

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, N.E., 3<sup>rd</sup> Floor  
Washington, DC 20002

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PETITIONER, on behalf of STUDENT, <sup>1</sup>	)	
	)	Date Issued: March 5, 2018
Petitioner,	)	
	)	Hearing Officer: Peter B. Vaden
v.	)	
	)	Case No: 2017-0340
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
	)	Hearing Dates: February 16 & 26, 2018
Respondent.	)	
	)	Office of Dispute Resolution, Room 112 Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.).

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on December 21, 2017, named District of Columbia Public Schools (DCPS) as Respondent. In her due process complaint, Petitioner alleges that DCPS has denied Student a free appropriate public education (FAPE) by failing to provide an appropriate Individualized Education Programs (IEP) since March 2017 and by failing to implement Student's IEP related services in the 2016-2017 and 2017-2018 school years.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner and DCPS met for a resolution session on January 11, 2018 but DCPS was unable to resolve the dispute that was the basis for the due process complaint. On January 10, 2018, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing was convened before this Impartial Hearing Officer on February 16 and 26, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner and Student appeared in person and were represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by CASE MANAGER and by DCPS' COUNSEL.

MOTHER and Student testified and called as additional witnesses EDUCATIONAL ADVOCATE 1, INDEPENDENT SLP, INDEPENDENT OT, EDUCATIONAL ADVOCATE 2 and EDUCATIONAL ADVOCATE 3. DCPS called as witnesses SCHOOL SOCIAL WORKER, DCPS AUDIOLOGIST, ELA TEACHER, DCPS OT and Case Manager. Petitioner's Exhibits P-1 through P-58 were admitted into evidence, including Exhibits P-47, P-48, P-58 and P-59 admitted over DCPS' objections. DCPS' Exhibits R-1 through R-21 were all admitted into evidence without objection. Counsel for the respective parties made opening statements and closing arguments. There was no request to file post-hearing written briefs.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

## **ISSUES AND RELIEF SOUGHT**

The following issues for determination were certified in the January 10, 2018

Prehearing Order:

A. Whether Student's March 29, 2017 IEP was not appropriate in that it did not provide a sufficiently restrictive setting or sufficient special education supports to address Student's needs;

B. Whether Student's March 29, 2017 IEP, as amended in fall 2017, was not appropriate in that it did not provide a sufficiently restrictive setting or sufficient special education supports to address Student's needs;

C. Whether DCPS failed to implement Student's IEP during the 2016-2017 and 2017-2018 school years by not providing the Occupational Therapy, Speech and Language and Behavioral Support Services specified in the IEPs;

D. Whether DCPS violated the IDEA by removing the parent from the March 27, 2017 IEP meeting and completing the March 29, 2017 IEP without the parent's continued participation.

For relief, Petitioner requests the hearing officer to order DCPS to convene Student's IEP team to update Student's IEP to provide for full time special education and increased related services; order DCPS to provide counseling to Student to address social-emotional deficits and order DCPS to fund Student's placement at a private therapeutic day school. In addition, Petitioner seeks an award of compensatory education to address Student's Speech/Language and motor deficits and provide for a reading specialist.

## **FINDINGS OF FACT**

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments of counsel, this hearing officer's findings of fact are as follows:

1. Student resides with the Mother in the District of Columbia. Testimony of Mother. Student is eligible for special education and related services as a student with a

Specific Learning Disability (SLD). Exhibit R-21.

2. Since the beginning of the 2016-2017 school year, Student has attended CITY SCHOOL, where Student is currently in GRADE. Testimony of Mother.

3. Student's IEP annual review was conducted at City School on November 21, 2016. The November 21, 2016 IEP identified Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern. The November 21, 2016 IEP provided for Student to receive 16 hours per week of Specialized Instruction, 120 minutes per month of Occupational Therapy (OT) and 120 minutes per month of Behavioral Support Services (BSS). All services were to be provided outside general education. Exhibit P-25.

4. In January and February 2017, SCHOOL PSYCHOLOGIST conducted a psychological reevaluation of Student. Tests of cognitive functioning indicated that Student's general intellectual functioning was in the Very Low range. On educational testing, Student's scores were Very Low for Broad Reading, Broad Mathematics and Broad Written Language. School Psychologist did not conduct a behavioral assessment of Student. Exhibit P-7.

5. On January 27, 2017, Independent SLP conducted an IEE speech-language evaluation of Student. Student's score on the Clinical Evaluation of Language Fundamental - Fifth Edition (CELF-5) indicated that Student's Core Language is Below Average in the range of overall functioning. Student's performance suggested that Student's ability to participate in the classroom, access the curriculum and understand/use language is impacted by the existence of a mild language disorder. On the Test of Problem Solving - 2<sup>nd</sup> Edition Adolescent (TOPS-2), Student's critical

thinking skills were found to be in the mildly disordered range. Student's hearing, vocal quality, and Pragmatic communication skills tested within normal limits. Articulation and fluency were deemed to be within normal limits. Independent OT recommended, *inter alia*, that Student would benefit from 30 minutes per week of speech and language therapy and that Student should have a comprehensive audiology examination. Exhibit P-6.

6. Petitioner brought a prior due process complaint, on behalf of Student, on December 23, 2016 (Case No. 2016-0297). The issues in that case were whether DCPS had failed to provide Student appropriate IEPs in November 2015 and November 2016 and whether DCPS had failed to comprehensively reevaluate Student. Following a two-day due process hearing, Hearing Officer Coles B. Ruff held in his March 8, 2017 Hearing Officer Determination (March 8, 2017 HOD) that DCPS denied Student a FAPE by reducing Specialized Instruction Services in Student's November 2015 IEP. DCPS prevailed on the other issues, including that DCPS' November 21, 2016 IEP was appropriate. As compensatory education relief in the March 8, 2017 HOD, Hearing Officer Ruff ordered DCPS to provide Student 200 hours independent tutoring. Exhibit P-4. As of the first day of the due process hearing in the present case, Student had not yet used 140 hours of the compensatory education tutoring. Testimony of Mother.

7. On March 27, 2017, an IEP team meeting was convened for Student at City School to review the January 27, 2017 IEE speech-language evaluation report. Mother, FORMER ATTORNEY and Educational Advocate 1 attended the meeting. The parent and her representatives requested a more restrictive educational environment for Student in a self-contained classroom for every class that requires reading or written language, to which the school representatives would not agree. Exhibit R-9. Student's

IEP was amended to add Communication/Speech and Language as an area of concern and to provide 120 minutes per month of Speech-Language Pathology related services. The revised IEP continued the other special education and related services from the November 21, 2016 IEP, including 16 hours per week of Specialized Instruction, 120 minutes per month of OT and 120 minutes per month of Behavioral Support Services. All services were to be provided outside general education. Exhibit P-26.

8. The March 27, 2017 IEP team meeting became heated. LEA Representative felt that Educational Advocate 1 was being disrespectful to DCPS representatives and ended the meeting. Testimony of Educational Advocate 1, Exhibits R-9, P-42. Educational Advocate 1 testified that at the point the meeting was ended, there was still a lot that needed to be done. However, on cross-examination, this witness agreed that the meeting was ending and that she did not know what the IEP team had done after she and the parent left the meeting. Testimony of Educational Advocate 1. DCPS contends that the IEP team had completed revising Student's IEP. The record does not show that the parent's representatives objected, at the time the March 29, 2017 IEP was issued, that the March 27, 2017 IEP team had not completed its work. In July 10, 2017 and July 13, 2017 emails to RESOLUTION SPECIALIST, Educational Advocate 1 requested a new IEP team meeting to discuss Student's allegedly being dismissed from City School, as well as to review Student's auditory processing evaluation. In those emails, Educational Advocate 1 did not claim that the review of Student's IEP had not been completed at the March 27, 2017 IEP team meeting. Exhibit P-49. On this equivocal evidence, I find that Petitioner has not met her burden of persuasion that the development of the March 29, 2017 IEP was not substantially completed at the time LEA Representative ended the meeting.

9. Student's final grades for the 2016-2017 school year were all B's and C's, except for D's in Art and Health Education. Exhibit P-15. For the final reporting period of the 2016-2017 school year, Student was reported as Progressing on all IEP annual goals, except for No Progress on 1 of 4 Behavioral Goals (charting homework completion) and No Progress on Executive Functioning and Written Communication OT skills. The occupational therapist attributed Student's lack of progress toward these goals to decreased attendance. Student was also reported to have mastered a Transition-Employment goal to register for a computer-related class. Student's Speech-Language goals were reported as "Just Introduced." Exhibit P-32.

10. Speech and Language Service Trackers for Student indicate that Student received no Speech-Language Pathology services in the spring of 2017, due to school closure, Student absences and Student unavailability. Exhibit P-36.

11. Occupational Therapy (OT) Service Trackers for Student indicate that Student missed many OT session over the 2016-2017 school year, most often due to Student's absences or unavailability. The Service Trackers report Student's participation in a total of 215 minutes of OT services from January 2017 through the end of the 2016-2017 school year. Exhibit P-37.

12. Behavioral Support Service Trackers for Student indicate that School Social Worker substantially implemented Student's IEP BSS related services over the 2016-2017 school year. Exhibit P-38, Testimony of School Social Worker.

13. During the 2017 summer break, Mother received a letter from DCPS stating that Student was not invited to return to City School due to excessive absences. The letter indicated that Mother should enroll Student in the in-boundary school for Student's residence. Mother contacted LEA Representative at City School and it was

eventually established that the District had made a mistake. Student's attendance record was changed and Student was allowed to return to City School for the 2017-2018 school year. Testimony of Mother.

14. In August 2017, Independent OT conducted an Independent Educational Evaluation (IEE) occupational therapy (OT) evaluation of Student. She found that Student's bilateral coordination skills were in the Below Average range. Student's fine motor and manual coordination skills were in the Below Average range. On the Visual Motor Integration (VMI) subtest, Student could not be scored because Student overlooked two pages of the test. Independent OT felt that Student's overall visual motor integration was below age expectations, based on Student's observed performance and Student's score on the Bruininks-Oseretsky Test of Motor Proficiency, 2<sup>nd</sup> Edition (BOTS-2). Student presented with overall visual perceptual skills in the Below Average range. Student's handwriting and keyboarding performance supported the idea that writing and typing tasks were challenging for Student, legibility and pace were below expectations and increased time was needed to ensure accuracy, fluency and completion. Student's responses to the Sensory Processing Measure indicated that Student presented with some problems in relation to balance and motion (vestibular processing) and with motor planning. Student presented with definite dysfunction in social participation. Independent OT recommended, *inter alia*, that Student should receive direct OT services for 60 minutes per week, in addition to 30 minutes per month of consultation services. Exhibit P-8.

15. On September 12, 2017, City School convened an IEP team meeting for Student. Mother, Student and Educational Advocate 1 attended the meeting, Student stated that Student had not been provided any Speech-Language services at City School.

Educational Advocate 1 requested a more restrictive setting for Student. No revisions to Student's prior, March 29, 2017, IEP were finalized at this meeting. Exhibit P-43.

16. Student's IEP team convened again on September 28, 2017. The August 2017 IEE OT evaluation was reviewed at the meeting. Student's IEP was not revised at the meeting. Exhibit P-44, Testimony of Educational Advocate 1.

17. On October 27, 2017, Independent Audiologist conducted an IEE auditory processing evaluation of Student. Independent Audiologist found that Student had normal hearing. With respect to auditory processing, Independent Audiologist's testing indicated that auditory sensitivity, auditory extraction, and auditory attention and distractibility were not problems for Student. Independent Audiologist reported that significant deficits were found with auditory memory, auditory phonological integrative processing and sound-symbol association along with weaknesses with auditory lexical integration. Independent Audiologist recommended that Student needed speech-language therapy services that were not included in Student's IEP. Exhibit P-9.

18. Student's IEP team met again on November 7, 2017. At the November 7, 2017 IEP team meeting, the team reviewed an Assistive Technology (AT) evaluation and the IEE OT evaluation of Student. Student's IEP was not revised at the meeting. Exhibit P-45.

19. On December 4, 2017, Student's IEP team convened at City School for the annual IEP review. Mother, Petitioner's Counsel and Educational Advocate 1 attended the IEP meeting. The team reviewed Independent Audiologist's evaluation of Student. DCPS Audiologist told the team that Independent Audiologist's evaluation was "questionable" because Independent Audiologist referenced his personal approach to diagnosing an auditory processing disorder rather than the criteria of the American

Speech–Language–Hearing Association (ASHA). DCPS Audiologist stated that the raw data in Independent Audiologist’s report did not indicate an auditory processing disorder based on ASHA criteria. The school representatives agreed to increase Student’s Specialized Instruction Services from 16 to 20 hours per week. The parent’s representatives dissented from the IEP because they felt that Student needed full-time special education and they did not agree that City School was an appropriate placement. Exhibits P-46, R-15.

20. Student’s grades for the first term of the 2017-2018 school year at City School were D’s and F’s in all core subjects. For the second term, Student received D’s and F’s in core subjects except for a C- in World History. Exhibit P-17.

21. For the 2017-2018 school year, up to the winter break, Student was provided 480 minutes of OT related services, 384 minutes of Behavioral Support Services, 465 hours of Speech-Language’ Pathology. Student’s March 29, 2017 IEP provided for Student to receive 120 minutes per month of each of these related services. Exhibits P-39, P-40 and P-41.

#### CONCLUSIONS OF LAW

Based upon the above findings of fact and argument of counsel, as well as this hearing officer’s own legal research, my conclusions of law are as follows:

##### Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student’s IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the

appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

### Analysis

- Was DCPS' March 29, 2017 IEP not appropriate for Student in that it did not provide a sufficiently restrictive setting or sufficient special education supports to address Student's needs?
- Did DCPS violate the IDEA by removing the parent from the March 27, 2017 IEP meeting and completing the March 29, 2017 IEP without the parent's continued participation?

DCPS' March 29, 2017 IEP provided for Student to receive 16 hours per week of Specialized Instruction outside general education, 120 minutes per month of OT, 120 minutes per month of Behavioral Support Services and 120 minutes per month of Speech-Language Pathology related services. Parent contends that Student's Specialized Instruction Services were inadequate<sup>2</sup> and that Student should have been placed in a full-time, 27-plus hour per week, special education setting. DCPS responds that at the time of the March 27, 2017 IEP meeting, Student was failing only one class and that Student's failure to complete assignments had a negative impact on Student's grades. DCPS maintains that the March 29, 2017 IEP was appropriate for Student.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in *[Bd. of Educ. v. Rowley]*, 458 U.S. 176,

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<sup>2</sup> Petitioner's Counsel confirmed in closing argument that the term "sufficient special education supports" refers to IEP Specialized Instruction Services.

102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court’s assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA’s] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Moradnejad* at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*,

137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F.*, 137 S.Ct. at 999. . . . The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be “*pecially designed*” to meet a child’s “*unique needs*” through an “*individualized education program.*” An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

“The adequacy of an IEP can be measured only at the time it is formulated, not in

hindsight.” *District of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (citing *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008)).

Before addressing the appropriateness of the March 29, 2017 IEP, I consider the procedural violation alleged by the parent in this case, namely that DCPS violated the IDEA by removing the parent from the March 27, 2017 IEP meeting and completing the IEP without the parent’s participation. The IDEA regulations mandate that the District take steps to ensure that the parent is present at each IEP Team meeting or is afforded the opportunity to participate. *See* 34 CFR § 300.322(a). *See, also, e.g. J.N. v. District of Columbia*, 677 F. Supp. 2d 314, 320 (D.D.C. 2010) (“The IDEA guarantees parents of disabled children the opportunity to participate in the evaluation and placement process.”) *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 124 n.6 (D.D.C. 2013) (“Absent an uncooperative parent, meaningful participation is the cornerstone of the IEP process.”) Petitioner has the burden of persuasion on this claim.

Mother, Former Attorney and Educational Advocate 1 all attended the March 27, 2017 IEP team meeting. Mother requested a more restrictive setting for Student. It is undisputed that the team’s deliberations became heated after the school representatives declined to change Student’s special education services or educational placement. LEA Representative curtailed the meeting after Educational Advocate 1 was allegedly rude and verbally aggressive toward the DCPS participants. Mother and her representatives actively participated in the IEP meeting up to that point. In my Findings of Fact, above, I have found the evidence did not establish that when the meeting ended, development of Student’s IEP was not substantially completed. I conclude, therefore, that Petitioner has not met her burden of persuasion that DCPS violated the IDEA’s procedural requirements by not ensuring she had the opportunity to meaningfully participate in the

March 27, 2017 IEP team meeting.<sup>3</sup>

I turn next to the second prong of the *Rowley/Andrew F.* inquiry. Was the March 29, 2017 IEP reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances? The March 29, 2017 IEP provided for Student to receive 16 hours per week of Specialized Instruction, outside the general education classroom. The parent alleges that the IEP was not adequate because it did not provide a sufficiently restrictive setting or sufficient special education supports to address Student's needs. At the March 27, 2017 IEP review meeting, the parent argued that Student needed a self-contained classroom for every class that requires reading, writing or written language, that is, that Student needed special education for elective classes as well as for core curriculum courses. The parent had made the same allegation in her December 23, 2016 due process complaint in Case No. 2016-0297. In the March 8, 2017 HOD, Hearing Officer Ruff determined that the evidence established that DCPS' November 21, 2016 IEP for Student, with the same hours of Specialized Instruction Services and the same educational setting, was reasonably calculated to provide Student educational benefit. Hearing Officer Ruff denied Petitioner's request to order DCPS to revise Student's IEP to provide for full-time specialized instruction.

The March 27, 2017 IEP team meeting was convened pursuant to Hearing Officer Ruff's order in the March 8, 2017 HOD – to review recent DCPS and IEE evaluations and to review and revise Student's IEP as appropriate. When the IEP team met, it

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<sup>3</sup> While I make no finding as to who was at fault for the breakdown in discussions at the IEP meeting, I remind the parties that “the core of the IDEA is the collaborative process between the parents and the school officials to fashion the IEP.” *Andrew F., supra*, 137 S. Ct. 988 at 994 (citing 20 U.S.C. § 1414). It is the responsibility of the parent's representatives as well as of the DCPS participants to ensure that the collaborative process is respected.

reviewed the February 27, 2017 DCPS comprehensive psychological evaluation of Student and the January 27, 2017 IEE speech and language evaluation. Neither evaluator recommended that Student required placement in a full-time special education setting. The adequacy of an IEP can only be determined as of the time it is offered to the student. *See S.S. ex rel. Shank, supra*, 585 F.Supp.2d at 66. Based upon the data and information before the IEP team on March 27, 2017, especially the recent HOD decision by Hearing Officer Ruff that the November 21, 2016 IEP was appropriate, I conclude that DCPS has met its burden of persuasion that the March 29, 2017 IEP provision for 16 hours per week of Specialized Instruction Services outside general education was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Andrew F., supra*, 137 S.Ct. at 999.

B.

- Was DCPS' March 29, 2017 IEP, as amended in fall 2017, not appropriate for Student in that it did not provide a sufficiently restrictive setting or sufficient special education supports to address Student's needs?

Petitioner next contends (1) that DCPS denied Student a FAPE by not ensuring that the March 29, 2017 IEP was timely revised in the fall of 2017 and (2) that the December 12, 2017 revised IEP continues to provide an inappropriate educational setting and inadequate special education supports for Student. I consider these claims in turn.

- i. Did DCPS unduly delay revising Student's March 29, 2017 IEP?

Petitioner alleges that DCPS denied Student a FAPE by failing to ensure that Student's March 29, 2017 IEP was appropriately revised in the fall of 2017. City School convened multiple IEP team meetings for Student in September, November and December 2017 and at each meeting, Mother and her representatives argued for Student

to have a full-time IEP. However, it was only at a meeting on December 4, 2017 that the IEP team agreed to increase Student's Specialized Instruction Services from 16 hours to 20 hours per week.

Petitioner contends that Student's IEP should have been revised sooner than December 2017. The IDEA does not set a time frame for revising a student's IEP, except that the IEP must be reviewed at least annually. *See* 34 CFR § 300.324(b)(1). In an analogous analysis of the timeliness of a parent-requested special education reevaluation, the U.S. District Court for the District of Columbia decided that in light of the lack of statutory guidance, a Local Education Agency (LEA) must conduct a special education reevaluation, when requested by a parent, in a "reasonable period of time," or "without undue delay," as determined in each individual case. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). I conclude that, similarly, the IEP team must revise a student's IEP, as appropriate, in a reasonable period of time, or without undue delay, upon receipt of significant new information about the student's needs.

Student's IEP team met on September 12, 2017, September 28, 2017, November 7, 2017 and December 4, 2017. The first three meetings were called to review related services evaluations of Student. At the September 12, 2017 meeting, DCPS Audiologist reviewed her May 17, 2017 comprehensive Auditory Processing Disorder (APD) evaluation of Student. Her evaluation indicated that Student presented with normal hearing in both ears and that there were no specific deficits that indicated a definitive auditory processing disorder. This report was not new information that would have warranted revision of Student's March 29, 2018 IEP. At the next IEP team meeting on September 28, 2017, Student's IEE OT evaluation, received by DCPS on September 21,

2017, was reviewed. Independent Audiologist had recommended that Student's OT services be increased from 120 minutes per month to 60 minutes per week, in addition to 30 minutes per month of consultation services. The IEP team decided that the present levels of performance and OT goals in Student's current IEP were congruent with this report and that Student's IEP did not need to be revised.

On October 27, 2017, Student's grades for the first term of the 2017-2018 school year were issued. Student received D's and F's in all core subjects. I find that this was significant new information because Student's grades in core subjects at the end of 2016-2017 school year had been all B's and C's. Although Student's IEP was not amended at the November 7, 2017 meeting, at the next meeting on December 4, 2017, the IEP team amended Student's IEP to, *inter alia*, increase Specialized Instruction Services from 16 hours per week to 20 hours per week. This was only some 21 school days after the end of the first term. I conclude that this short period did not constitute "undue delay" in convening Student's IEP team to revise the IEP.

- ii. Are the special education supports in DCPS' December 12, 2017 IEP reasonably calculated to enable Student to make appropriate progress?

The long-standing dispute between Mother and DCPS, which was decided in DCPS' favor in the March 8, 2017 HOD, is whether Student requires a full-time special education program. Student's IEP teams have increased Student's special education services, incrementally, from 8 hours per week in November 2015 to 16 hours per week in November 2016, and finally, to 20 hours per week, all outside general education, in December 2017. Mother has maintained consistently that Student requires full-time special education in a self-contained classroom for all classes. DCPS has the burden of persuasion on the appropriateness of the December 2017 IEP.

Petitioner's expert, Educational Advocate 1, opined that the incremental approach was not working for Student and that Student needs specialized support in all classes. Educational Advocate 2 opined that with Student's Very Low full-scale IQ of 74 and Extremely Low Processing Speed Index score of 56, Student needs one-on-One attention from teachers. Student testified, quite articulately, about Student's need for small classes with 1:1 attention. Both of Petitioner's experts are employees of Petitioner's Counsel's law firm and are tasked with being zealous advocates for the parent and Student. *See District of Columbia Rules of Professional Conduct, Rules 1.3, 5.3.* Therefore, I consider their testimony less credible than that of a non-party expert. However, in this case, their testimony was buttressed by that of DCPS' expert, School Social Worker, who opined that Student was not currently progressing. School Social Worker testified that Student's sessions with her have been therapeutic and Student has learned problem-solving skills. However, Student has not been able to apply those skills back in the classroom and Student is not always accepting of interventions offered by City School instructors.

ELA Teacher testified that since the beginning of the current calendar year, Student has been "checked out" and not doing any work at all. Another DCPS witness, Case Manager, testified that Student's behavior is cyclical and that since the first of the current calendar year, Student has been in a bad period. Case Manager related that Student has told peers and teachers about going to another school and not having to do the work at City School. Case Manager opined that Student is capable of doing well at City School. Whatever the reason, Student's grades have declined precipitously in the current school year and Student's educational progress has slowed. The common thread in Student's testimony, as well as that of ELA Teacher and Social Worker, is that Student

benefits from one-on-one instruction, which is not consistently available in a general education classroom. I find that in light of Student's current circumstances, in order to make appropriate progress, Student needs instruction for all classes to be delivered in the self-contained special education setting. I conclude, therefore, that DCPS has not met its burden of persuasion that the provision of 20 hours per week of Specialized Instruction in the December 12, 2017 IEP was reasonably calculated to enable Student to make appropriate educational progress. *See Andrew F., supra.*

C.

Failure to Implement Related Services

Petitioner alleges that DCPS failed to implement Student's IEPs during the 2016-2017 and 2017-2018 school years by not providing the Occupational Therapy, Speech-Language Pathology and Behavioral Support related services specified in Student's IEPs. In its response to the due process complaint, DCPS asserts that the District's alleged failure to implement Student's 2016-2017 school year IEP was litigated in the parent's prior due process case, Case No. 2016-0297. In fact, it does not appear that the parent raised failure to implement services as an issue in that case. Notwithstanding, I find that Mother's claims, with respect to DCPS' alleged failure to implement Student's IEP prior to the December 23, 2016 filing date of the last complaint, are barred by the principle of claim preclusion. "The general principle of claim preclusion is that a final, valid judgment on the merits precludes any further litigation between the same parties on the same cause of action. . . . The District of Columbia, like the majority of jurisdictions, has adopted the Second Restatement's transactional approach under which a cause of action, for purposes of claim preclusion, comprises all rights of the plaintiff to remedies against the defendant with respect to all or any part of the

transaction, or series of connected transactions, out of which the action arose.” *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 78 (D.C. Cir. 1997) (internal quotations and citations omitted.)

The prior administrative due process proceeding, Case No. 2016-0297, was between the same parties, Mother and DCPS. The issues in that case arose out of the same transactions, that is the educational placement of Student and the provision of FAPE to Student. There was a valid judgment on the merits, namely the March 8, 2017 HOD. I conclude, therefore, that the parent is barred by the principle of claim preclusion from litigating her claims against DCPS for failure to implement Student’s IEP prior to December 23, 2016, that is, prior to DCPS’ 2016-2017 winter break.<sup>4</sup>

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party “must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000) . . . . To meet this standard, a moving party need not prove that the student suffered “educational harm” because “the Court has no way of knowing how much more progress” a student might have made in the absence of a failure to implement. *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275, 276 n. 2 (D.D.C.2011) (emphasis original). Generally, in analyzing whether a student was deprived of an educational benefit, “courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson*, 770 F.Supp.2d at 275. For example, in *Sumter County School District 17 v. Heffernan*, the court held that a 33% gap of 60 minutes per day between the required and provided hours of applied behavioral analysis therapy was substantial. 642 F.3d 478, 486 (4th Cir.2011). On the other hand, in *Savoy v. District of Columbia*, the court held that a 3% gap of 10 minutes per day between the required and provided hours of specialized instruction was not substantial. 844 F.Supp.2d 23, 34–35 (D.D.C.2012).

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<sup>4</sup> DCPS’ winter break ran from December 22, 2016 through January 2, 2018. Hearing Officer Notice.

*Beckwith, supra*, 208 F. Supp. 3d at 49.

Student's November 21, 2016 IEP provided that DCPS was to provide Student 120 minutes per month of OT services and 120 minutes per month of Behavioral Support Services. Through the end of the school year, DCPS provided substantially all of the Behavioral Support Services specified in the IEP. From January 2017 through the end of the school year, Student should have received some 600 minutes of OT and Behavioral Support Related Services. Student was actually provided some 215 minutes of OT during the period.

Student's IEP was amended on March 29, 2017 to supplement Student's related services with 120 minutes per month of Speech-Language Pathology services, totaling approximately 240 minutes of services through the end of the school year. DCPS provided no Speech-Language Pathology services to Student in the 2016-2017 school year.

In sum, DCPS did not provide Student some 385 minutes of IEP OT services and 240 minutes of IEP Speech-Language Pathology services due from January 3, 2017 through the end of the 2016-2017 school year. I find that this was a failure by DCPS to implement substantial provisions of Student's IEP and Student was denied a FAPE as a result.

In the 2017-2018 school year through December 2017, Student was due some 480 minutes each of OT services, Behavioral Support Services and Speech-Language Pathology. (Student's OT services were increased to 180 minutes per month in the December 12, 2017 IEP.) During this period, Student was actually provided 480 minutes of OT services, 384 minutes of Behavioral Support Services and 465 minutes of Speech-Language' Pathology. This was at least 80 per cent of the related services due

under Student's IEPs. Petitioner's Counsel stated in closing argument that Behavioral Support Services had been substantially provided. School Social Worker was on leave at the beginning of the school year and the BSS shortfall was due to having to line up a replacement counselor. I find that Petitioner has not established that for the 2017-2018 school year, DCPS failed to implement substantial or significant provisions of Student's IEP related services.

### Remedy

In this decision, I have determined that DCPS denied Student a FAPE by failing to ensure that Student was provided full-time special education, outside of general education, in the December 12, 2017 IEP. In addition, I have found that Student has been denied a FAPE by DCPS' failure to fully implement Student's IEP requirements for OT and Speech-Language Pathology services in the 2016-2017 school year.

For relief in this case, the parent has requested. *inter alia*, that I order DCPS to fund Student's placement at a private, therapeutic, day school. The District may be required to pay for private school placement if no suitable public school is available. *See, Q.C-C. v. District of Columbia*, 164 F. Supp. 3d 35, 52 (D.D.C. 2016) (Where private school is the only potential placement in the record that could satisfy student's needs, an order to fund nonpublic placement is warranted.) In this case there has been no showing that no suitable public school is available for Student. Moreover, the parent has not identified a nonpublic school, appropriate for Student, where Student has been accepted for admission. *See Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (Considerations relevant to determining whether a private school is appropriate for a particular student). I will not, therefore, order DCPS to fund a nonpublic placement for Student but will require that DCPS ensure that Student's IEP

is revised in accordance with this decision and that Student is offered a suitable educational placement that is “capable of fulfilling the student’s IEP.” *See Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013).

Petitioner also seeks a compensatory education award to compensate Student for the denials of FAPE in this case. “If a hearing officer concludes that the school district denied a student a FAPE, he has ‘broad discretion to fashion an appropriate remedy,’ which may include compensatory education. *See B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). The compensatory education inquiry requires ‘figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.’ *Id.* at 799.” *Butler v. District of Columbia*, Case No. 16-cv-01033 (D.D.C. Aug. 14, 2017).

Educational Advocate 3 recommended in her compensatory education proposal that Student be awarded mentoring services twice per week for one school year to aid with motivation and “behavioral activation” and 50 hours of outside of school OT for missed OT services. I see no correlation between these proposed services and whatever harm Student suffered from the IEP team’s decision not to provide for full-time special education after December 2017 and from DCPS’ failure to implement some 10 hours, combined, of OT and Speech and Language services in the 2016-2017 school year. I am also mindful that Student still has available some 140 hours of unused compensatory education tutoring services ordered by Hearing Officer Ruff in the March 9, 2017 IEP. Unfortunately this leaves this hearing officer without sufficient information to craft a compensatory education remedy.

In the D.C. Circuit’s *B.D.* decision, *supra*, in the context of compensatory education awards, the Court encouraged hearing officers to order further assessments if

needed to discern a student's needs. ("Assessments sufficient to discern B.D.'s needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them . . ." *Id.* at 800.) It appears that the D.C. Circuit anticipated that the hearing officer or court would keep the evidentiary record open until further compensatory education assessments are completed. However, because my Hearing Officer Determination is due by March 6, 2018, *see* 34 CFR § 300.515(a), it is not permissible to defer my final decision in this case until after a compensatory education evaluation is completed. Accordingly, in my final order, I will order DCPS to obtain an independent compensatory education evaluation of Student. If, after Student's IEP team has reviewed the ordered assessment, Petitioner and DCPS are unable to agree on a compensatory education award "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place," *see Reid, supra*, Petitioner may request compensatory education relief through a new due process hearing request.

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. Within 15 school days of the date of this order, DCPS shall ensure that Student's IEP is revised to provide for full-time specialized instruction in a self-contained setting for all of Student's classes, including electives but not lunch or recess. DCPS shall ensure that a suitable public or nonpublic school location is identified that is capable of fulfilling the revised IEP;
2. Unless the parent and DCPS reach a voluntary agreement on compensatory education for Student, DCPS must obtain an independent compensatory education assessment by a qualified professional to assess

Student's compensatory education needs resulting from the denials of FAPE determined in this decision – namely the City School IEP team's decision not to provide for full-time special education at the December 4, 2017 IEP meeting and DCPS' failure to fully implement the OT and Speech and Language Services required by Student's IEPs from January 3, 2017 through the end of the 2016-2017 school year. If DCPS and Petitioner remain unable to agree upon an appropriate compensatory education award, informed by the recommendations of the independent evaluator, Petitioner may request another due process hearing to seek a compensatory education award for the denials of FAPE determined in this decision and

3. All other relief requested by the Petitioner herein is denied.

Date: March 5, 2018

s/ Peter B. Vaden  
Peter B. Vaden, 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).

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE - SPED  
DCPS Resolution Team