

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

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

OSSE
Office of Dispute Resolution
May 16, 2019

<i>Student</i> , ¹)	Case Nos.: 2019-0044 & 2019-0054
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 5/16/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
<i>PCS</i> ,)	Hearing Dates (Room): 5/6/19 (423),
Respondent.)	5/7/19 (423) & 5/8/19 (Teleconf.)
)	

HEARING OFFICER DETERMINATION

Background

Student’s Parent pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to lack of full IEP implementation and full parental participation. PCS responded that it had fully implemented Student’s IEP and that Parent had fully participated in determining Student’s IEP and placement. PCS had initially filed a due process complaint alleging that its evaluations were appropriate after Parent sought independent evaluations, but PCS withdrew its claim prior to hearing.

Subject Matter Jurisdiction

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

Procedural History

Following the filing of PCS’s due process complaint in Case No. 2019-0044 on 2/11/19, the case was assigned to the undersigned on 2/12/19; Parent filed a response on 2/21/19 and did not challenge jurisdiction. Parent filed a due process complaint in Case No. 2019-0054 relating to similar issues on 2/22/19; the case was assigned to the undersigned on

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

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2/25/19; PCS filed a response on 3/5/19 and did not challenge jurisdiction. The undersigned on 3/15/19 granted an unopposed motion to consolidate the cases. A resolution meeting in Case No. 2019-0054 occurred on 3/12/19, but did not resolve the dispute or shorten the 30-day resolution period, which ended on 3/24/19. A final decision in this consolidated matter must be reached no later than 45 days following the filing of the case by the LEA and 45 days following the end of the resolution period in the case filed by Parent, as extended by a continuance of 51 and 10 days, respectively, which requires a Hearing Officer Determination (“HOD”) by 5/18/19. PCS’s complaint was withdrawn without prejudice by motion dated 4/24/19 and the undersigned’s 5/2/19 order, but the case has been processed to conclusion with the consolidated case numbers.

The due process hearing took place on 5/6/19, 5/7/19 and 5/8/19 (with closing arguments by teleconference) and was closed to the public. Parent was represented by *Parent’s counsel*. PCS was represented by *PCS’s counsel*. *Mother* and *Father* both participated in virtually the entire hearing.

Parent’s Disclosures, submitted on 4/29/19, contained documents P1 through P40, to which PCS raised numerous objections as to relevance, many of which were sustained, resulting in only the following exhibits from Parent being admitted into evidence: P1, P2, P3, P4, P6 (over objection), P8, P12 (over objection), P13 (over objection), P18 (over objection), P19 (over objection), P22 (over objection), P23, P24, P25, P26 (over objection), P27, P28, P29, P30, P32, P33, P34, P35 and P36 (over objection).

PCS’s Disclosures, submitted on 4/29/19, contained documents LEA1 through LEA10, all of which were admitted into evidence without objection.

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

1. Mother
2. Father
3. *Dedicated Aide*

PCS’s counsel presented 4 witnesses in PCS’s case (*see Appendix A*):

1. *General Education Teacher* at PCS
2. *Learning Specialist* at PCS
3. *Special Education Teacher* at PCS (qualified over objection as an expert in Special Education, especially with respect to Instruction)
4. *Director of Special Education* at PCS (qualified over objection as an expert in Special Education)

Parent’s counsel presented Mother as the sole rebuttal witness.

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The issues² to be determined in this Hearing Officer Determination are:

Issue 1: Whether PCS denied Student a FAPE by failing to fully implement Student's IEP following a 1/11/19 IEP meeting for a period of some 7 weeks due to (a) lack of an appropriate dedicated aide, (b) location of services, (c) suitability of classmate, and/or (d) time in the general education setting. *Parent has the burden of persuasion on this issue.*

Issue 2: Whether PCS denied Student a FAPE by making changes to Student's placement and setting following the 1/11/19 IEP meeting without (a) obtaining Parent's informed consent, (b) providing Parent with a prior written notice, and/or (c) providing Parent a meaningful opportunity to participate in all decision-making relating to Student's education. *Parent has the burden of persuasion on this issue.*

The relief³ requested by Parent is:

1. A finding that Student was denied a FAPE.
2. Within 5 days, PCS must authorize Parent to obtain independent evaluations at market rates, including (a) a psychoeducational evaluation, (b) a functional behavior assessment, (c) an occupational therapy assessment, and (d) any other assessments (e.g., speech-language or assistive technology) that the independent evaluator deems necessary to comprehensively reevaluate Student in all areas of suspected disability. Funding should cover at least 2 hours of the evaluator's time to participate in an IEP meeting when the evaluation is reviewed to answer any questions about the report.
3. Within 10 days after receiving the independent evaluations in the previous paragraph, PCS shall convene an IEP team meeting to determine whether modifications of Student's IEP and placement are appropriate, including whether a full-time dedicated aide should be provided and/or a nonpublic placement.
4. PCS shall fund appropriate compensatory education for any denial of FAPE.⁴

² The single issue in PCS's due process complaint (Case No. 2019-0044), which was withdrawn prior to hearing, was, "Whether the comprehensive psychoeducational evaluation and functional behavior assessment conducted by PCS were appropriate under the IDEA."

³ The single element of relief sought in PCS's due process complaint (Case No. 2019-0044), which was withdrawn prior to hearing, was, "A finding that the comprehensive psychoeducational evaluation and functional behavior assessment conducted by PCS were appropriate."

⁴ Parent's counsel was put on notice during the prehearing conference that Parent 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. PCS was to be prepared at the due process hearing to introduce

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5. Any other appropriate relief.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner (in Case No. 2019-0054) is Student's Mother.⁶ Student is *Age*, *Gender* and in *Grade* at PCS, where Student began in 2013/14.⁷ Learning Specialist thinks of Student as articulate and entertaining.⁸

2. Student is eligible for special education and related services under the disability classification Specific Learning Disability.⁹ In the past, Student qualified based on Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"), and also was diagnosed while a young child with multiple epiphyseal dysplasia (a genetic disorder causing joint pain in the hips and knees) and more recently with dyslexia.¹⁰

3. Cognitive and Academic Scores. Measured by the Woodcock-Johnson IV Tests of Cognitive Ability ("WJ-IV Cognitive"), Student's general intelligence score was in the Low range, with a standard score of 77; Student was in the Average range on the perceptual speed cluster and in the Low Average range on fluid reasoning, number facility, and cognitive efficiency.¹¹

4. Student's math skills were in the Low range according to the NWEA in Fall 2018, with a score at the 3rd percentile.¹² On the Woodcock-Johnson IV Tests of Achievement ("WJ-IV ACH"), Student's Broad Math was in the Low Average range.¹³

evidence contravening the requested compensatory education in the event a denial of FAPE was found.

⁵ 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.

⁶ Mother.

⁷ Mother; P12-1.

⁸ P23-1.

⁹ LEA5-1.

¹⁰ P12-3,25,26; P22-1.

¹¹ P13-24.

¹² LEA5-4.

¹³ P13-14,24,25 (1/2017 psychoeducational evaluation).

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5. Student's reading skills were in the Low Average range for literacy text and informational text according to the NWEA in Fall 2018, with a score at the 13th percentile.¹⁴ On the WJ-IV ACH, Student's Broad Reading was in the Average range.¹⁵

6. Student's writing skills were in the Average range based on the WJ-IV ACH in 2/2017, although Student's handwriting was illegible and there were spelling and grammatical errors which did not impact the Woodcock-Johnson scores.¹⁶ On the WJ-IV ACH in 12/2016 or 1/2017, Student's Broad Written Language was in the Average range.¹⁷

7. On PARCC testing of ELA in 2017/18, Student scored near the high end of Level 1, but needed to be on Level 4 to meet expectations, while on math Student was in the middle of Level 2, rather than Level 4.¹⁸ Director of Special Education testified that Student does not like PARCC testing, so scores must be taken with a "grain of salt."¹⁹ Student told Learning Specialist that Student would "just push buttons" on the computer during testing.²⁰

8. PCS regularly said that Student was getting better academically, but Mother believed that Student was always behind and never at grade level; Mother testified that she was always asking for more for Student, speaking with Director of Special Education and others at PCS who had more authority.²¹ Mother stated that the IEP team and staff at PCS not only refused Mother's requests but screamed at her, tried to shame her, and stressed how many resources Student was already receiving.²²

9. Change in Placement Meeting. An initial change in placement meeting was held for Student on about 12/11/18, but the change to a nonpublic school sought by Mother was denied.²³ A second change in placement meeting was held on 1/11/19; Student's teachers reported that Student was performing in the same range as peers and was able to grasp concepts well, but did well in smaller settings.²⁴

10. The OSSE representative at the 1/11/19 meeting believed that PCS was still an appropriate placement for Student; Director of Special Education agreed and stated that a more restrictive placement would be harmful for Student and the rest of the school team

¹⁴ LEA5-5.

¹⁵ P13-14,24 (1/2017 psychoeducational evaluation).

¹⁶ LEA5-6.

¹⁷ P13-15,25 (1/2017 psychoeducational evaluation).

¹⁸ P18-1,3.

¹⁹ Director of Special Education.

²⁰ LEA4-3.

²¹ Mother.

²² *Id.*

²³ Mother; P24 (justification for 11/9/18 referral).

²⁴ LEA3-2; P23-1 (does well with small group instruction and needs 1:1 individualized instruction).

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agreed; Mother and Father disagreed.²⁵ Dedicated Aide testified that it would have been unfair and traumatic for Student to move to a different school in the last year at PCS.²⁶

11. IEP Team Meeting. At the 1/11/19 IEP meeting following the change in placement meeting, everyone spoke and *Parents* were very involved.²⁷ Mother sought a small self-contained class for Student with few students, as she felt Student needed a smaller classroom setting.²⁸ The IEP team discussed and agreed that Student might be more successful in a self-contained setting for core subjects (reading, writing and math), but would remain in general education for the International Baccalaureate (“IB”) class, lunch and “specials” (PE, Art and Music); the team concluded that Student would not need a dedicated aide in the self-contained setting, although the issue could be revisited.²⁹ Mother confirmed that Student would have a dedicated aide for specials, especially PE.³⁰

12. Mother asked “all the time” for a smaller class for Student as the general education classroom contained 20 children or more, and was frustrated and surprised when PCS stated on 1/11/19 that it could send Student to a smaller class as requested.³¹ Father was also surprised that a self-contained classroom was an option at PCS.³² Parents wanted to know how quickly Student could start in the small group setting, although details about the setting were not yet finalized.³³ The entire IEP team, including Parents, agreed on a self-contained classroom for Student.³⁴

13. Mother testified that the IEP team on 1/11/19 did not discuss what physical space would be used for the self-contained room; Mother also testified that PCS said Student would be in a “room” in the library, rather than a corner of the library.³⁵ Father could not recall whether the library was mentioned or not at the IEP meeting; PCS witnesses were unsure whether the library was specifically discussed as the location for Student.³⁶ The IEP team did not discuss classmates or that there would not be classmates from Student’s grade in the self-contained room.³⁷ Father was happy about Student moving to a smaller class.³⁸

²⁵ LEA3-3; Director of Special Education.

²⁶ Dedicated Aide.

²⁷ General Education Teacher.

²⁸ LEA4-3.

²⁹ LEA4-3; Special Education Teacher (no dedicated aide needed in self-contained setting).

³⁰ LEA4-3; Mother.

³¹ Mother; Father (“absolutely wanted smaller setting”).

³² Father.

³³ General Education Teacher; Learning Specialist.

³⁴ General Education Teacher.

³⁵ Mother.

³⁶ Father; Learning Specialist (believe Parents told that classroom initially would be in library); Director of Special Education (Parents told classroom being put in place).

³⁷ Father; Mother.

³⁸ Father.

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14. IEPs. Student's 1/11/19 IEP was finalized on 1/15/19 and implemented a week later.³⁹ The 1/11/19 IEP provided for 16.5 hours/week of specialized instruction outside general education divided between math, reading and written expression, and 4 hours/week of specialized instruction inside general education, along with 1 hour/week of Behavioral Support Services ("BSS") outside general education and 30 minutes/week of occupational therapy outside general education.⁴⁰ Dedicated aide services continued inside general education; the IEP made clear that the dedicated aide must attend specials, including PE, but declined to 13.5 hours/week (from 17).⁴¹ The draft IEP sent to Mother on 1/8/19 had proposed increasing the dedicated aide from 17 to 35 hours/week; Mother instead sought the self-contained classroom.⁴²

15. The prior year, Student's 1/11/18 IEP provided for 5.5 hours/week of specialized instruction outside general education for math and a little reading, with 6.5 hours/week of specialized instruction inside general education for written expression and unspecified specialized instruction, along with 30 minutes/week of BSS outside general education and 30 minutes/week of occupational therapy outside general education; a dedicated aide was provided 17 hours/week inside general education.⁴³

16. Implementation of IEP. PCS was trying to make a new setting work for several students; PCS didn't know where the new classroom would be at the time of the 1/11/19 IEP meeting; the library was a temporary space until a classroom was found.⁴⁴ PCS explained the situation to Parents, who were in a hurry to shift Student to the new room.⁴⁵ Prior to placing Student in the self-contained class in the library, Student had sometimes been pulled out of the general education classroom for special education services in the hallway, which led to bullying.⁴⁶ While witnesses were clear that Student was in the library for 3 weeks, Student first went to the library with 2 other children on 1/22/19; the self-contained class with Student was moved to a newly constructed classroom on the second floor on 2/19/19.⁴⁷

17. While the new classroom was constructed, PCS's library was used as the self-contained classroom for Student and 2 other children who were younger but the same gender as Student, with 1 child a year behind and the other 3 years behind Student.⁴⁸ The younger child broke Student's personal earphones and irritated Student by poking and touching Student, including an incident with the child touching Student's butt.⁴⁹ Special

³⁹ LEA5-1; Director of Special Education.

⁴⁰ LEA5-12.

⁴¹ LEA5-12,17; P4-11.

⁴² P35-1.

⁴³ P4-1,11.

⁴⁴ General Education Teacher.

⁴⁵ General Education Teacher; Learning Specialist.

⁴⁶ Mother; Father.

⁴⁷ P33-1; Mother; Father; Special Education Teacher; Director of Special Education.

⁴⁸ Special Education Teacher; Father; Director of Special Education; LEA8 (photographs); P28 (photograph); P29 (photograph); P30 (photograph).

⁴⁹ Mother; Father; P27-1; P26-1.

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Education Teacher provided instruction to Student one-on-one in the self-contained classroom in the library; Student received further assistance from a classroom aide in the self-contained class.⁵⁰

18. The shift to the library was a “very disagreeable surprise” of which Mother learned from Student, who was disappointed by the move.⁵¹ Parents felt the space was not an appropriate classroom due to its size and lack of privacy, children sometimes playing in the room, and the presence of 3 bean bag chairs.⁵² Mother expressed her concerns to Director of Special Education, the Dean of Students, and the Campus Director.⁵³ The library changed as individual desks and laptops were brought in.⁵⁴

19. PCS took significant efforts to shift normal activities out of the library, so that there was no regular use of the library except for Student’s classroom during the 3-4 weeks Student was there.⁵⁵ Mother observed calls to the library and teachers picking up books in a cart, which she believed distracted the class.⁵⁶ Mother asserted that Student’s peers could see Student through the windows as the blinds were open; Special Education Teacher credibly testified that children were not allowed to play outside the windows as there was a parking lot that was dangerous, and that the blinds were usually closed.⁵⁷ The library contained a security camera in the ceiling near where Student was working, which upset Mother.⁵⁸ Director of Special Education testified that the camera was due to techs previously working there and giving out computer equipment; the camera did not record sound and was automatically taped over every 2-3 days.⁵⁹

20. Mother and Father were concerned about finding Student watching a cartoon in the classroom; Special Education Teacher explained that it was positive reinforcement for working hard and achieving goals.⁶⁰ Special Education Teacher testified that Student was never without instructional materials, for Special Education Teacher could download PCS materials from a SharePoint site and obtained other materials on his own.⁶¹

21. Dedicated Aide. Student’s 2018 IEP provided 17 hours/week of services from a dedicated aide to assist during general education.⁶² The 1/11/19 IEP reduced the dedicated

⁵⁰ Special Education Teacher.

⁵¹ Mother.

⁵² Mother; Father.

⁵³ Mother.

⁵⁴ Father; Mother.

⁵⁵ Special Education Teacher.

⁵⁶ P27; Mother.

⁵⁷ Mother; Special Education Teacher.

⁵⁸ Mother.

⁵⁹ Director of Special Education.

⁶⁰ Mother; Father; P33-1; Special Education Teacher.

⁶¹ Special Education Teacher.

⁶² LEA1-1,12,17.

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aide services to 13.5 hours/week.⁶³ All agreed that the dedicated aide was to assist Student in specials and IB class, along with lunch and recess, pursuant to the 1/11/19 IEP.⁶⁴ The IEP team believed Student did not need a dedicated aide when in the very small self-contained setting where there were only 2 other students and a classroom aide in addition to Special Education Teacher; Parent did not agree and “absolutely” expressed her concerns to PCS.⁶⁵

22. After 1/11/19, Parent testified that she regularly asked Special Education Teacher about Student’s dedicated aide, but was not told who the aide was.⁶⁶ Father testified that he observed Student “many” times and sometimes Student had a dedicated aide and sometimes Student did not; Student was without a dedicated aide in the library and upstairs in the new classroom.⁶⁷ Dedicated Aide testified that Student told him that Student did not have a dedicated aide when in the library.⁶⁸

23. Special Education Teacher tried to reassure Parents about Student’s dedicated aide; Special Education Teacher never said that Student didn’t have a dedicated aide.⁶⁹ Apart from one time early on that Student went without a dedicated aide due to a miscommunication by staff, there was no time when Student didn’t have a dedicated aide as required.⁷⁰ Director of Special Education was responsible for dedicated aides and always made sure Student had a dedicated aide as required.⁷¹ In particular, Director of Special Education was “very certain” that Student had a dedicated aide from 1/11/19 to 1/22/19.⁷² Student remained in General Education Teacher’s general education class the week after 1/11/19 and General Education Teacher thought Student had a dedicated aide that week.⁷³ There was no time when Student didn’t go to specials or lunch for lack of a dedicated aide; there were times when Student had to be pressed to attend specials.⁷⁴

24. As of 1/11/19, the IEP team stated that Dedicated Aide was doing well working with Student.⁷⁵ Dedicated Aide was let go by PCS on 1/12/19 without any explanation.⁷⁶ Student and Dedicated Aide were upset at not being given a chance to say goodbye; regular

⁶³ P1-11.

⁶⁴ Learning Specialist; Director of Special Education; Father; Mother.

⁶⁵ Learning Specialist; Director of Special Education; Mother.

⁶⁶ Mother.

⁶⁷ Father.

⁶⁸ Dedicated Aide.

⁶⁹ Special Education Teacher.

⁷⁰ *Id.*

⁷¹ Director of Special Education.

⁷² *Id.*

⁷³ General Education Teacher.

⁷⁴ Special Education Teacher; Director of Special Education.

⁷⁵ LEA3-2.

⁷⁶ Dedicated Aide.

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telephone communication between them continued.⁷⁷ Student's dedicated aide frequently changed without PCS informing Student or Parents.⁷⁸

25. Mother routinely spoke to Student each night about what happened at school that day and recorded it in her journal (P40), which was not admitted into evidence due to partial illegibility, but from which Mother was permitted to read and quote at length during her testimony.⁷⁹ Mother recorded a number of statements from Student about not having a dedicated aide and not being able to go to specials and lunch, but the statements did not begin until well into February, even though the journal began on 1/7/19.⁸⁰

26. Mother testified that her journal did not note when Student refused to go to specials, even though Mother acknowledged that Student had declined at least twice and others testified that Student refused more often than that.⁸¹ Mother asserted that Student was not allowed to go to eat in the cafeteria with peers due to lack of a dedicated aide; Special Education Teacher testified that Student preferred to eat in the self-contained classroom in order to have more time to work on the computer.⁸²

27. PWN and Observations. A Prior Written Notice ("PWN") was issued by PCS on 1/15/19 noting the updating of Student's IEP to ensure Student would make progress in the general education curriculum.⁸³

28. Parents were very involved with Student at PCS; Mother wrote many emails to PCS expressing her concerns about Student and Student's needs.⁸⁴ Parents frequently observed Student in the classroom, including as soon as Student began in the library and as soon as Student was moved to the new classroom.⁸⁵

29. IB Class. Student was expected to be in IB class with peers, but was not able to participate in a chapter in the class due to initially refusing to attend and then being behind the rest of the class, as well as having behavior issues.⁸⁶ Student had difficulty coming back into general education for IB, even when encouraged.⁸⁷ Student had to wait until the next chapter to rejoin the class.⁸⁸

⁷⁷ Dedicated Aide; Mother.

⁷⁸ Mother.

⁷⁹ Administrative Notice.

⁸⁰ Mother; Administrative Notice.

⁸¹ Mother; Director of Special Education.

⁸² Mother; Special Education Teacher.

⁸³ LEA6-1.

⁸⁴ Director of Special Education.

⁸⁵ Mother; Father; P33-1 (Father observed day after Student moved to library).

⁸⁶ General Education Teacher; Special Education Teacher.

⁸⁷ General Education Teacher.

⁸⁸ Mother.

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30. An IB project combined work in the IB class with extra time in a writing class in which Student did not participate.⁸⁹ The content of Student's lessons was available to Special Education Teacher on the SharePoint drive so lessons could be given to Student to keep up sufficiently so Student could on a school trip to the country of Panama.⁹⁰

31. Communication. Mother's native language is [REDACTED] and her testimony was largely given in [REDACTED], although she did not need interpretation to understand most of the proceedings at the hearing and generally did not use the interpreter when listening to the proceedings in English.⁹¹ Father's English capabilities were even better than Mother's and he gave much of his testimony in English, although he relied on the interpreter as needed.⁹² The 1/11/19 meetings did not include a [REDACTED] interpreter and Parents did not request an interpreter; meetings at PCS (a [REDACTED] immersion school) routinely included [REDACTED]-speakers who could interpret if needed by Parents, including Learning Specialist and the Campus Director.⁹³

32. Father was forthright about Parent's complaint being filed as a result of PCS rejecting Parents' request for independent educational evaluations ("IEEs") and PCS filing a complaint against Parent to defend its evaluations.⁹⁴

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

⁸⁹ General Education Teacher.

⁹⁰ Director of Special Education.

⁹¹ Mother; Administrative Notice.

⁹² Administrative Notice.

⁹³ Father; Mother; Director of Special Education.

⁹⁴ Father.

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Once a child who may need special education services is identified and found eligible, the Local Education Agency (“LEA”) must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which the LEA has the burden of persuasion, if Parent establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden

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of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide Student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether PCS denied Student a FAPE by failing to fully implement Student’s IEP following a 1/11/19 IEP meeting for a period of some 7 weeks due to (a) lack of an appropriate dedicated aide, (b) location of services, (c) suitability of classmate, and/or (d) time in the general education setting. (Parent has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on the issue of full implementation of Student’s 1/11/19 IEP in the 7-week period after the IEP was finalized, focusing on the particular concerns raised in the due process complaint.

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

Lack of Appropriate Dedicated Aide. The central factual dispute in this case is whether Student was consistently provided a dedicated aide after 1/12/19, when Dedicated Aide was let go by PCS following a reduction from 17 to 13.5 hours/week of dedicated aide services in Student’s 1/11/19 IEP. There is no dispute that a dedicated aide was to assist Student in so-called specials (PE, Art and Music) and IB class, along with lunch and recess, pursuant to the 1/11/19 IEP, but the aide was not to assist Student during the 16.5 hours/week in the self-contained classroom.

Petitioner’s evidence that the school failed to provide a dedicated aide after 1/11/19 is based on the journal she kept, in which she recorded what Student told her each night about what happened at school that day. Mother included a number of statements from Student about not having a dedicated aide and thus not being able to go to specials and lunch, but such statements were not recorded until well into February, even though the journal began in early January. Moreover, Mother acknowledged that her journal did not note when Student refused to go to specials, even though Mother recognized that Student had declined to go at least twice, while others credibly testified that Student refused more often than that. Mother asserted that Student was not allowed to eat in the cafeteria with peers due to lack of a dedicated aide, but Special Education Teacher persuasively testified that Student preferred to eat in the self-contained classroom in order to have more computer time.

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For his part, Father observed Student “many” times at school and testified that Student was without a dedicated aide both in the library and upstairs in the new classroom. Similarly, Dedicated Aide testified that Student told him (after Dedicated Aide was let go) that Student did not have a dedicated aide in the library. But Student was not supposed to have a dedicated aide while in the self-contained setting of the library or the new classroom, so that was not a failure to implement Student’s IEP.

As for the evidence from PCS, the undersigned found Director of Special Education and Special Education Teacher to be credible in their testimony and, apart from a small miscommunication early on, they testified unambiguously that there was no time when Student did not have a dedicated aide. Director of Special Education was responsible for dedicated aides and always made sure that Student had a dedicated aide as required by the IEP. Further, Director of Special Education and Special Education Teacher were clear that there was no time when Student didn’t go to specials or lunch for lack of a dedicated aide, although there were times when Student had to be encouraged to attend specials and preferred lunch in the classroom.

On balance, the undersigned finds the PCS witnesses more convincing than Parents’ testimony and the evidence from the journal, with its limitations. If Mother had believed that Student wasn’t able to go to specials due to lack of a dedicated aide over a period of time, the undersigned finds it likely that she would have raised her concerns much more emphatically and broadly than simply asking Special Education Teacher about the status of Student’s dedicated aide. Mother wrote many emails to PCS expressing a variety of concerns, yet there was curiously little contemporaneous evidence of concern from Mother on this key issue. At the end of the analysis, Mother has the burden of persuasion on this issue, which was not met.

Location of Services. The location of services was not specified in the IEP, so Mother’s concern about Student’s classroom does not amount to a failure to implement claim. Moreover, as the Court recently held in *Z.B. v. Dist. of Columbia*, 2019 WL 1858303, at *10 (D.D.C. 4/25/19), “the IDEA does not ‘explicitly require parental participation in site selection.’ *James [v. Dist. of Columbia]*, 949 F. Supp. 2d [134] at 138 [(D.D.C. 2013)] (internal quotation omitted).” Here, Mother is not objecting to the school itself, which is the typical dispute over location of services, but simply objecting to the temporary use of the library as Student’s classroom for 3-4 weeks. Mother’s concerns ranged from the size of the room, to the presence of a security camera and bean bag chairs (in addition to desk chairs) in the room, to the blinds on the windows sometimes being open, and the occasional presence of other adults or children in other parts of the room. These various concerns together or separately do not rise to a failure to implement claim in the view of the undersigned. In fact, PCS took significant effort to make the room suitable for the self-contained class and ensure that there was no regular use of the library except as Student’s classroom during the 3-4 weeks Student was there.

Suitability of Classmate. Mother sought a small self-contained classroom, but objected to the classroom containing 2 other children who were younger but the same gender as Student, with 1 child a year behind and the other 3 years behind Student. The younger child particularly irritated Student by poking and touching Student, including an

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incident in which the child touched Student's butt, and recently broke Student's personal earphones. Nonetheless, teaching occurred as Student received instruction from Special Education Teacher one-on-one in the self-contained classroom and received further assistance from the classroom aide. Despite annoyances, students do not get to choose who their classmates will be. This concern does not amount to a failure to implement claim.

Time in General Education Setting. Finally, in addition to whether Student had a dedicated aide in order to go to general education specials and lunch, as discussed above, Petitioner raised an issue about Student attending a general education IB class, which impacted whether Student could go on an international class trip to Panama. After the transition to the self-contained class, Student refused to go to the IB class on a daily basis as required by Student's IEP and got behind in the chapter the IB class was covering, so it was determined that Student needed to wait until the next chapter began in order to re-enter the IB class. However, the content of Student's IB lessons was available to Special Education Teacher on the SharePoint drive so Student kept up with the class sufficiently to make the trip to Panama. Thus, based on credible explanations, the undersigned is not persuaded that there was any failure to implement here either. *See Joaquin v. Friendship Pub. Charter Sch.*, 2015 WL 5175885, at *8 (D.D.C. 2015) (in an implementation claim, services simply need to be offered to the student, even if the student is not there to receive them).

In sum, whether the issues are considered individually or together, this Hearing Officer concludes that there was no material deviation from Student's IEP and that any failure of implementation by the school was *de minimis*.

Issue 2: *Whether PCS denied Student a FAPE by making changes to Student's placement and setting following the 1/11/19 IEP meeting without (a) obtaining Parent's informed consent, (b) providing Parent with a prior written notice, and/or (c) providing Parent a meaningful opportunity to participate in all decision-making relating to Student's education. (Parent has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden on this issue, for Mother's consent to placement was sufficiently informed, Mother did not demonstrate that other PWNs were required or would have made any practical difference, and PCS did not prevent meaningful parental participation.

Parental Participation. Beginning with the most significant issue in this claim, the IDEA clearly requires parental involvement in "decisions on the educational placement of their child." 34 C.F.R. § 300.327; 34 C.F.R. § 300.116(a)(1) (requiring public agency to ensure that the educational placement decision is made by a group that includes parents); 34 C.F.R. § 300.501(c) (same); *Z.B.*, 2019 WL 1858303, at *10 (the "IDEA requires that a student's parents be part of the team that creates the student's IEP and determines the student's educational placement"). Just as the Supreme Court held in crafting an appropriate program of education, determining a suitable educational placement "contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Endrew F.*, 137 S. Ct. at 999. *See also Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 198 (D.D.C. 2013).

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Here, Mother was thoroughly involved in IEP team discussions about appropriate placement of Student and succeeded in convincing the team to place Student in a small self-contained classroom, as discussed above. However, Mother goes on to assert that she should have had more control over Student's setting in order to prevent Student from spending a few weeks in a classroom located in the library with the concerns discussed above, ranging from the size of the room to whether the blinds were drawn and the presence of bean bag chairs. But as the Court recently held in *Z.B.*, 2019 WL 1858303, at *10, "the IDEA does not 'explicitly require parental participation in site selection'" (*quoting James*, 949 F. Supp. 2d at 138), much less the specific details making up an individual classroom. Even so, Parents here were very deeply involved – to their credit – in their child's education and did provide regular and ongoing input to school personnel at all levels, so cannot now credibly assert a lack of participation.

Moreover, even if Parents had a right to provide input at the classroom level, the Court explained in *Pavelko v. Dist. of Columbia*, 288 F. Supp. 3d 301, 306 (D.D.C. 2018), that "plaintiffs' disagreement with the *output* of the IEP process does not mean that they were denied the chance to provide meaningful *input* into that process" (emphasis in original). *See also Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power over the IEP team's decisions).

Prior Written Notices. Turning to the issue of PWNs, Mother did not demonstrate with specificity that other PWNs were required beyond the 1/15/19 PWN or would have made any practical difference, for Mother knew on a daily basis what was happening at school both from detailed reports by Student and from Parents' own frequent observations at PCS.

Specifically, the IDEA requires that the public agency must give prior written notice before it proposes to, or refuses to, initiate or change the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). PWNs are not required each time any sort of change is made in a classroom, for the regulation is limited in the present case to a change in educational placement or provision of FAPE. In the view of the undersigned, this does not include moving Student out of the library to a newly constructed classroom (with the same teacher and classmates), much less moving desks into a room or moving bean bag chairs out.

In any case, failure to provide PWNs would at most have been a procedural violation of the IDEA, and would not have risen to the level of a substantive violation in the absence of evidence that the lack of notice itself harmed Student's education in some way. *See Shaw v. Dist. of Columbia*, 2019 WL 498731, at *14–15 (D.D.C. 2/8/19), *report and recommendation adopted*, 2019 WL 935418 (D.D.C. 2/26/19) ("failure to provide prior written notice is a procedural violation of the IDEA, which constitutes a denial of a FAPE only if it negatively impacts 'the student's substantive rights.' *Lesesne*, 447 F.3d at 834"); *Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 42 (D.D.C. 2006) (same); 34 C.F.R. § 300.513(a).

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As noted, Mother received nightly reports from Student about what was occurring at school, as supplemented by frequent observations by Parents. Mother did not need PWNs to know when Student was moved into the library or when Student was moved to the new classroom on the second floor, for Student appropriately relayed that information and Father or Mother showed up to check out each situation the next day, followed by articulation of concerns (or litigation) as they felt appropriate. On these facts, it is the conclusion of this Hearing Officer that omission of any prior written notices is neither a violation of the IDEA nor a denial of FAPE.

Informed Consent. Finally, the undersigned is persuaded that Mother did give informed consent about Student being placed in the small self-contained class, which was Student's educational placement, since she actually instigated the change. The evidence is clear that no one knew precisely how the self-contained classroom would be developed as of 1/11/19. As decisions were made by the school to close the library and use the room temporarily for the self-contained class, Mother learned about the changes as they occurred, but Mother did not have a role in determining or agreeing with each detail in the classroom. As the Court explained in *Middleton*, 312 F. Supp. 3d at 136, "the IDEA does not require that a parent ultimately agree with a placement decision," which is even more true as to the classroom setting.

ORDER

Parent has not prevailed on any claim in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief in Case No. 2019-0054 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:

Counsel of Record (Appendix A, by email)
OSSE-SPED (due.process@dc.gov)
ODR (hearing.office@dc.gov)

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Contact.resolution@dc.gov