

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

OSSE
Office of Dispute Resolution
October 06, 2017

STUDENT, ¹)	
through the GUARDIAN,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2017-0195
v.)	
)	Date Issued: October 6, 2017
District of Columbia Public Schools)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on July 17, 2017 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On July 27, 2017, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on August 3, 2017. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on August 17, 2017 and was set to conclude on September 30, 2017. However, on September 18, 2017, the undersigned granted Respondent’s unopposed September 13, 2017 motion for continuance, moving the HOD deadline to October 6, 2017.

¹ Personal identification information is provided in Appendix A.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on August 7, 2017, during which the parties discussed and clarified the issues and the requested relief. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on August 8, 2017, which ordered that five-day disclosures would be filed by September 7, 2017 and that the DPH would be held on September 14, 2017 and September 15, 2017.

The DPH was held on September 14, 2017, September 15, 2017 and September 22, 2017 at the Office of Dispute Resolution, 810 First Street, NE, Room 2003. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL], Esq. DPCS was represented by [RESPONDENT’S COUNSEL], Esq.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-42 were admitted without objection. Respondent’s exhibits R-2 through R-44 were admitted into evidence without objection. Respondent’s exhibit R-1 was admitted into evidence over Petitioner’s objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Psychologist (Parent)²
- (c) Admissions Director, Nonpublic School (“Admissions Director”)
- (d) DCPS Speech Language Pathologist³
- (e) Educational Advocate

Respondent called the following witnesses at the DPH:

- (a) Former Special Education Teacher
- (b) Special Education Teacher
- (c) Compliance Case Manager
- (d) School Psychologist (LEA)⁴

Petitioner and Respondent gave oral closing arguments.

On October 31, 2016, a different Hearing Officer issued an HOD (“October 2016 HOD”) regarding the parties. As stated in the August 8, 2017 PHO, the parties agree that the undersigned will adopt findings from the October 2016 HOD, to the extent that the undersigned deems those findings to be relevant to the instant matter.⁵

ISSUE

² Qualified, without objection, as an expert in clinical psychology.

³ Parent called DCPS Speech Language Pathologist to testify pursuant to a Petitioner-requested “Notice to Appear.”

⁴ Qualified, without objection, as an expert in school psychology.

⁵ The October 2016 HOD is included in Petitioner’s disclosures at P-34 and Respondent’s disclosures at R-16.

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH:

- (a) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP (in that it did not provide adaptive goals or services, lacked sufficient speech therapy services or goals, failed to adequately identify Student's disability and failed to adequately describe Student's LRE), placement and/or location of services based on the September 23, 2016 and/or the May 16, 2017 IEP meetings.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE;
- (b) an Order that DCPS provide Student with a program capable of implementing Student's IEP and addressing Student's individualized needs, and that Parent have an opportunity to visit and approve of the placement, and/or an Order that DCPS fund placement for Student at Nonpublic School, with transportation;
- (c) an Order that DCPS fund compensatory education for Student.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parent and attends District School.⁶
2. Student has a limited ability to initiate and independently sustain conversations and/or play with others. Student's communications deficits impede Student's ability to adequately interact with teachers and peers.⁷ In part due to Student's communications deficits, Student has difficulty with self-advocacy.⁸
3. Student was initially determined eligible for special education in 2008, under the disability classification was Speech Language Impairment (SLI). Since the initial eligibility determination, Student has always been placed in a self-contained classroom.⁹ On October 24, 2011, Student's IEP team again found Student eligible under the disability classification SLI.¹⁰
4. DCPS reevaluated Student in November 2013, and the school psychologist concluded that Student met criteria as a student with a Specific Learning Disability (SLD) in reading, mathematics and written expression.¹¹ On February 5, 2014, Student's IEP team changed Student's primary disability classification to SLD.¹²

⁶ Testimony of Parent; P-3-1; R-4-1.

⁷ Testimony of Educational Advocate; R-18-245

⁸ Testimony of School Psychologist (DCPS)

⁹ October 2016 HOD, Finding of Fact 2.

¹⁰ October 2016 HOD, Finding of Fact 2; P-12-3.

¹¹ October 2016 HOD, Finding of Fact 4.

¹² October 2016 HOD, Finding of Fact 4.

5. Student's March 15, 2016 IEP provided Student with 25 hours per week of specialized instruction outside the general education setting, 120 minutes of speech-language pathology, 120 minutes per month of occupational therapy services and 120 minutes per month of behavioral support services outside the general education setting.¹³

6. School Psychologist (DCPS) conducted a "Confidential Comprehensive Psychological Re-evaluation" of Student, reflected in an evaluation report dated June 27, 2016 ("June 2016 Psychological"). As stated in the report, School Psychologist (DCPS) found that although Student's 2014-2015 end-of-year Report Card indicated that Student was approaching grade level expectation in several core subjects, Student was actually performing five or six grade levels below expectations in most subjects.¹⁴

7. By way of a verbal measure during the June 2016 Psychological, Student's cognitive functioning fell in the "Extremely Low" range. By way of a non-verbal measure, Student's cognitive functioning fell in the "Poor" range. Student's academic functioning fell in the "Very Low" range.¹⁵

8. During the June 2016 Psychological, Student was assessed, by way of rating scales completed by Parent and Student's teacher, for Autism Spectrum Disorder. Overall, Student was found to have "Probable" or "Very Likely" characteristics of Autism. While the teacher indicated that Student's level of severity required "minimal support," Parent indicated that Student's level of severity required "substantial support."¹⁶ The teacher's rating scale may have been skewed away from demonstrating Autism, in that the teacher who responded to the rating scale teaches only students with disabilities, and may have been rating Student in comparison to students with disabilities, rather than without.¹⁷

9. During the June 2016 Psychological, Student's adaptive functioning was assessed, by way of rating scales completed by Parent and Student's teacher. Scores from Parent fell in the "Extremely Low" range. Scores from the teacher fell in the "Low" to "Average" range; however, based on Student's school records and previous evaluations, School Psychologist determined that the teacher's ratings may have been an overestimation of Student's overall adaptive abilities, and recommended that an additional or alternative adaptive measure be administered to the teacher.¹⁸

10. Based on available information including "school records . . . previous assessments/evaluations data, challenges with retaining information, increased educational supports, [Student's performance] well below grade level in all academic areas and very low cognitive and academic scores," School Psychologist (DCPS) concluded that Student met the classification of a student with an "Intellectual Disability" ("ID"). School Psychologist (DCPS)

¹³ October 2016 HOD, Findings of Fact 12 and 3.

¹⁴ October 2016 HOD, Finding of Fact 15.

¹⁵ October 2016 HOD, Finding of Fact 15.

¹⁶ October 2016 HOD, Finding of Fact 15.

¹⁷ Testimony of School Psychologist (DCPS); P-11-15.

¹⁸ October 2016 HOD, Finding of Fact 15; P-11-21.

determined that data, including Student's developmental and school history and yielded scores on Autism measures, did not support criteria for Autism Spectrum Disorder.¹⁹

11. Student started the 2016-2017 school year at Local School.²⁰ On or around September 1, 2016, Student's IEP team reviewed the June 2016 Psychological. Following the review, Parent and Parent's counsel tentatively agreed to change Student's disability classification from SLD to ID; however, Parent also requested an independent psychological evaluation ("IEE").²¹

12. Student's September 23, 2016 IEP classified Student with ID. The IEP included goals in math, reading, written expression, motor skills/physical development. It provided 25 hours per week of specialized instruction outside the general education setting, 120 minutes per month of behavioral support services outside the general education setting, 120 minutes per month of occupational therapy services outside the general educational setting, and 120 minutes per month of speech-language pathology services outside the general education setting.²² DCPS had proposed removing speech-language services from Student's IEP at this juncture, asserting that Student's growth had plateaued. Parent and Parent's team requested that the services be increased to 240 minutes per month. DCPS maintained the prior level of speech-language services, and granted Parent's request for an independent speech-language evaluation.²³

13. Student's September 23, 2016 IEP did not include adaptive goals. It described Student's least restrictive environment ("LRE") as follows: (1) for specialized instruction, Student requires a small structured environment to accommodate delays in reading and math readiness to access the general education curriculum; (2) for speech-language pathology, Student requires a small structured environment to address Student's speech and language needs and some sessions may be done in the non-categorical classroom with the teacher; (3) for occupational therapy, Student requires a small structured environment to accommodate delays in visual and perceptual motor skills; and that (4) Student's behavioral support services will be delivered outside the general education setting in order to rigorously build and improve self-esteem and self-management which will assist Student in preparing for increased activities inside the general education setting.

14. Parent and Parent's advocates had concerns that Local School could not appropriately serve Student's needs, and the team at Local School did not disagree.²⁴ On October 5, 2016, DCPS issued a letter to Parent changing Student's location of services from Local School to a program at City School geared toward students with ID, stating that and that Local School could implement Student's IEP.²⁵ Parent visited and enrolled Student in City

¹⁹ October 2016 HOD, Finding of Fact 15; P-11-17.

²⁰ Testimony of Educational Advocate; testimony of Compliance Case Manager.

²¹ P-7-9.

²² October 2016 HOD, Finding of Fact 19.

²³ Testimony of Educational Advocate.

²⁴ Testimony of Educational Advocate; testimony of Compliance Case Manager.

²⁵ October 2016 HOD, Finding of Fact 20 and page 21.

School on November 15, 2016.²⁶ Student started at City School on November 17, 2017, and attended Local School until that date.²⁷

15. Student received an independent speech-language evaluation on March 12, 2017 (“March 2017 Speech Evaluation”). Based on the data gleaned through the evaluation and other available data, approximately 240 minutes per month of direct speech-language services outside the general education setting would be appropriate for Student, along with 30 minutes per month of consultative speech-language services to instruct Student’s classroom teachers on effective strategies for interacting with Student.²⁸

16. The results of the independent comprehensive psychological evaluation (IEE) Parent had requested were reflected in an evaluation report prepared in two stages (“April 2017 IEE”). An initial version of the report was prepared in March 2017, and diagnosed Student with a Specific Learning Disability (“SLD”) in math, reading and writing. However, on further review and reflection of the available data, Psychologist (Parent) revised the proposed disability classification and issued a revised comprehensive psychological evaluation report on April 24, 2017, diagnosing Student with Autism. DCPS was provided a copy of only the April 24, 2017 revised version of the report.²⁹

17. The cognitive and academic scores in the June 2016 Psychological and the April 2017 IEE differed, but not drastically. Based on both the DCPS’ June 2016 psychological evaluation of Student and the April 2017 IEE, Student’s nonverbal cognitive ability tests significantly higher than Student’s verbal cognitive ability.³⁰ As a result, each set of evaluators had difficulty determining Student’s appropriate disability classification. However, the teacher rating scales completed for the June 2016 Psychological were less reliable than the teacher rating scales completed for April 2017 IEE, and the teacher rating scales for the April 2017 IEE weigh in favor of an Autism classification (as did the parent rating scales for both evaluations, and the developmental history information Parent provided for the April 2017 IEE).³¹

18. On May 16, 2017 Student’s IEP team determined Student to be eligible for special education and related services under the disability classification “Autism Spectrum Disorder,” based in significant part on the April 2017 IEE.³²

19. A draft IEP prepared for Student on May 16, 2017, as revised on May 25, 2017 (“draft May 2017 IEP”) classified Student with “Autism Spectrum Disorder.” The IEP included goals in mathematics; reading; written expression; adaptive/daily living skills; communication/speech and language; emotional, social and behavioral development; and motor skills/physical development. It provided 25 hours per week of specialized instruction outside the

²⁶ P-31-3.

²⁷ Testimony of Parent.

²⁸ Testimony of DCPS Speech Language Pathologist.

²⁹ Testimony of Psychologist (Parent); P-8-1; R-1-133.

³⁰ P-8-4 and P-8-5; P-11-8 through P-11-15.

³¹ Testimony of Psychologist (Parent); testimony of School Psychologist (LEA).

³² R-10-183.

general education setting, 120 minutes per month of occupational therapy services outside the general education setting, 120 minutes per month behavioral support services outside the general education setting, 240 minutes per month of speech-language pathology services outside the general education setting, 30 minutes per month of consultative speech-language pathology services and 30 minutes per month of consultative occupational therapy.³³

20. The adaptive/daily living skills in Student's draft May 2017 IEP are as follows: (1) Student will learn and practice appropriate interpersonal communication and social skills for different settings on demand daily in 9 out of 10 trials as measured by teacher-created checklist; (2) Student will identify and demonstrate personal health and grooming habits to include brushing Student's teeth, tucking in Student's shirt, combing and brushing Student's hair independently in 7 out of 10 trials as measured by a teacher-created checklist; (3) Student will state the current date, give Student's address and identify the day of the week independently in 9 out of 10 trials as measured by a teacher-created log; (4) when assigned a classroom job, Student will identify and prevent safety hazards by maintaining a neat and organized work area and by assisting with organizing items within the classroom in 9 out of 10 trials a measured by a checklist.³⁴

21. Student's draft May 2017 IEP describes Student's least restrictive environment ("LRE") as follows: (1) for specialized instruction, Student "requires a small structured environment outside of the general education classroom to target intervention in areas of deficit which is inclusive of core content classes and electives; (2) for occupational therapy, Student requires a small structured environment to accommodate Student's delays in visual and perceptual motor skills; (3) Student's behavioral support services will be delivered outside the general education setting in order to rigorously build and improve self-esteem and self-management which will assist Student in preparing for increased activities inside the general education setting; (4) Student's speech and language services will be provided outside the general education classroom to rigorously target deficit areas.³⁵

22. A program geared primarily to students with ID would not be appropriate for Student because Student could potentially make more progress than a student with ID with appropriate support.³⁶ Applied Behavior Analysis ("ABA") based instruction is a research based form of instruction/therapy for students with Autism. ABA is a highly structured form of instruction that addresses the needs of students with Autism, and focuses on changing a student's behaviors.³⁷ DCPS has Communication Education Supports classrooms that offer ABA and focus on students with Autism; however, despite requests, Parent had not been provided the opportunity to visit or enroll Student in such a program.³⁸

³³ P-2.

³⁴ P-2.

³⁵ P-2-19.

³⁶ Testimony of Psychologist (Parent).

³⁷ Testimony of Educational Advocate.

³⁸ Testimony of Educational Advocate.

23. In the District School ILS program, the special education teacher teaches all the students in the class self-advocacy skills such as recognizing warning signs, raising hands to ask questions, recognizing and appropriately responding to street signs, and verbalizing what they do and do not want.³⁹

24. Student has been bullied during the 2016-2017 school year, including at District School.⁴⁰ Placing Student in a setting with students with behavioral difficulties will be problematic for Student, due to Student's limited communications abilities and self-advocacy skills.⁴¹

25. Throughout the 2016-2017 school year, Student made a limited amount of progress on IEP goals, to the extent that the goals had been introduced. A significant number of goals had not been, or had just been, introduced by the end of the school year.⁴²

26. Student's Scholastic Reading Inventory ("SRI") score dropped precipitously (by 179 points) from the start of the 2016-2017 school to the middle of the school year.⁴³

27. Student's i-Ready math assessment score dropped by 16 points from the beginning of the 2016-2017 school year to the middle of the school year.⁴⁴

28. City School has a self-contained Independent Learning Support (ILS) program for students with ID. The ILS curriculum includes math, reading, life skills, social studies and science.⁴⁵

29. Prior to visiting City School's ILS program, Parent's understanding was that it had five or six students taught by a special education teacher and a paraprofessional.⁴⁶ The program is actually in a wide open space in the basement of the school with a partition that can be arranged to form small classroom spaces. At certain points of the day, Students in the ILS program and the Communication Education Support ("CES") program are combined into a group of 17 students and 3-4 adults. Students are in small groups for academic instruction.⁴⁷

30. On November 17, 2017, Student's first day at City School, another student with a disability spit in Student's face ("the spitting incident"). This frightened Student to the point where Student did not want to return to City School, and Parent did not send Student back.⁴⁸

³⁹ Testimony of Former Special Education Teacher.

⁴⁰ Testimony of Parent; testimony of Educational Advocate.

⁴¹ Testimony of Psychologist (Parent).

⁴² P-19; R-27.

⁴³ P-17; R-20.

⁴⁴ P-18; R-21.

⁴⁵ October 2016 HOD, Finding of Fact 20.

⁴⁶ October 2016 HOD, Finding of Fact 20.

⁴⁷ Testimony of Compliance Case Manager.

⁴⁸ Testimony of Parent.

31. On November 18, 2017, Respondent counsel wrote Petitioner's counsel to request Parent's participation in an IEP team meeting to address Parent's concerns regarding the spitting incident, and to offer in the interim additional assistance for Student from a paraprofessional upon Student's next morning arrival to school. The following week, Respondent's counsel continued to request that Student return to school and Respondent's counsel continued to take the position that Student was too traumatized to do so, and asked that Student's absences be designated "excused."⁴⁹

32. The parties agreed to convene Student's IEP team on November 29, 2017 to discuss the trauma Student experienced as a result of the spitting incident. However, the meeting was canceled because on November 28, 2016, DCPS made an expedited location reassignment for Student to District School, and issued the official location of services letter on or around November 29, 2017.⁵⁰ Parent visited District School on November 30, 2017, and agreed to allow Student to attend there, though Parent was not fully comfortable with the program.⁵¹

33. Nonpublic School is a full-time special education school serving students with high functioning Autism, in addition to Learning Disabilities, Other Health Impairment, Speech Language Disabilities, Multiple Disabilities and Intellectual Disabilities.⁵²

34. Including for its students with Autism, Non-public School has an ABA trained co-teacher, small teacher-student ratios, social and social pragmatic groups (designed to build social skills). The speech-language pathologist also provides push-in services in the classroom for students.⁵³

35. Most of the students at Nonpublic School have some form of behavioral disabilities/challenges. However, Student would in portion of the school where the students do not tend to have behavioral challenges. While the two sections of the school are only approximately 60-70 yards from one another, each portion of the school has its own separate entrance.⁵⁴

36. The tuition at Nonpublic School is \$63,000 per year, and the school has a certificate of approval from OSSE.⁵⁵

37. On October 31, 2016, a different Hearing Officer issued an HOD ("October 2016 HOD"), resulting from a DPC filed on August 17, 2016. The PHC in that matter was convened on September 15, 2016, and the DPH was convened on October 19, 2016 and October 20, 2016.⁵⁶

⁴⁹ R-1.

⁵⁰ R-1-21; R-1-023.

⁵¹ R-1-046.

⁵² Testimony of Nonpublic Director.

⁵³ Testimony of Nonpublic Director.

⁵⁴ Testimony of Nonpublic Director.

⁵⁵ Testimony of Nonpublic Director.

⁵⁶ October 2016 HOD, pages 1 and 2.

38. The October 2016 HOD adjudicated the following issues: (A) whether DCPS failed to provide Student with an appropriate IEP and placement from the 2014-2015 and 2015-2016 school years to the present to address Student's minimal progress under the hours of instruction designated on Student's IEPs, and where Student's placement and level of instruction have remained substantially the same since 2013, despite Student's lack of progress, substantial deficits, and the concerns raised by Student's parent regarding Student's placement and location of services; (B) whether DCPS failed to comprehensively reevaluate Student in all areas of suspected disabilities and to timely convene a meeting to review Student's reevaluations following a request for reevaluations by the parent in March 2016.⁵⁷

39. The October 2016 HOD adjudicates the appropriateness of Student's May 9, 2014 and May 4, 2015 IEPs, and states that "the appropriateness of DCPS' proposed placement of Student in the ILS program at [City School] is not at issue in th[at] case."⁵⁸

CONCLUSIONS OF LAW

"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 Student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief, except that once Petitioner has established a prima facie case, Respondent shall carry the burden of persuasion on issues regarding the appropriateness of an IEP or placement (issue (a)). The burden of persuasion shall be met by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party with the burden of persuasion must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student'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).

- (a) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP (in that it did not provide adaptive goals or services, lacked sufficient speech therapy services or goals, failed to adequately identify Student's disability and failed to adequately describe Student's LRE),**

⁵⁷ October 2016 HOD, pages 1-3. Though the issue is phrased "through the present," the undersigned reads the provision as referring either to the point when the DPC was filed, or by the PHC. The HOD indicates that it is not adjudicating issues related to City School as a location of services, and/or the September 2016 IEP.

⁵⁸ P-34; R-16.

**placement and/or location of services based on the September 23, 2016
and/or the May 16, 2017 IEP meetings.**

An “IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). While an LEA is not required to maximize a student’s educational potential, it also cannot “discharge its duty under the [IDEA] 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 order for an IEP to be appropriate, (1) the LEA must have complied with IDEA’s administrative procedures and (2) the IEP must be reasonably calculated to provide some educational benefit to Student. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003); *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). The appropriateness of an IEP must be assessed as of the time the IEP was developed. *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) (“Because the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.”) Petitioner does not assert that the LEA failed to comply with the administrative procedures attendant to developing Student’s IEPs. Rather, Petitioner claims that Student’s IEPs were not reasonably calculated to provide Student educational benefit.

The IDEA specifies that “[n]othing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability.” In Student’s case, however, determining the disability classification has proved to be a challenge and an obstacle to providing Student with programming reasonably calculated to provide Student with educational benefit. Despite Student’s best and thorough efforts, School Psychologist (DCPS) was not able to diagnosis Student with Autism because the rating scales returned by Student’s teacher had a potentially unintentional skew away from the diagnosis. As did Psychologist (Parent) initially, Psychologist (DCPS) reached a diagnosis other than Autism in what turned out to be a close call, by one crucial to achieving appropriate programming for Student. Follow up measures to address the potential data skewing resulting from the teacher’s rating scale in the June 2016 psychological could have possibly resolved the discrepancy between the teacher’s and parent’s reports and resulted in Student being diagnosed with Autism prior to spending nearly a school year in classes geared toward students with ID.

Despite the weaknesses in adaptive skills demonstrated by the June 2016 Psychological, Student’s September 2016 IEP did not include adaptive goals. The proposed May 2017 IEP, however, does include adaptive goals. Based on the data gleaned through the independent March

2017 speech-language evaluation and other available data, approximately 240 minutes per month of direct speech-language services outside the general education setting would be appropriate for Student, along with 30 minutes per month of consultative speech-language services. This is the level of speech services included in the draft May 2017 IEP. As of the September 2016 IEP, DCPS maintained the previously level of speech-language services and granted Parent's request for an independent speech-language evaluation. Yet, had Student been diagnosed with Autism as of that point, DCPS may not have concluded Student had plateaued in speech-language growth and offered the higher level of services Parent had been requesting and that was granted in May 2017. Given Student's Autism, speech/communication deficits, difficulty with self-advocacy and demonstrating appropriate affect, Student needs an educational setting that provides ABA therapy and that does not generate significant externalized behavioral difficulties, as Student is ill-equipped to defend against aggression.

Respondent does not meet the burden of persuasion that the September 2016 IEP is appropriate, in that it did not provide adaptive goals or services, lacked sufficient speech therapy services or goals, failed to adequately identify Student's Autism disability, and failed to adequately describe Student's LRE. Respondent does not meet the burden of persuasion that the May 2017 IEP is appropriate, in that it does not adequately describe Student's LRE.

To the extent that a student's IEP is appropriate, his/her educational placement is also appropriate, if it is able to implement the terms and conditions of the IEP. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008) (Where a student's IEP was adequate, a school capable of implementing the IEP was an appropriate placement.) Here, Student was not properly classified with Autism until May 2017, and has been located in ILS programs geared largely toward Students with ID, and which lack ABA therapy, from approximately October 5, 2017 (when DCPS issued the letter assigning Student to City School, though Student did not enroll there until the following month). DCPS does not meet the burden of persuasion that it provided Student an appropriate location of services during the 2016-2017 school year.

Request for Placement at Non-Public School

An order for DCPS to fund a placement at Nonpublic School is part of the relief Petitioners seek for the denials of FAPE. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

a. Nature and Severity of Student's Disability

Student has a limited ability to initiate and independently sustain conversations and/or play with others. Student's communications deficits impede Student's ability to adequately interact with teachers and peers. In part due to Student's communications deficits, Student has difficulty with self-advocacy. Student's academic and cognitive functioning are low, but Student's non-verbal cognitive functioning is much higher than Student's verbal cognitive functioning. Student is diagnosed with Autism.

b. Student's Specialized Educational Needs

A program geared primarily to students with ID would not be appropriate for Student because Student could potentially make more progress than a student with ID with appropriate support. Student would benefit from ABA therapy in order to address the impact of Student's Autism on Student's ability to access the general education curriculum.

c. Link between Student's Needs and the Services Offered by Private School

Nonpublic School is a full-time special education school serving students with high functioning Autism, in addition to Learning Disabilities, Other Health Impairment, Speech Language Disabilities, Multiple Disabilities and Intellectual Disabilities. Including for its students with Autism, Non-public School has an ABA trained co-teacher, small teacher-student ratios, social and social pragmatic groups (designed to build social skills). The speech-language pathologist also provides push-in services in the classroom for students. Most of the students at Nonpublic School have some form of behavioral disabilities/challenges. However, Student would in portion of the school where the students do not tend to have behavioral challenges. While the two sections of the school are only approximately 60-70 yards from one another, each portion of the school has its own separate entrance.

While some of Nonpublic School's students have Autism and the school is equipped to serve them, Autism is one of many disability classifications the school serves, and it does not have a particular focus on educating students with Autism. Most of Nonpublic School's student body has emotional/behavioral challenges. Student would be the section of the building geared toward Students who do not tend to demonstrate externalized behavioral problems, but the two programs share a building and are in close proximity of the programs. Nonpublic School has a moderate link to Student's needs.

d. Cost of Placement at Private School

The tuition at Nonpublic School is \$63,000 per year, and the school has a certificate of approval from OSSE. The undersigned deems the costs to be reasonable.

e. Extent to Which Private School Represents Least Restrictive Environment

DCPS has CES classrooms that offer ABA and focus on students with Autism; however, despite requests, Parent had not been provided the opportunity to visit or enroll Student in such a program. It is possible that a DCPS CES program could meet Student's needs at least as well as Nonpublic School. At this juncture, the undersigned does not conclude that Nonpublic School is the least restrictive environment in which Student can be educated.

As the undersigned does not find Nonpublic School to be Student's LRE, the undersigned does not conclude that Nonpublic School is an appropriate placement for Student under *Branham*.

Request for Compensatory Education

The IDEA gives hearing officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010), quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527. *See also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10-11 (D.D.C. July 2, 2013).

The undersigned has found that Student was harmed by the lack of an appropriate disability classification and location of services throughout the 2016-2017 school year; lack of sufficient speech-language services from at least September 2016 through May 16, 2017; and the lack of adaptive goals from September 2016 through May 16, 2017. Factoring in the recommendations and rationale of Educational Advocate included in Petitioner's proposed compensatory education plan, the undersigned finds that 180 hours of specialized tutoring and/or adaptive skills training, 15 hours of independent speech therapy, and 72 hours of behavioral support through ABA therapy would provide the benefits that likely would have accrued to Student, but for the denials of FAPE.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. Within eight (8) school days of this Order, DCPS shall identify for Student a tentative location of services that can: implement Student's May 2017 (or any more recent) IEP; provide ABA therapy; and meet Student's needs for a small, low student-teacher ratio setting with minimal likelihood of interaction with students with tendencies to exhibit behavioral challenges.⁵⁹ DCPS shall promptly provide Parent an opportunity to tour any such proposed program, and consider any feedback Parent may wish to offer, provided that Parent promptly provides such feedback. Within fifteen (15) school days of this Order, DCPS shall formally identify a location of services for Student as described herein in Order A;
- B. As an alternative to Order A, DCPS may within twenty (20) school days of this Order fund Student at Nonpublic School, with transportation, for the remainder of the 2017-2018 school year;

⁵⁹ This provision does not imply that any setting, Nonpublic or public, can guarantee that Student will not ever encounter any challenges arising from the behavior of other students.

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- C. Within fifteen (15) school days of this Order, DCPS shall fund as compensatory education for Student 180 hours of specialized tutoring and/or adaptive skills training, 15 hours of independent speech therapy, and 72 hours of behavioral support through ABA therapy.⁶⁰

All other relief Petitioner requested in the complaint is **DENIED**.

SO ORDERED.

Date: October 6, 2017

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:
Petitioner (by U.S. mail)
Petitioner's Attorney (electronically)
Respondent's Attorney (electronically)
OSSE-SPED (electronically)
ODR (electronically)

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).

⁶⁰ Parent may allocate the 180 hours between specialized tutoring and/or adaptive skills training, at Parent's discretion. Compensatory education services shall be funded at the OSSE rate.