

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

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

OSSE
Office of Dispute Resolution
March 25, 2017

<i>Student</i> , ¹)	Case No.: 2016-0285
through his <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 3/25/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 3/8/17 & 3/9/17
("DCPS"),)	ODR Hearing Rooms: 2006 & 2003
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because ■ was not provided a sufficiently restrictive Individualized Education Program (“IEP”) and placement, and was improperly exited from related services, among other things. DCPS responded that Student did have an appropriate IEP and placement and was provided all related services.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of the due process complaint on 12/1/16, the case was reassigned from another Hearing Officer to the undersigned on 1/9/17. DCPS filed an untimely response on 12/12/16, and did not challenge jurisdiction, apart from questioning the jurisdiction of this forum over a claim of inability to access educational records. The

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

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resolution session meeting took place on 12/9/16, but did not resolve the case or shorten the 30-day resolution period, which ended on 12/31/16. 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 40-day continuance, which requires a Hearing Officer Determination (“HOD”) by 3/26/17.

The due process hearing took place on 3/8/17 and 3/9/17, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present during most of the hearing.

Petitioner’s Disclosures, submitted on 3/1/17, contained documents P1 through P56, which were admitted into evidence without proper objection. A supplemental disclosure, P57, was offered and admitted without objection at the due process hearing on 3/8/17.

Respondent’s Disclosures, submitted on 3/1/17, contained documents R1 through R15, which were admitted into evidence without objection.

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

1. *Community Support Worker*
2. *Psychologist* (qualified over objection as an expert in School Psychology)
3. *Principal (at Nonpublic School)*
4. Parent
5. *Educational Advocate 1* (qualified over objection as an expert in School Administration for Special Education Students with a Background in Least Restrictive Environment (“LRE”) and Assessment Data Review and Analysis)
6. *Educational Advocate 2* (qualified without objection as an expert in IEP Programming)

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

1. *Speech Language Pathologist*
2. *School Social Worker*
3. *Independence & Learning Support (“ILS”) Specialist*
4. *Local Educational Agency (“LEA”) Representative*
5. *Occupational Therapist*

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

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Issue 1: Whether DCPS denied Student a FAPE from August 2016 on by failing to provide an appropriate IEP with (a) sufficient hours outside general education, (b) sufficient Behavioral Support Services (“BSS”), and (c) a sufficiently restrictive, therapeutic and structured LRE, with placement/setting/location of services. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by ending ■ eligibility for related services (both Occupational Therapy (“OT”) and Speech Language Pathology (“SLP”)) in October 2016, without evaluating ■ prior to ending ■ services, despite Parent’s request for independent educational evaluations (“IEEs”) in October 2016. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to conduct a triennial reevaluation in each area of suspected disability by (a) 5/31/16 or (b) 12/1/14, and update ■ services accordingly. *Petitioner has the burden of persuasion on this issue.*

Issue 4: Whether DCPS denied Student a FAPE by failing to provide timely access to ■ full cumulative and special education files, including ■ amended or revised IEPs from the Fall of 2016. *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Within 15 school days, DCPS shall develop and implement an appropriate IEP for Student, including (a) sufficient Behavioral Support Services; (b) a narrowly tailored and restrictive LRE, appropriately described; (c) an appropriately small, therapeutic, fulltime setting with up to 31 hours/week, wholly separate from general education; (d) a statement that ■ behavior does interfere with ■ learning and that of other students; and (e) for an interim period, a dedicated aide or behavioral tech to work with ■ individually.
3. Within 15 school days, DCPS shall (a) fund placement and transportation for Student at a public or non-public school that can provide educational benefit, or alternatively (b) convene a Multi-Disciplinary Team (“MDT”) meeting with Parent and her counsel to discuss and determine an appropriate placement/setting/location of services.
4. Within 20 school days, DCPS shall fund or develop and implement an appropriate Functional Behavioral Assessment (“FBA”) and Behavioral Intervention Plan (“BIP”), or modify and revise existing FBAs and BIPs to ensure a FAPE for Student.
5. DCPS shall provide Parent access to all educational records of Student.

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6. DCPS shall provide compensatory education, or fund any assessment necessary to determine compensatory education, for any denial of FAPE from 12/1/14 on.²
7. Any other just and equitable relief.

Petitioner made an oral motion for summary judgment on Issue 4 at the conclusion of her case-in-chief, just prior to resting. After hearing from counsel for both Petitioner and Respondent, the undersigned took the motion under advisement and hereby denies the motion for the reasons set forth in the Conclusions of Law below.

The parties were permitted to submit closing arguments in writing by 11:59 p.m. on 3/13/17, which Petitioner did.

Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁴ Student is *Age* and in *Grade* at *Public School*.⁵
2. Student is eligible for special education and related services with a classification of Intellectual Disability ("ID").⁶ From early in life, Student was diagnosed with

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

³ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁴ Parent.

⁵ *Id.*

⁶ R15-1; P7-1.

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Developmental Delay, Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder (“ADHD”).⁷

3. Student’s 2/23/16 IEP at Public School – the IEP at issue in this case – provided 23 hours/week of specialized instruction outside general education, 2 hours/month of BSS outside general education, 15 minutes/month of OT consultation and 1 hour/month of SLP consultation.⁸ An earlier IEP from *Prior Public School* dated 4/24/14 provided 26 hours/week of specialized instruction outside general education, 2 hours/month of OT outside general education, 2 hours/month of SLP outside general education, and 2 hours/month of BSS outside general education, with no consultation services.⁹

4. Student’s recent 2/22/17 IEP at Public School provides 23 hours/week of specialized instruction outside general education, 2 hours/month of BSS outside general education, 4 hours/month of SLP outside general education, and 15 minutes/month of OT consultation.¹⁰ LEA Representative persuasively testified that the continuation of 2 hours/month of BSS was an error, as BSS had actually been increased to 4 hours/month for Student.¹¹ Student had “informally” been receiving much more than 2 hours/month of BSS prior to this IEP, as School Social Worker had often responded with therapeutic services when Student needed to leave ■ special education classroom, which was not counted toward ■ BSS hours.¹²

5. A Comprehensive Psychological (“Comp Psych”) Reevaluation by DCPS dated 9/26/16 found that Student’s Composite Intelligence Index (CIX) was 55 and ■ Verbal Intelligence Index (VIX) was 54, both of which are significantly below average.¹³ Student’s Non-verbal Intelligence Index (NIX) was 71, which is moderately below average.¹⁴ Student’s overall achievement (Reading, Math, Written Language) was in the very low range; Student continued to have “significant difficulties in all subject areas” and continued to need individualized support.¹⁵ Student is in the ILS program at Public School, which provides iPads and charts the growth of each child; Student is making progress.¹⁶ The “Fs” on Student’s progress report may have simply been the default setting if grades were not entered by Student’s special education teacher.¹⁷

⁷ P15-2.

⁸ P7-1,10.

⁹ P8-1,11.

¹⁰ R15-12.

¹¹ LEA Representative (she was certain because she had to rework School Social Worker’s entire schedule to double Student’s BSS services); *see* R11-3 (School Social Worker increased her service hours to 4 hours/month).

¹² School Social Worker; LEA Representative.

¹³ P14-4,16.

¹⁴ P14-5,16.

¹⁵ P14-6,16.

¹⁶ LEA Representative.

¹⁷ LEA Representative; P57.

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6. Behavior. Student started having behavioral difficulties after ■■■ baby brother was born in April 2016.¹⁸ In all of 2015/16¹⁹ Student had 14 disciplinary incidents, with none before 4/18/16.²⁰ Student's behavior problem very largely centered on ■■■ special education teacher, with Student frequently grabbing and twisting her wrists and arms, encroaching on her personal space and blocking her movement.²¹ Student had 10 incidents in the first month of 2016/17; "One hundred percent" were for physical aggression against Student's special education teacher.²² Student acknowledged that ■■■ had problems in ■■■ special education teacher's class when ■■■ got in her personal space.²³ Student had some incidents encroaching on the personal space and holding the wrists of several female teachers/aides, but the overwhelming number involved ■■■ special education teacher.²⁴

7. An FBA on 9/20/16 emphasized Student's attention-seeking behavior and inability to maintain appropriate physical boundaries with female authority figures.²⁵ After the FBA was completed, a BIP was prepared and adopted by Student's IEP team on 10/25/16.²⁶ Along with others, School Social Worker implemented the "very structured" BIP, where Student would get 3 warnings and then would be removed from the special education classroom to address the problem in a therapeutic manner; Parent agreed with the structured BIP in October 2016.²⁷ A BIP 2 was developed, sent to Parent's counsel and reviewed on 12/9/16; Parent and counsel agreed with it.²⁸ Student's special education teacher didn't "buy into" the BIPs sufficiently.²⁹

8. The level of Student's BSS was appropriate, as Student began getting more intensive BSS services early in 2016/17; School Social Worker began to see Student more individually, rather than in a group, in addition to providing therapeutic responses when Student needed to leave ■■■ classroom.³⁰ Even with Student's active participation in weekly counseling, ■■■ continued to exhibit the same behaviors in ■■■ special education classroom.³¹ ILS Specialist was asked to provide assistance with additional behavioral support for

¹⁸ LEA Representative; P14-2; Parent.

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

²⁰ P15-2.

²¹ School Social Worker; LEA Representative; R6-2,3,4,6; P15-4; P28-1,2; Community Support Worker.

²² P15-2.

²³ P15-3.

²⁴ R6-5,6,7,8; LEA Representative.

²⁵ P15-1.

²⁶ R7-4.

²⁷ School Social Worker.

²⁸ P24-2; P25-1,2; R9-1; R10.

²⁹ ILS Specialist.

³⁰ School Social Worker.

³¹ P31-3.

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Student.³² ILS Specialist helped Public School collect and make decisions based on data, rather than relying on anecdotes.³³

9. Student's problems with ■ special education teacher were so serious that they caused ■ entire class to miss instruction.³⁴ Other students were increasingly frustrated with Student, as ■ sought more and more attention.³⁵ Moving a student from a teacher is a last resort, especially midyear, but things reached the point that it became clear Student would do better moving to an ILS program at another school.³⁶ Parent and her advocate agreed that with Student's difficulties it became appropriate to look at a similar program in another location.³⁷ Parent agreed to look at ILS programs in other schools; LEA Representative made the request to DCPS for another location for Student.³⁸ Public School contacted Parent repeatedly to tour other ILS classrooms, including reaching out on 11/8/16, 11/14/16, 11/23/16 and 12/5/16.³⁹ DCPS sent Parent a Location of Service ("LOS") letter dated 11/28/16 saying that the ILS program at *Proposed School 1* would be Student's location of service.⁴⁰ Out of respect for Parent, DCPS did not force a change of school for Student, but tried to work with her so everyone was "on the same page."⁴¹

10. Parent toured Proposed School 1 on 12/9/16, but was concerned about how isolated Student would be from the general education portion of the school and the fact that Student would only interact with nondisabled peers at lunch, recess and specials.⁴² Parent toured *Proposed School 2* but found it too chaotic, although the teacher was good.⁴³ Parent forthrightly testified that she was not disputing that Proposed School 1 and Proposed School 2 could adequately implement Student's IEP.⁴⁴ Parent did not enroll Student at Proposed School 1 or Proposed School 2, but chose to keep Student at Public School.⁴⁵ ILS Specialist was involved in deciding to move Student and thought Proposed School 1 was a better fit and could implement Student's IEP with fidelity.⁴⁶

³² ILS Specialist.

³³ *Id.*

³⁴ School Social Worker.

³⁵ *Id.*

³⁶ ILS Specialist; School Social Worker.

³⁷ Educational Advocate 2; Parent.

³⁸ School Social Worker; R7-4; LEA Representative.

³⁹ P24-2.

⁴⁰ R8-1.

⁴¹ LEA Representative.

⁴² Parent; P24-2.

⁴³ Parent.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ ILS Specialist.

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11. About 2 weeks prior to the due process hearing, Student's special education teacher was no longer teaching █ class, which has effectively resolved Student's behavior problem and need to change schools, especially as the substitute teacher is male.⁴⁷

12. Dedicated Aide. The FBA recommended assessing the appropriateness of Student's placement, including the staff-to-student ratio in █ classroom.⁴⁸ Public School addressed that recommendation by seeking a dedicated aide – at Parent's request – to enhance the student-staff ratio, but that request was denied by DCPS.⁴⁹ A dedicated aide is quite a restrictive option, as the aide would go everywhere with Student all day long, including the restroom, lunch and recess.⁵⁰ Parent acknowledged that she was not interested in a dedicated aide for Student once she understood that the aide would be with Student constantly, even though an aide might be helpful with redirection and behavior in the classroom.⁵¹ Student "would hate" having a dedicated aide, as █ is able to do everything by █ including going to lunch, recess, class, the toilet, and even running errands.⁵² As a 4th adult in the ILS classroom, another aide could not have kept Student away from █ special education teacher any more than the other adults could.⁵³

13. General Education. Student is in the general education setting for █ advisory class, for specials (3rd period) and PE (8th period), which is an appropriate amount on █ IEP.⁵⁴ Student is most successful while among █ general education peers – at lunch, on the playground, and in specials.⁵⁵ Student loves █ general education classes; █ smiles when coming out of those classes.⁵⁶ Student reported that █ got in the least amount of trouble in school in advisory class, which █ stated was "kind of fun."⁵⁷ Student is "quiet and eager to please" in █ general education class (with a male teacher); █ "gets very upset when █ is corrected, but is overall well-behaved" in general education.⁵⁸ Student's FBA found that █ does not have issues at lunch.⁵⁹ Student does not have issues on the bus.⁶⁰ Student

⁴⁷ School Social Worker.

⁴⁸ P15-6.

⁴⁹ P24-2; School Social Worker.

⁵⁰ Educational Advocate 2; LEA Representative.

⁵¹ Parent.

⁵² LEA Representative.

⁵³ *Id.*

⁵⁴ School Social Worker; LEA Representative.

⁵⁵ LEA Representative; School Social Worker (Student does well around █ general education peers).

⁵⁶ LEA Representative.

⁵⁷ P15-3.

⁵⁸ P15-4.

⁵⁹ P15-3.

⁶⁰ LEA Representative.

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shouldn't be removed from general education if ■ is doing well there.⁶¹ No data supported moving Student from ■ typically developing peers.⁶²

14. The 9/22/16 Dedicated Aide Fade Plan stated that Student does well with general education students; "■ is able to go to advisory and lunch without support."⁶³ "Student is successful during advisory period with a general education teacher" and "behaves appropriately when surrounded by ■ peers."⁶⁴ Student is "able to be successful in cafeteria, specials and advisory. ■ has frequent behaviors (sic) when in the self-contained classroom."⁶⁵ The special education teacher states that Student is "continuously 'assaulting' her."⁶⁶

15. Public School expressed concern about whether a more restrictive environment would be good for Student, as ■ likes being around other children; LEA Representative stated that Student "lives to go to PE," which is ■ "favorite thing."⁶⁷ Public School and Parent's advocates agreed that Student needed a fulltime placement, by which Public School meant a DCPS ILS program, rather than Nonpublic School which Parent preferred.⁶⁸ On 2/22/17, the school team expressed its view that Nonpublic School was too restrictive, as Student is motivated and enjoys being around nondisabled peers.⁶⁹ Psychologist testified that she was not recommending "fulltime" special education (a nonpublic school) at this point, as she viewed a dedicated aide as the next step for Student.⁷⁰

16. Although Student was seeking more and more attention from ■ special education teacher, ■ was still at an appropriate level of placement, and the ILS program was appropriately therapeutic.⁷¹ Student's IEP was appropriate with 23 hours/week of specialized instruction outside general education.⁷² Public School was able to appropriately implement Student's IEP apart from the issue with Student's special education teacher.⁷³ Student didn't need a more restrictive setting; the school team strongly believed that if given a more restrictive placement, Student would regress.⁷⁴

⁶¹ Principal; Educational Advocate 1; Educational Advocate 2.

⁶² Psychologist; Educational Advocate 1; Educational Advocate 2.

⁶³ P29-1.

⁶⁴ P29-2.

⁶⁵ *Id.*

⁶⁶ P29-1.

⁶⁷ P27-2,5; LEA Representative.

⁶⁸ P43-1; LEA Representative; Parent.

⁶⁹ R13-3.

⁷⁰ Psychologist.

⁷¹ School Social Worker; LEA Representative.

⁷² *Id.*

⁷³ School Social Worker.

⁷⁴ LEA Representative.

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17. Related Services. An OT Assessment by DCPS dated 10/7/16 concluded that Student did not demonstrate OT deficits that “prevent him from accessing [REDACTED] educational environment.”⁷⁵ A Speech Language Reevaluation by DCPS dated 10/6/16 concluded that a determination to receive speech and language services should be made at the MDT meeting, as [REDACTED] “overall communication skills have decreased” and [REDACTED] weak expressive language skills impact speaking in the classroom, writing and spelling.⁷⁶

18. Student’s related service providers proposed exiting [REDACTED] from SLP and OT based on the DCPS evaluations and the SLP provider’s professional view that Student had plateaued and other factors were going on that would cause [REDACTED] to regress if services continued.⁷⁷ Parent disagreed with ending services and with the DCPS evaluations; she sought IEEs before services were reduced on Student’s IEP.⁷⁸ DCPS formally authorized IEEs for OT and SLP on 12/9/16.⁷⁹

19. While awaiting the IEEs, Student’s SLP services were not discontinued and Speech Language Pathologist continued to provide services to Student without interruption, going every week to work with the whole class and providing undocumented services to Student.⁸⁰ Similarly, Student’s OT services were not changed while awaiting the IEEs and no services were missed while the OT provider was serving Student.⁸¹ Student missed no services on his IEP.⁸² A Speech Language IEE dated 2/8/17 recommended 4 hours/week of SLP for Student.⁸³ An OT IEE dated 2/8/17 concluded that Student “does not warrant” direct OT services in the academic environment.⁸⁴

20. Triennial Reevaluation. Every evaluation is not repeated for a triennial review; the scope of evaluation is a team decision, but typically not much changes cognitively for children with ID.⁸⁵ Student was reevaluated in 2013 using psychological testing (Vineland), the Reynolds (RIAS), and in-house assessments; the Woodcock-Johnson was taken into consideration.⁸⁶ A Physical Therapy Assessment Report was dated 5/30/13.⁸⁷ A Disability Worksheet for Intellectual Disability was completed on 5/31/13 and concluded that Student

⁷⁵ P12-1,6.

⁷⁶ P13-1,5,6.

⁷⁷ R7-2,3; Speech Language Pathologist.

⁷⁸ Speech Language Pathologist.

⁷⁹ P26-1.

⁸⁰ Speech Language Pathologist.

⁸¹ Occupational Therapist.

⁸² LEA Representative.

⁸³ P9-1,9.

⁸⁴ P10-1,7.

⁸⁵ LEA Representative.

⁸⁶ P24-4.

⁸⁷ R4-1.

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met all criteria for ID.⁸⁸ Parent participated and agreed with the eligibility determination in 2013.⁸⁹

21. Student was again found eligible for special education and related services based on ID in a Final Eligibility Determination Report on 4/27/16, which was within 3 years from ■ previous eligibility on 5/31/13.⁹⁰ Student's entire IEP team, including Parent, agreed with that eligibility determination, which was based on an Evaluation Summary Report.⁹¹ The Evaluation Summary Report incorporated data from (a) classroom observations conducted on 3/21/16 for Adaptive Daily Living Skills, Mathematics, Reading, Written Expression, Communications/Speech Language, Health/Physical, (b) further classroom observations on 4/8/16 for Social-Emotional/Behavioral Development, and (c) therapist observations and related services session notes.⁹² On 8/23/16, Student's IEP team agreed to conduct the following evaluations: Comp Psych, SLP, OT, and FBA, which were conducted and then reviewed on 10/25/16.⁹³

22. Documents. A formal request for documents was initially made by letter dated 7/29/16.⁹⁴ Parent's advocates sent several subsequent requests for documents, including one on 12/7/16 to which LEA Representative responded the same day, providing several additional documents, although other documents could not be found.⁹⁵ Petitioner's counsel stated on 12/9/16 that there wasn't a finalized IEP in the file, but LEA Representative had given it to Parent in person.⁹⁶ Petitioner's counsel argued at the hearing that Parent had not received Student's finalized 2/22/17 IEP, but LEA Representative credibly testified – without rebuttal – that she had given it to Parent in person.⁹⁷ LEA Representative persuasively testified that she had “nothing to hide,” sought to provide all documents to Petitioner's counsel, and believed Petitioner's counsel had been provided everything available, even though LEA Representative could not find every document requested.⁹⁸

⁸⁸ R4-8,9.

⁸⁹ Educational Advocate 1; R4-8,9.

⁹⁰ P35-1,3; R6-1; LEA Representative.

⁹¹ P35-3.

⁹² P35-4,5,6,7,8.

⁹³ P45-1; R7-1.

⁹⁴ P47-5.

⁹⁵ P40-1; P41-1,2; P42-1; P24-4; LEA Representative.

⁹⁶ P24-4.

⁹⁷ LEA Representative.

⁹⁸ *Id.*

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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*, 2017 WL 1066260, at *4 (U.S. Mar. 22, 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.*, 2017 WL 1066260, at *4, *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, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 2017 WL 1066260, at *4; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 2017 WL 1066260, at *12. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Andrew F.*, 2017 WL 1066260, at *12.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be

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achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 2017 WL 1066260, at *10 (children with disabilities should receive education in the regular classroom to the extent possible).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioners carry 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 Petitioners establish a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. West*, 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 from August 2016 on by failing to provide an appropriate IEP with (a) sufficient hours outside general education, (b) sufficient Behavioral Support Services, and (c) a sufficiently restrictive, therapeutic and structured LRE, with placement/setting/location of services.* (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)

Petitioner did establish a prima facie case on this issue, shifting the burden of persuasion to Respondent, which met its burden of proving that Student's IEP and placement were appropriate.

The applicable legal standard for analyzing the appropriateness of an IEP has just been articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 2017 WL 1066260, at *10. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was "reasonably calculated to produce meaningful educational benefit" and to permit Student to access the general education curriculum to the extent possible. See *Damarcus S. v. Dist. of Columbia*, 2016 WL 2993158, at *12 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEP are to be determined as of the time it was offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEP is analyzed by considering the specific concerns raised by Petitioner relating to the amount of specialized instruction outside general education, the level of BSS, and placement. See 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

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Here, Petitioner asserted that Student needed more hours outside general education, but the overwhelming evidence is that Student does very well in general education and ■■■ problem was predominantly with ■■■ special education teacher. Thus, Petitioner's efforts to obtain more hours outside general education appear entirely backwards, as that would have increased ■■■ time in the one environment in which ■■■ was having serious problems.

Student's behavioral problems centered on attention-seeking from ■■■ special education teacher, with Student very frequently grabbing and twisting her wrists and arms, encroaching on her personal space and blocking her movement, to the point she felt continually assaulted by Student. At the same time, DCPS witnesses credibly testified at length that Student is most successful while among ■■■ general education peers – at lunch, on the playground, and in specials. This was confirmed by documentary evidence that Student was successful in the cafeteria, specials and advisory, but had frequent problematic behaviors when in ■■■ self-contained classroom with ■■■ special education teacher. Clearly, it would have been counterproductive to reduce ■■■ time in general education and require ■■■ to spend more time in the special education classroom where ■■■ was having great difficulties. Student's IEP was appropriate with no more than 23 hours/week of specialized instruction outside general education, plus related services.

The level of Student's BSS was also appropriate, as Student began getting more intensive BSS services early in 2016/17. School Social Worker began to see Student more individually, rather than in a group, in addition to providing therapeutic responses when Student needed to leave ■■■ classroom. But even with Student's active participation in weekly counseling, ■■■ continued to have the same negative behaviors with ■■■ special education teacher. It seemed that an increase of BSS didn't help that problem and it became clear that separating Student and ■■■ special education teacher would be necessary.

Finally, Petitioner has challenged Student's placement and location, and whether they were sufficiently therapeutic. But it is clear, as discussed above, that Student's problem was focused on ■■■ special education teacher and didn't extend to other aspects of Public School as a location or to ■■■ ILS program as a placement. DCPS convincingly demonstrated that although Student was seeking more and more attention, ■■■ was still at an appropriate placement level, and the ILS program was an appropriately therapeutic placement.

Specifically, when Student's problems with ■■■ special education teacher became so serious they caused not only ■■■ but ■■■ entire class to miss instruction, and nothing else worked to keep Student from grabbing ■■■ special education teacher, Public School understandably turned to ways to separate them. Moving a student from a teacher is a last resort, especially midyear, but it became clear that Student would do better by moving to the ILS program at another school. Parent agreed to look at ILS programs in other schools and did not dispute that other schools could properly implement Student's IEP. But Parent chose not to enroll Student at another school. Public School issued an LOS letter, but did not force a change in school without getting Parent on board. Notably, however, as of a couple of weeks prior to the due process hearing, Student's special education teacher left ■■■

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classroom, which effectively resolved Student's behavior problem and the need for [REDACTED] to change schools.

In short, Student didn't need a more restrictive or therapeutic setting and DCPS presented persuasive evidence that Student would likely regress if put into a more restrictive placement. This Hearing Officer concludes that DCPS has met its burden of proving that Student's IEP was appropriate.

Issue 2: *Whether DCPS denied Student a FAPE by ending [REDACTED] eligibility for related services (both OT and SLP) in October 2016, without evaluating [REDACTED] prior to ending [REDACTED] services, despite Parent's request for IEEs in October 2016.* (Petitioner has the burden of persuasion on this issue.)

Petitioner did not meet her burden of proving that Student was denied a FAPE due to DCPS's actions concerning related services. The IDEA provides that before determining that a child receiving special education services is no longer eligible, the local educational agency must first reevaluate the child. *See* 34 C.F.R. 300.305(e); *Dist. of Columbia v. West*, 699 F. Supp. 2d 273, 279 (D.D.C. 2010). Here, DCPS did conduct new evaluations before Student's team sought to end [REDACTED] OT or SLP services and even then waited for the completion of IEEs sought by Parent before taking action.

An OT Assessment by DCPS dated 10/7/16 concluded that Student does not demonstrate OT deficits that prevent [REDACTED] from accessing [REDACTED] educational environment, which was the basis for deciding to end services. As for SLP, a Speech Language Reevaluation by DCPS dated 10/6/16 concluded that [REDACTED] overall communication skills had decreased and that [REDACTED] weak expressive language skills impact [REDACTED] but [REDACTED] SLP provider felt that Student had plateaued and other factors were going on that would cause [REDACTED] to regress if services continued. Parent disagreed and sought IEEs in both areas before services were changed on Student's IEP.

DCPS formally authorized IEEs for OT and SLP on 12/9/16, but in the meantime Student's SLP and OT services were not changed. Speech Language Pathologist continued to provide services to Student without interruption, going every week to work with [REDACTED] whole class and providing undocumented services to Student. Similarly, Student's OT services continued while awaiting the IEE; no services were missed. The Speech Language IEE dated 2/8/17 recommended 4 hours/week of SLP for Student, which resulted in an agreed level of SLP services on [REDACTED] 2/22/17 IEP. The OT IEE dated 2/8/17 concluded that Student did not warrant direct OT services in the academic environment, so they were not included in [REDACTED] 2/22/17 IEP.

Thus, it appears that the changes in Student's related services were carried out appropriately. This Hearing Officer was not persuaded by Petitioner that there was any flaw at all, much less one that amounted to a denial of FAPE.

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Issue 3: *Whether DCPS denied Student a FAPE by failing to conduct a triennial reevaluation in each area of suspected disability by (a) 5/31/16 or (b) 12/1/14, and update services accordingly.* (Petitioner has the burden of persuasion on this issue.)

Petitioner failed to meet her burden of demonstrating that DCPS failed to conduct appropriate triennial reevaluations by 5/31/16 or 12/1/14 (the date 2 years before the complaint was filed), or that any alleged failure resulted in substantive harm to Student.

The IDEA requires a reevaluation of each student with a disability at least once every 3 years, or sooner if the student's parent or teacher requests a reevaluation, or if the LEA (here DCPS) determines that the needs of the student warrant reevaluation. 34 C.F.R. 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student's parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. 300.305(a). *See James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016) ("a reevaluation requires a new round of tests and analysis to evaluate the child"). Of course, the IDEA does not require a public agency to administer every test requested by a parent, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information.

Here, Student was reevaluated in 2013 using psychological testing (Vineland), the Reynolds (RIAS), and in-house assessments. Data from a Woodcock-Johnson assessment was taken into consideration and a Physical Therapy Assessment Report was issued on 5/30/13. A Disability Worksheet for Intellectual Disability was completed on 5/31/13 and concluded that Student met all criteria for ID. Parent participated and agreed with the 2013 eligibility determination.

Student was again found eligible for special education and related services based on ID in a Final Eligibility Determination Report on 4/27/16, which was within 3 years from his previous eligibility. Student's entire IEP team, including Parent, agreed with the 2016 eligibility determination, based on the Evaluation Summary Report which incorporated data from classroom observations conducted on 3/21/16 for Adaptive Daily Living Skills, Mathematics, Reading, Written Expression, Communications/Speech Language, Health/Physical; classroom observations on 4/8/16 for Social-Emotional/Behavioral Development; and therapist observations and related services session notes.

If that degree of assessment were insufficient, a new battery of evaluations was conducted at the beginning of 2016/17, including: Comp Psych, SLP, OT, and FBA. Petitioner has not demonstrated that there was any lack of assessments in the Spring of 2016 or – even assuming there was – any harm to Student from delayed assessments until the Fall. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at *4,5 (D.D.C. 2010) (no relief warranted where petitioner "has not shown that DCPS' failure to conduct the reevaluations here sooner affected substantive rights" or that the child's "education would have been different" but for the violation). In sum, Petitioner did not persuade the undersigned that

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there was any procedural failure to conduct triennial evaluations when required, much less any impact on Student's substantive rights.

Issue 4: *Whether DCPS denied Student a FAPE by failing to provide timely access to ■■■ full cumulative and special education files, including ■■■ amended or revised IEPs from the Fall of 2016.* (Petitioner has the burden of persuasion on this issue.)

Petitioner failed to meet her burden of proof that DCPS failed to provide Student's educational records or make them available for review as required by the IDEA. While Petitioner had to make ongoing efforts to obtain Student's educational records, due in part to Student changing schools, she failed to convincingly demonstrate a failure to receive any significant documents.

As an initial matter, the undersigned is of the view that lack of access to educational documents does come within the jurisdiction of this forum, based on the general authority by which any "matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" can be the basis of a due process complaint and hearing. *See* 20 U.S.C. § 1415(b)(6) & (f)(1). *See Letter to Kohn*, 17 IDELR 522 (OSERS 1991) ("OSEP's position is that, based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he/she is entitled"). It is possible for the failure of DCPS to provide documents to rise to the level of a denial of a FAPE to Student if it significantly impeded Parent's opportunity to pursue her rights pursuant to 34 C.F.R. 300.507. *See* 34 C.F.R. 300.513(a), 300.613(a).

Under the IDEA, DCPS must permit parents to inspect and review any education records that are collected, maintained, or used by the agency, with respect to the identification, evaluation, and educational placement of their child, and the provision of a FAPE to the child. 34 C.F.R. 300.501(a), 300.613(a). *See Jalloh ex rel. R.H. v. District 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," quoting 5 D.C.M.R. § 3021 and the Office of Dispute Resolution Due Process Hearing – Standard Operating Procedures § 800.2). Moreover, the regulations are clear that the "agency must comply with a request without unnecessary delay and before . . . any hearing. . . ." 34 C.F.R. 300.613(a).

Here, a formal request for documents was initially made by letter dated 7/29/16 and Parent's advocates sent several subsequent requests for documents, to which Public School appeared reasonably responsive. Petitioner's counsel stated on 12/9/16 that there wasn't a finalized IEP in the file, but LEA Representative had given it to Parent in person. Similarly, Petitioner's counsel argued at the hearing that Parent had not received Student's finalized 2/22/17 IEP, but LEA Representative credibly testified – without rebuttal – that she had also given it to Parent in person. LEA Representative persuasively testified that she had "nothing to hide," sought to provide all documents to Petitioner's counsel, and believed

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Petitioner's counsel had been provided everything available, even though LEA Representative could not find every document sought.

Accordingly, this Hearing Officer is persuaded that any failure of DCPS to provide additional documents did not rise to the level of a denial of a FAPE to Student because there was no showing that any significant documents were not provided or that the failure to provide those documents significantly impeded Parent's opportunity to participate in decision-making. *See* 34 C.F.R. 300.513(a).

ORDER

Petitioner has not prevailed on any of the issues in this case. Accordingly, **it is hereby ordered** that any and all 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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