural regression during breaks; and (3) whether the time required for recoupment is “extraordinary,” based on student data, for any critical skill jeopardized.<sup>75</sup> A critical skill may be an academic skill, such as reading.<sup>76</sup>

18. Standardized Scores. Student’s iReady math scores were generally about 4 years below grade level, with 2017/18 BOY at 352, Middle of Year (“MOY”) at 433, and EOY at 465; 2018/19 BOY was 438, MOY was 440, EOY was 470; for 2019/20, BOY was 444, MOY was 459.<sup>77</sup> Student’s math PARCC assessment in Spring 2019 indicated a Level 2 (Partially Met Expectations) with a 710, up from 703 in Spring 2018.<sup>78</sup>

19. As for reading, Student’s Reading Inventory lexile scores were generally 3-4 years below grade level, with 2017/18 BOY at 306, no data for MOY or EOY; 2018/19 BOY at 252, MOY was 172, EOY was 435; 2019/20 BOY was 522 (although still at 4<sup>th</sup> percentile).<sup>79</sup> Student did have growth over the 2019 summer in reading.<sup>80</sup> Case Manager testified about the very low reading score of 172 that sometimes there are outside factors and scores are not always accurate.<sup>81</sup> Student’s ELA PARCC assessment in Spring 2019 indicated a Level 2 (Partially Met Expectations) with a 704, down from 729 in Spring 2018, a 25-point regression.<sup>82</sup>

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<sup>70</sup> R4-55.

<sup>71</sup> Educational Advocate.

<sup>72</sup> Assistant Principal.

<sup>73</sup> P54.

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

<sup>75</sup> *Id.*

<sup>76</sup> P54-2.

<sup>77</sup> P34-1; R12-124; R10-100; R11-123; P36-1; P58-1.

<sup>78</sup> P35-6,7; P6-4.

<sup>79</sup> P33-5; R13-125; R14-126,127; Educational Advocate.

<sup>80</sup> Case Manager.

<sup>81</sup> *Id.*

<sup>82</sup> P35-6,7; P6-8.

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20. Compensatory Education. The parties resolved a prior due process complaint with a settlement dated 12/2019 and an authorization letter dated 12/31/19 that provided for 300 hours of independent tutoring, 150 hours of Lindamood Bell tutoring, 40 hours of independent mentoring, and 40 hours of occupational therapy services.<sup>83</sup> Student began receiving tutoring services in February 2020 and met the tutor twice in person and 3 times online as of 5/18/20; Student likes the tutoring and works well 1:1.<sup>84</sup>

21. Credibility. The undersigned finds that all witnesses at the due process hearing were credible. Case Manager acknowledged having only a couple years of experience, but testified that she was regularly backed up in making judgments about Student's special education needs by both the Special Education Coordinator and the Department Chair at Prior Public School.<sup>85</sup>

### 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.'" *Endrew 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." *Endrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent 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); *Endrew 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).

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<sup>83</sup> P5; R21-160.

<sup>84</sup> Petitioner.

<sup>85</sup> Case Manager.

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The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The 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 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.” *Endrew F.*, 137 S. Ct. at 1001.

In addition, the LEA 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; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at \*3 (D.D.C. 9/26/18).

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); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

**Issue:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 1/23/20 with (a) sufficient specialized instruction due to Student’s lack of progress in standardized testing, low class grades and retention, being far behind peers, and low evaluation scores in November 2019; and/or (b) provision of ESY services due to*

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*regression. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which met its burden of persuasion on specialized instruction but not ESY, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of the IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered in turn.<sup>86</sup> *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Specialized Instruction. Student has Specific Learning Disabilities with processing deficits in reading and math and is performing well below grade level. The central question to be resolved here is whether – as Petitioner asserts – Student required a full-time IEP (or at least a greater increase in specialized instruction) or whether Student’s IEP was created with sufficient specialized instruction given Student’s needs, and the explanations and solutions to Student’s academic shortcomings are to be found elsewhere. Student’s comprehensive psychological evaluation (and addendum) explained that Student demonstrated discrepancies within abilities to work fluently with math facts fluency, calculation, and overall reading abilities, but that those difficulties are consistent with Student’s cognitive abilities and consistent with Student’s present levels of functioning.

The 1/23/20 IEP is much more restrictive than Student’s IEPs in the past, with 8 hours/week of specialized instruction outside general education, compared to none in the past at Prior Public School (when all specialized instruction was inside general education). Specialized instruction was increased significantly, with a blend to keep Student engaged in an inclusive setting, but allowing enough time outside general education to address some of the foundational deficits to help access the general education curriculum. The intention at Prior Public School was for Student to get supports in the general education classroom instead of pulling Student out and fully separating Student from general education peers. Indeed, this is in line with the “least restrictive environment” principle discussed above in

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<sup>86</sup> A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Procedural violations were not separately alleged in this matter.

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which to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

Moreover, beyond the specialized instruction hours, Student's IEP for the first time provided a significant number of Other Classroom Aids and Services, including small group instruction (on prior IEPs), independent and instructional level texts, grade level material read aloud in the general education setting, math manipulatives, printed out class notes, and checklists, among other things. This IEP also expanded Classroom Accommodations for Student compared to prior IEPs.

These decisions by the team were informed by the results of the KTEA-3 for academic testing, the WISC-V for cognitive testing, and the Connors-3 and BRIEF-2 for psychological/behavioral assessment. In addition, the team considered formal and informal assessments including i-Ready, SRI, A-Net, classroom diagnostics, PARCC scores, work samples, teacher observations, previous progress reports, and report cards. With supports, the school team was confident that Student could be successful inside general education. Specifically, the present levels of performance on the IEP concluded that when fully engaged Student could grasp math concepts with some supports, that Student displayed reasonable English proficiency when fully engaged, and that Student was able to grasp content and would be able to progress when fully engaged with continued supports.

While alleging that Student's lack of academic success required a full-time IEP with a self-contained SLS classroom, Petitioner ignored the behavioral issues that arose in 2019/20 and their impact on Student's academic progress. The comprehensive psychological evaluation noted that Student's observed behaviors were having an adverse impact on academic performance, so resolving Student's needs may be found at least in part by focusing on behavior. That is what Prior Public School did by conducting an FBA and then developing a BIP that was completed in January 2020. These steps revealed that Student was off-task in the classroom a little more than half the time and targeted Student not completing assignments, not engaging in instruction, and not remaining in classroom, aspects that more specialized instruction alone could not resolve. Student's 1/23/20 IEP added BSS for the first time, with 60 minutes/month inside general education.

In 2019/20, Student was overwhelmed at Prior Public School, which is a rigorous, dual-language, advanced placement school. Petitioner was concerned about Student's academic abilities in English, and wondered about Student being distracted by the need to learn and use a second language, but had no option at Prior Public School. Case Manager agreed that the general education would be easier if not dual-language. Student expressed frustration and disengaged at Prior Public School when Student was retained at the beginning of 2019/20, and unable to advance to Grade until after Term 1. Student claimed to hate Prior Public School and said that the school administration did not treat Student right. Early in 2019/20 Petitioner was looking into other schools for Student.

Although Petitioner sought a full-time IEP so that Student could be in the SLS self-contained classroom, the school team was confident that Student could largely remain in the general education setting and should not be in an SLS classroom based on Student's

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academic and social functioning being too high. Indeed, an express goal of the SLS program is to promote inclusion by transitioning students to the general education setting once determined ready by their IEP teams, which is the level Student is at now. When Student transferred to Public School, Assistant Principal developed a schedule for Student and initially put Student in the lower level math class based on iReady scores, but when he saw Student was in Algebra at Prior Public School, he switched Student to the higher level math class at Public School where Student's Term 3 grades in all subjects have been encouraging.

In testifying at the due process hearing, School Psychologist credibly articulated that Student did not need a full-time IEP because Student was not low functioning, did well when redirected, and "can do" general education. Looking at the IEP from the perspective of Public School, Assistant Principal testified that he was in "solid agreement" with both the specialized instruction hours and accommodations, based on the data. Assistant Principal persuasively concluded that based on the information available Student did not need a more restrictive environment and did not need a full-time IEP, for Student was making great progress. Going from no pull-out for specialized instruction in the prior IEP to a full-time IEP as Petitioner sought could be detrimental to Student's socio-emotional well-being.

For all these reasons, this Hearing Officer is persuaded that the 1/23/20 IEP was reasonably calculated when created by Prior Public School to permit Student to make progress appropriate in light of the circumstances.

(b) Extended School Year. Turning to Petitioner's other issue, 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.

The point of ESY is not to provide additional resources or to maximize programming, but to provide a FAPE, as explained in a 3/10/11 memorandum from the Acting State Superintendent of Education. The 3 criteria for determining ESY eligibility are: (1) whether the break in service will jeopardize one or more critical skills, based on student data; (2) the likelihood of "significant regression" in any jeopardized critical skill, based on student data, recognizing that most students experience some natural regression during breaks; and (3) whether the time required for recoupment is "extraordinary," based on student data, for any critical skill jeopardized. The memorandum stated that a critical skill may be an academic skill, such as reading, which is in line with Educational Advocate considering critical skills broadly as math or reading, so that a child could understand and master the curriculum. Assistant Principal agreed that basic math skills could be a critical skill, but not higher levels such as algebra.

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At the IEP meeting, the team disagreed on whether Student needed ESY for 2020 and decided to revisit the issue in March 2020. The school planned to pull EOY data to check the extent of regression, but Student transferred before the meeting could be held. Reviewing at the data in the record, it seems clear that Student's iReady scores show significant regression in math, declining from 465 to 438 when comparing Spring to Fall in 2018 and again dropping from 470 to 444 comparing Spring to Fall in 2019. Moreover, the math present levels of performance in the 1/23/20 IEP note that on an informal math test on foundational skills, Student had only 36% accuracy. As for extraordinary recoupment, it apparently took almost an entire year to return to the 465 level of the Spring of 2018, as Student did not reach 470 until the Spring of 2019.

Turning to reading data, the Reading Inventory lexile scores are incomplete – even though Petitioner did seek education documents – and there appear be anomalies in the available records. What is available shows that 252 in the Fall of 2018 was far lower than 306, which was the only data point in 2017/18, although the next year there was a large increase from 435 to 522 comparing Spring to Fall of 2019. The increase over the summer was notable, but still lifted Student only to the 4<sup>th</sup> percentile, some 4 years below grade level. Further, the 435 in the Spring of 2019 is the same timeframe in which Student regressed on ELA PARCC scores compared to a year earlier. Further, present levels of performance for reading in the 1/23/20 IEP noted that an informal progress monitoring assessment showed Student had 0% accuracy on foundational reading skills at BOY 2019/20. Assuming Student had some foundational reading skills at the end of 2018/19, this would suggest regression. The data is thin for determining the time required for recoupment, but the undersigned notes that the 2018/19 BOY reading score was not exceeded until EOY.

For these reasons, this Hearing Officer concludes that DCPS failed to meet its burden of persuasion and Student's 1/23/20 IEP should have included ESY for 2020 to ensure meaningful progress in math and reading and provide a FAPE. The undersigned orders ESY to be included in Student's IEP below. Since ESY for 2020 has not yet occurred, no services have been missed and there is no need to consider compensatory education here.

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**ORDER**

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

Within 10 business days from the date of this HOD, DCPS shall convene Student's IEP team and revise Student's IEP to include ESY for 2020, consistent with this HOD.

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

**IT IS SO ORDERED.**

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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

Copies to:

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