

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

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

OSSE  
Office of Dispute Resolution  
March 12, 2016

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<i>Student</i> , <sup>1</sup>	)	Date Issued: 3/12/16
through his <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Case No.: 2015-0401
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
<i>Public Charter School</i> (“PCS”),	)	Hearing Dates: 2/29/16, 3/3/16 & 3/4/16
Respondent.	)	Hearing Location: ODR Room 2003
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s mother, filed a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because PCS did not properly implement his Individualized Education Program (“IEP”) by providing sufficient specialized instruction and related services. PCS responded that any missed hours were *de minimis*, Student was provided supports and accommodations that he needed, and there was no harm because he is making progress in school.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

**Procedural History**

Following the filing of the due process complaint on 12/18/15, the case was assigned to the undersigned on 12/22/15. Respondent’s response to the complaint was timely filed on 12/24/15 and did not challenge jurisdiction.

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

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The resolution session meeting took place on 1/13/16, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 1/17/16. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 10-day continuance granted on 2/4/16, which requires a Hearing Officer Determination (“HOD”) by 3/12/16.

The due process hearing took place on 2/29/16 (briefly, due to the absence of Petitioner for health reasons), 3/3/16, and 3/4/16 (closing arguments only, conducted by conference call). The hearing was closed to the public. Petitioner was represented by *Petitioner’s counsel*. PCS was represented by *Respondent’s counsel*. Counsel discussed settlement on the first day of the hearing without success. Petitioner was present for the entire substance of the hearing (second and third days).

Neither party objected to the testimony of witnesses by telephone. The parties agreed on no stipulations.

Petitioner’s Disclosure statement, submitted on 2/19/16, consisted of a witness list of 4 witnesses and documents P1 through P27, which were admitted into evidence without objection.

Respondent’s Disclosure statement, submitted on 2/19/16, consisted of a witness list of 6 witnesses and documents R1 through R10, which were admitted into evidence without objection.

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

1. *Educational Advocate*
2. *Compensatory Education Planner* (“Planner”), who was qualified without objection as an expert in Special Education Administration and Programming with a Focus on Compensatory Education Plans
3. Parent

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

1. *IEP Coordinator* at PCS
2. *Special Education Teacher* at PCS
3. *Vice President of Special Education* at PCS (“Vice President”), who was qualified without objection as an expert in Providing Special Education Services to Students with Disabilities

Petitioner’s counsel did not call any rebuttal witnesses.

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

**Issue 1:** Whether Respondent denied Student a FAPE by (a) failing to fully implement Student's 4/21/15 IEP during the 2015/16 school year where (i) Student did not receive specialized instruction prior to 10/23/15 as there was no special education teacher for Student, (ii) Student did not receive all specialized instruction required after 10/23/15, and (iii) Student did not receive the behavior support services or occupational therapy services required; and/or (b) failing to notify the SEA that it could not provide Student an appropriate location of services.

**Issue 2:** Whether Respondent denied Student a FAPE by failing to convene an IEP team meeting during the summer of 2015 to ensure that Student had an appropriate IEP in place at the beginning of the 2015/16 school year, where Respondent did not have either Student's 11/18/14 IEP or his 4/21/15 IEP and was relying on his earlier 5/10/13 IEP.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Respondent within 10 school days shall identify an appropriate location of services to fully implement Student's 4/21/15 IEP.
3. Compensatory education for any denial of FAPE from the beginning of the 2015/16 school year.
4. Any other relief that is just and reasonable.

Oral opening statements and closing statements were made by Petitioner's counsel and Respondent's counsel. The parties were permitted to submit legal citations after the hearing but did not do so.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>2</sup> are as follows:

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<sup>2</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>3</sup> Student is *Age* and in *Grade*.<sup>4</sup>

2. Student is classified as having an Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"); he has had an IEP for about 4 years.<sup>5</sup> Student no longer takes medication for ADHD due to side effects, although he tried such medication again during the summer of 2015.<sup>6</sup>

3. Student's general cognitive ability is in the average range according to the WISC-IV.<sup>7</sup> Academically, Student is increasingly below grade level. According to Woodcock-Johnson ("WJ") scores in March 2013, Student's Broad Math, Broad Reading, and Broad Written Expression scores all were in the average range with grade level equivalencies that were both above and below his grade at the time.<sup>8</sup> By January 2015, according to WJ-III scores, Student was over 1 year behind in Broad Reading, 2 years behind in Broad Math, and 2-1/2 years behind in Broad Written Expression.<sup>9</sup> PCS staff stated on 11/23/15 that Student was about 3 years behind in both Reading and Math.<sup>10</sup>

4. Student's 10/26/15 iReady in Reading showed that Student received a 571, but needed a 650 to be on grade level, and Needs Improvement, which is the lowest placement level.<sup>11</sup> Student's 10/28/15 iReady in Math showed that Student received a 459, but needed a 550 to be on grade level, and Needs Improvement.<sup>12</sup>

5. Student's grades at PCS in the first 2 quarters of 2015/16<sup>13</sup> were not good, with all "Fs" in Math, Language Arts, and Social Studies, and a decline from a "B" to a "C" in Science.<sup>14</sup> Specials (Art, Music, Physical Education, and Health) and other grades ranged from "As" to "Cs," except for "Ds" in Work Habits.<sup>15</sup> Student's 12/21/15 IEP Progress Report generally shows Progress in academics, except for one Reading goal where there was

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<sup>3</sup> Parent.

<sup>4</sup> Parent; P13-4.

<sup>5</sup> Parent; P11-2,3; P14-23.

<sup>6</sup> Parent; R1-10; P11-5; P13-24.

<sup>7</sup> P14-21.

<sup>8</sup> R1-3,6,8; P16-2,3.

<sup>9</sup> P14-12,21.

<sup>10</sup> P5-1; Planner.

<sup>11</sup> R4-1.

<sup>12</sup> P21-1.

<sup>13</sup> All dates in the format "2015/16" refer to school years.

<sup>14</sup> R3-1.

<sup>15</sup> *Id.*

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No Progress.<sup>16</sup> Student's grades at Prior School in 2014/15 had been somewhat better, boosted (at least in part) by grading Student only on completed work.<sup>17</sup>

6. IEPs. Student's 11/18/14 IEP was in SEDS from the beginning of 2015/16 and was accessed in August 2015 as PCS teachers reviewed all students to determine which teachers they would be assigned for the new school year.<sup>18</sup> The 11/18/14 IEP was the most recent finalized IEP for Student in SEDS.<sup>19</sup>

7. Parent credibly testified that she gave Student's 11/18/14 IEP to PCS when she enrolled him for 2015/16, and referred to it as Student's current IEP.<sup>20</sup> Student's IEP Progress Report dated 7/10/15 for the final reporting period of 2014/15 at Prior School was based on Student's 11/18/14 IEP.<sup>21</sup>

8. From the beginning of 2015/16, PCS sought to implement Student's 11/18/14 IEP.<sup>22</sup> Student's 11/18/14 IEP required 7.5 hours/week of special education services in Reading outside general education and 7.5 hours/week of special education services in Mathematics inside general education, along with 30 minutes/week of Behavior Support Services ("BSS") outside general education and 45 minutes/week of Occupational Therapy ("OT") outside general education, and 30 minutes/month of OT consultation.<sup>23</sup>

9. Student's IEP was modified at Prior School on 2/19/15 to require pull-out in Math and Written Expression; a 30-day review was held on 3/24/15.<sup>24</sup> That 2/19/15 IEP was not provided to PCS,<sup>25</sup> nor was it included in the disclosures or discussed at the due process hearing.

10. PCS received an IEP for Student's dated 4/21/15 by email from Petitioner's counsel on 11/4/15.<sup>26</sup> No evidence was presented that PCS had ever previously received it. The 4/21/15 IEP was a draft that was never finalized, and was not available in SEDS.<sup>27</sup> Draft

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<sup>16</sup> R2; R2-3.

<sup>17</sup> P18-1; P8-2; Planner; IEP Coordinator.

<sup>18</sup> IEP Coordinator.

<sup>19</sup> IEP Coordinator. This Hearing Officer finds IEP Coordinator's unambiguous testimony that Student's 11/18/14 IEP was in SEDS from the beginning of 2015/16 more credible than Educational Advocate's testimony asserting that IEP Coordinator said that PCS didn't have Student's 11/18/14 IEP. Educational Advocate; IEP Coordinator.

<sup>20</sup> Parent.

<sup>21</sup> P19-1.

<sup>22</sup> IEP Coordinator.

<sup>23</sup> P13-14.

<sup>24</sup> P8-1.

<sup>25</sup> IEP Coordinator.

<sup>26</sup> P1-1.

<sup>27</sup> P7; IEP Coordinator; Educational Advocate.

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IEPs remain in SEDS for 30 days and then automatically drop out of the system.<sup>28</sup> IEP Coordinator first saw the 4/21/15 IEP at the 11/23/15 meeting with Parent and her representatives.<sup>29</sup>

11. Student's draft 4/21/15 IEP required 7.5 hours/week of special education services in Reading, 1.5 hours/week in Written Expression, and 4.5 hours/week in Mathematics, all outside general education, along with 30 minutes/week of BSS outside general education and 45 minutes/week of OT outside general education, and 30 minutes/month of OT consultation.<sup>30</sup>

12. Services Provided. Seeking to provide grade-level content and do what is best for Student, PCS has been trying to "redistribute" his hours.<sup>31</sup> PCS did not believe Student's 11/18/14 IEP was appropriate because it called for too many hours of specialized instruction, however PCS had the ability to implement the 11/18/14 IEP.<sup>32</sup> IEP Coordinator convincingly testified and emailed Parent on 11/30/15 that PCS never indicated that it could not accommodate Student's IEP.<sup>33</sup>

13. Vice President did not believe that Student should be pulled out of general education for special education services, and testified that Student needed only accommodations and modifications that PCS provided.<sup>34</sup> Vice President stated that Student made progress at PCS and is available for learning; Student's poor grades at PCS merely reflected his inability to complete his work, which would pull down his grades even if he had mastered the materials.<sup>35</sup>

14. At the beginning of 2015/16 there were as many as 24-25 children in Student's class, but some left and many were sent to another PCS campus.<sup>36</sup> There are now 8 children and 1 teacher in Student's class.<sup>37</sup> The services PCS provided Student varied over the months. Initially in 2015/16, Math and Reading were provided to Student by 1 of 2 teachers inside his general education classroom.<sup>38</sup> Student did not have a special education teacher prior to 10/23/15, when Special Education Teacher began working with Student, which continued until 12/7/15.<sup>39</sup> Student was only pulled out of general education during the weeks Special

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<sup>28</sup> IEP Coordinator.

<sup>29</sup> *Id.*

<sup>30</sup> P7-15.

<sup>31</sup> IEP Coordinator; R7-1.

<sup>32</sup> IEP Coordinator.

<sup>33</sup> IEP Coordinator; R7-1.

<sup>34</sup> Vice President.

<sup>35</sup> *Id.*

<sup>36</sup> Parent.

<sup>37</sup> IEP Coordinator.

<sup>38</sup> IEP Coordinator; P5-1.

<sup>39</sup> P5-1; Special Education Teacher; Educational Advocate.

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Education Teacher was providing services to Student from 10/23/15 to 12/7/15.<sup>40</sup> Special Education Teacher taught Student Language Arts, Math, Social Studies and Science, pulling him out for 15-20 minutes of each period.<sup>41</sup> Reading can be supported in classes other than Language Arts.<sup>42</sup> Student was not receiving 7.5 hour/week of specialized instruction in Reading outside general education at any time from the beginning of 2015/16.<sup>43</sup>

15. At times, Special Education Teacher tried to pull out Student, but he refused to leave the general education classroom.<sup>44</sup> At Prior School, Student would sometimes refuse his pull-out services, so the provider would work with him in the general education classroom.<sup>45</sup> Prior School worked with Student to get him to agree to receive the services provided.<sup>46</sup>

16. BSS. Student has mild depressive symptoms due to past trauma and grief.<sup>47</sup> Student experienced trauma with the loss of his father, grandmother and aunt, one after the other, along with having been at risk in a shooting at summer camp, and other challenges.<sup>48</sup> Counseling was needed to address Student's ADHD, which impacted his education, along with Student's anxiety, need for impulse control, and help with peer interactions.<sup>49</sup> Student needed BSS to help him know how to act in class and avoid horseplay and getting in trouble.<sup>50</sup> The lack of services resulted in Student being disrespectful to school staff in 2015/16, and not just peers as in the past.<sup>51</sup>

17. Initially in 2015/16, PCS had only 1 social worker on staff and was not able to provide the BSS hours needed by Student and other children.<sup>52</sup> The lack of Service Trackers indicate the lack of BSS services; Student also confirmed that he did not receive BSS services.<sup>53</sup> Student's BSS goals in his 12/21/15 IEP Progress Report are all marked as "Not Introduced."<sup>54</sup>

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<sup>40</sup> IEP Coordinator; Special Education Teacher.

<sup>41</sup> Special Education Teacher.

<sup>42</sup> Vice President.

<sup>43</sup> IEP Coordinator.

<sup>44</sup> *Id.*

<sup>45</sup> P9-2.

<sup>46</sup> P11-4.

<sup>47</sup> R1-10; Parent.

<sup>48</sup> P13-24; P14-3.

<sup>49</sup> Planner.

<sup>50</sup> Parent.

<sup>51</sup> *Id.*

<sup>52</sup> IEP Coordinator; Vice President.

<sup>53</sup> P5-2; Educational Advocate; Parent.

<sup>54</sup> R2-5,6.

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18. PCS is working on a plan to make up the BSS hours for Student and others now that more services from social workers have been obtained.<sup>55</sup> The plan for making up BSS hours has not been provided to Parent and the missed hours have not been made up.<sup>56</sup>

19. Student did receive counseling for disruptive behavior from the Student Support Center, visiting 5 times on his own initiative or when sent by staff.<sup>57</sup> Student worked on Emotional, Social, and Behavioral Development goals 2 and 3 in his 11/18/14 IEP at PCS in the Student Support Center.<sup>58</sup>

20. OT. PCS's Service Tracker for Student shows that a provider was not available for OT services for 5 weeks from 9/21/15 through 10/19/15, and that Student refused OT services from 10/30/15 on.<sup>59</sup> The Progress Notes from the Service Tracker state that Student "expressed that he does not need OT services."<sup>60</sup> PCS offered Student OT at lunchtime and failed to contact Parent when Student refused OT services.<sup>61</sup> IEP Coordinator never discussed Student refusing services with Parent, but expects providers to reach out to parents if children refuse services.<sup>62</sup> Student confirmed that he never received OT services, except when he was observed once or twice by an OT provider, on 9/15/15 and/or 12/3/15.<sup>63</sup> Student's OT goals in his 12/21/15 IEP Progress Report are all marked as "Not Introduced."<sup>64</sup>

21. Student struggles with handwriting and shaping upper and lower case letters.<sup>65</sup> Student's handwriting is a problem as it is illegible and Student doesn't like to write.<sup>66</sup> Student's 11/18/14 and 4/21/15 IEPs provide for a laptop computer for in-class use to assist him with writing assignments.<sup>67</sup> Student's OT goals focus on typing rather than handwriting.<sup>68</sup>

22. Student's 11/18/14 and 4/21/15 IEPs state that his fine motor skills do not negatively impact his ability to participate in the educational setting, but provide 45 minutes/week of OT services and another 30 minutes/month of OT consultation services.<sup>69</sup> Planner disagreed

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<sup>55</sup> IEP Coordinator; Vice President.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Vice President; R1-11.

<sup>59</sup> R6-1.

<sup>60</sup> R6-2.

<sup>61</sup> Educational Advocate; Parent.

<sup>62</sup> IEP Coordinator.

<sup>63</sup> P5-2; P24-6; P24-9; Educational Advocate; Parent.

<sup>64</sup> R2-6.

<sup>65</sup> R1-8,13; P13-26,27.

<sup>66</sup> Parent.

<sup>67</sup> R1-2; Parent.

<sup>68</sup> R1-12,13.

<sup>69</sup> R1-12,14; P7-13,15.

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with the IEP statement, as it was not based on Student's OT evaluation.<sup>70</sup> Student's most recent OT evaluation, dated 4/29/14, concluded that Student could benefit from continued OT services.<sup>71</sup>

23. Compensatory Education Issues. Planner calculated that PCS failed to provide Student 197.5 hours of specialized instruction that he should have received based on the 11/18/14 IEP (or 176 hours based on the 4/21/15 IEP), calculating from late August until the end of November 2015.<sup>72</sup> Planner reached this total by calculating a lack of all services for 9 weeks (August to 10/23/15) which accounted for 135 hours (15 hours/week for 9 weeks), and then insufficient services for 5 more weeks (10/23/15 through November), which accounted for another 62.5 hours (12.5 hours/week for 5 weeks).<sup>73</sup>

24. For related services, Planner calculated that PCS failed to provide Student 7 hours of BSS and 10.5 hours of OT (14 weeks, from late August through November 2015 at 30 minutes/week for BSS and 45 minutes/week for OT).<sup>74</sup>

25. Planner analyzed Student's educational deficits and developed a qualitative proposal tailored to Student's specific needs, recommending 90 hours of specialized tutoring (at 6 hours per week over 15 weeks), to remediate deficits in Reading, Math, and Written Expression.<sup>75</sup> In addition, Planner proposed 7 hours of BSS to address socio-emotional goals, with coping skills and calming strategies, and 10 hours of OT to address fine motor skills.<sup>76</sup>

26. The lack of specialized instruction at PCS was harmful for Student, since continuous support is needed for Student to avoid regression, as confirmed by the fact that Student's 11/18/14 IEP provided for ESY to avoid significant regression in Math and Reading.<sup>77</sup>

27. Planner's firm provided 25 hours of compensatory education services to Student in 2013.<sup>78</sup> Student did well with after-school tutoring in 2-hour blocks in 2013, so Planner believes that he would do well with any additional tutoring.<sup>79</sup>

28. PCS and Parent began working on an updated IEP for Student on 11/23/15 and reached agreement on temporary service hours, but have not yet finalized the IEP due to

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<sup>70</sup> Planner.

<sup>71</sup> P15-3.

<sup>72</sup> P25-3,4.

<sup>73</sup> *Id.*

<sup>74</sup> P25-4.

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

<sup>76</sup> P25-5.

<sup>77</sup> R1-17; P13-20.

<sup>78</sup> Planner.

<sup>79</sup> *Id.*

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delays caused by Parent's high-risk pregnancy combined with her preference to meet in person rather than participating in meetings by telephone.<sup>80</sup>

### Conclusions of Law

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

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

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

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

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, PCS 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

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<sup>80</sup> Parent; Educational Advocate.

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regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

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

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

**Issue 1:** *Whether Respondent denied Student a FAPE by (a) failing to fully implement Student's 4/21/15 IEP during the 2015/16 school year where (i) Student did not receive specialized instruction prior to 10/23/15 as there was no special education teacher for Student, (ii) Student did not receive all specialized instruction required after 10/23/15, and (iii) Student did not receive the behavior support services or occupational therapy services required; and/or (b) failing to notify the SEA that it could not provide Student an appropriate location of services.*

Petitioner has met her burden on the central issue in this case by proving that PCS failed to fully implement Student's IEP from the beginning of school on 9/8/15 through the filing of the due process complaint. See 34 C.F.R. 300.323(c), 300.324; *Banks ex rel. D.B. v. Dist. of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010). However, Petitioner did not sustain her burden of proving that PCS could not satisfy Student's IEP so that there was any obligation to notify OSSE that PCS could not provide Student an appropriate location of services. PCS's witnesses persuasively testified that PCS had the capacity to provide the services on Student's IEP, even though PCS did not do so.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

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Here, Student did not have a special education teacher at PCS from the beginning of 2015/16 until 10/23/15, even though his IEP required 15 hours/week of specialized instruction, with half inside and half outside general education.<sup>81</sup> Once Special Education Teacher began teaching Student on 10/23/15, she credibly testified that she pulled him out 15-20 minutes during each period of Language Arts, Math, Social Studies and Science. While not facially consistent with the requirements of Student's IEP, assuming Special Education Teacher was working on reading in each of his other classes, being pulled out for 15-20 minutes in 4 classes a day would result in 5 or 5.5 hours/week of instruction outside general education, rather than the 7.5 hours/week for Reading required by Student's IEP. Indeed, PCS's IEP Coordinator acknowledged in her testimony that at no point did Student ever receive 7.5 hours/week of special education outside general education. Nor did Student received the additional 7.5 hours/week of push-in for Math required by his IEP. Special Education Teacher provided services to Student only until 12/7/15, when she was reassigned by PCS; PCS did not begin providing in early December all the services required by Student's IEP as Petitioner had expected.

PCS asserted more than once during the due process hearing that Student's IEP required too many hours of specialized instruction and that Student should not have been pulled out of general education for special education services, as he only needed accommodations and modifications which he received from PCS in the general education classroom. Even if PCS were correct, however, it cannot unilaterally override Student's IEP; any change needed to be incorporated into his IEP through appropriate processes, as Student's IEP must determine the services provided. *See, e.g.*, 34 C.F.R. 300.324(a)(6), 300.322. Moreover, Parent certainly has the right to know what special education services her child is receiving, the right to participate in decisions about her child's IEP, and the right to challenge those decisions if she does not agree with them. *See* 34 C.F.R. 300.116(a)(1), 300.322, 300.324(a)(ii), 300.501(c).

The IDEA and its regulations establish the process for developing and amending an IEP, and carefully define the composition of the IEP Team to ensure that the particular

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<sup>81</sup> Significant advocacy was devoted during the due process hearing to the issue of whether the 11/18/14 IEP or the draft 4/21/15 IEP was applicable in 2015/16, even though the only difference between the 2 IEPs is that 7.5 hours/week of Math inside general education in the 11/18/14 IEP was changed to 4.5 hours/week of Math and 1.5 hours/week of Written Expression outside general education in the draft 4/21/15 IEP. For the reasons discussed below, this Hearing Officer concludes that PCS failed to materially implement either IEP and that either IEP would result in the compensatory education award below, for the award of compensatory education cannot be based on mechanistic hour-for-hour calculations pursuant to *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005). Nonetheless, it is the further conclusion of the undersigned that the 11/18/14 IEP was applicable in 2015/16 since the 4/21/15 IEP was merely a draft that was never finalized at Prior School through no fault of PCS and was not available to PCS through SEDS or Parent. Thus, unless otherwise specified, references herein to Student's IEP refer to the 11/18/14 IEP.

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needs of Student are considered and incorporated into his IEP, all the while ensuring adequate parental participation. 34 C.F.R. 300.116, 300.324, 300.323, 300.322, 300.321. A school may not change Student's IEP, formally or informally, without prior notice to Parent and an opportunity for Parent to discuss any proposed changes with the public agency. See Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46685 (August 14, 2006). Even if failure to modify Student's IEP were viewed as only a procedural violation, there can be no doubt that it "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child," which is sufficient for a denial of FAPE. 34 C.F.R. 300.513(a).

PCS's failure to provide the related services required by Student's IEP was even worse than its provision of special education services. PCS acknowledged that it had been short-staffed in 2015/16 and unable to provide BSS for Student as his IEP required. PCS has recently procured additional BSS services and is developing a plan to make up missed services for Student and others, but it has not revealed its plan to Parent or actually made up any missed services as of the time of the due process hearing. Instead, PCS asserted that Student received counseling for his disruptive behavior from PCS's Student Support Center, which he visited 5 times on his own initiative or when sent by staff. PCS's efforts to provide substitutes and make up missed services do not take the place of BSS required by Student's IEP, but are considered below by this Hearing Officer in determining the equities in awarding compensatory education.

As for OT, there is no dispute that PCS did not provide or offer any OT services from 9/21/15 until 10/30/15, but from 10/30/15 forward PCS offered OT services that Student refused, possibly because OT was offered only at lunchtime. PCS asserted that Student did not need OT, but as discussed above, a school may not simply disregard aspects of an IEP with which it disagrees. Further, PCS did not communicate to Parent that Student was refusing services so that she could work with Student and attempt to overcome any impediments to Student receiving his OT services. While a significant portion of the OT services were not even offered and essentially none provided, the offer of some OT services is considered below by this Hearing Officer in awarding compensatory education.

In sum, considering the lack of any special education teacher for Student from 9/8/15 to 10/23/15, the limited specialized instruction after 10/23/15, the lack of BSS services, and essentially no OT services (with an offer of OT services only part of the time), this Hearing Officer concludes that PCS materially deviated from Student's IEP. Clearly, this is not a case of PCS missing a few minutes of services here or there, which might be excused as a "minor discrepancy," *Van Duyn*, 502 F.3d at 822. Here, as in *Turner*, 952 F. Supp. 2d at 40-41, there was a substantial lack of a large proportion of special education and related services as required by Student's IEP, which this Hearing Officer concludes was a denial of FAPE.

When there is a material failure to implement an IEP, as here, no educational harm need be shown. Contrary to PCS's arguments, progress by Student is not a defense. See *Walker v. Dist. of Columbia*, 2014 WL 3883308, at \*5 (D.D.C. 2014) (materiality standard

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“does not require that the child suffer demonstrable educational harm in order to prevail”); *Turner*, 952 F. Supp. 2d at 40 (“[s]ignificantly, a plaintiff does not have to prove a resulting harm caused by the failure to implement”), *quoting Wilson*, 770 F. Supp. 2d at 275. Here, moreover, there was harm, as demonstrated by Student’s below-grade iReady scores and poor grades in 2015/16, with all “Fs” in Math, Language Arts, and Social Studies. Student was also harmed by not receiving the counseling Student needed for his ADHD, anxiety, impulse control, and to help with peer interactions, as well as OT services to help with his writing. This denial of FAPE is remedied through an award of compensatory education below.

**Issue 2:** *Whether Respondent denied Student a FAPE by failing to convene an IEP team meeting during the summer of 2015 to ensure that Student had an appropriate IEP in place at the beginning of the 2015/16 school year, where Respondent did not have either Student’s 11/18/14 IEP or his 4/21/15 IEP and was relying on his earlier 5/10/13 IEP.*

Petitioner has not met her burden of proving that Student did not have a current IEP in place at the beginning of 2015/16, as required by 34 C.F.R. 300.323(a). IEP Coordinator credibly testified that PCS had access to Student’s 11/18/14 IEP through SEDS prior to the beginning of 2015/16 and sought to implement it from the beginning of the school year. The 11/18/14 IEP was the latest IEP for Student in SEDS and was less than a year old, so was appropriately viewed by PCS as Student’s current IEP, consistent with 34 C.F.R. 300.324(b)(1).

### Remedy

Petitioner seeks compensatory education to make up for the denial of FAPE discussed above, which is awarded below. Petitioner also seeks an appropriate location of services to fully implement Student’s draft 4/21/15 IEP, which is denied by the undersigned as PCS has been trying to update Student’s IEP since 11/23/15 and agreements were reached on at least temporary service hours that differ from the hours in the 4/21/15 IEP. The parties are encouraged to cooperate to finalize a new IEP promptly in the best interests of Student.

The IDEA gives Hearing Officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005). The proper amount of compensatory education, if any, depends on how much more progress Student might have shown if he had received the required special education services, and the type and amount of services that would place Student in the same position he would have occupied but for PCS’s violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid*, 401 F.3d 516.

The challenge of determining what additional educational benefits would have accrued, if PCS had provided all the special education and related services appropriate for Student does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record

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are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *See Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, Planner testified as an expert for Petitioner about the Compensatory Education Proposal she prepared to remedy PCS’s failures, in which she calculated that Student missed 197.5 hours of specialized instruction required by his IEP. Planner reached this total by calculating a complete lack of services for 9 weeks (August to 10/23/15) which accounted for 135 hours (15 hours/week for 9 weeks), and then insufficient services for 5 more weeks (10/23/15 through November), which accounted for another 62.5 hours (12.5 hours/week for 5 weeks). This Hearing Officer finds Planner’s calculations reasonably accurate with some adjustments. First, Planner considered the period from late August through November 2015, a period which both begins and ends about 2 weeks early, as school did not begin until 9/8/15 and Student’s IEP was not fully implemented in early December as Petitioner had expected. Further, during the period of instruction by Special Education Teacher, giving full credit to her testimony, she provided closer to 5.5 hours/week of pull-out instruction, rather than the 2.5 hours/week in Planner’s calculations. Together these adjustments reduce the specialized instruction that Student missed to some 170 hours. While the compensatory education awarded below is not hour-for-hour, the scope of services missed does help provide some sense of the magnitude of loss suffered by Student. *See Reid*, 401 F.3d 516.

Similarly, for related services Planner calculated that Student missed 7 hours of BSS and 10.5 hours of OT, calculating 14 weeks, from late August through November 2015 at 30 minutes/week for BSS and 45 minutes/week for OT. This Hearing Officer also finds these calculations generally accurate, with adjustments for beginning and ending about 2 weeks early. While this Hearing Officer does credit PCS’s evidence that it did offer OT to Student for much of that time, Petitioner presented un rebutted testimony that OT services were at least sometimes offered at lunchtime, when Student may reasonably have wanted to eat, and that the OT provider did not alert Parent to the fact that Student was refusing services, even though IEP Coordinator testified that she expected PCS’s service providers to provide such notice.

Planner proceeded to analyze Student’s educational deficits and develop a qualitative proposal uniquely tailored to Student’s specific needs, recommending – in her expert opinion – 90 hours of specialized tutoring (providing 6 hours per week over 15 weeks), to remediate deficits in Reading, Math, and Written Expression, along with 7 hours of BSS to address socio-emotional goals, with coping skills and calming strategies, and 10 hours of OT to address fine motor skills.

Based on the entire record herein, and giving due consideration to other relevant factors, including the greater benefit of one-on-one tutoring compared to small group pull-out from the classroom or push-in services, and the fact that Student may have received some benefit from the extra time in the inclusion classroom, and considering the equities in an exercise of broad discretion, this Hearing Officer concludes that it is appropriate for PCS to fund independent providers for a total of 75 hours of academic tutoring at a pace and in

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subjects determined by Parent, plus another 15 hours divided between counseling and OT services as determined by Parent, in consultation with her advocates and service providers, based on what would be most helpful to Student.

**ORDER**

Petitioner has met her burden of proof as set forth above. Accordingly, **it is hereby ordered that** compensatory education for the denial of FAPE found herein shall consist of PCS funding independent providers to be chosen by Petitioner, and providing letters of authorization within 10 business days of Petitioner’s request(s), for:

- (a) 75 hours of academic tutoring in subjects determined by Petitioner; and
- (b) 15 hours divided between counseling and occupational therapy services as determined by Petitioner.

All compensatory education hours are to be used within 1 year; any unused hours will be forfeited.

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

**IT IS SO ORDERED.**

Dated in Caption

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

**NOTICE OF RIGHT TO APPEAL**

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

Copies to:

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