

Hearing Officer Determination

Case No. 2015-0299

Procedural History

Following the filing of the due process complaint on 9/10/15, the case was assigned to the undersigned on 9/11/15. DCPS's response to the complaint was timely filed on 9/18/15 and did not challenge jurisdiction.

The resolution session meeting took place on 10/1/15, but the parties neither settled the case nor terminated the 30-day resolution period early, which ended on 10/10/15. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination ("HOD") by 11/24/15.

The due process hearing took place on 11/4/15 and 11/5/15. The hearing was closed to the public. Petitioners were represented by *Petitioners' Counsel*. DCPS was represented by *Respondent's Counsel*. Counsel discussed settlement near the beginning of the hearing without success. Petitioners were present for the entire hearing.

Neither party objected to the testimony of witnesses by telephone.

The parties agreed on one stipulation: "If the DCPS IEP dated 8/20/15 is found inappropriate, the parties stipulate that Nonpublic School is proper and appropriate for reimbursement purposes, without any need to consider equitable factors."

Petitioners' Disclosure statement and Supplemental Disclosure statement, both submitted on 10/28/15, consisted of a witness list of 8 witnesses and documents P1 through P24. During the Due Process Hearing, Petitioners' Counsel corrected the Student's birth date on the Disclosure letters and corrected the submission date on the Due Process Complaint (P1-5) from 9/9/10 to 9/9/15. Petitioners' Disclosure letters and documents were admitted into evidence without objection.

Respondent's Disclosure statement, submitted on 10/28/15, consisted of a witness list of 11 witnesses and documents R1 through R24. Respondent's Disclosure letter and documents were admitted into evidence without objection.

Petitioners' Counsel presented 2 witnesses in Petitioners' case-in-chief (*see* Appendix A):

1. *Special Education Consultant*, qualified without objection as an expert in Special Education Programming for Students with Learning Disabilities
2. *Curriculum Specialist* at Nonpublic School, qualified without objection as an expert in Special Education Instruction, with an Emphasis on Curriculum, Technology & Learning Disabilities

Respondent's Counsel presented 6 witnesses in Respondent's case (*see* Appendix A):

1. *Grade Teacher* at Public School

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2. *Science Teacher* at Public School
3. *Reading Specialist* at Public School
4. *Speech Language Pathologist* at Public School
5. *Resolution Specialist*
6. *LEA Representative*, qualified without objection as an expert in Special Education Programming and Placement

Petitioners' Counsel presented no rebuttal witnesses.

The sole issue to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE for the 2015/16 school year by failing to provide an IEP and placement reasonably calculated to provide meaningful educational benefit, where (a) DCPS included only 15 hours per week of special education services in its proposed 2015/16 IEP, without intensive interventions in reading, and (b) DCPS proposed general education placement at Student's neighborhood public school, although Student benefited from Nonpublic School during the 2014/15 school year, which provided more than 30 hours per week of special education instruction, with emphasis on reading.

Petitioners seek the following relief:

1. DCPS shall reimburse Parents' educational expenses for Student at Nonpublic School for the 2015/16 school year.
2. Any other relief that is just and fair.

An oral opening statement was made by Petitioners' Counsel and was waived by Respondent's Counsel. Oral closing arguments were made by counsel for both parties at the end of the due process hearing. Both parties were permitted to submit legal citations after the hearing, which Respondent's Counsel provided by email on 11/5/15.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact² are as follows:

² 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

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1. Student is a resident of the District of Columbia; Petitioners are Student's Parents.³ Student is *Age* and in *Grade* during the relevant time period.⁴ Student has severe dyslexia and has been identified as eligible for special education and related services under the disability classification Specific Learning Disorder ("SLD").⁵

2. Student attended Public School through 2013/14⁶; Parents withdrew Student from Public School and unilaterally placed him at Nonpublic School for 2014/15.⁷ Parents successfully sought reimbursement for the cost of Nonpublic School for 2014/15, with an HOD in Case No. 2015-0091 issued on 6/8/15 ("6/8/15 HOD") ordering reimbursement.⁸ The HOD concluded that 8.5 hours of special education services, as proposed by DCPS in a 6/19/14 IEP, was not adequate to provide a FAPE to Student.⁹

3. In 2011/12 at Public School, Student was referred for a full comprehensive psychological evaluation, which included a battery of cognitive, educational and behavioral assessments and observation of Student in his classroom.¹⁰ Student tested in the Above Average range for both verbal and nonverbal intellectual abilities, but the DCPS psychologist reported that Student was performing two years or more below his general education peers in reading fluency and in the broad reading intra-achievement cluster, so concluded that Student met criteria under the IDEA and D.C. Regulations for identification as a child with an SLD.¹¹

4. On 6/12/12, Student's Public School MDT team determined that he was eligible for special education and related services on the basis of an SLD primary disability and developed his initial IEP, providing 2 hours per week of specialized instruction for Reading in the general education setting.¹² In his 3/28/13 IEP, Student's Specialized Instruction was increased to 1 hour per week in general education and 2 hours per week outside general education.¹³

5. On 12/11/13, Student's Public School classroom teacher completed a Teacher Evaluation of Student Strengths and Needs form for Nonpublic School, reporting as "areas of significant concern" for Student, Reading decoding, Reading fluency, Written expression,

taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ P1.

⁴ Curriculum Specialist.

⁵ P3-1; Special Education Consultant; Curriculum Specialist; P5-2; P9-5.

⁶ All dates in the format "2013/14" refer to school years.

⁷ Special Education Consultant.

⁸ P2.

⁹ *Id.*

¹⁰ P13-1.

¹¹ P13-4,5,8.

¹² P2-5.

¹³ *Id.*

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Writing mechanics, and Independent work.¹⁴ In written comments, his classroom teacher wrote that Student prefers an environment that promotes “higher-order thinking, rigorous content and questioning,” but is “often frustrated throughout the school day” at Public School.¹⁵ Classroom teacher further stated that Student struggles with working with independence and initiative and “becomes frustrated, upset and disengaged, as well as discouraged” and “appears distracted and disengaged at times because he is overwhelmed.”¹⁶ DCPS witnesses corroborated classroom teacher’s perceptions of Student’s frustrations and that Student was overwhelmed at Public School.¹⁷

6. In January 2014, Student’s Public School special education teacher referred Student to DCPS for a Least Restrictive Environment (“LRE”) review, explaining that “the IEP team recently reevaluated [Student] and his academic scores, particularly in reading, have not progressed sufficiently in the 20 months since his prior evaluation. He continues to be well behind grade level expectations in reading despite significant interventions at school and outside of school funded by his parents.”¹⁸ His special education teacher also selected an option which stated, “Instructional/Educational - Student’s academic needs exceed the capacity of available school resources.”¹⁹

7. Student’s IEP was revised on 6/19/14 to add annual goals and additional specialized instruction for Mathematics, with 1 hour per week in general education and 30 minutes per week outside general education; Student was determined eligible for special education based on an SLD in Mathematics, in addition to the SLD in Reading.²⁰

8. When Student entered Nonpublic School in August 2014, he was functionally illiterate; he was severely disabled in reading and written language and was unable to access anything requiring being able to read written language.²¹ Nonpublic School started Student on the Wilson Foundations reading program, but he did not make expected progress.²² In January 2015, Nonpublic School changed Student’s reading program to the Phono-Graphix program, which was an important adjustment.²³ Nonpublic School also brought in a reading teacher to provide an extra daily 1:1 reading class for Student, so he received 2 daily periods of reading instruction.²⁴

¹⁴ P11-2.

¹⁵ P11-1.

¹⁶ *Id.*

¹⁷ Science Teacher; LEA Representative.

¹⁸ P12-1.

¹⁹ *Id.*

²⁰ R9-11; R8-1.

²¹ Curriculum Specialist; Special Education Consultant.

²² Special Education Consultant; Curriculum Specialist.

²³ Special Education Consultant.

²⁴ Curriculum Specialist; Special Education Consultant.

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9. Since February 2015, Student has made progress in reading, but still shows severe deficits in reading.²⁵ Student's composite reading score improved from 68 ("not ready for [grade] reading material") to 92 ("approaching reading material readiness").²⁶ His Nonpublic School reading instructor qualified this report of progress by noting that Student was not yet ready for grade level materials and that his new skills are fragile and depend on 1:1 instruction, which has been crucial for his success.²⁷

10. Following the 6/8/15 HOD, which concluded that 8.5 hours/week of special education services was not sufficient for a FAPE, DCPS met with Parents on 7/29/15 and 8/20/15 to revise Student's IEP for 2015/16.²⁸ After much effort, the Team reached agreement on everything in the 8/20/15 IEP except the hours of special education services.²⁹ DCPS concluded that 15 hours was sufficient, but Parents believed that Student required additional services for FAPE, and sought full-time placement at Nonpublic School where Student receives more than 30 hours of special education services each week.³⁰

11. The IEP Team did reach consensus in the 8/20/15 IEP on the facts that³¹:

- a. Student's "reading disability greatly impacts his ability to access the general education curriculum without support."
- b. Student "requires support to complete most tasks that require reading."
- c. "Specialized instruction is necessary in order to guide [Student] towards accessing the general education curriculum."
- d. Student's "disability directly affects his progress in the general education curriculum because he requires support on most reading tasks."

12. DCPS witnesses had no experience with the Phono-Graphix reading program that Nonpublic School found worked best for Student and allowed him to make progress in reading.³² DCPS acknowledged that "reading programs such as Phonograpix (sic)" have helped Student, but did not propose to continue using it and did not propose any other reading plan for Student.³³ DCPS's expert testified that Public School had various reading

²⁵ P9-3,4.

²⁶ P9-3.

²⁷ P9-3,4.

²⁸ Special Education Consultant.

²⁹ Special Education Consultant; LEA Representative.

³⁰ Special Education Consultant; P22-3.

³¹ P3-7; Resolution Specialist; LEA Representative.

³² LEA Representative, Reading Specialist, Resolution Specialist.

³³ P3-7; LEA Representative.

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programs that could be tried with Student, and if those did not work the school would be willing to purchase and try others.³⁴

13. At the time of the 8/20/15 IEP, Student was functioning 4 or more years behind grade level in reading.³⁵ Reliance was still being placed on relatively recent tests of Student using primer (pre-1st grade) and 1st grade materials.³⁶

14. With the increasing complexity of Grade general education materials, Student is falling further and further behind.³⁷ Reading is vital in nearly every class in school, including word problems and written instructions in Math, and impacts Written Language as well; Student's severe dyslexia also negatively impacts him when working with numbers and symbols.³⁸ Technology is a helpful tool for Student and integrated into supports for Student, but cannot close the gap he is facing.³⁹

15. Student's writing has improved over the last year, with an increase in his writing production since entering Nonpublic School, yet independent writing samples from February 2015 are nearly illegible without translation.⁴⁰ Student produced the following (with translations in parentheses) when asked to write a story about what happens at school at night when everything comes to life, as in *Night at the Museum*⁴¹:

“Bataalsip cils the utr gams. (Battleship calls the other games). All the ijis hav a vijis part Theanumu fit for The animus cajis. (All the ??? have a ??? party. The animals fit for the animals cages). The cups poow the cap jog. (The cups?????). Pensus rit ubowt tharlief. (Pencils write about their life). Hed foes cant stand the nus of bataship fiting uther gaims. (Headphones can't stand the noise of battleship fighting other games) Jaigu bilds afuf the gams hid in from batulship. (Jenga builds ??? the games hide in the battleship). The cprutrs toc tgether dy emal. (The computers talk together by email). The sics fud the scol. (The sinks flood the school). OT dols roal urawd (OT dolls roll around).”

16. Based on decades of experience in special education and considerable time working with Student, including a 10/16/15 observation at Nonpublic School, the expert opinion of Special Education Consultant was that the 8/20/15 IEP was inappropriate for Student.⁴² Student continues to make slow progress with full-time support at Nonpublic School.⁴³

³⁴ LEA Representative.

³⁵ Curriculum Specialist.

³⁶ P3-7; P7-1.

³⁷ LEA Representative.

³⁸ Special Education Consultant.

³⁹ Curriculum Specialist.

⁴⁰ P3-10; P10; LEA Representative.

⁴¹ P9-6; P10-4.

⁴² Special Education Consultant.

⁴³ P5-3; Special Education Consultant.

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Student is now more willing to be persistent when the work is hard, rather than giving up in frustration as he had done at Public School.⁴⁴

17. The expert opinion of Curriculum Specialist from Nonpublic School is that there are insufficient hours of specialized instruction for Student in the 8/20/15 IEP.⁴⁵ Student continues to need the Phono-Graphix intensive reading program, which to be implemented properly requires 45 minutes daily, but as a practical matter there is not sufficient time available for it in the 8/20/15 IEP.⁴⁶

18. With the exception of LEA Representative who taught Student in 2012/13 and Reading Specialist who administered assessments to him in 2013/14, none of the DCPS members of the IEP team had firsthand knowledge of Student.⁴⁷ DCPS witnesses had not evaluated, observed, or worked with Student since he left Public School at the end of 2013/14, so based their conclusions about the ability of the 8/20/15 IEP to provide a FAPE on memories and records of Student from 2013/14, along with updates from Nonpublic School.⁴⁸

19. Resolution Specialist viewed the proposed change in hours in the 8/20/15 IEP as a “drastic increase in services,” while LEA Representative viewed it as a “big increase.”⁴⁹ Reading Specialist testified that 1 hour of reading intervention a day would be sufficient for Student.⁵⁰

20. Prior experience and Student’s response to his recent programming should affect the IEP Team’s determination of how Student’s needs can be met appropriately, which requires much more than provided in the 8/20/15 IEP according to the expert testimony of Curriculum Specialist.⁵¹

21. Nonpublic School is a private day school for Students with specific learning disabilities, grades 1 through 12, located in the District of Columbia.⁵² Every student at Nonpublic School has a full-time special education placement.⁵³ Nonpublic School holds a current Certificate of Approval from the D.C. Office of the State Superintendent of Education (“OSSE”).⁵⁴

⁴⁴ Special Education Consultant.

⁴⁵ Curriculum Specialist.

⁴⁶ Special Education Consultant.

⁴⁷ Resolution Specialist; LEA Representative; Reading Specialist.

⁴⁸ LEA Representative; Science Teacher.

⁴⁹ Resolution Specialist; LEA Representative.

⁵⁰ Reading Specialist.

⁵¹ Curriculum Specialist.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ P20; Curriculum Specialist.

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22. Nonpublic School stated by letter dated 8/31/15 and confirmed under oath that there is no additional cost for the 1:1 daily reading instruction that Student is being given at Nonpublic School.⁵⁵

Conclusions of Law

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

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

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

Once a child who may need special education services is identified, DCPS is obligated to conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a). If the child is found eligible, DCPS must then devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

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

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes,

⁵⁵ P8; Curriculum Specialist.

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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.

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

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

Issue: *Whether DCPS denied Student a FAPE for the 2015/16 school year by failing to provide an IEP and placement reasonably calculated to provide meaningful educational benefit, where (a) DCPS included only 15 hours per week of special education services in its proposed 2015/16 IEP, without intensive interventions in reading, and (b) DCPS proposed general education placement at Student's neighborhood public school, although Student benefited from Nonpublic School during the 2014/15 school year, which provided more than 30 hours per week of special education instruction, with emphasis on reading.*

In this case, Parents seek reimbursement for their unilateral placement of Student at Nonpublic School for a second year because DCPS allegedly failed to offer Student an appropriate IEP and placement for 2015/16. Under the IDEA, parents who unilaterally place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993) (quoting *Burlington*, 471 U.S. at 374). Under the so-called *Burlington-Carter* test, Parents may receive tuition reimbursement only on a finding that the local education agency ("LEA") "violated the IDEA, that the private school placement was an appropriate placement, and that [the] cost of the private education was reasonable[.]" *Holland v. Dist. of Columbia*, 71 F.3d 417, 425 (D.C. Cir. 1995) (citing *Florence County*, 510 U.S. at 16).

Alleged Violation of the IDEA

Here, Parents claim that DCPS violated the IDEA by not offering Student an appropriately revised IEP for 2015/16. Student's prior 6/19/14 IEP had increased Student's special education services to 8.5 hours per week, including 3.5 hours outside general

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education, which was found to be insufficient for a FAPE in the 6/8/15 HOD, by which Parents received reimbursement of tuition at Nonpublic School for 2014/15. At meetings on 7/29/15 and 8/20/15, Student's IEP team revised his IEP, increasing Student's special education services to 15 hours per week, including 7 hours outside general education. Parents contend that Student has again been denied a FAPE, because the 8/20/15 IEP provided insufficient direct special education instruction delivered outside the general education environment, and lacked sufficient intensive interventions in reading.

To determine whether a FAPE has been provided for 2015/16 through the revised IEP, this Hearing Officer must first determine whether IDEA procedures have been complied with, and then whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. Here, Petitioners have not alleged that DCPS failed to comply with the IDEA's administrative procedures, so this analysis focuses on the second part of the inquiry, where the adequacy of the IEP is determined as of the time it was offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

In *K.S. v. Dist. of Columbia*, 962 F. Supp. 2d 216 (D.D.C. 2013), the Court explained that the "IEP must be formulated in accordance with the terms of IDEA and 'should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.' *Rowley*, 458 U.S. at 204, 102 S. Ct. 3034." *K.S.*, 962 F. Supp. 2d at 220. However, as noted above, the "IDEA provides a 'basic floor of opportunity' for students, *Rowley*, 458 U.S. at 201, 102 S. Ct. 3034, rather than 'a potential-maximizing education.' *Id.* at 197 n.21, 102 S. Ct. 3034." *K.S.*, 962 F. Supp. 2d at 220. The "question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute." *K.S.*, 962 F. Supp. 2d at 221, quoting *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

Every IEP must be based on the "individualized consideration of and instruction for each child." *Rowley*, 458 U.S. at 189-190. Examining the benefit necessary for an IEP to satisfy IDEA, the court in *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 185 (3d Cir. 1988), rejected the notion that what was "appropriate" could be reduced to a single standard, instead holding that the benefit "must be gauged in relation to the child's potential." The "IDEA calls for more than a trivial educational benefit and requires a satisfactory IEP to provide significant learning and confer meaningful benefit. . . . When students display considerable intellectual potential, IDEA requires a great deal more than a negligible benefit." *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (citations and internal quotations omitted).

Here, Student tested in the Above Average range for both verbal and nonverbal intellectual abilities, yet when Student entered Nonpublic School in August 2014, he was "functionally illiterate" according to Nonpublic School's Curriculum Specialist. Student was severely disabled in Reading and Written Language and was unable to access anything requiring being able to read. But "the ability to read is truly the key that opens the door to

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all other aspects of an education.” *Nein v. Greater Clark County Sch. Corp.*, 95 F. Supp. 2d 961, 977 (S.D. Ind. 2000).

Despite a year in Nonpublic School, during which progress was made, at the time of the 8/20/15 IEP Student was functioning 4 or more years behind grade level in reading. The IEP Team reached consensus in the 8/20/15 IEP on the facts that:

- Student’s reading disability greatly impacts his ability to access the general education curriculum without support.
- Student requires support to complete most tasks that require reading.
- Student’s disability directly affects his progress in the general education curriculum because he requires support on most reading tasks.
- Specialized instruction is necessary in order to guide Student towards accessing the general education curriculum.

As Special Education Consultant credibly testified, not only is reading vital in nearly every class in school, it impacts Written Language as well. Student’s writing improved over the last school year, with an increase in his writing production since entering Nonpublic School, yet independent writing samples from February 2015 are nearly illegible (see ¶ 15 in Findings of Fact).

Based on decades of experience in special education and considerable time working with Student, including a 10/16/15 observation at Nonpublic School, Special Education Consultant’s credible expert testimony was that the 8/20/15 IEP was not appropriate for Student, as he needs much more support than provided in that IEP. The expert from Nonpublic School also convincingly testified that there are insufficient hours of specialized instruction for Student in the 8/20/15 IEP. In particular, Student continues to need Phono-Graphix, the intensive reading program that has allowed Student to progress in reading at Nonpublic School. Phono-Graphix requires 45 minutes daily to be implemented properly, but the 8/20/15 IEP provided only 5 hours out of general education for all subjects other than Math, which would hardly provide time for Phono-Graphix. Indeed, Student is making only slow progress with full-time support at Nonpublic School.

Parents urged at the 7/29/15 and 8/20/15 IEP meetings that the hours of special education services be greatly increased in Student’s IEP, seeking a full-time IEP with placement at Nonpublic School. They assert that by increasing Student’s special education services to only 15 hours per week, the 8/20/15 IEP was not adequate to provide Student “significant learning” and confer “meaningful benefit.” *See Ridgewood*, 172 F.3d at 247.

On the other side, DCPS witnesses testified that the 8/20/15 IEP would be sufficient for Student, but they lacked the credibility of Petitioners’ witnesses due to not having recent experience with Student and because of their view that he had been progressing at Public School previously and would progress if returned. Reading Specialist testified that 1 hour of reading intervention a day would be sufficient for Student, despite the fact that Student was receiving significantly more than that at Nonpublic School in order to achieve some

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progress in reading. DCPS witnesses had no experience with the Phono-Graphix reading program that allowed Student to make progress in reading. DCPS did not propose to continue using Phono-Graphix and did not propose any other reading plan for Student. Instead, DCPS's expert testified that Public School had various reading programs that it could try with Student, and if those did not work the school could purchase and try others.

DCPS viewed the increase in Student's IEP from 7 hours that could be used for Reading (and all subjects other than Math) up to 10 hours in the 8/20/15 IEP as a substantial increase, but this Hearing Officer does not share that perspective in light of the severity of Student's disability. DCPS witnesses were unconvincing in stating that Student could receive the assistance he needs at Public School. While decisions of school personnel are entitled to due deference, *see, e.g., K.S.*, 962 F. Supp. 2d at 221; *T.T. v. Dist. of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007), the undersigned finds unpersuasive the opinion of the DCPS expert that 15 hours per week was sufficient for Student, as she had similarly testified at the prior due process hearing that 8.5 hours was sufficient for Student, and there was no new data on which she was basing her opinion other than the rejection of the lower number by the 6/8/15 HOD.

This Hearing Officer concludes that Petitioners have met their burden of proof to show that the 8/20/15 IEP with 15 hours of services, of which only 7 hours would be provided outside general education, was not adequate to address Student's severe disabilities, and thus was not reasonably calculated to enable the child to receive educational benefits. This was a violation of the IDEA and Student was consequently denied a FAPE.

Appropriateness of Parental Placement

The second part of the *Burlington-Carter* test for private school reimbursement is whether the private school placement made by Parents was appropriate and the cost is reasonable. Analysis of the specific factors set forth in *Branham v. Gov't of the Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005), is not necessary here, however, as the parties entered into the following stipulation: If the DCPS IEP dated 8/20/15 is found inappropriate, the parties stipulate that Nonpublic School is proper and appropriate for reimbursement purposes.

This Hearing Officer concluded above that the 8/20/15 IEP is inappropriate, so pursuant to the parties' stipulation, reimbursement will be ordered below consistent with the 6/8/15 HOD.⁵⁶

⁵⁶ No exclusion of extra reading services need be considered, as in the 6/8/15 HOD. It is now clear that Nonpublic School does not charge extra for supplemental 1:1 reading instruction.

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ORDER

Petitioners have met their burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Upon receipt of documentation of payment by Parents, as may be reasonably required, DCPS shall reimburse Parents the costs of tuition expenses for Student's enrollment at Nonpublic School for the 2015/16 school year.
- (2) Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

Counsel of Record (Appendix A, by email)
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