

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
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OSSE
Office of Dispute Resolution
November 03, 2017

<i>Student</i> , ¹)	Case No.: 2017-0253
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 11/3/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 10/26/17
("DCPS"),)	ODR Hearing Room: 2004
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been found eligible for Extended School Year (“ESY”) services for the summer of calendar year 2017 and also missed a material amount of related services. DCPS responded that the IEP team’s ESY decision was appropriate and that it did provide Student’s related services.

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 the due process complaint on 9/15/17, the case was assigned to the undersigned on 9/18/17. DCPS filed a response on 9/28/17 and did not challenge jurisdiction. The resolution session meeting took place on 10/2/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 10/15/17. A

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

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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 11/29/17.

The due process hearing took place on 10/26/17, and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout the entire hearing.

Petitioner’s Disclosures, submitted on 10/19/17, contained documents P1 through P103, which were admitted into evidence over a number of objections. Respondent’s Disclosures, submitted on 10/19/17, contained documents R1 through R25, which were admitted into evidence without objection.

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

1. *Psychologist* (qualified without objection as an expert in Clinical Psychology and Evaluation of Special Education Students)
2. Parent
3. *Educational Advocate* (qualified over objection as an expert in Individualized Education Program (“IEP”) Monitoring)

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see Appendix A*):

1. *Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology Services for Special Education Students)
2. *Special Education Teacher* (qualified without objection as an expert in Special Education, and IEP Development and Implementation)

Petitioner’s counsel recalled Parent as the only rebuttal witness.

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

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP with ESY for the Summer of 2017, despite data suggesting likely regression over the summer. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

² A third issue was expressly withdrawn by Petitioner’s counsel with prejudice early in the due process hearing, which was, “Whether DCPS denied Student a FAPE by failing to provide full access to Student’s educational records in response to counsel’s requests on 5/23/17, 7/28/17 and 9/6/17.”

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Issue 2: Whether DCPS denied Student a FAPE by failing to implement Student's IEPs in 2015/16³ and/or 2016/17 relating to (a) occupational therapy, where DCPS failed to implement 39% of services in 2015/16 and 37% in 2016/17, and/or (b) speech and language therapy, where DCPS failed to implement 13% of services in 2015/16 and 42% in 2016/17.⁴ *Petitioner has the burden of persuasion on this issue.*

The relief requested⁵ by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall provide compensatory education for any denial of FAPE.⁶

On 10/17/17, DCPS filed a Motion to Compel Education Records, seeking an order compelling Student's current Local Education Agency ("LEA") to provide education records of Student. By email on 10/20/17, Petitioner stated that she did not oppose the motion. However, the undersigned denied the motion on the record at the beginning of the due process hearing, due to the lack of availability of discovery processes in special education proceedings. It was then revealed at the due process hearing that based on Petitioner's lack of opposition, DCPS had been able to obtain the documents in the absence of an Order.

On 10/25/17, the day before the hearing, DCPS filed a Motion for a Frivolous Finding based on Petitioner filing this due process complaint seeking an award of evaluations that Petitioner was also seeking from Student's current LEA. Petitioner filed its opposition to the motion during the evening of 10/25/17. Following oral argument on the record at the end of the testimony at the due process hearing, the undersigned denied the

³ All dates in the format "2015/16" refer to school years.

⁴ Issue 2 combines issues B and C from pages 12 and 13 of the due process complaint.

⁵ At the prehearing conference, Petitioner's counsel expressly withdrew the relief requested in paragraph d) on page 10 of the due process complaint, which was, "Independent education evaluations (IEE) for comprehensive Occupational Therapy and Speech and Language." Further, at the due process hearing, Petitioner's counsel expressly withdrew the relief requested in paragraph 2 of the Relief Requested in the Prehearing Order, which was, "Within 10 business days, DCPS shall provide copies of all requested records of Student, as well as a list of all records of Student maintained by DCPS."

⁶ Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was put on notice to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

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motion on the record both procedurally as untimely and substantively as the request for evaluations in the due process hearing had been withdrawn at the prehearing conference.

One stipulation was agreed to by the parties at the beginning of the due process hearing: “DCPS has provided Petitioner all documents relating to Student’s ESY for the summer of 2017.”

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁷ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student’s Parent.⁸ Student is *Age, Gender* and in *Grade* at *Public Charter School*, where Student began at the beginning of 2017/18.⁹ Student attended *Public School* in 2014/15, 2015/16 and 2016/17.¹⁰ Student is bilingual.¹¹

2. Student initially qualified for special education and related services on 12/29/14, based on Developmental Delay, which is age-limited.¹² In 2016/17, Student’s IEP team considered other classifications and concluded that Student did not meet the criteria for a specific learning disability and no longer qualified for specialized instruction; Student’s academic scores were commensurate with, or above Student’s cognitive scores.¹³ The IEP team agreed that Student would continue to receive Speech-Language and Occupational Therapy (“OT”) services in 2016/17; Public School also provided specialized instruction through the end of 2016/17; Public Charter School found Student eligible for special education and related services for 2017/18.¹⁴

3. Student’s IEPs all provided for 120 minutes/month of OT and 120 minutes/month of Speech-Language, which are the subject of Issue 2 in this case.¹⁵ Student was found eligible

⁷ 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.

⁸ Parent.

⁹ *Id.*

¹⁰ *Id.*

¹¹ P17-3; P18-2; Special Education Teacher.

¹² P2-1.

¹³ P17-1,3,4; P17-12 (Student “achieving at (and above)” cognitive level); P18-2; P30-3.

¹⁴ P30-3; P82-2; Special Education Teacher.

¹⁵ P2-10; P3-10; P4-11; P5-8; P6-15 (Public Charter School continued the related services with 30 minutes/week). Prior to 2016/17, the OT was to be inside general education, and

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for ESY for the summers of 2015 and 2016, but not the summer of 2017, which is the subject of Issue 1.¹⁶ Student has been determined eligible for ESY for the summer of 2018 by Public Charter School.¹⁷

4. A DCPS comprehensive psychological evaluation dated 5/5/17 assessed Student's cognitive functioning with the Stanford-Binet Intelligence Scales – Fifth Edition ("SB5"), which found a Full Scale IQ of 82, in the Low Average range.¹⁸ An 8/4/17 independent comprehensive psychological evaluation (conducted on 6/22/17) measured Student's general intellectual ability with the Woodcock-Johnson IV ("WJ-IV") as an 84, in the Low Average range.¹⁹

5. The Kaufman Test of Educational Achievement – Third Edition ("KTEA-III") administered in the 5/5/17 evaluation indicated that Student's reading, math and written language composite scores were all in the Average range.²⁰ The evaluation concluded from TRC data that Student is reading below grade level, although Student's DIBELS in the green range suggested that Student is on grade level; iReady data suggested that Student's math is below grade level.²¹ The 8/4/17 evaluation found that Student's WJ-IV Achievement scores at the end of 2016/17 were on grade level for reading and math, and 2 years above grade level for writing.²²

6. ESY Process. Psychologist acknowledged that it is best for the IEP team to make the decision about ESY, based on Student data, and that those who work directly with Student are in the best position to determine what Student needs.²³

7. On 12/6/16, Student's IEP team decided that Student did not need ESY services in 2017, but agreed to review the decision in March or April 2017.²⁴ On 5/9/17, Student's IEP team – including Parent – again discussed ESY and determined that Student did not qualify for ESY both because of the progress being made and because Student no longer qualified for specialized instruction.²⁵ The team used all available data and compared the 5/5/17

was outside general education beginning in 2016/17; Speech-Language was consistently outside general education. *Id.* The location of related services is not at issue in this case. P88. Student's IEPs at Public School provided for 5 hours of specialized instruction, which is not at issue in this case. P2-10; P3-10; P5-8.

¹⁶ P3-1,13; P5-11; R3-3; Parent; P1; P88.

¹⁷ P6-18; Parent.

¹⁸ P17-8,14.

¹⁹ P18-4,11; Psychologist.

²⁰ P17-10,15.

²¹ P17-11.

²² P18-5.

²³ Psychologist.

²⁴ P30-2.

²⁵ P33-3; P83-1 (ESY is an IEP team decision and Student's team decided Student does not qualify); Special Education Teacher.

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psychological evaluation and the previous psychological evaluation; reviewed DIBELS and iReady scores; and incorporated the views of Student's teachers and others.²⁶

8. Although eligible, Student did not attend ESY in either the summer of 2015 or 2016.²⁷ Student's IEP team did want Student to attend ESY during the summer of 2016, but understood that Parent had declined ESY and did not want it because of the experience during the summer of 2015 when Student quit after 3 days because there were few, if any, other students.²⁸ The team recommended against ESY for the summer of 2017 because of Student's steady progress, as shown in the details of Student's report card from the 2 years and other information discussed below.²⁹ DCPS did not complete an ESY eligibility worksheet for Student for the summer of 2017.³⁰ Special Education Teacher asserted that DCPS complied with OSSE's requirements.³¹

9. Special Education Teacher signed Student up for 2 summer programs for the summer of 2017 and offered a choice to Parent.³² Student attended regular summer school for the summers of 2016 and 2017.³³ Summer school is more rigorous than ESY and was better for Student by 2017; DCPS recommended summer school to Parent for 2017.³⁴ ESY caters to children more severely disabled than Student was in 2017.³⁵ It would have hindered Student's progress to be in ESY in 2017, rather than summer school.³⁶

10. Progress/Regression. Special Education Teacher's interview form for the 8/4/17 evaluation stated that Student made "great progress" in 2016/17, with more than a year's progress in both reading and math, although Student was still about a year below grade level.³⁷ At the beginning of 2017/18, Student's math and reading skills were found to be a grade level below the grade Student was just starting, while Student's writing skills were a grade above.³⁸ Student's grades and behavior were notably better in 2016/17 than in 2015/16.³⁹

²⁶ Special Education Teacher.

²⁷ Parent; R3-3.

²⁸ P80-1,2.

²⁹ Special Education Teacher; R7; R12.

³⁰ Educational Advocate; Special Education Teacher; P26-1.

³¹ Special Education Teacher.

³² P33-3.

³³ P81-1; Parent.

³⁴ Special Education Teacher.

³⁵ *Id.*

³⁶ *Id.*

³⁷ P18-3.

³⁸ P6-4,6,9.

³⁹ R7-1 (*i.e.*, 2016/17 final quarter: two "4s" (Advanced), five "3s" (Proficient), and three "2s" (Basic)); R12-1 (*i.e.*, 2015/16 final quarter: two "3s," seven "2s," and one "1" (Below Basic)).

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11. Student's IEP Progress Reports noted broad progress on Student's IEP goals.⁴⁰ Student's service trackers also showed general progress as Student received OT and Speech-Language services.⁴¹

12. Psychologist concluded that Student was at great risk for "decay" of educational information over time, so was a good candidate for ESY based on Student's memory deficits and difficulty recouping skills after summer break.⁴²

13. Petitioner's counsel asserted that Student's iReady math scores showed regression over the summer of 2017, comparing the 5/10/17 test at Public School to the 8/21/17 test at Public Charter School, due to Student's overall performance declining by 1 point from 397 to 396 (with a stated standard error of ± 6 points), and the test details, in which Number and Operations declined from 414 to 409; Algebra and Algebraic Thinking increased from 397 to 419; Measurement and Data declined from 389 to 356; and Geometry increased from 380 to 381.⁴³ Educational Advocate lost some credibility with the undersigned by testifying that she couldn't agree that Student was in the same place in math with a 396 as with a 397 iReady score.⁴⁴

14. Speech-Language Pathologist explained that the "stop sign" symbols in front of Test 1 and Test 2 on the 5/10/17 iReady report indicate that Student was clicking rapidly through the tests and may not have given concentrated effort.⁴⁵

15. In the summer of 2015, Student was at TRC level "A" at the end of 2014/15 and also at level "A" at the beginning of 2015/16, indicating no summer regression.⁴⁶ Student had been eligible for ESY the summer of 2015, but didn't go.⁴⁷

16. As for the summer of 2016, Student went from a TRC level "E" at the end of 2015/16 to level "C" at the beginning of 2016/17; by middle-of-year testing in 2016/17, Student was up to level "F."⁴⁸ Petitioner's witnesses testified that going from "E" to "C" over the summer of 2016 was clear regression.⁴⁹ The record is not clear when Student returned to a level "E" in 2016/17.⁵⁰ Special Education Teacher recalled that Student returned to level "E" sooner than middle-of-year, when Student achieved an "F."⁵¹ At the

⁴⁰ R8 (2016/17); R13 (2015/16).

⁴¹ Speech-Language Pathologist; R9; R10; R14; R15.

⁴² P18-11.

⁴³ P13-1; P103-1.

⁴⁴ Educational Advocate.

⁴⁵ P13-1; Speech-Language Pathologist.

⁴⁶ P15-1; Special Education Teacher.

⁴⁷ Educational Advocate.

⁴⁸ P15-1; Psychologist.

⁴⁹ Educational Advocate; Psychologist.

⁵⁰ Educational Advocate.

⁵¹ Special Education Teacher.

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end of 2015/16, Student was not progressing on a goal of answering “wh” questions; at the beginning of 2016/17, Student was progressing on that goal, suggesting lack of regression.⁵²

17. Student’s IEP Progress Report noted that on 6/8/17 Student was able to read at an “H” level.⁵³ In the 2017/18 beginning-of-year Fountas & Pinnell testing, Student was also reading at level “H.”⁵⁴ Psychologist acknowledged that remaining on an “H” level over the summer of 2017 appeared to show a lack of regression.⁵⁵

18. Students typically lose some amount of academic skill over the summer break and take time to recoup it the next year.⁵⁶ On TRC, students might lose a step or a step and a half.⁵⁷ Special Education Teacher testified that typical summer regression might be 1 or 2 reading levels, while recoupment might take most of the first quarter and possibly into the second quarter.⁵⁸

19. Both TRC and iReady testing do not permit special education accommodations, which make the results less reliable for special education students.⁵⁹ Further, any given test may occur on a “bad day” for the student, so a single test or data point should not be given too much weight.⁶⁰

20. Related Services. Petitioner did not raise with Public School any concerns about missed related services for Student at any time prior to filing the complaint; the filing came as a surprise to Public School.⁶¹ If Public School had known there was any issue, the providers could have worked with Parent to determine if it would be appropriate to make up services and seek to address her concerns.⁶²

21. DCPS policies and guidelines for related services call for proration of services, so that a week of classes in August would require 30 minutes of services, if 120 minutes were required for a month.⁶³ DCPS policies require unavailability by the provider to be made up, with a best practice of making up missed time within the quarter, if possible.⁶⁴ DCPS policy is that services need not be made up for school closures, including holidays and inclement weather, or for student absences.⁶⁵ When a student is unavailable due to field trips and other

⁵² R13-3; R8-18; Speech-Language Pathologist.

⁵³ R8-1.

⁵⁴ P6-7.

⁵⁵ Psychologist.

⁵⁶ Educational Advocate.

⁵⁷ *Id.*

⁵⁸ Special Education Teacher.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Speech-Language Pathologist.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

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school activities, the DCPS policy is to make up the session only if missing would cause a negative impact on performance.⁶⁶ Student's service trackers did not give any indication of a pattern of regression.⁶⁷

22. Educational Advocate's calculation of the related services that Student allegedly missed did not take into account school closures and Student absences.⁶⁸ Educational Advocate testified that she thought DCPS should make up services whenever Student was absent and that DCPS was required to provide related services to Student during winter break and other times when school was not in session.⁶⁹ DCPS provided all service trackers that Petitioner's advocates requested and offered to provide any others needed; Petitioner's advocates stated that they would contact DCPS if "anything further is required."⁷⁰ Petitioner knew service trackers were missing, but Educational Advocate never sought the remaining service trackers and was unaware of other advocates for Petitioner asking for them.⁷¹

23. Student's Speech-Language service trackers for 2015/16 indicated that Student was provided a total of 65 extra minutes, if Public School is not penalized for missing services due to school holidays/closure or when Student was absent or unavailable; the details by month are 8/2015: +15; 10/2015: +30; 6/2016: +20.⁷² Petitioner's counsel asserted a deficit of 165 minutes, primarily by assuming that Public School must make up for Student absences/unavailability and school holidays/closures.⁷³

24. Student's Speech-Language service trackers for 2016/17 indicated no missing minutes for Student, if Public School is not penalized for missing services due to school holidays/closure or when Student was absent or unavailable; the details by month are 8/2016: +30; 11/2016: -30; 12/2016: -30; 5/2017: +30.⁷⁴ Petitioner's counsel asserted a deficit of over 500 minutes, due to failing to review all service trackers, along with assuming that Public School must make up for Student absences/unavailability and school holidays/closures.⁷⁵

25. Student's OT service trackers for 2015/16 indicated that Student was provided a total of 20 extra minutes, if Public School is not penalized for missing services due to school holidays/closure or when Student was absent or unavailable; the details by month are

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Educational Advocate.

⁶⁹ *Id.*

⁷⁰ R19-4,5; Special Education Teacher.

⁷¹ Educational Advocate; P91-2 ("No trackers provided"); P92-1 ("no tracker provided").

⁷² R14, with calculations by the undersigned analyzing service trackers month by month to determine whether services provided were over or under the amount required by Student's IEPs.

⁷³ P91-1,2.

⁷⁴ R9, with calculations by the undersigned.

⁷⁵ P91-2,3.

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5/2016: +5; 6/2016: +15.⁷⁶ Petitioner's counsel asserted a deficit of about 300 minutes, due to failing to review all service trackers, as well as assuming that Public School must make up for Student absences/unavailability and school holidays/closures.⁷⁷

26. Student's OT service trackers for 2016/17 indicated that Student was provided a total of 210 extra minutes, if Public School is not penalized for missing services due to school holidays/closure or when Student was absent or unavailable; the details by month are 8/2016: -30; 9/2016: +30; 1/2017: +30; 3/2017: +60; 4/2017: +60; 5/2017: +60.⁷⁸ Petitioner's counsel asserted a deficit of about 400 minutes, due to failing to review all service trackers, computational errors (e.g., 11/2016 and 3/2017), and assuming that Public School must make up for Student absences/unavailability and school holidays/closures.⁷⁹

27. Remedial Hours Authorized. On 10/4/17, DCPS gave Petitioner an unconditional letter of authorization for 50 hours of tutoring, 10 hours of OT and 10 hours of Speech-Language pathology by independent providers of Petitioner's choice.⁸⁰

28. Credibility. The credibility of Psychologist's comprehensive psychological evaluation suffered modestly from her assertion that she had observed Student in the classroom, but failed to include her observations in the evaluation report due to an oversight.⁸¹

Conclusions of Law

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

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

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 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,

⁷⁶ R15, with calculations by the undersigned.

⁷⁷ P92-1.

⁷⁸ R10, with calculations by the undersigned.

⁷⁹ P92-1,2.

⁸⁰ R1.

⁸¹ Psychologist.

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quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew 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." *Endrew 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 recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Endrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *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

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determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP with ESY for the Summer of 2017, despite data suggesting likely regression over the summer. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner did establish a prima facie case on the issue of Public School not finding Student eligible for ESY for the summer of 2017, but DCPS met its burden of persuasion and prevails on the facts of this case.

ESY is necessary to provide a FAPE under 34 C.F.R. 300.106(a) when the benefits a disabled child gains during a regular school year will be “significantly jeopardized” if the child is not provided with an educational program during the summer months. *Johnson v. Dist. of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012), quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002); see also *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008) (adopting standard from *MM*). However, the “mere fact of likely regression” is not a sufficient basis for finding ESY eligibility, for all students may regress to some extent during lengthy breaks; ESY is required only when regression will substantially thwart the goal of “meaningful progress.” *Johnson*, 873 F. Supp. 2d at 386, quoting *MM*, 303 F.3d at 538.

A 3/10/11 memorandum from the Acting State Superintendent of Education explained that the point of ESY is to provide a FAPE, not to provide additional resources or to maximize programming. Further, the benefits gained during the regular school year must be “significantly jeopardized” for a student to receive ESY services. See P95-2. The 3 criteria for determining ESY eligibility are: (1) whether the break in service will jeopardize one or more critical skills, based on student data; (2) the likelihood of “significant regression” in any jeopardized critical skill, based on student data, recognizing that most students experience some natural regression during breaks; and (3) whether the time required for recoupment is “extraordinary,” based on student data, for any critical skill jeopardized. See P95-2,3.

Here, Psychologist testified that Student was a “good candidate” for ESY based on Student’s memory deficits and difficulty recouping skills after summer break, but acknowledged that it is best for the IEP team – as expressly required by 34 C.F.R. 300.106(a)(2) – to make the decision about ESY, based on Student’s data, for those who work directly with Student are in the best position to determine Student’s needs. Student’s IEP team, which did not have Psychologist’s 8/4/17 evaluation when it made the ESY determination for 2017, concluded that Student did not need ESY in the summer of 2017 based on the available data about Student, comparing the 5/5/17 psychological evaluation and a previous psychological evaluation, reviewing DIBELS and iReady scores; and considering the views of Student’s teachers and others.

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Looking specifically at the likelihood of significant regression when Student's IEP team made its ESY decision, Petitioner's counsel emphasized the previous summer, noting that over the summer of 2016 Student went from a TRC reading level "E" to level "C." However, some regression is normal for any child over the summer. Petitioner's witness, Educational Advocate, estimated that students might lose a step or a step-and-a-half on TRC due to normal summer regression, while DCPS's witness, Special Education Teacher, stated that typical regression might be 1 or 2 reading levels. Thus, going from "E" to "C" is not significant regression according to DCPS, and Petitioner's step-and-a-half might include a shift from a low "E" to a high "C."

Looking at the earlier summer of 2015, it is worth noting that Student was at TRC level "A" at the end of 2015/16 and at level "A" at the beginning of 2016/17, indicating no summer regression even though Student did not attend ESY that summer (although Student could have). Moreover, Special Education Teacher clearly testified that neither TRC nor iReady testing permits special education accommodations, which makes low results less reliable for special education students.

As for recoupment, Petitioner emphasized that after the "C" at the beginning of 2016/17, Student did not achieve the prior level until middle-of-year when Student achieved an "F." But the record is not clear when Student returned to level "E." and Special Education Teacher testified that Student had returned to level "E" sooner than the middle-of-year when Student was at an "F," as logic also suggests. Special Education Teacher testified without contradiction that for any child recoupment might take most of the first quarter and possibly into the second quarter of the school year.

The determination of whether Student's IEP team erred in concluding that ESY was not needed in 2017 must be made based on the data available to the team. However, the evidence of how things unfolded during the summer of 2017 is used by Petitioner's counsel to argue that ESY was needed. Petitioner's counsel asserted that Student's iReady math scores showed regression over the summer of 2017, due to Student's overall performance declining by 1 point from 397 to 396 (with a stated standard error of ± 6 points), and the test details, in which Number and Operations declined from 414 to 409 and Measurement and Data declined from 389 to 356, even though Algebra and Algebraic Thinking increased from 397 to 419 and Geometry increased by 1 point. Educational Advocate lost some credibility with the undersigned by testifying that she couldn't agree that Student was in the same place in math with a 396 as with a 397 iReady test score, for this Hearing Officer does not view 1 point as regression, nor the single test detail as being sufficient to require a conclusion of significant regression.

As for reading, Student did not appear to regress over the summer of 2017, even without ESY, as Psychologist acknowledged in her testimony. Student's IEP Progress Report noted that on 6/8/17 Student was able to read at an "H" level and in the 2017/18 BOY Fountas & Pinnell testing, Student was still reading at level "H."

Moreover, all evidence of supposed regression was against the backdrop of Student's overall steady progress. Student was doing notably better in 2016/17 than in 2015/16, both academically and behaviorally, as shown by Student's report cards. The 8/4/17 evaluation

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quoted Special Education Teacher stating that Student had made “great progress” in 2016/17, with more than a year’s progress in both reading and math, although not yet on grade level. At the beginning of 2017/18 in Public Charter School’s new IEP, Student’s math and reading skills were found to be a grade level below the grade Student was just starting, while Student’s writing skills were a grade above. Further, Student’s IEP Progress Reports consistently noted progress on Student’s IEP goals. Student’s service trackers also showed general progress as Student received OT and Speech-Language services.

Finally, Petitioner’s counsel put significant weight on the fact that an ESY eligibility form was not completed for Student for the summer of 2017 and uploaded into SEDS as apparently required by OSSE requirements set out in P97-24. DCPS acknowledged through the single stipulation in this case and in Special Education Teacher’s testimony that it did not complete ESY documentation for Student, but Special Education Teacher testified that DCPS nonetheless complied with OSSE’s requirements. In any case, an LEA failing to meet an OSSE obligation does not necessarily violate the IDEA, and no such violation has been pointed out here. Moreover, even if failure to complete an eligibility worksheet and submit it in SEDS were a violation of IDEA, it appears to this Hearing Officer that it would merely be a procedural offense and not rise to a substantive denial of a FAPE, as the lack of the form did not impede the child’s right to a FAPE, significantly impede Parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit pursuant to 34 C.F.R. 300.513(a).

Accordingly, based on the evidence above, this Hearing Officer concludes that Student’s likely regression was not significant, Student’s recoupment time was not extraordinary, and that the IEP team’s determination that Student was not eligible for ESY in the summer of 2017 was not a denial of FAPE.

Issue 2: *Whether DCPS denied Student a FAPE by failing to implement Student’s IEPs in 2015/16 and/or 2016/17 relating to (a) occupational therapy, where DCPS failed to implement 39% of services in 2015/16 and 37% in 2016/17, and/or (b) speech and language therapy, where DCPS failed to implement 13% of services in 2015/16 and 42% in 2016/17. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of proving that DCPS did not adequately implement Student’s IEP. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student’s IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). 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).

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Here, Speech-Language Pathologist credibly testified about DCPS policies and guidelines for related services, explaining that services missed due to: (a) provider unavailability must be made up, (b) school closures, including holidays and inclement weather, need not be made up, (c) student absences need not be made up, but (d) student unavailable from field trips and other school activities are to be made up only if missing would cause a negative impact on the child's performance, but here Student's service trackers did not give any indication of a pattern of regression. Finally, DCPS policies call for proration of services, so that a week of classes in August would require 30 minutes of services, where 120 minutes were required per month.

Petitioner's calculation of the related services that Student allegedly missed did not take into account school closures and Student's absences, as it should have. Educational Advocate testified that she thought DCPS should make up services whenever Student was absent or whenever school was closed, including winter break and holidays. However, the August 2013 DCPS *Missed Related Service Sessions, Truancy and Due Diligence Guidelines* included in Petitioner's closing, summarize on p. 8 that a related service provider is not required to make up missed service sessions for Student absence (excused or unexcused), Student refusal to participate or attend, or when School is closed for holiday or emergency. Further, Petitioner indicated on her compilation of services provided that some service trackers were missing, but Petitioner's advocates never sought the remaining service trackers, despite DCPS's stated willingness to provide them.

Turning to whether the required related services were actually provided, the undersigned carefully reviewed the service trackers on a month by month basis to determine how many minutes Public School provided or offered to Student and noting whether they totaled more or less than the 120 minutes/month required by Student's IEPs for each OT and Speech-Language. The undersigned applied DCPS's policies, so that August and June were prorated and when the day for services to be provided fell on a day when school was closed or Student was absent or unavailable, no services were expected.

Student's Speech-Language service trackers for 2015/16 indicated that Student was provided a total of 65 minutes more than was required over the course of the year, with an extra 15 minutes in August 2015, an extra 30 minutes in October 2015, and an extra 20 minutes in June 2016. By contrast, Petitioner asserted a deficit of 165 minutes in 2015/16, primarily by assuming that Public School must make up days when Student was not there or school was not open. Student's Speech-Language service trackers for 2016/17 indicated no missing or extra minutes for Student, with 30 extra minutes in August 2016 and May 2017 evenly balanced with 30 missing minutes in November and December 2016. Petitioner claimed that over 500 minutes were missing by failing to review all service trackers, and assuming that Public School must make up time when Student was not there or school was not open.

Turning to OT, Student's service trackers for 2015/16 indicated that Student was provided a total of 20 minutes more than required by Student's IEP, with 5 extra minutes in May 2016 and 15 extra minutes in June 2016. This contrasts with Petitioner claiming a deficit of about 300 minutes, due to failing to include all service trackers and assumptions about making up time. Finally, Student's OT service trackers for 2016/17 indicated that

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Student was provided a total of 210 extra minutes, with a deficit of 30 minutes in August 2016 offset by 30 extra minutes in September 2016, 30 extra minutes in January 2016, and 60 extra minutes in each of March, April and May 2017. Petitioner, however, asserted a deficit of about 400 minutes, due to computational errors, as well as the usual failure to include all service trackers and assumptions about making up time.

As Petitioner’s counsel repeatedly asserted at the due process hearing, “numbers don’t lie.” Thus, based on this Hearing Officer’s computations that Public School actually provided more services than required, there was no failure to implement Student’s IEP. Indeed, even a conclusion that services missed due to Student’s unavailability should have been made up would at most be *de minimis* and not a FAPE violation.

ORDER

Petitioner has not prevailed on any issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

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