

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: November 12, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2017-0223

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: October 19, 2017

Respondent.

Office of Dispute Resolution, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not providing Student appropriate Individualized Education Programs on March 24, 2017 and July 19, 2017.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 18, 2017, named DCPS as respondent. The

¹ Personal identification information is provided in Appendix A.

undersigned hearing officer was appointed on August 21, 2017. On September 20, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The parties met for a resolution session on September 11, 2017 and were unable to reach an agreement. My final decision in this case was originally due by November 1, 2017. After the due process hearing, in order to allow time for the parties to provide information to assist me to craft a compensatory education award, I granted Petitioner's motion, opposed by DCPS to extend the final decision due date to November 17, 2017.

The due process hearing was held before the undersigned impartial hearing officer on October 19, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

The Petitioner testified and called INDEPENDENT PSYCHOLOGIST and EDUCATIONAL ADVOCATE as additional witnesses. DCPS called SPECIAL EDUCATION TEACHER, SCHOOL PSYCHOLOGIST, and LEA REPRESENTATIVE as witnesses. Petitioner's Exhibits P-1 through P-30 and DCPS' Exhibits R-1 through R-22 were all admitted into evidence without objection. Counsel for the respective parties made opening statements and closing arguments. Neither party requested leave to file a post-hearing written closing.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 20, 2017

Prehearing Order:

1. Whether DCPS failed to develop an appropriate IEP for Student on or about July 19, 2017 in that the IEP, a) lacked provision for specialized instruction outside the general education setting for all classes including specials, lunch, and transitions; b) the IEP lacked an appropriate disability classification and Student should be identified under the disability classification as a student with multiple disabilities for emotional disturbance and other health impairment and c) the IEP failed to provide a placement in a separate therapeutic special education day school;

2. Whether DCPS failed to develop an appropriate IEP for Student on or about March 24, 2017 in that the IEP: a) lacked specialized instruction outside the general education setting in a full time or close to full time setting and b) failed to provide a dedicated aide to assist with toileting and behavior issues.

For relief, the parent requested that DCPS be ordered to develop an IEP for Student that is consistent with the claims made by Petitioner or, in the alternative, that DCPS convene a meeting to develop an appropriate IEP to include specialized instruction in reading, writing and math, adaptive goals, and speech and language services and that DCPS be ordered to fund reasonable compensatory education for its alleged denials of FAPE.

At the beginning of the due process hearing on October 19, 2017, Petitioner's Counsel stated that the parent no longer asserted that Student required a dedicated aide to assist with toileting and that the parent would not seek prospective placement for Student at a nonpublic school.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing, as well as the argument of counsel, this hearing officer's findings of fact are as follows:

1. Student, an AGE child, resides with Mother in the District of Columbia.

Testimony of Mother. Student is eligible for special education under the IDEA disability

classification Multiple Disabilities (MD), based upon concurrent Specific Learning Disability (SLD) and Other Health Impairment - Attention Deficit Hyperactivity Disorder impairments. Exhibit R-19.

2. For the 2016-2017 school year, Student was enrolled at CITY SCHOOL 1. For the current 2017-2018 school year, Student is enrolled in GRADE at CITY SCHOOL

2. Testimony of Mother.

3. School Psychologist conducted a comprehensive psychological reevaluation of Student in September 2016. In her October 3, 2016 report, School Psychologist concluded that based on current cognitive and academic testing, Student met IDEA disability criteria as a child with an Intellectual Disability (full scale IQ of 63). In addition, responses by the parent and Student's teacher on the Behavior Assessment System for Children, Second Edition (BASC-2) rating scales indicated scores in the Clinically Significant range in the areas of aggression, conduct problems, depression, atypicality and activities of daily living. Exhibit P-18.

4. In Student's October 24, 2016 IEP, developed at City School 1, Student's disability was identified as Developmental Delay. Areas of concern identified in the IEP were Mathematics, Reading, Emotional, Social and Behavioral Development and Motor Skills/Physical Development. For Special Education and Related Services, the October 24, 2016 IEP provided for 10 hours per week of Specialized Instruction outside general education, 2 hours per month of Occupational Therapy (OT) and 120 minutes per month of Behavioral Support Services (BSS). The IEP also provided for 30 minutes per month of BSS as consultation services. Exhibit P-6.

5. On January 5, 2017, Mother brought a prior due process complaint on behalf of Student. The issues in the prior case concerned the appropriateness of

Student's October 14, 2015 and October 24, 2016 IEPs and whether DCPS had failed to comprehensively evaluate Student and to fund an Independent Educational Evaluation (IEE) speech and language assessment requested by the parent. Following a two-day due process hearing, former Impartial Hearing Officer NaKeisha Sylver Blount issued a hearing officer determination on April 12, 2017 (the April 12 2017 HOD). Hearing Officer Blount determined, *inter alia*, that the October 16, 2016 IEP lacked adequate written expression goals, sufficient hours of specialized instruction and specialized instruction in written expression and that the October 4, 2015 IEP had the same shortcomings and also lacked a needed adaptive goal with respect to toileting. Hearing Officer Blount also determined that DCPS had failed to adequately evaluate Student in 2016 and had violated the IDEA by not timely authorizing an IEE speech and language evaluation requested by the parent in January 2017. For relief, Hearing Officer Blount awarded Student compensatory education and ordered that DCPS ensure that Student's IEP was revised to increase Student's Specialized Instruction and Related Services, that DCPS fund IEE speech and language and autism evaluations of Student and that DCPS reconvene Student's IEP team to revise Student's IEP as appropriate, based on the new assessments. Exhibit P-5.

6. In a March 2017 Behavior Intervention Plan, Level II, developed at City School 1, Student was reported to refuse to consistently comply with any form of academic activities; to be inattentive and easily distracted and to refuse to participate in class; to be extremely oppositional and unwilling to comply with teacher and school staff directives; to be unable to control inappropriate actions and words; to have poor self regulation and to have a strong inability to think through ramifications of actions prior to acting out. Student was reported to have a history of noncompliance in school and in

spite of behavioral interventions and supports, Student was still displaying negative behaviors in school and at home. Student was reported to continue to be inattentive at school and to lack the ability to retain academic information and to be disruptive in all classroom settings. Student was reported to have a very negative self-view and of Student's academic ability, causing Student to refuse to take academic risks. Student's behaviors were reported to have resulted in poor relationships with peers in school and in the community. Student was reported to be often unable to access preferred activities at home and at school because Student required constant supervision and prompts. Student was also reported to be struggling to make progress and to access the curriculum in the general education setting. Student's cognitive abilities were reported to impact Student's progress but many of the behavior issues also served as a great barrier to progress. Exhibit P-20.

7. On March 24, 2017, while the prior due process case was pending, the City School 1 IEP team revised Student's IEP. Student's disability classification was changed to Intellectual Disability (ID). IEP Special Education and Related Services were increased to 15 hours per week of Specialized Instruction outside general education, 2 hours per month of OT outside general education, 120 minutes per month of BSS outside general education and 120 minutes per month of BSS in general education. The revised IEP also provided for 30 minutes per month of BSS consultation services. Exhibit P-8.

8. Independent Psychologist evaluated Student on May 2, 2017 to assess Student's cognitive, academic and social-emotional functioning. Independent Psychologist observed that Student evidenced excess motor energy and paced around the room at the beginning of the assessment but that Student complied for most of the

testing when redirected. However, Independent Psychologist reported that Student got up again, and started touching things in the room; that Student's attention was very short and that Student was fidgety, and lacked internal resources to sit for extended periods of time in order to effectively grapple with the tasks at hand; that Student would pout when frustrated and that Student complained about the intensity of the work.

Exhibit P-21.

9. To assess Student's cognitive ability, Independent Psychologist administered the Woodcock-Johnson IV Tests of Cognitive Abilities (WJ IV Cognitive). Student's General Intellectual Ability (GIA) score was 71, in the Low Range. Student's Brief Intellectual Ability (BIA) score, 79, was also in the Low Range, but was only one point below Low Average. On the Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2), which measures nonverbal abilities, Student scored 85, in the Low Average Range. Independent Psychologist attributed Student's lower scores on the WJ IV Cognitive to Student's poor verbal attention. Exhibit P-21, Testimony of Independent Psychologist.

10. On the Woodcock Johnson IV Tests of Achievement (WJ IV ACH), in the Reading domain, Student received a standard score of 77 (Low). Student's score for Math was 83 (Low Average). Student's score for Written Language was 64 (Very Low).

Exhibit P-21.

11. To assess Student's Social-Emotional Functioning, Independent Psychologist had Mother and two teachers complete Behavior Assessment Scale for Children - Third Edition (BASC-3) rating scales. Their responses placed Student in the Clinically Significant range for Externalizing Problems, Internalizing Problems, School Problems, Behavioral Symptoms and Adaptive Skills. On the Attention Deficit-

Hyperactivity Disorder Test (ADHDT), Mother's and the teachers' responses indicated a Very Likely Probability of ADHD. The teachers' responses to the Gilliam Autism Rating Scales, 3rd Edition (GARS-3) indicated it was "Probable" that Student has Autism Spectrum Disorder (ASD). However Independent Psychologist opined that the teachers' responses were due to Student's "oppositonality" and Student's lack of involvement with teachers and peers in a proactive manner. Independent Psychologist did not see any of the typical signs of ASD in Student and would not have entertained this diagnosis except for the parent's concern. Exhibit P-21.

12. Independent Psychologist diagnosed Student with Oppositional Defiant Disorder (ODD) and ADHD. She recommend that Student be reassessed for ASD in 12 months. Exhibit P-21.

13. On June 26, 2017, School Psychologist conducted a review of Independent Psychologist's IEE evaluation of Student. School Psychologist concluded that based on Independent Psychologist's test results, Student is not a student with an Intellectual Disability. School Psychologist concluded that the ED classification is not appropriate for students, such as Student, who have "behavior disorders" such as ODD or may be socially maladjusted. School Psychologist recommended that Student could qualify for specialized instruction as a student with MD due to Student's ADHD diagnosis and a consideration of Specific Learning Disability (SLD) due to a discrepancy between Student's cognitive abilities and academic achievement. School Psychologist also recommended that a "Least Restrictive Environment (LRE) referral should be made to further explore the option of placing [Student] in a non-categorical, self-contained classroom to address [Student's] academic needs, intellectual concerns, and behavior needs." Exhibit P-23.

14. Student's MDT/IEP team met at City School 1 on July 19, 2017. Mother and Educational Advocate 2 attended the meeting. School Psychologist stated to the team her reasons why Student should not be classified as ED, that is because she considered that ODD was a behavioral disorder, not an emotional disturbance. The team agreed to change Student's disability classification from ID to MD, based upon OHI (ADHD and ODD) and SLD. Exhibit P-11, Testimony of Special Education Teacher.

15. After updating Student's disability classification, the team reviewed Student's IEP. The team increased Student's Specialized Instruction Services to 20 hours per week outside general education. The IEP also provided as Related Services, 210 minutes per month of OT, 120 minutes per month of Speech-Language Pathology, and 120 minutes per month of Behavioral Support Services, all outside general education, and 120 minutes per month of Behavioral Support Services in general education. The IEP also provided for 30 minutes per month of behavioral support consultation services. Exhibit P-9. At the meeting, Mother and Educational Advocate 2 disagreed with the IEP because it did not provide for all in-school time, including core academic classes, specials classes, lunch, recess and transitions, to be outside general education. Exhibit P-13.

16. By letter of July 25, 2017, DCPS informed Mother that the location of services for Student for the 2017-2018 school year would be City School 2, which was the closest school to Student's home that had space available in the Behavior and Education Support (BES) classroom. Exhibit P-36.

17. Mother enrolled Student at City School 2 for the 2017-2018 school year where Student was placed in a BES classroom. Student's behavior at school has been better because there are less students in the BES classroom. Student's teachers say that

Student is not crying so much at school. Mother thinks that Student likes being in the smaller classroom. Testimony of Mother.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

A.

Did DCPS fail to develop an appropriate IEP for Student on or about March 24, 2017 in that the IEP: a) lacked specialized instruction outside the general education setting in a full time or close to full time setting and b) failed to provide a dedicated aide to assist with behavior issues?

When Student's City School 1 IEP was developed on October 24, 2016, Student's disability was identified as Developmental Delay. For Special Education and Related Services, this IEP provided for 10 hours per week of Specialized Instruction outside

general education. On March 24, 2017, while a prior due process case for Student was pending, the City School 1 IEP team revised Student's IEP. Student's disability classification was changed to Intellectual Disability (ID). Student's IEP Special Education and Related Services were increased to 15 hours per week of Specialized Instruction outside general education, 2 hours per month of OT, 140 minutes per month of Behavioral Support Services (BSS). The IEP team turned down Mother's request for a dedicated aide for Student. Mother contends that the Specialized Instruction Services were inadequate for Student without the support of a dedicated aide. DCPS maintains that the increase to 15 hours per week of Specialized Instruction was appropriate at the time the March 24, 2017 IEP was adopted.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully

integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

“The adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.” *District of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (citing *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008)).

School Psychologist conducted a comprehensive psychological reevaluation of Student in September 2016. In her October 3, 2016 report, School Psychologist concluded that based on current cognitive and academic testing, Student met IDEA disability criteria as a child with an Intellectual Disability (full scale IQ of 63). In addition, responses by the parent and Student’s teacher on the BASC-2 rating scale indicated scores in the Clinically Significant range in the areas of aggression, conduct problems, depression, atypicality and activities of daily living. In a March 2017 Behavior Intervention Plan, Level II, developed at City School 1 for the March 24, 2017 IEP team meeting, it was noted that in addition to cognitive deficits, Student’s behavior issues also served as a great barrier to progress. Student was reported as “extremely oppositional” and to have poor self-regulation, to refuse to consistently comply with any form of academic activities, to be inattentive and easily distracted, to be extremely oppositional and unwilling to comply with teacher and school staff directives and to display these behaviors in spite of behavior interventions and supports which had previously been attempted. At the March 24, 2017 IEP team meeting, Student was

reported to require “constant redirection” to remain on task and academically engaged.

The March 24, 2017 IEP team had this information, yet decided to increase Student’s Specialized Instruction by only 5 hours, to 15 hours per week of small group instruction. As discussed below in this decision, on July 19, 2017, after receiving the psychological reevaluation from Independent Psychologist, the City School 1 IEP team changed Student’s placement to a self-contained BES program where Student now receives all core academic instruction. Petitioner’s expert, Educational Advocate 1, opined that as of the March 24, 2017 IEP meeting date, Student needed full-time special education. DCPS’ expert, LEA Representative, attended the March 24, 2017 IEP team meeting. He explained that the DCPS members of the IEP team thought 15 hours per week of Specialized Instruction were appropriate for Student because it would have been too big a step to completely segregate Student from the nondisabled peers. The March 24, 2017 IEP team’s reluctance to place Student in a special education classroom, separate from Student’s nondisabled peers, is understandable. However, given the severity of Student’s academic and behavioral deficits, which were already well documented in March 2017, I find that DCPS has not met its burden of persuasion that the provision of only 15 hours per week of Specialized Instruction in the March 24, 2017 IEP was reasonably calculated to enable Student to make progress appropriate in light of this child’s circumstances. *See Andrew F., supra*, 137 S.Ct. at 1002. Student was denied a FAPE as a result.

B.

Did DCPS fail to develop an appropriate IEP for Student on or about July 19, 2017 in that i) the IEP lacked provision for specialized instruction outside the general education setting for the full school day including for specials classes, lunch, and transitions and ii) the IEP failed to identify Student as Multiply Disabled based on co-occurring emotional disturbance and other health

impairment disabilities?

After Independent Psychologist completed her IEE psychological reevaluation on May 24, 2017, Student's IEP team met at City School 1 to review and update Student's IEP. Independent Psychologist diagnosed Student with Oppositional Defiant Disorder (ODD) and ADHD and recommended that Student's disability classification be changed from ID to Multiple Disabilities based on co-occurring ED and OHI-ADHD disabilities. She also recommended that Student needed a self-contained classroom "with minimal competing stimuli (including students), so that [Student] can be on task with [Student's] work." School Psychologist reviewed Independent Psychologist's psychological evaluation. School Psychologist concluded that the ED disability classification was not appropriate for Student, because, as she explained, the ED classification is not appropriate for children who have "behavior disorders" such as ODD or who may be socially maladjusted. School Psychologist recommended that Student could qualify for specialized instruction as a student with multiple disabilities based on the ADHD diagnosis and a Specific Learning Disability (SLD) due to a purported discrepancy between Student's cognitive abilities and academic achievement.

On July 19, 2017, Student's City School 1 IEP team met to review Independent Psychologist's evaluation of Student. The team agreed to change Student's disability classification from ID to MD, based upon OHI (ADHD and ODD) and SLD, as recommended by School Psychologist. The team increased Student's Specialized Instruction Services to 20 hours per week outside general education. By letter of July 25, 2017, DCPS informed Mother that the IEP would be implemented in a Behavior and Education Support (BES) classroom at City School 2. Mother contends that the July 19, 2017 IEP is inadequate because the disability classification does not include ED and

because the IEP lacked provision for specialized instruction outside the general education setting for the full school day, including for specials classes, lunch, and transitions. DCPS maintains that the IEP is appropriate and that Student benefits from interaction with nondisabled peers for part of the school day.

With regard to Student's disability classification, Independent Psychologist testified that Student's ODD condition is an emotional disturbance. School Psychologist testified to the contrary that ODD is a behavior disorder and is not an emotional disturbance. I am inclined to give more credence to the assertion of School Psychologist because she is a school psychologist by profession and should be more familiar with IDEA disability criteria, as opposed to diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM) used by clinical psychologists. However, assuming that Student's ODD did meet IDEA eligibility criteria for the ED disability, that would not show the July 19, 2017 IEP is inappropriate. The IDEA does not require that the disability classification be identified in the IEP. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE.) The July 19, 2017 IEP identifies Emotional, Social and Behavioral Development as an area of concern for Student. The IEP provides 240 minutes per month of Behavioral Support Services, plus 30 minutes per month of Behavioral Support consultation services. Moreover, Student's Specialized Instruction would be provided in the self-contained Behavior and Education Support classroom at City School 2. I conclude that DCPS has met its burden of persuasion that the July 19, 2107 IEP provides appropriate services to address Student's emotional and behavioral

needs, notwithstanding that ED is not identified as a disability.

Petitioner also alleges that the IEP is not appropriate because Student is permitted to interact with nondisabled peers for non-core specials classes, at lunch and during transition times. The IDEA requires that to the maximum extent appropriate, children with disabilities be educated with children who are nondisabled. *See* 34 CFR § 300.112(a)(2)(i). Petitioner's expert, Independent Psychologist, opined that Student should not attend specials classes with nondisabled peers because Student needs a lot of support to stay regulated in the classroom. LEA Representative testified that he had observed that Student was able to function appropriately with nondisabled peers at breakfast and that for 60-70 percent of the time, Student was successful in transition settings. Both DCPS experts, Special Education Teacher and LEA Representative, opined that Student would benefit from the opportunity to interact in the specials classrooms with nondisabled peers and from the opportunity for peer modeling. Unlike Independent Psychologist who observed Student at school for one 15 minute session, both DCPS witnesses interacted regularly with Student at City School 1. I found their testimony that Student would benefit from interactions with nondisabled peers, especially in specials classes, more persuasive than the contrary opinion of Independent Psychologist. I conclude that DCPS has met its burden of persuasion that the July 19, 2017 IEP, with provision for Student to interact for part of the school day with nondisabled peers in specials classes and in non-academic settings, was reasonably calculated to enable Student to make progress appropriate in light of this child's circumstances. *See Andrew F., supra.*

Remedy

In this decision, I have concluded that DCPS did not meet its burden of

persuasion that the City School 1 March 24, 2017 IEP was appropriate for Student. For special education services, this IEP provided Student 15 hours per week of Specialized Instruction outside general education. For the 2017-2018 school year, Student has been placed in the Behavior and Education Support classroom at City School 2, based upon the July 19, 2017 IEP, which increased Student's Specialized Instruction Services to 20 hours per week. Mother testified that Student likes being in the smaller classroom and that since this change, Student's behavior at school has been better. I conclude that Student should have been provided these special education services in the March 24, 2017 IEP and that the denial of FAPE in this case continued from March 24, 2017 through the end of the 2016-2017 school year. Student is entitled to an award of compensatory education for this denial of FAPE.

In crafting a compensatory education award, “[t]he Hearing Officer should be guided by the principle that, ‘[t]o fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.’ *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C.Cir. 2016) *B.D.* That inquiry requires ‘figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.’ *Id.* at 799.” *Butler v. District of Columbia*, Case No. 16-cv-01033 (D.D.C. Aug. 14, 2017). During the prehearing conference and in my prehearing order in this case, I emphasized to counsel the principles governing compensatory education awards which the courts set out in the *B.D.* and *Butler* decisions. Notwithstanding, at the due process hearing, Petitioner’s compensatory education witness, Educational Advocate 1, was not prepared to provide any evidence on Student’s current performance or academic levels in the present school year. That left this hearing officer without

sufficient information to craft a fact-based compensatory education award.

In the *Butler* decision, U.S. District Judge Mehta held that a hearing officer may not deny, even without prejudice, a request for compensatory education if there has been a denial of FAPE. The Court instructed that a hearing officer, who finds that he needs more information to make an individualized compensatory education assessment, may invite the parent to submit additional evidence to help to fashion an award of compensatory education. Following that guidance, by email of October 24, 2017, I advised counsel that I would allow the parties to submit additional evidence to enable me to craft an appropriate compensatory education award for Student for the denial of FAPE in this case. I solicited from the parties the evidence necessary to determine Student's "specific educational deficits resulting from [the] loss of FAPE and the specific compensatory measures needed to best correct those deficits." *See Butler, supra*. In response, on November 9, 2017, Petitioner's Counsel submitted a score sheet from the Woodcock-Johnson Tests of Achievement administered to Student on November 7, 2017. The assessor, Educational Advocate 1, acknowledged that Student became uncooperative during testing and had made no effort to attempt test items that appeared to be difficult, but still asserted her belief that these test results reflected Student's true abilities. However, the bare Woodcock-Johnson scores shed no light either on what position Student would be in absent the denial of FAPE in this case, or what is needed now to get Student to that position.

For the period of harm in this case, from the March 24, 2017 IEP meeting date to the end of the school year, approximately 10 weeks, Student was provided some five hours per week of Specialized Instruction Services less than indicated for an appropriate IEP. In a memorandum filed November 9, 2017, DCPS' Counsel represented that

following my October 24, 2017 email soliciting additional information to craft a compensatory education award, DCPS authorized funding for Student to receive 27.5 hours of individual academic tutoring at \$65.00 per hour. DCPS' Counsel also represented that prior to the due process hearing, on October 11, 2017, DCPS had issued funding authorization for Student to obtain 40 hours of speech and language services at \$105.95 per hour and an additional 6 hours of Occupational Therapy services at \$124.11 per hour. Absent contrary evidence, I find that these hours of One-on-one tutoring and additional related services provided by DCPS were reasonably calculated to get Student to the position Student would now be in, had the March 24, 2017 IEP, like the July 19, 2017 IEP, provided for 20 hours per week of Specialized Instruction. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005) (A final award relies on "individualized assessments," requires a "fact-specific" inquiry, and must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.* at 524.) I conclude that no further compensatory education award is warranted.

ORDER

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

ORDERED:

1. As compensatory education for the denial of FAPE in this case, Student is awarded 27.5 hours of individual tutoring at \$65.00 per hour to be funded by DCPS. Inasmuch as the parties, by counsel, have stipulated that DCPS has already issued funding authorization for this award,² no additional compensatory education shall be due; and
2. All other relief requested by the Petitioner herein is denied.

² In his November 9, 2017 memorandum, DCPS' Counsel represented that Petitioner, by counsel, had stipulated that DCPS authorized funding for this amount of tutoring.

Date: November 12, 2017

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

cc: Counsel of Record
Office of Dispute Resolution
OSSE Division of Specialized Education
DCPS Resolution Team