

**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

OSSE
Office of Dispute Resolution
June 15, 2021

<i>Student,</i> ¹)	Case No.: 2021-0015
through <i>Parents,</i>)	
<i>Petitioners,</i>)	Date Issued: 6/15/21
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	5/10/21, 5/11/21, 5/12/21, 5/17/21,
Respondent.)	5/21/21 and 6/1/21
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, Student’s Parents, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to DCPS’s failure to provide sufficiently restrictive IEPs and adequate placement, among other concerns. DCPS responded that it had provided needed programming, placement and other services for Student to make appropriate progress.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 2/1/21, the case was assigned to the undersigned on 2/2/21. Respondent filed a response on 2/16/21 and did not challenge jurisdiction. A resolution meeting took place on 2/16/21, but the parties did not settle the case or shortened the 30-day resolution period, which ended on 3/3/21. A final decision in

¹ 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, as extended by 40-day and 19-day continuances, which require a Hearing Officer Determination (“HOD”) by 6/15/21.

A prehearing conference was held on 4/27/21 and the Prehearing Order was issued on 4/28/21 addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 5/10/21, 5/11/21, 5/12/21, 5/17/21 and 6/1/21 and was closed to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. Petitioners participated by videoconference throughout the hearing.

Documents and Witnesses

Petitioners’ Disclosures, submitted on 5/3/21, contained documents P1 through P76, which were all admitted into evidence over objection to many documents. Respondent’s Disclosures, also submitted on 5/3/21, contained documents R1 through R20, all of which were admitted into evidence without objection.²

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

1. *Educational Consultant* (qualified over objection as an expert in Special Education Placement and IEP Development, and Development of Compensatory Education Plans)
2. *Associate Head at Nonpublic School* (qualified over objection as an expert in Occupational Therapy and Special Education Administration)
3. *Father*
4. *Mother*

Respondent’s counsel presented 5 witnesses in Respondent’s case (*see* Appendix A):

1. *Special Education Teacher at Public School* (qualified without objection as an expert in Special Education Programming, Placement, and Instruction)
2. *Reading Specialist at Public School* (qualified without objection as an expert in Special Education Programming, Placement, and Instruction)

² Citations herein to Petitioners’ documents are indicated by a “P” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted, while Respondent’s documents are indicated in the same manner beginning with an “R.”

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3. *LEA Representative* at Public School (qualified without objection as an expert in Special Education Evaluation, Programming, and Placement)
4. *Program Specialist*, Centralized IEP Team at DCPS (qualified without objection as an expert in Special Education Programming and Placement)
5. *Manager*, Centralized IEP Team at DCPS (qualified without objection as an expert in Special Education Programming and Placement, and Reading)

Petitioners' counsel recalled both Father and Mother as rebuttal witnesses.

Issues and Relief Requested

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

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement from 10/30/19 when Student needed a more intensive IEP and a more restrictive placement. (*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to evaluate in all areas of suspected disability when it failed to conduct an assistive technology ("AT") assessment following Parents' request in October 2019, and failed to issue a proper prior written notice ("PWN"). (*Petitioners have the burden of persuasion.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to include an appropriate LEA representative at IEP meetings in October, November, and/or December 2019 to ensure the team had information about the continuum of alternative placements and options in the District. (*Petitioners have the burden of persuasion.*)

Issue 4: Whether DCPS denied Student a FAPE by delaying an offer of FAPE and interfering with Parents' right to participate in the placement decision through use of the "LRE team" process. (*Petitioners have the burden of persuasion.*)

Issue 5: Whether DCPS denied Student a FAPE by providing inappropriate IEPs on 11/6/19, 12/4/19 and/or 3/12/20, which (a) provided insufficient specialized instruction hours that were based on what the school could provide and not Student's individual needs, (b) provided goals that could not be achieved or executed in the time allotted, (c) failed to provide appropriate reading and writing interventions, (d) failed to provide an appropriate educational placement in a more restrictive setting, and/or (e) failed to provide appropriate modifications and accommodations. (*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*)

Issue 6: Whether DCPS denied Student a FAPE by refusing to provide an education record following parental request, specifically the "LRE report" or "LRE observation report." (*Petitioners have the burden of persuasion.*)

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Issue 7: Whether DCPS denied Student a FAPE by failing to implement IEPs when it (a) failed to provide assistive technology as required by the 4/24/19 IEP; (b) failed to properly implement reading and writing interventions from 4/24/19, as “evidence based programs” were not delivered; and/or (c) failed to implement Extended School Year (“ESY”) as required by the 3/12/20 IEP, because DCPS was incapable of implementing a number of IEP goals.³ (*Petitioners have the burden of persuasion.*)

Issue 8: Whether DCPS denied Student a FAPE by providing an inappropriate placement for ESY in 2020, where the program in which Student was placed (a) could not implement Student’s IEP; (b) was a Specific Learning Support (“SLS”) program that was inappropriate and more restrictive than called for by Student’s IEP; and/or (c) was not determined by a team including Parents. (*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*)

Issue 9: Whether DCPS denied Student a FAPE by (a) failing to provide an educational placement capable of implementing Student’s IEP for 2020/21,⁴ and/or (b) providing an inappropriate educational placement and corresponding IEP prior to 2020/21, justifying unilateral placement at Nonpublic School. (*Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall reimburse Parents for all costs of placement of Student at Nonpublic School, including tuition, transportation, related services, and any other associated costs, from the beginning of 2020/21 until the HOD is issued or FAPE is offered consistent with the HOD.
3. DCPS shall reimburse Parents for all costs related to private services and support, including any tutoring, transportation to and from the Lindamood-Bell summer program.⁵

³ Subsection (c) of this issue in the Prehearing Order, which stated “failed to provide occupational therapy (‘OT’) from November 2019 through January 2020 as required by the 11/6/19 and 12/4/19 amended IEPs,” was withdrawn without prejudice by Petitioners’ counsel at the beginning of the due process hearing.

⁴ All dates in the format “2020/21” refer to school years.

⁵ Request for reimbursement in the due process complaint (paragraph 3 of relief requested) for “any private assessments/evaluations done that were done to determine [Student’s] needs from February 2019 to the present” was withdrawn without prejudice by Petitioners’ counsel during the prehearing conference. In addition, request for reimbursement for “occupational therapy” in paragraph 3 of the relief requested in the Prehearing Order was withdrawn without prejudice by Petitioners’ counsel at the beginning of the due process hearing.

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4. DCPS shall provide or fund appropriate compensatory education as proposed in a plan by Petitioners and/or determined by the Hearing Officer.⁶
5. Any and all other relief that is equitable, just and appropriate to remedy the denials of FAPE in this case.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁷ are as follows:

1. Background. Student is a resident of the District of Columbia; Petitioners are Student's Parents.⁸ Student is *Age*, *Gender* and in *Grade* at Nonpublic School, where Student began at the beginning of 2020/21; Student was previously at Public School for years.⁹ Student has no behavior concerns, is a hard worker and very cooperative, completes all assignments and homework, and is very diligent.¹⁰

2. DCPS conducted a psychological reevaluation of Student dated 1/17/20; Student has a diagnosis of dyslexia, with core overall reading skills that are below age and grade-level expectations; Student's scores are consistent with mixed dyslexia, with difficulty across the language spectrum; Student has shown a pattern of difficulty responding to targeted interventions.¹¹ Student has challenges meeting grade level expectations in language-based subjects; when text is read to Student, Student can comprehend material on grade level.¹²

⁶ Petitioners' counsel was put on notice that, at the due process hearing, Petitioners must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent should be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁷ 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.

⁸ Father; Mother.

⁹ *Id.*

¹⁰ P5p125.

¹¹ P46p511-13 (based on various assessments, including the Feifer Assessment of Reading ("FAR")).

¹² P46p498-99.

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3. The 1/17/20 reevaluation states that Student has the potential to make adequate strides in reading, provided Student has access to specific targeted reading intervention programs; Student would benefit from balanced reading programs that target all five pillars of early reading: phonemic awareness, phonics, fluency, vocabulary and comprehension.¹³ Student's overall performance indicates a learning disability specific to reading and written expression and that specialized instruction should be "both extensive and intensive"; multiple reading strategies reinforcing various aspects of the reading process will most likely be needed; dyslexic students need to be taught, slowly and thoroughly, with lots of practice.¹⁴ Early intervention is key with dyslexia.¹⁵

4. Parents have been very involved, very conscientious and always on top of Student's education, with concerns that Student was not learning fast enough and Student's progress was not sufficient.¹⁶ LEA Representative does "not blame them," for Parents simply wanted what good parents want.¹⁷ Mother put tremendous effort into understanding and tracking the special education process for Student, including very detailed spreadsheets with scores of emails and other substantive documents linked electronically, and binders containing critical documents.¹⁸ Parents requested many meetings with Public School and were always seeking more reading support for Student, but not less of anything else.¹⁹ Public School was their neighborhood school and Parents were connected due to their older children attending Public School and having good relationships with teachers there.²⁰

5. Public School tried hard to work with Parents, including numerous changes to Student's IEPs.²¹ Public School was very responsive to Parents, such as LEA Representative responding within hours on a Sunday afternoon to an erroneous Location of Services ("LOS") letter; Mother emailed one evening about Student being bored the day before during quiet time and Student's teacher responded within 10 minutes offering academic-related options for Student.²² In response to Parents' concern over delay, LEA Representative explained that Public School was doing its best to expedite a process that usually takes a much longer time.²³ The Public School team put its "heart" into Student's programming and wanted Student to do as well as possible.²⁴ Public School teachers gave up their planning time to add extra programming time for Student.²⁵

¹³ P46p513.

¹⁴ *Id.*

¹⁵ Educational Consultant.

¹⁶ LEA Representative.

¹⁷ *Id.*

¹⁸ P33p434-42; P34p443-50; Mother.

¹⁹ LEA Representative.

²⁰ *Id.*

²¹ *Id.*

²² P4p97; P2p35.

²³ P4p63.

²⁴ LEA Representative.

²⁵ *Id.*

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6. IEPs. Student's IEP disability classification has consistently been Specific Learning Disability.²⁶ Student's 10/6/17 IEP provided for 1 hour/week of specialized instruction outside general education in reading, 1 hour/week of specialized instruction outside general education in written expression, 20 minutes/week of specialized instruction inside general education in math, 45 minutes/week of specialized instruction inside general education in written expression, along with 2 hours/month of Speech Language Pathology ("SLP") outside general education and 2 hours/month of Occupational Therapy ("OT") outside general education.²⁷

7. Student's 5/18/18 IEP provided for 1 hour/week of specialized instruction outside general education in reading, 45 minutes/week of specialized instruction inside general education in math, 1.5 hours/week of specialized instruction inside general education in written expression, 1.5 hours/week of specialized instruction inside general education in reading, along with 2 hours/month of SLP outside general education and 2 hours/month of OT outside general education.²⁸

8. Student's 4/24/19 IEP provided for 1.5 hours/week of specialized instruction outside general education in reading, 45 minutes/week of specialized instruction inside general education in math, 1.5 hours/week of specialized instruction inside general education in written expression, 1.5 hours/week of specialized instruction inside general education in reading, along with 2 hours/month of SLP outside general education and 2 hours/month of OT outside general education.²⁹

9. Student's 11/6/19 Amended IEP provided for 2.5 hours/week of specialized instruction outside general education in reading, 45 minutes/week of specialized instruction inside general education in math, 1.5 hours/week of specialized instruction inside general education in written expression, 1.5 hours/week of specialized instruction inside general education in reading, along with 2 hours/month of SLP outside general education and 2 hours/month of OT outside general education.³⁰

10. Student's 12/4/19 Amended IEP did not change specialized instruction, but added new goals at Parents' request.³¹

11. Student's 1/22/20 Amended IEP provided for 5 hours/week of specialized instruction outside general education in reading, 45 minutes/week of specialized instruction inside general education in math, 1.5 hours/week of specialized instruction inside general education in written expression, 1.5 hours/week of specialized instruction inside general

²⁶ P7p138; P25p297; P8p150-51; P19p242-43; P16p237.

²⁷ P7p138,146.

²⁸ P9p158,167.

²⁹ P10p171,179.

³⁰ P12p195,203.

³¹ P13p207,216; LEA Representative.

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education in reading, along with 2 hours/month of SLP outside general education and 2 hours/month of OT outside general education.³²

12. Student's 3/12/20 IEP did not change specialized instruction from the prior amendment and provided for 5 hours/week of specialized instruction outside general education in reading, 45 minutes/week of specialized instruction inside general education in math, 1.5 hours/week of specialized instruction inside general education in written expression, 1.5 hours/week of specialized instruction inside general education in reading, along with 2 hours/month of SLP outside general education and 2 hours/month of OT outside general education.³³

13. Student's next IEPs were on 12/8/20 and 2/2/21 at Nonpublic School, which has no general education and provided 33.5 hours/week of special education, along with 3 hours/month of SLP and 3 hours/month of OT.³⁴

14. On 3/7/21, DCPS proposed an IEP for Student for 2021/22 which included 20 hours/week of specialized instruction outside general education, along with 2 hours/month of SLP outside general education, 2 hours/month of OT outside general education, and 30 minutes/day (sic) of OT consultation.³⁵

15. In summary, in reading outside general education, Student's IEPs increased specialized instruction from 1 hour/week in the 10/6/17 IEP, to 1.5 hours/week in the 4/24/19 IEP, to 2.5 hours/week in the 11/6/19 IEP, and then to 5 hours/week in the 1/22/20 IEP.³⁶ In reading inside general education, Student's IEPs provided 1.5 hours/week from the 5/18/18 IEP through the 3/12/20 IEP.³⁷

16. IEP Goals, Modifications and Accommodations. Parents provided detailed input for Student's IEPs, including goals for reading, writing and math.³⁸ Parents were generally in agreement with the school team on IEP goals.³⁹ Student's goals were capable of being achieved in service hours provided.⁴⁰ On 11/21/19 Mother noted that Student had mastered a reading goal so asked for a meeting to create new goals.⁴¹ The modifications and accommodations provided were appropriate and essential to allow Student access to everything else.⁴² Student will need accommodations "all day, every day," according to

³² P15p224p233.

³³ P25p297,310.

³⁴ P28p322; P29p341; Associate Head.

³⁵ R9p203,221.

³⁶ P32p410.

³⁷ *Id.*

³⁸ P2p42.

³⁹ LEA Representative.

⁴⁰ Special Education Teacher.

⁴¹ P2p25.

⁴² Special Education Teacher; LEA Representative; Manager (can comprehend grade level material with read aloud).

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DCPS, but with accommodations can do “great things.”⁴³ Essential modifications and accommodations included scribing and read aloud.⁴⁴

17. Cognitive Ability. Based on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) in the 1/17/20 psychology reevaluation, Student’s Full Scale IQ (“FSIQ”) was 110, in the High Average range, with all composite scores in the Average or High Average range.⁴⁵

18. Academic Abilities. Based on the Wechsler Individual Achievement Test – Third Edition (“WIAT-III”) in the 1/17/20 reevaluation, all of Student’s academic composite scores were Average, apart from Total Reading, Basic Reading, and Reading Comprehension and Fluency, which were all in the Below Average range with standard scores in the low 70s.⁴⁶ Student could “absolutely” access grade level core instruction with read aloud; Student is very bright.⁴⁷

19. Reading Programs at Public School. Parents wanted Student to learn to read.⁴⁸ As of 3/18/20, the plan for Student’s reading at Public School was (a) 4 – 30 minute sessions a week of small group Wilson Instruction, (b) 3 – 20-30 minute reading group (at end of reader’s workshop), (c) 1 – 30 minute Lindamood-Bell (“LMB”) Instruction, and (d) 2- 30 minute “Wilson Extension” sessions, requiring four different teachers providing reading instruction to Student each week, which Parents did not consider “researched based intervention delivered with fidelity.”⁴⁹ Wilson, Seeing Stars, and Leveled Literacy Intervention (“LLI”) are all evidence-based programs.⁵⁰

20. Educational Consultant believed that Student was not being provided Wilson with fidelity.⁵¹ Special Education Teacher told Parents that Wilson was not provided with fidelity to Student as recommended by Wilson.⁵² Special Education Teacher said that Student received no reading intervention with fidelity in 2019/20 at Public School.⁵³ LEA Representative considered Wilson implementation to be absolutely appropriate and noted that optimum use of Wilson would exceed the time in the school day.⁵⁴ Parent asserted that 1.5 hours/week of reading support inside general education was not adequate.⁵⁵ Specific

⁴³ Manager.

⁴⁴ Special Education Teacher; P25p310.

⁴⁵ P46p501.

⁴⁶ P46p503-06.

⁴⁷ Special Education Teacher.

⁴⁸ *Id.*

⁴⁹ P2p44.

⁵⁰ LEA Representative.

⁵¹ Educational Consultant.

⁵² Special Education Teacher.

⁵³ *Id.*

⁵⁴ LEA Representative.

⁵⁵ P2p44.

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reading programs are not to be included in IEPs, but can be described.⁵⁶ Public School asserted that its interventions for reading and writing were appropriate for Student and provided progress and growth.⁵⁷

21. Extra Services. Student had a private tutor paid by Parents for 1 hour/week from mid-October 2019 through February 2020.⁵⁸ Public School provided more specialized instruction than was included on Student's IEPs.⁵⁹ In 2018/19, Student had 1 hour/week of specialized instruction outside general education on IEP, but was receiving 2.5 to 4.5 hours/week (8 30-minute sessions of Foundations and a 30-minute session of LMB).⁶⁰ Knowing Student was receiving so much specialized instruction while making so little progress would have deepened Parents' concerns.⁶¹ Changes in the level of specialized instruction provided to Student were made without a PWN or IEP change.⁶² Student's IEP should reflect the amount of services actually receiving.⁶³ It was not appropriate to provide specialized instruction before or after school.⁶⁴

22. Reading Progress. The gap between Student's academic achievement in reading and grade level continued to grow over time.⁶⁵ Mother's careful assessment was that Student's reading gap was getting larger over time between the end of 2017/18 and the beginning of 2019/20.⁶⁶ The LRE team observers on 2/10/20 found that Student "[d]oes not retain phonemic skills or sight words" so remained two years below grade.⁶⁷ Considering how young Student was, Educational Consultant considered being two years below grade in reading to be unacceptable and that Student needed a lot more intensive services, including Wilson with fidelity.⁶⁸ Educational Consultant believed Student needed Wilson applied in other subjects, so there would be consistency across classrooms at Public School, as at Nonpublic School.⁶⁹

23. Specifically, in April 2019 Student was at level "E."⁷⁰ Progress report on 6/6/19 (End of Year ("EOY") 2018/19) noted that Student read at level "G" independently.⁷¹ By

⁵⁶ Educational Consultant; LEA Representative.

⁵⁷ LEA Representative; Special Education Teacher; Reading Specialist.

⁵⁸ Mother; P32p409.

⁵⁹ LEA Representative; Special Education Teacher.

⁶⁰ LEA Representative; Father (increase to 2.5 hours/week on IEP occurred on 11/6/19).

⁶¹ Father; Mother (only learned when 2.5 hours/week began during the due process hearing).

⁶² Mother.

⁶³ Manager.

⁶⁴ *Id.*

⁶⁵ Reading Specialist (Student fell further behind peers in reading at Public School); P4p55 (12/6/19); Mother; Educational Consultant.

⁶⁶ P41p456.

⁶⁷ P5p125,128.

⁶⁸ Educational Consultant ("no meaningful progress" at Public School).

⁶⁹ Educational Consultant.

⁷⁰ P4p55.

⁷¹ P2p33.

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December 2019 Student was evaluated at level “H.”⁷² At EOY 2018/19, Student was about 1.5 years below grade and by the EOY 2019/20, Student was about 2 years below grade.⁷³ Student was at level “I” in March 2020 and was at level “J” by May 2020, although not formally assessed due to distance learning.⁷⁴ Progress reports on 5/8/20 referred to levels “I” and “J,” which were 2 years below grade.⁷⁵ Student’s reading at Nonpublic School on 9/22/20 at level “I” (2 years below grade) was at 75 words correct per minute (“wcpm”) and 50% accuracy for decoding.⁷⁶ Student’s reading at Nonpublic School in November 2020 at the 560 lexile level was at 92.5% accuracy and 59 wcpm, with literal comprehension.⁷⁷ Student’s instructional reading level at Nonpublic School in January 2021 was “J,” at 51 wcpm and an accuracy rate of 89, more than 2 years below grade.⁷⁸

24. Near the end of the due process hearing (on 6/1/21), Program Specialist was asked whether Student was at “N” level currently at Nonpublic School and responded that she was not aware of information from the last week or two.⁷⁹ Following his initial testimony on 5/11/21, Father credibly testified in rebuttal on 6/1/21 that at a parent-teacher conference with Nonpublic School on 5/19/21 the school provided a video of Student reading and an update that Student was at an independent level “N,” with 99% accuracy and over 100 wcpm; Student made 1.5 years of progress in less than a year at Nonpublic School after years of slow growth at Public School.⁸⁰

25. Concerns Increase. Student was not progressing adequately in 2019/20; a key meeting of the IEP team occurred on 10/30/19 when LEA Representative told Parents that Student might not be able to get the help needed at Public School; instead, Student might need the support of an SLS classroom within DCPS or a private school like Nonpublic School.⁸¹ LEA Representative stated that there were a very few times that students did not respond to the interventions Public School provided.⁸² Mother understood that Public School was saying that Student needed more services.⁸³ Parents registered for open house at Nonpublic School on 10/30/19.⁸⁴

26. LEA Representative testified that Parents were not the only ones concerned about Student’s slow rate of learning.⁸⁵ LEA Representative also testified that she believed

⁷² P4p55.

⁷³ P37p452-53; Mother.

⁷⁴ R9p210.

⁷⁵ P2p33,34.

⁷⁶ P49p535.

⁷⁷ P28p324.

⁷⁸ P29p343-44.

⁷⁹ Program Specialist.

⁸⁰ Father.

⁸¹ Mother; P2p21; P3p49,50 (Nonpublic School mentioned as “classic” private school).

⁸² P32p402; Mother.

⁸³ Mother.

⁸⁴ P32p402.

⁸⁵ LEA Representative.

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Student was making meaningful progress at Public School and that she never told Parents that Student needed more reading instruction or that Student was being denied a FAPE.⁸⁶ LEA Representative explained that she mentioned Nonpublic School to Parents as a private school located within the District of Columbia when explaining the full continuum of services.⁸⁷ If Public School was not sufficient, Parents could consider a self-contained program within DCPS or a full-time placement at a private school like Nonpublic School.⁸⁸ LEA Representative described *Proposed Public School* as the “next level placement” after Public School.⁸⁹ Parents repeatedly made statements in email to Public School stating “[LEA Representative] stated that [Public School] was not providing [Student] FAPE” and the like, without contradiction from Public School.⁹⁰ LEA Representative testified that Parents always “had to have the last word” so she did not bother to try to clarify the record.⁹¹

27. After the October 2019 meeting, Parents and DCPS talked about the slow progress Student had made on goals and that Public School could not provide the intensity of services that the IEP team thought Student required, which again led to discussions of SLS programs and mention of Nonpublic School.⁹² Parents were seeking the “variable” that could increase the rate of Student’s progress, hoping it would become clear through an educational evaluation or an LRE review.⁹³ On 12/8/19, Parents reiterated that Student needed more intensive services and interventions.⁹⁴ During a 12/18/19 meeting with Public School, Parents understood that all agreed that the amount of specialized instruction outside general education for reading needed to be increased to support Student’s needs; there was discussion of services needed and how Public School “is currently not able to provide [Student] FAPE.”⁹⁵ LEA Representative was to discuss with the Public School principal options to increase the time Student was receiving.⁹⁶

28. Public School’s inclusion approach did not allow additional time for specialized instruction outside general education beyond what Student was already receiving.⁹⁷ Parents were told that Student’s specialized instruction could not be increased at Public School without omission of critical instruction including content area subjects.⁹⁸ Parents sought more 1:1 pull out for Student in place of small groups to increase the intensity of reading

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ P4p81; Administrative Notice.

⁹¹ LEA Representative.

⁹² P4p76.

⁹³ P2p26 (12/4/19).

⁹⁴ P4p55.

⁹⁵ P2p31; P32p404; Mother.

⁹⁶ P2p31; Mother.

⁹⁷ P2p26 (12/4/19).

⁹⁸ P2p27; P14-3.

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intervention.⁹⁹ Having 1:1 sessions with one provider and one instructional approach was positive for Student during distance learning.¹⁰⁰ Parents understood from LEA Representative that DCPS had dedicated programs across DCPS that support more intensive needs than the inclusion model at Public School; LEA Representative also mentioned Nonpublic School.¹⁰¹ Parents understood that LEA Representative reached out for more information about those programs that might be a match or have availability; LEA Representative initiated a referral to the LRE team on 12/4/19 to evaluate Student.¹⁰² Parents remained concerned about the time required for these processes and the impact on Student's education.¹⁰³

29. On 1/24/20, Parents disagreed that Student's Amended IEP was adequate, as they believed Student needed specialized instruction in every class since every class involved reading and language; Parents disagreed that Public School was an appropriate placement; they considered that FAPE was being delayed by the lengthy process; Parents wanted to be part of the discussion and decision on the "full continuum of placements."¹⁰⁴ Parents also disagreed with Student's 10/30/19 draft IEP (amended IEP on 11/6/19), Student's 12/4/19 amended IEP, and Student's 3/12/20 IEP.¹⁰⁵

30. LRE Team Process. Both Public School and Parents hoped an LRE review process would provide insight to better serve Student.¹⁰⁶ Parents requested information about a more restrictive setting, which triggered the LRE process.¹⁰⁷ Parents understood that an LRE team could analyze the situation and advise on best next steps for their child's reading challenges, including a significant increase in services.¹⁰⁸ Mother never discussed with DCPS whether more restrictive options were possible that were less than Nonpublic School or SLS.¹⁰⁹

31. The reason for referral to the LRE process made by Public School was that Student was "not making adequate progress" and Student's reading remained two years below grade despite receiving intensive intervention, including "Wilson Reading 4 x weekly, Double Dose Foundations 4 x weekly, LMB Seeing Stars weekly, LMB summer full day six-week program."¹¹⁰

⁹⁹ P2p27.

¹⁰⁰ P2p33.

¹⁰¹ P2p26.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ P4p80.

¹⁰⁵ Mother.

¹⁰⁶ LEA Representative.

¹⁰⁷ *Id.*

¹⁰⁸ Mother; P2p21.

¹⁰⁹ Mother.

¹¹⁰ P4p82; P5p125.

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32. On 12/5/19 LEA Representative sent Parents a list of the DCPS schools that had SLS programs for elementary students and invited Parents to contact the closest schools for information and possible observation; Mother responded that they did not have enough information about the SLS programs to know if they were appropriate; LEA Representative explained that the SLS programs provide more intensive programming for students with learning disabilities, especially in reading, and provide more time in the day for 1:1 and small group instruction.¹¹¹ Parents observed Proposed Public School (scheduled for 2/10/20).¹¹²

33. On 12/13/19, LEA Representative emailed Parents that “our” request for an LRE review was accepted and the documentation submitted was sufficient for a more intensive program setting, so the need for an observation was “waived” and the request passed on to the DCPS Location of Services team; Proposed Public School and another school had SLS classes that might be able to support Student “in the comprehensive manner you are seeking.”¹¹³

34. On 12/15/19, Parents emailed that they understood the LRE process to work differently (as they set forth); on 12/18/19 LEA Representative agreed to re-initiate the LRE process and include case review, which had initially been omitted.¹¹⁴ Parents noted that they had not been included as part of the IEP team in any recommendations by the LRE team; LEA Representative responded that Parents were “absolutely correct” that the process moved differently than expected, which was “a surprise to us as well as for you.”¹¹⁵ Parents asked how the LRE process helped inform what the next steps should be for Student.¹¹⁶ Parents noted their understanding that a change in placement involved the IEP team, but Parents had not been part of any meetings.¹¹⁷

35. LRE Report. An LRE team of 2 observers came to Public School on 2/10/20 and issued a 4-page report dated 2/10/20 in which details were provided from their 2-hour observation, but no meaningful recommendations were provided for Student.¹¹⁸

36. Parents repeatedly requested the LRE report and without the report felt unable to participate fully in development of Student’s IEP.¹¹⁹ LEA Representative provided Parents a statement and excerpts from the LRE review, noting that LRE reports are no longer issued to Parents; the observers noted that Student’s challenge in decoding did not prevent grade

¹¹¹ P4p64-65.

¹¹² P4p74.

¹¹³ P4p56.

¹¹⁴ Mother; P4p57; P2p31.

¹¹⁵ P4p58.

¹¹⁶ P4p59.

¹¹⁷ P4p72.

¹¹⁸ P5p125-28 (the single primary recommendation was “[d]ifferentiate classroom teaching using a variety of specialized instruction strategies to meet the needs of all learners”).

¹¹⁹ P2p44; P4p92-94 (Parents felt unable to adequately participate in the absence of the LRE report and continued to seek the report); Mother.

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level comprehension skills, so the suggestion was that “servicing be focus (sic) on the area in which [Student] has the greatest need.”¹²⁰

37. Proposed Public School. On 1/16/20, Mother received an LOS letter from DCPS dated 1/3/20 stating that Proposed Public School had been identified as Student’s LOS based on the most recent IEP, without mention of SLS.¹²¹ Parents contacted DCPS to note their surprise and concern over not being involved in the decision or having a discussion among the IEP team about appropriate services and placement.¹²² LEA Representative quickly responded that the letter was sent out by mistake due to exploring “alternative settings”; LEA Representative stated that Parents “should ignore the letter” as nothing had changed for Student, although if Parents wanted a more intensive program the Proposed Public School seat would be available for only 30 days.¹²³

38. Parents decided to visit Proposed Public School and pursued the inconsistencies of DCPS discussing SLS, which has a minimum of 20 hours/week of specialized instruction, while including only 5 hours/week outside general education on Student’s IEP.¹²⁴ LEA Representative sought to leave it up to Parents to continue at Public School or to pursue a change in placement to SLS, which would require Student’s IEP to be revisited; a self-contained SLS setting would have required changing Student’s IEP to 20 hours/week of specialized instruction.¹²⁵

39. Parents understood that the SLS program they observed at Proposed Public School was for lower functioning children than Student; a child with Student’s needs at Proposed Public School would not be recommended for SLS, but placed in a regular special education program at Proposed Public School.¹²⁶ LEA Representative did not propose 20 hours/week of specialized instruction while Student was at Public School, which would have taken away general education classes where Student was proficient.¹²⁷ Special Education Teacher was clear that Student did not need a self-contained program such as SLS.¹²⁸

40. On 7/11/20, Parents received a letter from DCPS dated 6/29/20 that identified Proposed Public School as the LOS for Student for 2020/21 because it was the closest school with space in an SLS classroom.¹²⁹ Parents again sent a detailed email to LEA Representative noting that they were not involved in any change in placement to put Student in an SLS classroom and recounting the visit to the Proposed Public School SLS classroom

¹²⁰ P4p91.

¹²¹ P4p75; P4p78; Mother.

¹²² P4p76.

¹²³ P4p76,78.

¹²⁴ P4p78-79.

¹²⁵ P4p80; LEA Representative.

¹²⁶ P4p81.

¹²⁷ LEA Representative.

¹²⁸ Special Education Teacher.

¹²⁹ P4p95.

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in February 2020.¹³⁰ LEA Representative promptly responded that it was clearly an error and that such a change “cannot occur without local school and parental involvement.”¹³¹

41. Assistive Technology. Student’s 4/24/19 IEP provided that no assistive technology was recommended beyond that provided by the classroom setting.¹³² Public School had a wide array of technology for students, including a laptop option for every student, speech-to-text and text-to-speech, along with Google apps.¹³³ Public School provided so much technology routinely that it was very rare for a student to need more assistive technology.¹³⁴ LEA Representative believed it best to wait until Student assimilated the technology already offered Student before adding more.¹³⁵

42. Parents requested an assistive technology assessment at the 10/30/19 IEP team meeting, but Public School didn’t agree and didn’t provide a PWN.¹³⁶ Mother explained that they sought the assistive technology assessment and addition of assistive technology to Student’s IEP because Student’s 2019/20 teacher did not know how to set up the speech-to-text technology that Student had been using in 2018/19 (and prior teacher and OT provider were both gone in 2019/20).¹³⁷ Student’s 1/22/20 Amended IEP noted that Student had speech-to-text and read aloud on a dedicated laptop in the classroom.¹³⁸ Parents sought an assistive technology assessment to see if there were any other resources to accommodate Student’s inability to read and write.¹³⁹ The 1/22/20 PWN stated that Parents requested an assistive technology assessment and the IEP team agreed.¹⁴⁰ The assistive technology evaluation was completed with recommendations, with the most significant suggesting a tablet for Student in place of a laptop.¹⁴¹ The 2/4/20 Assistive Technology Collaboration Summary and Implementation Plan concluded that Student would benefit from access to dictation, text-to-speech, digital graphic organizers, word prediction keyboard, accessible keyboard and worksheet accessibility.¹⁴²

43. Parents raised concerns about Student using the teacher’s phone to do speech-to-text because a laptop was not available.¹⁴³ LEA Representative testified that Student was doing well with speech-to-text and that using teacher’s smartphone was to permit Student to

¹³⁰ P4p96.

¹³¹ P4p97,98.

¹³² P10p172 (LEA Representative did not recall any disagreement from Parents at that time).

¹³³ LEA Representative.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Father.

¹³⁷ Mother.

¹³⁸ P15p224,25.

¹³⁹ P47p525; P15p225 (1/22/20 Amended IEP).

¹⁴⁰ R10p232.

¹⁴¹ P25p298; LEA Representative.

¹⁴² P47p518,521.

¹⁴³ P2p37.

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access the technology without having to always carry a laptop; Public School was “teaching tools for life.”¹⁴⁴

44. Extended School Year (ESY). Student’s 3/12/20 IEP required ESY for the summer of 2020; Mother agreed with the ESY goals, one of which referred to “Wilson Steps 1-5”; another of the 10 goals referred to “Steps 1-5.”¹⁴⁵ In the absence of Wilson lists, the ESY teacher used Dolch sight words for Student’s grade.¹⁴⁶ Student was rated as progressing during ESY.¹⁴⁷ DCPS did not fail to implement Student’s ESY goals, all of which were from Student’s existing IEP.¹⁴⁸ “ESY is ESY”: there were not different levels of ESY groups, as there are no general education students in ESY.¹⁴⁹ Parents had full participation in the development of the IEP containing the ESY goals; there was no separate IEP team meeting regarding ESY.¹⁵⁰

45. Parents complained about Student being assigned to a virtual SLS classroom with other children who had greater needs in multiple areas and that the teacher was not trained in Wilson and did not have access to Wilson materials.¹⁵¹ DCPS explained to Mother that SLS during ESY was an organizing construct and not a placement; Student was an atypical child in ESY; ESY is not about making progress, but sustaining skills acquired during the school year.¹⁵² In ESY, Student was in a small group with only one other child, all other small groups had 3-5 children.¹⁵³

46. Nonpublic School. Petitioners’ counsel emailed a unilateral placement letter concerning Student to DCPS on 8/3/20 giving “official notice” of Parent’s plans to place Student at Nonpublic School after having dozens of meetings and countless letters and emails with Public School outlining their concerns about Student’s services.¹⁵⁴ Nonpublic School is a private special education day school that serves students in grades 1-12 with dyslexia, ADHD and other language-based learning differences.¹⁵⁵ Nonpublic School is on OSSE’s list of Approved Nonpublic Day Schools as of 3/21/21, with “full” approval status.¹⁵⁶

¹⁴⁴ LEA Representative.

¹⁴⁵ P25p297,313-19; Mother.

¹⁴⁶ P32p423.

¹⁴⁷ P54p632.

¹⁴⁸ LEA Representative.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ P4p99; Mother.

¹⁵² P31p395.

¹⁵³ P31p397-98.

¹⁵⁴ P43p460-62.

¹⁵⁵ P75p934; Educational Consultant.

¹⁵⁶ P64p835-36; Associate Head (Nonpublic School has a current OSSE Certificate of Approval).

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47. Educational Consultant concluded based on current data from Nonpublic School, observations of Student in multiple settings, and a review of Student's education records, that Nonpublic School was and is Student's appropriate placement to access general education curriculum; Student requires a structured environment with low student-to-teacher ratio, staff trained in evidence-based methodologies, and school-wide curriculum practices to ensure consistency between teachers and subjects; Student did not receive such programming at DCPS.¹⁵⁷ DCPS asserted that Student does not need 35 hours/week of specialized instruction and related services; in particular, Student does not need specialized instruction for recess, lunch and specials (art, music, PE).¹⁵⁸ DCPS also asserted that Nonpublic School does not provide 35 hours/week as it claims.¹⁵⁹

48. As of 5/11/21, Student's teacher at Nonpublic School was pleased with Student's progress in reading, although not documented at that point.¹⁶⁰ Nonpublic School provided the services Student needed to close the gap.¹⁶¹ Student has really made progress and is very comfortable at Nonpublic School; it's the right placement for now.¹⁶² There are trade-offs in Student's education, but support in reading is key; Public School pulled Student from social studies.¹⁶³ Nonpublic School does not currently have a music teacher; Student takes private music lessons (learning banjo) and made a Native American musical instrument as part of Nonpublic School classwork.¹⁶⁴ During the pandemic, PE at Nonpublic School became a "movement" class.¹⁶⁵

49. Student's transition to Nonpublic School was "great" for Student; Student has confidence and is thriving; Student is very engaged at Nonpublic School and there is a "tremendous" difference from Public School.¹⁶⁶ Student had been very aware that Student was not aligned with peers at Public School; book bins in the classroom at Public School started at "H," when Student was at level "F."¹⁶⁷ Student could not read or write to be able to correct peers' papers at Public School when expected to do so.¹⁶⁸ Student is connecting

¹⁵⁷ Educational Consultant; P75p941.

¹⁵⁸ Manager; Reading Specialist.

¹⁵⁹ Manager; P28p322.

¹⁶⁰ Associate Head.

¹⁶¹ Mother (Nonpublic School explained it must "fill the potholes" before Student can "drive on the road").

¹⁶² Mother.

¹⁶³ Father; Mother ("reading over music"); Special Education Teacher (pulled Student out of class during social studies).

¹⁶⁴ Associate Head; Mother.

¹⁶⁵ Mother; Associate Head.

¹⁶⁶ Father.

¹⁶⁷ P32p401; Mother.

¹⁶⁸ Mother.

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with peers at Nonpublic School and helped create a “club” in which Student is the vice president.¹⁶⁹ Student is flourishing at Nonpublic School.¹⁷⁰

50. Compensatory Education. If Student had received appropriate IEPs, with needed services and placement in 2019/20, Student should have made at least one year’s progress in one year’s time.¹⁷¹ As compensatory education, Petitioners are seeking only payment by DCPS of the cost (up to \$3,850) for Student to attend the 2021 summer program of Nonpublic School to make up the gap from the denials of FAPE and to begin 2021/22 closer to grade level; Educational Consultant considers this sufficient to the extent possible to put Student where Student should be but for the denials of FAPE.¹⁷²

Conclusions of Law

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

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

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

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

¹⁶⁹ *Id.*

¹⁷⁰ Educational Consultant.

¹⁷¹ Educational Consultant; P76p944.

¹⁷² *Id.*

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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 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 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement from 10/30/19 when Student needed a more intensive IEP and a more restrictive placement. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

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Petitioners established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which failed to meet its burden of persuasion, as discussed below. This issue involves 4 IEPs from 2019/20 (3 of which were amendments): 11/6/19, 12/4/19, 1/22/20 and 3/12/20.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “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 each 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; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at *12 (D.D.C. 5/18/21) (“the relevant inquiry is on the IEP’s adequacy at the time it was developed, based on the information known then”); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEPs is analyzed by considering the specific concerns raised by Petitioners.¹⁷³ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

The central issue in this case is whether Student made appropriate progress in reading at Public School despite Student’s disability, or whether additional services should have been added to attempt to increase Student’s progress. Public School now takes the position that Student was progressing adequately in 2019/20, but at the time LEA Representative and others shared Parents’ concern that Student’s progress was not adequate. LEA Representative clearly testified that Parents were not the only ones concerned about Student’s slow rate of progress in reading. Public School’s referral initiating the LRE process explained that Student was “not making adequate progress” as Student’s reading remained two years below grade despite intensive interventions. Worse, the gap continued to widen, which Parents found unacceptable.

A pivotal IEP team meeting occurred on 10/30/19 when LEA Representative told Parents that Student might not be able to get the help needed at Public School, but might need the support of an SLS classroom within DCPS or a private school like Nonpublic School. LEA Representative described Proposed Public School as the “next level placement” after Public School. Parents and Public School talked about the slow progress Student had made on goals and that Public School could not provide the intensity of services

¹⁷³ 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 raised and are discussed herein.

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that the IEP team thought Student required. Parents were seeking to find the “variable” that could increase the rate of Student’s progress.

Parents understood that the team agreed that the amount of specialized instruction outside general education for reading needed to be increased to support Student’s needs. The team discussed services needed and how Public School “is currently not able to provide [Student] FAPE.” LEA Representative agreed to discuss options with the Public School principal to increase the specialized instruction Student was receiving. Parents understood and confirmed in writing to Public School that “[LEA Representative] stated that [Public School] was not providing [Student] FAPE” and similar statements, without contradiction from Public School. LEA Representative testified that Parents always “had to have the last word,” so she did not bother to try to clarify the record, which the undersigned does not find credible given the lack of contemporaneous contradiction of Parents’ understanding at least for the record.

Public School’s inclusion approach did not allow additional time for specialized instruction outside general education beyond what Student was receiving. Parents were told that Student’s specialized instruction could not be increased further at Public School without omission of critical instruction, including content area subjects, so Parents suggested more 1:1 pull out for Student in place of small groups to increase the intensity of reading intervention. Parents also believed Student needed specialized instruction in every class since every class involved reading and language.

Parents understood from LEA Representative that there were dedicated programs across DCPS that could provide more intensive support than the inclusion model at Public School. LEA Representative mentioned Nonpublic School more than once as a possibility for Student. LEA Representative reached out for more information about the DCPS programs and initiated a referral to the LRE team on 12/4/19 to evaluate Student.

Rather than evaluating or even observing Student, the LRE team understood that a more restrictive placement was desired and was ready to move Student to an SLS classroom right away without input from Parents or the school team. Parents found this process unusual and through LEA Representative got the LRE team to do more of a review. Student was nonetheless twice assigned to Proposed Public School through the LOS process, with LEA Representative stating each time that the assignment was in error and that Parents should ignore the LOS letter. Parents instead decided to visit Proposed Public School and questioned the logic of DCPS discussing SLS, which has a minimum of 20 hours/week of specialized instruction, while including only a maximum of 5 hours/week of reading outside general education on Student’s IEP.

Parents’ visit to Proposed Public School made clear that the SLS program at Proposed Public School was not suitable for Student as it was for much lower functioning children. Parents understood that Proposed Public School could not help Student. Moreover, Parents were informed that a child with Student’s needs at Proposed Public School would not be recommended for SLS, but placed in a regular special education program at Proposed Public School. Student did not simply need a lot of specialized instruction hours, but an appropriate placement with more quality services of the sort being

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received at Public School and later provided at Nonpublic School. *See A.T.*, 2021 WL 1978792, at *3 (D.D.C. 5/18/21) (“[o]nce the IEP is developed, the school system must provide an appropriate educational placement that comports with the IEP. *Alston v. Dist. of Columbia*, 439 F. Supp. 2d 86, 90 (D.D.C. 2006)”).

The undersigned concurs in the expert opinion of Educational Consultant that Student being 2 years below grade in reading showed that Student was not making appropriate progress in the circumstances due to the IEPs in 2019/20, and that Student’s IEP required more intensive services, which would also require an appropriate placement that was suitable to carry out the IEP. This is not a question of simply bumping up specialized instruction hours for reading, as Student needed integrated support for reading across the school day.

In sum, this Hearing Officer concludes that DCPS failed to provide appropriate IEPs and placement in 2019/20 that were reasonably calculated to enable Student to make appropriate progress in light of Student’s circumstances. This was a denial of FAPE that results in reimbursement for Student’s unilateral placement for 2020/21, along with compensatory education, as discussed in the remedies section, below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to evaluate in all areas of suspected disability when it failed to conduct an assistive technology assessment following Parents’ request in October 2019, and failed to issue a proper PWN. (Petitioners have the burden of persuasion.)*

Petitioners met their burden of persuasion on the failure to provide a timely assistive technology assessment, although the impact was limited, while the PWN is merely a procedural matter.

Public School routinely provides a great deal of technology to students, including options for laptops with speech-to-text and text-to-speech, so it is rare for a student to need more assistive technology. Parents nonetheless sought an assistive technology assessment to determine if there were any other resources that might help accommodate Student’s inability to read and write. Specifically, Mother explained that they sought the assessment and addition of assistive technology to Student’s IEP because Student’s 2019/20 teacher did not know how to set up the speech-to-text technology that Student had been using in 2018/19, and turned to parents for assistance as Student’s prior teacher and OT provider were both gone in 2019/20. Parents’ request for an assistive technology assessment was renewed at the 1/22/20 IEP team meeting and granted. The resulting 2/4/20 Assistive Technology Collaboration Summary and Implementation Plan concluded that Student would benefit from access to a range of assistive technologies, most of which were being provided already. The most significant was recommending a tablet in place of a laptop.

The importance of assessing children in all areas of suspected disability was emphasized in *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z. B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See*

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also Long v. Dist. of Columbia, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); 34 C.F.R. § 300.304(c)(4).

While the question is a close one, this Hearing Officer concludes that DCPS committed a procedural violation at a minimum, *Z. B.*, 888 F.3d at 524, in not proceeding with an assistive technology assessment on 10/30/19. 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).

Here the delay of nearly 3 months significantly impeded Parents from participating in decision-making concerning whether assistive technology should be included on Student’s IEP and may have minimally impacted Student’s educational benefit. 34 C.F.R. § 300.513(a)(ii),(iii). This denial of FAPE contributes slightly to the compensatory education awarded below.

As for the lack of a proper PWN, the IDEA requires that a public agency must give prior written notice before it proposes to, or refuses to, initiate or change the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). DCPS failed to provide a PWN, which is a procedural violation, but Parents did not show that receiving a PWN concerning the denial of an assistive technology assessment on 10/30/19 would have made any practical or educational difference. Parents were fully aware of what was happening and knew that Public School did not agree to the assessment and that it did not take action in the final months of 2019.

Thus, the failure to provide a PWN does not rise to the level of a substantive violation as Parents have not persuaded the undersigned that lack of notice itself harmed Student’s education or Parents’ participation. *See Shaw v. Dist. of Columbia*, 2019 WL 498731, at *14-15 (D.D.C. 2/8/19), *report and recommendation adopted*, 2019 WL 935418 (D.D.C. 2/26/19) (“failure to provide prior written notice is a procedural violation of the IDEA, which constitutes a denial of a FAPE only if it negatively impacts ‘the student’s substantive rights.’ *Lesesne*, 447 F.3d at 834”); *Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 42 (D.D.C. 2006) (same); 34 C.F.R. § 300.513(a).

Issue 3: *Whether DCPS denied Student a FAPE by failing to include an appropriate LEA representative at IEP meetings in October, November, and/or December 2019 to ensure the team had information about the continuum of alternative placements and options in the District. (Petitioners have the burden of persuasion.)*

Petitioners did not meet their burden on this issue. IDEA regulations set out who should participate and LEA Representative adequately fulfilled the role of public agency representative. Specifically, 34 C.F.R. § 300.321 defines the composition of an IEP team and notes in subpart (4) that the public agency representative is to be (i) “qualified to

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provide, or supervise the provision of, specially designed instruction,” (ii) “knowledgeable about the general education curriculum,” and (iii) “knowledgeable about the availability of resources of the public agency.” The extensive paper trail in this case, along with LEA Representative’s hours of testimony, demonstrated LEA Representative’s competence and patience with Parents in an effort to provide Student all the services required. Reaching out to the principal and other sources of information does not suggest otherwise. The undersigned finds no violation here.

Issue 4: *Whether DCPS denied Student a FAPE by delaying an offer of FAPE and interfering with Parents’ right to participate in the placement decision through use of the “LRE team” process. (Petitioners have the burden of persuasion.)*

Petitioners did not meet their burden of persuasion on this issue, as the evidence in the hearing was that Petitioners were able to participate fully in Student’s IEP team meetings and related IEP team decisions, and were given options as to whether they sought a more restrictive setting or not. Much attention was paid to the LRE team that was brought in to consider more restrictive options for Student, which led to errors in telling Parents more than once that Student had been assigned to a new placement at Proposed Public School. But LEA Representative promptly clarified to Parents each time that the purported assignments to Proposed Public School were errors that should be ignored. Accordingly, there was no placement decision that was made by the IEP team (or anyone at Public School) from which Parents were left out.

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); *Z.B. by & through Sanchez v. Dist. of Columbia*, 382 F. Supp. 3d 32, 47 (D.D.C. 2019), and cases collected therein, *aff’d sub nom. Sanchez v. Dist. of Columbia*, 815 Fed. Appx. 559 (D.C. Cir. 2020), *cert. denied sub nom. Z.B. by & through Sanchez v. Dist. of Columbia*, 141 S. Ct. 375, 208 L. Ed. 2d 97 (2020) (the IDEA requires that a student’s parents be part of the team that creates the student’s IEP and determines the student’s educational placement).

Here, even if there was delay from Public School seeking input from central office and bringing in the LRE team observers on 2/10/20, that did not prevent ongoing efforts by Parents and Public School to provide the IEP and educational placement Student needed. Indeed, amended IEPs were developed on 11/6/19, 12/4/19, and 1/22/20, even before Student’s annual IEP on 3/12/20, which refutes Petitioners’ claim that they were blocked from proceeding by the LRE team. Accordingly, this Hearing Officer concludes that under these circumstances there was no violation.

Issue 5: *Whether DCPS denied Student a FAPE by providing inappropriate IEPs on 11/6/19, 12/4/19 and/or 3/12/20, which (a) provided insufficient specialized instruction hours that were based on what the school could provide and not Student’s individual needs, (b) provided goals that could not be achieved or executed in the time allotted, (c) failed to provide appropriate reading and writing interventions, (d) failed to provide an appropriate educational placement in a more restrictive setting, and/or (e) failed to provide appropriate*

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modifications and accommodations. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)

Just as in Issue 1 in which these same IEPs were considered, Petitioners established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which failed to meet its burden on subparts (a) and (d), which were ruled on in Issue 1, but met its burden of persuasion on the remaining subparts, as discussed below.

(a) Inufficient Specialized Instruction. Inufficient specialized instruction in the 2019/20 IEPs was fully discussed in Issue 1, where Petitioners prevailed. The undersigned would simply add here that Public School appeared to be cautious in not increasing specialized instruction above the level that could be served by the resources at Public School, which would not be a problem as long as the level of specialized instruction was sufficient, which it was not in this case, as discussed in Issue 1.

(b) Improper Goals. Petitioners next assert that IEP goals were included that could not be achieved or executed in the time allotted. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). Special Education Teacher testified that Student's goals were capable of being achieved in service hours provided. But even if they were not, that would not necessarily make them improper, for the Supreme Court has made clear that goals are to be appropriately ambitious. *Andrew F.*, 137 S. Ct. at 1000. While not achieving goals and carrying over the same goals from year to year may indicate failure to make meaningful progress, *see Andrew F.*, 137 S. Ct. at 994, lack of progress is not necessarily the fault of IEPs. Moreover, Parents provided detailed input for Student's IEPs, including goals for reading, writing and math, and were generally in agreement with the school team on IEP goals. For these reasons, the undersigned finds no violation here.

(c) Lacked Appropriate Reading and Writing Interventions. LEA Representative and other Public School witnesses convincingly testified that there were sufficient reading and writing interventions, which were appropriate for Student and provided progress and growth. As of December 2019, Student's interventions included Wilson Reading 4 x weekly, Double Dose Foundations 4 x weekly, and LMB Seeing Stars weekly. Moreover, specific methodologies are not required. *See Alexander G. through Stephen G. v. Downingtown Area Sch. Dist.*, CV 20-131, 2021 WL 1614400, at *7 (E.D. Pa. 4/26/21), quoting *Parker C. through Todd v. W. Chester Area Sch. Dist.*, CV 16-4836, 2017 WL 2888573, at *7 (E.D. Pa. 7/6/17) (school districts are "not required to provide a specific program or employ a specific methodology requested by the parent"). The undersigned finds no violation here.

(d) Lacked Placement in Sufficiently Restrictive Setting. Placement for the 2019/20 IEPs was also sufficiently addressed in Issue 1, where Petitioners prevailed.

(e) Failed to Provide Appropriate Modifications and Accommodations. An IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports that will be provided to enable the child to advance appropriately toward attaining annual goals. 34 C.F.R. § 300.320(a)(4). In addition, IEPs require a "statement of any

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individual appropriate accommodations” necessary to measure academic achievement and functional performance. 34 C.F.R. § 300.320(a)(6). Here, LEA Representative, Special Education Teacher and Manager each considered the modifications and accommodations provided Student to be appropriate and essential. Indeed, as Special Education Teacher testified, they allowed Student access to everything else, as Student’s comprehension was good when material was read aloud, so Student was progressing in core content areas.

In sum, DCPS did not prevail on the specialized instruction and placement issues discussed in Issue 1, but did prevail on the remaining IEP concerns raised here by Petitioners. *See S.M. v. Dist. of Columbia*, CV 19-2096 (RC), 2020 WL 7230266, at *5 (D.D.C. 12/8/20) (review of an IEP turns on whether it is reasonable, not whether it is ideal, quoting *Endrew F.*, 137 S. Ct. at 999). Certainly, repeating issues on which Petitioners prevail does not increase the remedies to be awarded below.

Issue 6: *Whether DCPS denied Student a FAPE by refusing to provide an education record following parental request, specifically the “LRE report” or “LRE observation report.” (Petitioners have the burden of persuasion.)*

Petitioners met their burden and proved a violation due to Public School’s delay in providing the contentious 2/10/20 LRE report, including a showing that withholding the report amounted to a substantive violation and denial of FAPE.

As a general matter, parents of a child with a disability have the right to examine all education records that pertain to the identification, evaluation, and educational placement of the child, and provision of a FAPE. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a), 34 C.F.R. § 300.613(a) (parents must be permitted to inspect and review any education records relating to their child that are collected, maintained, or used by an agency). *See also Jalloh ex rel. R.H. v. Dist. of Columbia*, 535 F. Supp. 2d 13, 21 (D.D.C. 2008) (“parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records”).

An “education record” under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act (“FERPA”). 34 C.F.R. § 300.611(b). Under FERPA, an education record includes records, files, documents, and other materials which “(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. Part 99.

Accordingly, this Hearing Officer holds that the LRE report was an education record that should have been made available to Petitioners, which is a procedural violation of the IDEA. Moreover, even though the LRE report contained very little substance, Parents did not know what wasn’t there and were thus significantly impeded in their efforts to participate in decision-making and help determine the best course for Student’s programming and setting. Parents had hoped to obtain clarity about the best path for Student from the LRE review, so assumed the report would provide information clarifying the situation for Student. Failure to give Parents access to the report thus amounts to a denial of FAPE pursuant to 34 C.F.R. § 300.513(a) with a substantive impact from impeding

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Student's right to a FAPE, and significantly impeding Parent's opportunity to participate in decision-making regarding the provision of a FAPE. This denial of FAPE contributes modestly to the award of compensatory education below.

Issue 7: *Whether DCPS denied Student a FAPE by failing to implement IEPs when it (a) failed to provide assistive technology as required by the 4/24/19 IEP; (b) failed to properly implement reading and writing interventions from 4/24/19, as "evidence based programs" were not delivered; and/or (c) failed to implement ESY as required by the 3/12/20 IEP, because DCPS was incapable of implementing a number of IEP goals. (Petitioners have the burden of persuasion.)*

Petitioners failed to meet their burden on the lack of implementation of Student's 4/24/19 and 3/12/20 IEPs in the specific areas asserted.

With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "de minimis failure to implement all elements of [the student's] IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is "the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is "no requirement that the child suffer educational harm in order to find a violation" in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016). Petitioners' claims are considered in turn.

(a) Assistive Technology. Student's 4/24/19 IEP provided no assistive technology beyond that provided to all students in the classroom setting. LEA Representative credibly asserted that Public School offers a great deal of technology to students, including a laptop option for every student with speech-to-text, text-to-speech and Google apps. It is not clear whether Petitioners are asserting that Student did not receive the technology provided to all students in the classroom, but those are not expressly required by Student's IEP. In any case, the undersigned is not persuaded that there was any material failure to implement assistive technology for Student based on the 4/24/19 IEP.

(b) Reading and Writing Interventions. Petitioners next assert that Public School failed to properly implement evidence-based reading and writing interventions from 4/24/19, but LEA Representative credibly testified that evidence-based programs were provided to Student, including Wilson, Seeing Stars, and LLI, all of which are evidence-based programs. The undersigned finds no violation here.

(c) ESY. Finally, Petitioners assert that Student's IEP goals were "incapable" of being implemented during 2020 ESY, which Petitioners' counsel explained was due to the reference to a "Wilson" list of 30 sight words. Student had 10 goals for ESY in the summer

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of 2020, one of which referred to 30 sight words from “Wilson Steps 1-5,” while another goal referred to a list of regular words from “Steps 1-5.” In the absence of the Wilson lists, the ESY teacher used Dolch sight words for Student’s grade. Student was reported as progressing during ESY. Thus, this Hearing Officer concludes that a shift to comparable sight word lists from another source in 1 or 2 out of 10 goals was a *de minimis* modification and that there was no material deviation from Student’s IEP relating to ESY.

Issue 8: *Whether DCPS denied Student a FAPE by providing an inappropriate placement for ESY in 2020, where the program in which Student was placed (a) could not implement Student’s IEP; (b) was an SLS program that was inappropriate and more restrictive than called for by Student’s IEP; and/or (c) was not determined by a team including Parents. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners did establish a prima facie case through documents and testimony, but Respondent met its burden of persuasion on these ESY issues.

The applicable legal standard for educational placement under the IDEA requires “school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student’s IEP.” *Middleton*, 312 F. Supp. 3d at 143, citing *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). See also *A.T.*, 2021 WL 1978792, at *12 (D.D.C. 5/18/21).

(a) Placement Could Not Implement IEP. Student’s 3/12/20 IEP required ESY for the summer of 2020, but DCPS did not fail to implement Student’s ESY goals, all of which were from Student’s existing IEP. LEA Representative credibly explained at the due process hearing that goals are not to include specific methodologies, but as discussed above any substitution of Dolch for Wilson word lists was *de minimis* in the view of the undersigned. Student was rated as progressing during ESY. The ESY classroom was able to implement Student’s IEP so there was no violation here.

(b) SLS Program Inappropriate and Too Restrictive. Parents were concerned about Student being assigned to a virtual SLS classroom with other children who had greater needs, which they thought was too restrictive given Student’s IEP. DCPS explained to Parent that reference to “SLS” during ESY was for purposes of organization and not a placement. LEA Representative credibly testified that “ESY is ESY,” and there were not different levels of ESY restrictiveness, as there are no general education students in ESY. Conversely, it is not possible to be too restrictive, as all are special education students. Student was an atypical child in ESY, and was given extra attention by being in a small group with only one other child, while all other small groups in Student’s class had 3-5 children. The undersigned finds no violation here.

(c) Lack of Parental Participation. As noted above, the IDEA 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). Here, however, Parents did have full participation in the development of the IEP

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containing the ESY goals. When Parents agreed to ESY for 2020, that merely required changing the IEP to “Yes” for ESY and the goals that had already been agreed to were incorporated. Importantly, there was no separate IEP team meeting regarding ESY. Thus, Parents were not left out of anything and fully participated. There is no violation here.

Issue 9: *Whether DCPS denied Student a FAPE by (a) failing to provide an educational placement capable of implementing Student’s IEP for 2020/21, and/or (b) providing an inappropriate educational placement and corresponding IEP prior to 2020/21, justifying unilateral placement at Nonpublic School. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners established a prima facie case on this issue through expert testimony and documents, shifting the burden of persuasion to DCPS. Based on analysis of the issues above, this final issue is readily resolved, with DCPS prevailing on subpart (a), and Petitioners prevailing on subpart (b), which repeats Issue 1.

(a) Placement for 2020/21 IEP. As noted above, Student must be provided a placement capable of fulfilling Student’s IEP. *See A.T.*, 2021 WL 1978792, at *3 (“[o]nce the IEP is developed, the school system must provide an appropriate educational placement that comports with the IEP”); *Johnson*, 962 F. Supp. 2d at 267 (DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP”).

Placement is discussed in Issue 1 where the undersigned concluded that a new, suitable placement is required for the increased services required by an appropriate IEP. Here, however, the question is whether the placement in place at Public School was capable of implementing Student’s IEP for 2020/21. The relevant IEP is the 3/12/20 IEP which required only 5 hours/week of specialized instruction outside general education for reading, and which was unchanged from the 1/22/20 Amended IEP. In short, the undersigned is persuaded that Public School was able to provide a suitable placement at that level of services. The problem, as explained in Issue 1, was that that level of services was too low.

(b) Inappropriate IEP and Placement for 2020/21. The remaining question is whether both the IEP and placement were inappropriate for 2020/21. This was resolved in Issue 1, where the undersigned thoroughly analyzed the situation and concluded that the IEPs issued in 2019/20, including the 3/12/20 IEP that would have applied to 2020/21, were not appropriate for Student under the circumstances. As noted in Issue 1, that results in the remedies discussed next.

Remedies

As the undersigned concluded in Issue 1, DCPS failed to provide appropriate IEPs and placement during 2019/20 that were reasonably calculated to enable Student to make appropriate progress in light of Student’s circumstances, which was a denial of FAPE that results in reimbursement for Student’s unilateral placement for 2020/21, along with compensatory education for this and other issues on which Petitioners prevailed, as discussed below.

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As the remedy for the denial of FAPE in Issue 1 concerning Student’s IEPs and placement in 2019/20, since a suitable public school was not available, Petitioners seek reimbursement for their payments to Nonpublic School for 2020/21. Judge Colleen Kollar-Kotelly recently confirmed in *A.T.*, 2021 WL 1978792, at *3 (D.D.C. 5/18/21), that “[i]f no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school,” quoting *Dist. of Columbia v. Vinyard*, 901 F. Supp. 2d 77, 80-81 (D.D.C. 2012) (Kollar-Kotelly, J.). See also *Montuori*, 2018 WL 4623572, at *3; *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (if a public school program were available to enable student to receive educational benefits, DCPS would not need to consider nonpublic placement).

Under the IDEA, however, 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 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 due to the denial of FAPE by DCPS failing to provide Student an appropriate IEP and placement, as discussed at length in Issue 1.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student, which Petitioners demonstrated by showing how well Student is doing at Nonpublic School this year. Considering whether placement is proper, under *Andrew F.*, 137 S. Ct. at 1001, the question would be whether Parents’ unilateral private placement was reasonably calculated to enable Student to make appropriate progress given Student’s circumstances. Cf. *Leggett*, 793 F.3d at 71, quoting *Rowley*, 458 U.S. at 207, 102 S. Ct. 3034. See also *Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994); *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008).

Here, Student has made progress and is very comfortable at Nonpublic School. Student is flourishing, with very good progress in reading according to the latest reports. DCPS sought to focus on the alleged shortcomings of Nonpublic School, which the undersigned did not find persuasive in light of the progress of Student. DCPS asserted that Nonpublic School does not provide 35 hours/week of specialized instruction and related services as it claims, but DCPS also asserted that Student does not need 35 hours/week of specialized instruction and related services. In the expert opinion of Educational Consultant, Nonpublic School is the appropriate placement for Student, who requires a structured environment with a low student-to-teacher ratio, staff trained in evidence-based methodologies, and school-wide curriculum practices to ensure consistency between teachers and subjects. Student did not receive this level of programming at DCPS,

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especially the consistency across subjects. In short, Nonpublic School is providing meaningful educational benefit and Student is making progress appropriate in Student's circumstances. For these reasons, this Hearing Officer concludes that Nonpublic School is proper and appropriate for Student, so the second prong is satisfied. *See* 34 C.F.R. § 300.148.

The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioners acted unreasonably. Here, Parents strenuously sought to understand the options available for their child and tried to interact reasonably with DCPS at each step, despite their serious concerns that their child was not receiving the services necessary to learn to read. While the interactions were sometimes challenging, DCPS understood that Parents simply wanted what good parents want – a satisfactory education in which their child overcomes disability to the extent possible in order to be able to read. The third prong is satisfied.

Accordingly, this Hearing Officer concludes that Parents should be reimbursed for Student's tuition, related services, and transportation at Nonpublic School for the entirety of 2020/21.

Compensatory education is also at issue based on the denials of FAPE found above relating to Issues 1, 2 and 6. In determining the amount of compensatory education for the denials of FAPE, there is often "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," but that does not permit the effort to be avoided. *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016). *See also Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, the situation is relatively straightforward. For compensatory education in this case to make up for the lack of reading services in 2019/20 (after 10/30/19), Petitioners seek payment by DCPS for the cost of Student attending the 2021 summer program at Nonpublic School, which should be no more than \$3,850. Educational Consultant submitted a Compensatory Education Plan and also credibly testified that attending Nonpublic School's summer program in 2021 will help Student make up the gap from the denials of FAPE found herein and will permit Student to begin 2021/22 closer to grade level.

Further, Educational Consultant stated that to the extent possible the summer program should be sufficient to put Student where Student would be but for the denials of FAPE. This remedy has been carefully considered by the undersigned, especially given Petitioners prevailing on only a portion of the issues, and found appropriate to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C.

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2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

ORDER

Petitioners have prevailed on certain issues in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- (a) Within 30 days, DCPS shall upon receipt of documentation of payment by Petitioners, reimburse Petitioners for tuition, related services, and transportation for Student at Nonpublic School for the entire 2020/21 school year.
- (b) As compensatory education for the denials of FAPE found herein, within 10 business days DCPS shall pay or reimburse the cost of the 2021 summer program at Nonpublic School, which is not to exceed \$3,850.

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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