DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

Student,[1] through *Parents*, *Petitioners*,	)	Case No.: 2018-0113
	)	Date Issued: 10/10/18
v.	)	Hearing Officer: Keith L. Seat, Esq.
District of Columbia Public Schools ("DCPS"), Respondent.	)	Hearing Dates & Room: 9/25/18 (112), 9/26/18 (112) & 9/27/18 (telephonic)

HEARING OFFICER DETERMINATION

Background

Petitioners, Student's Parents, 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 provided a timely and appropriate Individualized Education Program ("IEP") or placement. DCPS responded that it was delayed in evaluating Student by Petitioners, but did provide an appropriate IEP and placement for Student.

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 4/23/18, the case was assigned to the undersigned on 4/24/18. DCPS filed a response on 5/2/18, which did not challenge jurisdiction. Following a series of filings by the parties, on 5/21/18 the undersigned issued an Order Granting Petitioners' Motion for Stay-Put and Observation. The resolution session

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

meeting ("RSM") took place on 5/7/18, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 5/23/28. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 95-day continuance (to permit school observation and availability of witnesses), which requires a Hearing Officer Determination ("HOD") by 10/10/18.

The due process hearing took place on 9/25/18, 9/26/18 and 9/27/18. Petitioners were represented by *Petitioners' counsel*. DCPS was represented by *Respondent's counsel*. Both Petitioners participated in the entire hearing.

Petitioners' Disclosures, submitted on 9/18/18, contained documents P1 through P43 (plus P12A and P34A), which were admitted into evidence over objection to specific documents. Respondent's Disclosures, submitted on 9/18/18, contained documents R1 through R20 (plus R12A), which were admitted into evidence without objection.

Petitioners' counsel presented 6 witnesses in Petitioners' case-in-chief (*see* Appendix A):

1. *Special Education Consultant* (qualified over objection as an expert in Special Education)

2. *Private Psychologist* (qualified without objection as an expert in Psychology)

3. *Director of Speech-Language Services* at *Nonpublic School* (qualified without objection as an expert in Speech-Language Pathology)

4. *Associate Head of High School* at Nonpublic School (qualified over objection as an expert in Special Education Administration and Social Work)

5. *Clinical Psychologist* at Nonpublic School (qualified without objection as an expert in Psychology)

6. *Parent*

Respondent's counsel presented 5 witnesses in Respondent's case (*see* Appendix A):

1. *Clinical Social Worker* at DCPS (qualified without objection as an expert in Social Work and Behavior Support)

2. *School Psychologist* at DCPS (qualified without objection as an expert in School Psychology)

3. *Special Education Coordinator* at Proposed Public School (qualified without objection as an expert in Special Education Programming and Placement)

4. *Teacher* at DCPS (qualified without objection as an expert in Special Education and General Education)

5. DCPS *Nonpublic Monitoring Specialist* of Nonpublic School (qualified without objection as an expert in Special Education Programming and Placement)

Petitioner's counsel recalled Parent as the sole rebuttal witness.

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

Issue 1: Whether DCPS denied Student a FAPE by initially failing to propose any IEP and/or placement for 2017/18[2] and refusing to fund Student's placement from the beginning of 2017/18 until a proposal was made. *Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by proposing an IEP with an insufficient amount of specialized instruction and/or an inappropriate placement in a program at Public School, when Student needed a full-time, self-contained special education school.[3] *Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.*

Issue 3: Whether DCPS denied Student a FAPE by completing an inappropriate psychological assessment and changing Student's special education classification from specific learning disability to an emotional disability.[4] *Petitioners have the burden of persuasion.*

Issue 4: Whether DCPS denied Student a FAPE by failing to allow Parents to have meaningful input into the IEP meeting and IEP team decisions. *Petitioners have the burden of persuasion.*

Issue 5: Whether Nonpublic School is a proper placement.[5] *Petitioners have the burden of persuasion on this issue.*

At the end of the due process hearing, Issue 5 as set forth in the 9/5/18 Prehearing Order (which contained issues G and H from page 14 of the due process complaint) was dismissed with prejudice, with the concurrence of Petitioners. That issue was "Whether DCPS denied Student a FAPE by failing to permit reasonable observation of the program proposed for Student, including observation by Parents' educational consultant and provision of DCPS's observation policy," and had been a subject of the undersigned's 5/21/18 Order Granting Petitioners' Motion for Stay-Put and Observation.

The relief requested by Petitioners is:

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[2] All dates in the format "2017/18" refer to school years.
[3] Issue 2 contains issues C and D from page 13 of the due process complaint.
[4] Issue 3 contains issues B and F from page 13 of the due process complaint.
[5] This issue was numbered Issue 6 in the 9/5/18 Prehearing Order.

- DCPS shall (a) reimburse Parents for Student's tuition and related expenses for the 2017/18 school year at Nonpublic School, and (b) fund Student for the 2018/19 school year at Nonpublic School, including tuition and all related fees and costs.

At the end of Petitioners' case-in-chief, Respondent's counsel orally moved for a directed finding that Petitioners failed to meet their burden on Issue 3, which concerned changing Student's special education classification from specific learning disability to an emotional disability. The motion was taken under advisement by the undersigned and is hereby denied as the issue is substantively addressed below.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact[6] are as follows:

1. Student is a resident of the District of Columbia; Petitioners are Student's Parents.[7] Student is *Age*, *Gender* and in *Grade* at Nonpublic School where Student has attended for nearly seven years; Student previously was at Prior Public School and repeated 1st grade.[8] At 13 months, Student was the subject of an international adoption; Student's birth mother left Student at the hospital, but reportedly kept Student's sibling.[9]

2. Student was first found eligible for an IEP years ago based on Specific Learning Disabilities ("SLD"); Parents obtained help from Special Education Consultant who evaluated Student seven years ago and has monitored Student ever since.[10] As school became more difficult and homework increased in upper grades, Student felt unable to manage and "buckled" under the pressure in 2017.[11] Clinical Psychologist noted Student's increased anxiety and frustration between January and May 2017 and the limited coping strategies that resulted.[12] In the third quarter of 2016/17, the quality of Student's schoolwork dropped along with grades, as Student was frequently late and assignments were

[6] 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.
[7] Parent.
[8] Parent; P9-2,3.
[9] P9-2.
[10] P9-2,5; Special Education Consultant.
[11] P9-3; Special Education Consultant.
[12] P9-6; Clinical Psychologist.

missing; Student's body language changed along with interactions; these behaviors improved after hospitalization in the spring of 2017.[13]

3. After disclosing to Parents feelings of self-harm and secretly cutting on Student's legs in the bathroom at school, Student was admitted to a hospital for inpatient psychiatric treatment for a week in March 2017, and then shifted to a partial hospitalization program in April 2017.[14] Student returned to school on 4/24/17 with a modified curriculum plan and received significant tutoring and teacher support at Nonpublic School; Student's psychotherapy was increased from once to twice a week.[15]

4. In early 2018 evaluations, School Psychologist found Student to be very gregarious, funny, easily able to establish rapport, and smiling and laughing often, while Clinical Social Worker described Student as "bright, charming, social, engaging, energetic, curious, playful, and capable."[16] Student has a longstanding history of anxiety and frustration around academic functioning.[17] Student receives medication for a Major Depressive Disorder, diagnosed in the spring of 2017 and for Attention Deficit Hyperactivity Disorder ("ADHD"); records also indicate Generalized Anxiety Disorder; Student meets monthly with a psychiatrist for medication management and began seeing a psychotherapist in May 2015, where abandonment by Student's birth mother has been an important topic.[18] Parents and Clinical Psychologist continue to consider Student emotionally fragile.[19]

5. Student has been the subject of multiple due process complaints and appeals to the U.S. District Court.[20] The previous HOD concerning Student was issued on 12/12/17 in Case No. 2017-0187 in which Parents were reimbursed for their costs at Nonpublic School for 2015/16 and 2016/17; the case was filed on 7/5/17 and did not address the merits of 2017/18, although the Hearing Officer did decline to place Student prospectively at Nonpublic School for 2017/18.[21] For 2017/18, DCPS was directed to evaluate Student and the Multi-Disciplinary Team ("MDT") was ordered to update Student's IEP and determine Student's educational placement by meeting "all together, in person, and in the same room at Nonpublic School," followed by DCPS determining a location of service ("LOS") for Student within five days.[22]

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[13] P9-8; P6-19.
[14] P16-5; P4-1; P5-12 (suicidal ideation resulted in hospitalizations); P9-4.
[15] P4-1,2.
[16] R4-4; R6-10.
[17] P4-1.
[18] P9-2; P4-1; P16-6 ("hole in [Student's] soul" due to birth mother); Clinical Social Worker.
[19] Clinical Social Worker.
[20] R3-5,6.
[21] R3-2,15,17.
[22] R3-17.

6. While school was difficult, Student emphasized in an interview with School Psychologist that Student "loves" Nonpublic School.[23] Even though school had been difficult and anxiety-provoking; Student felt supported at Nonpublic School and teachers help Student to connect with academics.[24] Student has established relationships with teachers and friendships with peers at Nonpublic School.[25] Student often goes off-campus at Nonpublic School to get lunch; Nonpublic School has two faculty members off-campus during lunch to supervise and two faculty on campus, plus others.[26] Student generally doesn't receive specialized instruction at lunch at Nonpublic School, but has opportunities for support during lunch in an environment in which Student is comfortable; Student sometimes goes to teachers for tutoring during lunch.[27]

7. Evaluations. Special Education Consultant first evaluated Student in June 2011 and found SLD across all academic areas, despite Student's High Average Nonverbal IQ.[28] In 2016, Special Education Consultant noted Student's underlying ADHD and Speech-Language diagnoses and testing confirmed Student's ongoing SLD in reading (all areas), math (all areas) and writing (all areas).[29] Special Education Consultant believes that Student continues to require full-time special education placement with related services to meet Student's academic, linguistic, and social-emotional needs.[30]

8. Private Psychologist's August 2017 psychological evaluation reported Student's Full Scale IQ ("FSIQ") on the WISC-V at 87, which is Low Average, but noted that the underlying scores had significant differences (with WMI at 79, VCI at 84, PSI at 92, FRI at 94, and VSI at 105).[31] Private Psychologist's evaluation relied on the WIAT-III for achievement scores, which ranged from Impaired (2%) to Superior (91%), with the large majority of scores in the Low Average range.[32] Student presents with a Broad Language Disorder; Student's reading disorder is consistent with Mixed Dyslexia.[33] Student's speech-language pathologist confirmed Student's diagnosis of Mixed Receptive-Expressive Language Disorder, as well as SLD with impairment in reading and writing, which are supported by Private Psychologist's psychological evaluation.[34] Student continues to meet

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[23] School Psychologist.
[24] P16-7.
[25] Associate Head of High School.
[26] *Id.*
[27] Private Psychologist; P18-13.
[28] P9-5; Special Education Consultant.
[29] P9-5.
[30] P9-5; Special Education Consultant.
[31] P9-10,11,32.
[32] P9-33.
[33] P9-22.
[34] P12-10; P9-6,22; Special Education Consultant (agrees).

the criteria for SLD in math.[35] Student continues to meet the criteria for ADHD, Combined Type, with related executive functioning weaknesses.[36]

9. ADHD and Learning Disabilities ("LD") are commonly associated with higher risk for emotional difficulties, as many feel anxious and discouraged by the difficulty of achieving at their intellectual potential and worry about disappointing others and appearing inadequate.[37] Student continues to meet the criteria for Major Depressive Disorder, though symptoms eased during the summer given the lack of school stress.[38] Student also meets the criteria for Anxiety Disorder, Unspecified, although less pervasive than depression and may come and go.[39] Student's difficulties in meeting grade level requirements are due to SLD and ADHD; Student's feelings of being lost and inferior are a secondary problem.[40] Student's emotional difficulties stem in large part from the other diagnoses, so an Emotional Disturbance ("ED") classification was not recommended.[41]

10. Despite emotional struggles, Student is not a behavior problem at school as a result of emotional difficulties.[42] Student was disciplined one time for using offensive language toward another Nonpublic School student on 4/25/18, which Student admitted and expressed regret; Student stayed home one day to reflect on the behavior.[43] On another occasion School Psychologist heard Student curse loudly while School Psychologist was conducting an observation at Nonpublic School.[44] Psychotherapy with Clinical Psychologist is a safe place for Student and goals include enhancing understanding and ability to manage significant symptoms of depression and anxiety.[45]

11. Private Psychologist recommended that given Student's LDs, ADHD, speech-language needs and significant emotional diagnoses, Student continues to require a small, non-traditional classroom setting with full-time special education services and accommodations, with on-site speech-language and social-emotional support.[46] Private Psychologist saw Student on 9/18/18 and found Student had no emotional difficulties over the 2018 summer, was no longer having suicidal ideation and had gone two months without

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[35] P9-23.
[36] P9-21; Special Education Consultant (agrees).
[37] P9-23.
[38] *Id.*
[39] *Id.*
[40] Private Psychologist.
[41] P9-23; Special Education Consultant ("completely agree"); Private Psychologist ("ED is secondary").
[42] P9-23.
[43] R14-1.
[44] School Psychologist.
[45] P4-2; Clinical Psychologist.
[46] P9-24; Private Psychologist (Student's needs are profound).

self-harm (with recent episodes being minor scratching), although anxiety began to rise three weeks before school.[47]

12. Evaluations by DCPS. On 7/27/17, DCPS requested consent to evaluate Student for a functional behavioral assessment ("FBA"), to which Parents agreed.[48] On 8/17/17, DCPS requested additional consent to complete comprehensive psychological and speech-language evaluations of Student.[49] Petitioners' counsel explained on 8/21/17 that Parents were getting a comprehensive psychological evaluation that was just about completed, so asked DCPS to wait and review that report before conducting a further evaluation to avoid unnecessary testing; Parents were also exploring a speech-language assessment that they would share with DCPS as well.[50] Private Psychologist's August 2017 psychological evaluation (called a "neuropsychological" evaluation) was emailed to DCPS on 9/6/17.[51]

13. DCPS conducted a very thorough FBA of Student on 10/10/17 and 2/14/18, focused entirely on Student being "off task."[52] DCPS made eight observations of Student at Nonpublic School; the first six classroom observations found Student on average to be "appropriate and engaged" 77% of the time and off task and distracted 23%.[53] A BIP-Level II (with "draft" watermark) dated 2/28/18 addressed Student being off task.[54]

14. School Psychologist completed a comprehensive psychoeducational evaluation on 2/21/18 in which he recommended ED as the primary special education classification for Student, relying on the interviews and observations Clinical Social Worker conducted for her FBA.[55] School Psychologist testified that it is crucial for programming to be accurate and that ED was what was most impacting Student at the time of School Psychologist's evaluation.[56] On the RIAS-2, Student's nonverbal intelligence (NIX) was Average with an index score of 100, while verbal intelligence (VIX) was Moderately Below Average with an index score of 76, for a composite intelligence index (CIX) of 86, which was Below Average; these findings were consistent with previous assessments.[57]

15. School Psychologist incorporated background information from Private Psychologist's evaluation into his and stated that he "did not find conflicts or issues overall" with Private Psychologist's report; School Psychologist did not talk to Private Psychologist or analyze and compare her SLD conclusions with School Psychologist's ED conclusion.[58]

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[47] Private Psychologist.
[48] P12A-3,2.
[49] P12A-2.
[50] P12A-1; Parent (Student felt like a "science experiment").
[51] P12A-1.
[52] P16-1; Special Education Consultant.
[53] P16-2; P18-3.
[54] P19.
[55] R4-1; Special Education Consultant.
[56] School Psychologist.
[57] R4-8,12; Special Education Consultant.
[58] R4-2; P18-4; Special Education Consultant.

Private Psychologist's biggest concern with School Psychologist's evaluation was that the ED conclusion was reached without socio-emotional testing; School Psychologist relied on Private Psychologist's evaluation which was not sufficient to conclude that Student had ED.[59] School Psychologist did not conduct achievement testing of Student because testing had been done in August 2017 and Student objected to being tested so much.[60]

16. School Psychologist interviewed Student, who reported experiencing depression or anxiety centering on school and on the expectation that Student would do well in school, and does not have the same level of anxiety outside school.[61] Student was doing better at Nonpublic School in 2017/18 than previously; Student was receiving individual counseling to help control emotional dysregulation.[62] School Psychologist concluded that school performance was significantly impacted by Student's emotional state; Special Education Consultant "vehemently" disagreed with ED as Student's primary classification as inconsistent with longstanding data on Student, credibly testifying that school performance was impacted by SLD, and emotions were a result of Student's performance.[63]

17. IEP Meeting. The HOD-required MDT/IEP team meeting occurred on 2/28/18 ("IEP meeting") and involved some 18 people between DCPS, Nonpublic School and Parents with counsel and consultant; the meeting occurred in person at Nonpublic School as required by the HOD, lasted more than two hours and generated more than 13 pages of DCPS notes.[64] School Psychologist participated in the IEP meeting by telephone (as he was out of town for a family funeral) and reported on his evaluation of Student and his recommendation to shift Student's disability classification from SLD to ED.[65] Parents had trouble hearing School Psychologist on the phone and asked School Psychologist to repeat himself often; Petitioners' counsel several times requested that the meeting be postponed until School Psychologist could be present, which would have allowed Private Psychologist to attend as well.[66] DCPS was not willing to stop the meeting.[67] Parents were fully a part of the meeting; Parents participated, gave input and were not prevented from participating in any way.[68] Parents relied on Special Education Consultant and their counsel; the meeting included thorough discussion of Special Education Consultant's concerns; Clinical Psychologist also asked questions.[69] During the lengthy discussion everyone was able to express their views, especially around the disability classification.[70]

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[59] Private Psychologist.
[60] P18-4.
[61] R4-4.
[62] R4-12.
[63] R4-13; Special Education Consultant.
[64] P18; Nonpublic Monitoring Specialist; Special Education Consultant.
[65] P18-1,4,5; School Psychologist.
[66] Parent.
[67] Nonpublic Monitoring Specialist.
[68] Clinical Social Worker; Teacher; Nonpublic Monitoring Specialist.
[69] Clinical Social Worker; School Psychologist.
[70] Clinical Social Worker.

18. The IEP team focused on Student's eligibility classification and School Psychologist's recommendation of ED.[71] Parents asked for data to support the ED conclusion, but with the bad phone connection School Psychologist's justification was not clear or understood.[72] Petitioners' counsel asserted that Parents didn't think Student was ED and that ED should be ruled out and not considered.[73] Clinical Psychologist noted that School Psychologist didn't reach out to her to get her feedback on Student; she would have been happy to talk; Clinical Psychologist viewed learning challenges at Student's "primary," and anxiety as secondary to the learning challenges.[74] Special Education Consultant forcefully stated that she did not agree with DCPS and that it was wrong to consider ED (and was asked to lower her voice).[75] Nonpublic Monitoring Specialist stated that she conferred with School Psychologist and compared ED and SLD for Student and that LD can be "encapsulated" under ED, which Special Education Consultant testified was "ridiculous," noting the two separate classifications.[76] Student has a long history with SLD and a language disorder; DCPS suggested that it was possible that the label was wrong all along, which Special Education Consultant is certain was not the case.[77] Nonpublic Monitoring Specialist asserted that Student was so distressed internally that Student was not accessing school, but withdrawing from work; Petitioners' counsel responded that Student is not "blowing off" school but is at an LD school with a team working with Student.[78]

19. School Psychologist referred to data showing Student's emotional issues were impacting Student the most; Clinical Psychologist is not aware of such data in School Psychologist's report (or elsewhere); Clinical Psychologist convincingly testified that LD and ADHD are affecting Student most significantly.[79] Clinical Psychologist disagreed with School Psychologist's ED recommendation and testified that many people at the 2/28/18 IEP meeting were "bewildered" by the ED recommendation.[80] Student has anxiety and depression, which are secondary to the real problem of LD and ADHD.[81] Since Student was already classified as SLD, School Psychologist should have considered SLD if thinking of making a change, which required achievement testing; School Psychologist's evaluation did not integrate achievement testing or reference the August 2017 achievement testing of Student.[82] School Psychologist testified that he included no analysis in his report of SLD in reading, SLD in math or SLD in writing, but claimed that he had considered each.[83]

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[71] P18-5.
[72] P23-4; Parent.
[73] P18-5.
[74] P18-5,6; Clinical Psychologist.
[75] P18-7.
[76] P18-7; Special Education Consultant.
[77] P18-8; Special Education Consultant.
[78] P18-8,9.
[79] P18-9; Clinical Psychologist.
[80] Clinical Psychologist.
[81] *Id.*
[82] *Id.*
[83] School Psychologist.

20. Petitioners' counsel sought more hours on Student's IEP than DCPS proposed, seeking 32 hours/week of specialized instruction and three hours/week of related services, rather than 25.25 hours/week of specialized instruction and two hours/week of related services.[84] As discussed below, Petitioners' counsel sought more information about the specific program being recommended by DCPS and whether the program could serve both LD and ED.[85] Other than Student's classification and service hours, most of the rest of the IEP meeting was collaborative.[86]

21. On 2/28/18 DCPS completed disability worksheets for ED, Other Health Impairment ("OHI") and Multiple Disabilities ("MD"), but not SLD.[87] Petitioners' counsel submitted a dissent statement to the eligibility determination for Student as ED on 3/5/18, based on Private Psychologist's August 2017 comprehensive psychological evaluation of Student which recommended that Student continue to be eligible for special education based on SLD and OHI.[88] The eight signatories on the dissent letter included Parents, Special Education Consultant, Clinical Psychologist and Associate Head of High School.[89]

22. IEPs. On 8/4/17, DCPS completed an IEP for Student without Parents' input; the IEP was created on 5/22/17 and provided 5 hours/week of specialized instruction outside general education for reading, and 5 hours/week of specialized instruction inside general education for each reading and math; 180 minutes/month of speech language pathology ("SLP") outside general education and 120 minutes/month of behavioral support services ("BSS") outside general education; and 60 minutes/month of SLP consultation.[90] In the spring of 2017 the IEP team had agreed that additional assessments were needed, including a psychological and FBA, and Parents wanted the assessments completed before finishing the IEP process.[91] In July 2017, DCPS stated that it wished to move forward with the IEP process before completion of the assessments, despite Parents' disagreement.[92] Petitioners' counsel wrote on 9/8/17 expressing disagreement with the August 2017 IEP and requesting placement and funding at Nonpublic School.[93]

23. The 2/28/18 DCPS IEP indicated that Student was MD with ED and OHI, and has significant emotional concerns which include anxiety and depression.[94] The IEP provided 25.25 hours/week of specialized instruction, 240 minutes/month of SLP and 240 minutes/month of BSS, all outside general education, and 60 minutes/month of SLP

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[84] P18-12; Parent.
[85] P18-12.
[86] P18-10,11.
[87] P22; R12-2.
[88] P23-1,3.
[89] P23-4.
[90] P5-16; P10-1; P13-1.
[91] P13-1.
[92] *Id.*
[93] *Id.*
[94] P20-1,2.

consultation.[95] The IEP stated that the least restrictive environment ("LRE") could be implemented at Student's "neighborhood school."[96]

24. A 6/2/17 Nonpublic School IEP provided a total of 35 hours/week, with 23 hours/week of specialized instruction and 12 hours/week of related services, including 360 minutes/month with a speech-language therapist and 360 minutes/month with a child psychologist.[97] The 5/24/18 Nonpublic School IEP provided a total of 35 hours/week, with 27.5 hours/week of specialized instruction and 7.5 hours/week of related services, including 360 minutes/month with a speech-language therapist, and 360 minutes/month with a clinical psychologist.[98]

25. Proposed Public School. DCPS considered the selection of the location of service for Student to be within its discretion; DCPS selected Proposed Public School and believed it could implement Student's IEP.[99] The LOS letter dated 3/5/18 specified Proposed Public School based on Student's most recent IEP and the availability of space in the "appropriate program," which was not specified.[100] The 2/28/18 IEP meeting did not describe the type of classroom or program proposed for Student.[101] Petitioners' counsel sought more information at the IEP meeting about the specific program being recommended and was told that children are placed based on their needs and not by disability classification.[102] Petitioners' counsel asked if the program could serve both LD and ED and was told by Respondent's counsel that the location chosen "will meet [Student's] needs."[103] Parents were concerned about what program or setting was being proposed at Proposed Public School, and expected that Student's new ED classification would determine the supports and accommodations provided.[104]

26. Parents were each able to observe Proposed Public School before the end of 2017/18, visiting separately due to their schedules.[105] Parent observed three classes, but was told they were not children with an ED classification; Parent asked to see an ED class and observed a math class in which the teacher did not have command of the class; only 1 of the 5 students understood the lesson and another was belligerent and repeatedly used foul language; Special Education Coordinator intervened but the student stormed out of class.[106] DCPS provided no clarity about the classes that Student would be in at Proposed Public

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[95] P20-16.
[96] P20-18.
[97] P6-1.
[98] P34A-1.
[99] P34-2; Special Education Coordinator; Clinical Social Worker.
[100] P24-1.
[101] School Psychologist; Nonpublic Monitoring Specialist (Parents were not informed about SLS or BES classrooms or Student's proposed program at the IEP meeting).
[102] P18-12.
[103] *Id.*
[104] Parent.
[105] Parent; Special Education Coordinator.
[106] Parent.

School or even whether they would be ED classes; Parent was not told how or when that decision would be made.[107]

27. After an order from the undersigned, Special Education Consultant was able to observe Proposed Public School on 9/13/18, accompanied by Special Education Coordinator; several Proposed Public School special education students were absent on a field trip.[108] Special Education Consultant was told that Proposed Public School has certificate-track classrooms for communication education support ("CES") for students with autism spectrum disorder or similar needs, and independence learning support ("ILS") focused on independent living and functional skills for students with cognitive and intellectual disabilities.[109] The diploma track side serves students with disability classifications of ED, SLD, intellectual disabilities ("ID") and autism spectrum disorder, as well as MD and OHI; Proposed Public School has classes with more therapeutic supports for students with behavioral issues and more intense socio-emotional needs, and classes more geared towards students with learning disabilities.[110] Proposed Public School runs a "blending learning model which is competency based."[111]

28. The 5/7/18 RSM Notes stated that Student would not be in the BES program, for there is a "mixed program" at Proposed Public School; Petitioners' counsel responded that Parents had asked if there was a specific program that Student would be in and was told it was the BES program.[112] Petitioners' counsel later asked for clarification about Student's program at Proposed Public School as Parents were told it would be an ED program.[113] DCPS again emphasized that it places students "based on needs, not the disability classification" and there is a "mixed class" of students with ED, LD and OHI at Proposed Public School.[114]

29. By the time of the hearing, Special Education Coordinator was clear that Student should be on the SLS "track" due to the absence of "externalizing" ED behaviors.[115] School Psychologist testified that referring to an "ED class" meant the BES classroom for children with severe externalizing behaviors, while Student's ED was "internalized," so needed a Structured Learning Support ("SLS") classroom in which both ED and LD students are taught.[116] Since each student's program is based on "need" and not disability category, the "cluster" for Student was to be determined once Student was set to go to Proposed Public School.[117] At Proposed Public School, special education students in self-contained

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[107] *Id.*
[108] R19-2; Special Education Consultant.
[109] R19-3.
[110] *Id.*
[111] R19-3,4.
[112] P34-2.
[113] P34-2; Parent.
[114] P34-3; Special Education Coordinator.
[115] Special Education Coordinator.
[116] School Psychologist.
[117] Special Education Coordinator.

programs can have lunch in the cafeteria or in their self-contained classrooms.[118] Special Education Consultant testified that since DCPS got Student's disability classification so wrong by concluding it was ED over Parents' objection, then Student's program and classroom at Proposed Public School would likely be wrong as well.[119]

30. Proposed Public School is located about an hour from Student's home; transportation would be provided, although Student might be the only rider on the bus.[120] The website for Proposed Public School for 2017/18 indicated it was a "priority school" which needed intense support to address overall low student performance or other problems; Proposed Public School was performing well below District averages on nearly every measure, such as Advanced Placement performance of 0% for both 2015/16 and 2016/17 while the District average was 36%.[121] Special Education Consultant testified that she was concerned at Proposed Public School about the low graduation rates, low level of attendance, low standardized testing scores, the lack of a peer group for Student, and the distance Student would have to travel to Proposed Public School.[122]

31. School Psychologist testified that changing schools would involve an adjustment period, but felt the benefits would eventually outweigh the harm to Student.[123] Parent concluded that Student should not transfer to any school because of a very strong peer group and deep roots at Nonpublic School after seven years; transferring Student to Proposed Public School would be "devastating."[124] On 8/3/18, Petitioners' counsel formally notified DCPS by letter that Student would attend Nonpublic School for 2018/19.[125]

32. Nonpublic School. Nonpublic School has a current Certificate of Approval ("COA") from OSSE; tuition at Nonpublic School is about $50,000/year.[126] Nonpublic School does not serve students with ED; if Student was properly classified as ED, Nonpublic School would try to find a more appropriate setting than Nonpublic School for Student.[127] The 12/12/17 HOD concluded that Nonpublic School was a proper placement for purposes of reimbursing Parents for 2015/16 and 2016/17 at Nonpublic School.[128] Student's program at Nonpublic School is effective and Student is making appropriate progress; Student's socio-

[118] R17-2.
[119] Special Education Consultant.
[120] Parent; Special Education Coordinator.
[121] P37-1,2,3; Special Education Consultant.
[122] Special Education Consultant.
[123] School Psychologist.
[124] Parent.
[125] P35-1.
[126] Associate Head of High School.
[127] *Id.*
[128] P17-16.

emotional needs are being met at Nonpublic School; Student is off to a good start in 2018/19.[129] Nonpublic School is an appropriate placement for Student.[130]

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.'" *Endrew 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." *Endrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent 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 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

[129] P34-2; Special Education Consultant; Clinical Psychologist; Parent.
[130] Special Education Consultant.

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); *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden 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 initially failing to propose any IEP and/or placement for 2017/18 and refusing to fund Student's placement from the beginning of 2017/18 until a proposal was made. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners established a prima facie case on this issue based on the lack of a viable IEP and placement for the beginning of 2017/18, shifting the burden of persuasion to DCPS. DCPS did complete an IEP for Student on 8/4/17, without Parents' input, which was clearly insufficient and DCPS did not argue otherwise. That 8/4/17 IEP included only five hours/week of specialized instruction outside general education and 10 hours/week of specialized instruction inside general education, along with related services, and need not be discussed further herein.

The starting point in the analysis of IEP and placement issues relating to 2017/18 is that DCPS must have an IEP in place for each student with a disability '[a]t the beginning of

each school year.'" *Leggett v. Dist. of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015), *citing* 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. 300.322(a), 300.323(a). *See also Dist. of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 95 (D.D.C. 2014) ("there is no requirement that the child be currently enrolled in a public school in order to trigger the LEA's obligation to develop an IEP for that child"); *Dist. of Columbia v. Oliver*, 2014 WL 686860, at *6 (D.D.C. 2014).

This case is not the usual situation, however, for there is a long history between the parties, including numerous HOD and court decisions. The most recent was the 12/12/17 HOD which ordered reimbursement of the costs of Student attending Nonpublic School in 2015/16 and 2016/17, but did not rule on the substantive merits of 2017/18. For 2017/18, the HOD merely set out the process by which DCPS was to evaluate Student and the IEP team was to come together to update Student's IEP and determine an appropriate placement, with DCPS providing an appropriate location of service. Although 2017/18 was not substantively at issue in the 12/12/17 HOD, Petitioners did seek the remedy of prospective placement for 2017/18, which was denied. DCPS thus argues that Petitioners cannot include a denial of FAPE in 2017/18 as a substantive issue in their current complaint. However, claim or issue preclusion cannot be raised here when 2017/18 was not substantively raised in the previous complaint. Nor do Petitioners now seek the same relief of prospective placement for 2017/18 – which was denied in the 12/12/17 HOD – for they are now seeking reimbursement for the amounts they paid for Student's education at Nonpublic School in 2017/18 due to the denial of a FAPE by DCPS during that school year.

DCPS raises additional arguments that it was delayed in developing the 2/28/18 IEP by the actions of Petitioners in not providing consent for evaluation as quickly as desired and the like. But as discussed in Issue 2 below, this Hearing Officer concludes that the 2/28/18 IEP was not sufficient to offer Student a FAPE. For the reasons discussed below, that IEP would not have been sufficient even if DCPS had offered it at the beginning of 2017/18. Thus, the various concerns that DCPS raised about the purported delays by Petitioners in getting to the 2/28/18 IEP make no difference. Offering Student the terms of that IEP and placement as of the beginning of 2017/18 would not have resulted in a FAPE, based on the problems discussed next.

This Hearing Officer concludes that DCPS denied Student a FAPE from the beginning of 2017/18, which results in the remedy discussed below.

Issue 2: *Whether DCPS denied Student a FAPE by proposing an IEP with an insufficient amount of specialized instruction and/or an inappropriate placement in a program at Public School, when Student needed a full-time, self-contained special education school. (Respondent has the burden of persuasion on this issue, if Petitioners establish a prima facie case.)*

Petitioners established a prima facie case on this issue based on expert testimony and assessments, shifting the burden of persuasion to DCPS, which failed to prove that Student's 2/28/18 IEP and placement were appropriate, especially by forcing a change in disability classification and then failing to state what program was intended for Student at Proposed Public School.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 517 (D.C. Cir. 2018), *Endrew F.* "raised the bar on what counts as an adequate education under the IDEA," requiring more than "merely some" educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be "reasonably calculated to produce meaningful educational benefit").

The measure and adequacy of the IEP are determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving a perfect IEP, but one reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA "stops short of requiring public schools to provide the best possible education"). *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). The appropriateness of Student's IEP is analyzed by considering the specific concerns, which are considered below in turn.[131] *See* 34 C.F.R. 300.320(a); *Honig*, 484 U.S. at 311.

As for placement, the applicable legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements). As discussed below, there is unacceptable ambiguity in how DCPS proposed to implement Student's IEP.

The greatest disagreement between the parties in this litigation centered on the proper primary disability classification for Student. Parents have long understood that Student's primary classification is SLD, along with OHI (due to ADHD) and some ongoing socio-emotional issues. But in early 2018 School Psychologist re-evaluated Student for DCPS and concluded that the emotional issues were paramount so that Student's primary classification should be ED rather than SLD. Parent's advocates and experts were "bewildered" by DCPS's conclusion. Special Education Consultant strongly disagreed with ED as Student's primary classification due to data showing SLD since 2011, which had been recently confirmed. Special Education Consultant persuasively testified that Student's school performance is impacted by SLD, and that Student's emotions were a result – not the cause – of the pressure of school and Student's performance. Clinical Psychologist also viewed learning challenges (LD) as Student's "primary," and anxiety as secondary to the

[131] A Hearing Officer must also determine whether "the State complied with the procedures" set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. No specific procedural violations were alleged in this case, which was expressly confirmed during the hearing by Petitioners' counsel.

learning challenges. Both sides agree that Student also has ADHD, so is MD with either ED or SLD as the primary disability.

For his 2018 evaluation, School Psychologist did not interview Student's teachers or service providers and did not observe Student in class, relying on the interviews and observations that Clinical Social Worker conducted for her FBA. Clinical Psychologist would have been happy to talk to School Psychologist, but he failed to reach out to get her feedback on Student. Private Psychologist's biggest concern was that School Psychologist reached his ED conclusion without socio-emotional testing, relying on Private Psychologist's evaluation which was not sufficient to conclude that Student had ED. School Psychologist referred to data showing Student's emotional issues were impacting Student more than LD, but Clinical Psychologist was not aware of such data in School Psychologist's report or elsewhere.

School Psychologist acknowledged in his testimony that his report included no analysis of SLD in reading, math or writing, but claimed that he had nonetheless considered each. When thinking of making a change in Student's SLD classification, School Psychologist should have considered SLD, which required achievement testing. But because achievement testing had been done in August 2017 and Student was tired of so much testing, School Psychologist did not conduct achievement testing. However, School Psychologist did not even integrate the prior achievement testing or reference the August 2017 achievement testing of Student in his report.

All agree that Student has issues with anxiety and depression, which Parents' experts were quite certain are secondary to Student's deeper problems of LD and ADHD. In short, Student is not having difficulty with school because of anxiety and depression. Instead, Student is having difficulty with school because of SLD in reading, writing and math and those school difficulties and accompanying pressures are what cause Student's anxiety and depression. For all these reasons, the undersigned concludes that DCPS erred in forcing a change in Student's disability classification from SLD to ED, which would no doubt have resulted in erroneous programming for Student and a denial of FAPE, despite DCPS's repeatedly assertions that it provides services based on need rather than classification.

The recent decision by Judge Randolph D. Moss in *Smith v. Dist. of Columbia*, 2018 WL 4680208 (D.D.C. 9/28/18), is directly on point and emphasizes both the need to have proper disability classifications and to provide for the unique needs of each student. In *Smith*, the Court held that placing a student in an SLS classroom if the child was known to be ED was a denial of FAPE, for the classroom needs to be tailored to the student's needs. *Id.* at *6-7, *citing Z.B.*, 888 F.3d at 523. The Court explained that the SLS program "was not designed to accommodate the unique needs of a child with emotional disabilities but, rather, was designed for children with learning disabilities." *Smith*, at *7. The Court also made clear that the IDEA does not require a school to place students with similar disabilities together, but wherever placed they must receive a program of education that is reasonably calculated to enable appropriate progress. *Id.*

The greatest concern of the undersigned in this case is the failure of DCPS to adequately convey to Parents the educational placement or program in which DCPS

proposed to implement the IEP and educate Student. As the Court recently explained, "[a] reviewing court may fairly expect those [school] authorities to be able to offer a cogent and responsive explanation for their decisions," and this explanation should show why "the IEP is reasonably calculated" to ensure that the child "make[s] progress appropriate in light of his circumstances." *Smith*, 2018 WL 4680208, at *5, *quoting Endrew F.*, 137 S. Ct. at 1002. DCPS has not offered a cogent and responsive explanation for its decisions here.

Inexplicably, DCPS refused to clearly disclose to Parents the educational placement and/or type of classroom and program and/or setting (collectively "program") that was intended for Student at Proposed Public School, which Parents needed in order to consider the appropriateness of Proposed Public School for their child. Over the months Parents were eventually told many things, but without the clarity needed to understand the impact on Student's education.

First, DCPS did not describe the program proposed for Student in the 2/28/18 IEP meeting. Petitioners' counsel sought more information at the IEP meeting about the specific program being recommended and was told that children are placed based on their needs and not by disability classification. When Petitioners' counsel asked if the program could serve both LD and ED, Respondent's counsel stated that the location chosen "will meet [Student's] needs." The 3/5/18 LOS letter referred to space in the "appropriate program," without stating what that program was.

Second, as the weeks passed DCPS provided no clarity about the program or classroom that Student would be in at Proposed Public School, or even whether they would be ED classes. Parent was not told how or when that decision would be made. After all the contention over Student's disability classification, Parents quite reasonably expected that Student's new ED classification would determine the program, supports and accommodations DCPS provided, which was a great concern. Parent was able to observe three classes at Proposed Public School, but was told they did not contain children with an ED classification, so Parent asked to see an ED class, which was out of control.

Third, DCPS stated on 5/7/18, that Student would not be in the BES program, for there was a "mixed program" at Proposed Public School. Petitioners' counsel responded that Parents had asked about a specific program for Student and was told it was the BES program. Petitioners' counsel later asked for clarification about Student's program as Parents were told it would be an ED program. DCPS again stated that it places students "based on needs, not the disability classification" and there was a "mixed class" of students with ED, LD and OHI at Proposed Public School.

Fourth, Special Education Consultant was able to observe Proposed Public School and was told that Proposed Public School has classes with more therapeutic supports for students with behavioral issues and more intense socio-emotional needs, and other classes more geared towards students with learning disabilities. DCPS further stated that Proposed Public School runs a "blending learning model which is competency based," but DCPS did not explain what that meant for Student or what program or setting Student would be in.

Finally, not until the due process hearing did DCPS finally state that Student should be on the SLS track due to the absence of externalizing ED behaviors. School Psychologist acknowledged that referring to an "ED class" meant the BES classroom, but it was only for children with severe externalizing behaviors. For internalized ED, Student needed an SLS classroom in which both ED and LD students are taught.

Parents have the right to be informed of proposed educational programs for their children. But here, just as in *N.S. ex rel. Stein v. Dist. of Columbia,* 709 F. Supp. 2d 57, 71 (D.D.C. 2010), Parents did not have an understanding from the "IEP meeting or from the written IEP document" what services would actually be provided to Student. In fact, Parents made many additional attempts beyond the IEP and IEP meeting to find out about the services contemplated for Student in DCPS's proposed program, with varied DCPS statements ranging from "mixed classes" and "BES" or "not BES," to "blending learning" model" and "SLS," which did not provide the necessary clarity. Here, just as in *N.S.*, Parents were given an "incomplete picture of the educational services that might have been provided," which forced Parents to make a decision about Student's "placement based on inadequate and contradictory information." *N.S.*, 709 F. Supp. 2d at 72.

Further, DCPS's repeated statements about placing students according to need rather than classification might have been accompanied by a "cogent and responsive" explanation of how DCPS viewed Student's need, but was not. Worse, DCPS had made abundantly clear to Parents that it believed that Student was ED, so Parents had every reason to expect that would drive Student's program. This critical information for assessing the viability of Proposed Public School for Student was not included by DCPS in Student's IEP or provided directly to Parents despite their repeated attempts to obtain it directly and through counsel and consultant. *See Middleton v. Dist. of Columbia,* 312 F. Supp. 3d 113, 121 (D.D.C. 2018) ("Courts in this jurisdiction have concluded that an IEP Team is required to discuss a student's specific 'Least Restrictive Environment' ('LRE') and that the IEP is required to include at least a brief description of the child's LRE"); *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25 (D.D.C. 2016) ("the IEP must be 'specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate'" (*quoting N.S.*, 709 F. Supp. 2d at 70)).

Importantly, the law is clear that parents are not obliged to put their children into situations that do not appear viable in order to prove a denial of FAPE. As the Court explained in *N.S. ex rel. Stein v. Dist. of Columbia,* 709 F. Supp. 2d 57, 72 (D.D.C. 2010),

> [P]arents are not required to wait and see a proposed IEP [or placement] in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2492-93, 174 L. Ed. 2d 168 (2009) (holding that parents may be reimbursed for private-school placement when a school district fails to provide a FAPE even where the student has never received instruction in the public school); *see also Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) ("a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement").

In the judgment of the undersigned, DCPS's failure to disclose and adequately set forth Student's program at Proposed Public School amounts to more than a procedural violation of the IDEA and is a denial of FAPE, for it significantly impeded Parents' opportunity to participate in decision-making regarding what type of program was required for a FAPE and deprived Student of educational benefit since Parents quite reasonably would not permit Student to attend Proposed Public School in the absence of adequate information about the program. *See* 34 C.F.R. 300.513(a).

Hours of Specialized Instruction. DCPS sought to focus the entire IEP dispute between the parties on whether Student needs an IEP that includes specialized instruction during lunch, arguing that Student doesn't need that level of support and even if Student does, Nonpublic School is not providing it so offers no advantage over Proposed Public School. The evidence in the case was that Student often goes off-campus at Nonpublic School to get lunch, but Nonpublic School has two faculty members who are off-campus during lunch to supervise students and at least two supervising faculty on campus at well. By contrast, Proposed Public School has a cafeteria and DCPS emphasized during this litigation that students in self-contained programs can eat in their classrooms to avoid the school cafeteria, which would effectively increase the hours of specialized instruction in the IEP it proposed. However, IEPs are to be judged as initially offered to parents, not as they might be hypothetically improved. *Smith*, 2018 WL 4680208, at *5 ("adequacy of an IEP must be assessed by reference to 'what [the school] actually offered, not what it is capable of providing"), *quoting Z.B.*, 888 F.3d at 526; *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 14-15 (D.D.C. 2017) ("the correct yardstick for measuring the proposed services is the . . . text of the IEP in order to encourage clarity and reduce factual disputes"), *quoting N.S.*, 709 F. Supp. 2d at 72.

In analyzing the issue of IEP hours and needs at lunch, Student's emotional fragility is most critical to the undersigned. Student appears to be doing much better in school now, but Student's confident exterior continues to mask ongoing struggles with anxiety and depression, as all agree. It was just last calendar year that Student "buckled" under the pressure of higher grade expectations, and Student is now two grades higher yet. Thus, the opportunities at Nonpublic School for support when needed during lunch in an environment in which Student is already comfortable could be the difference between success and school failure, if not the return of suicidal ideation concerns. While Student in theory could seek help during lunch at Proposed Public School as well, Student does not have the trusting relationships in place with teachers and professionals to rely on there, and such relationships would take a significant period of time to develop, putting Student at higher risk during the most critical and difficult period of transition to a new school, when they would likely be needed the most. Given the other problems with Student's IEP and placement discussed herein, this Hearing Officer holds that the difference in specialized instruction hours does contribute to DCPS's denial of FAPE to Student.

Distance. A final concern is that Proposed Public School was selected by DCPS for Student despite the fact that it is located about an hour from Student's home. The IDEA regulations, of course, require that a child be placed in a school as close to home as possible. 34 C.F.R. 300.116(b)(3). DCPS did not seek to explain how such a distant school had been selected, but simply stated at the hearing that transportation would be provided, although

Student might be the only rider on the bus. Given the fact that DCPS bears the burden of persuasion on the IEP/placement issue, the undersigned holds that the great distance of Proposed Public School also contributes to DCPS's denial of FAPE.

In sum, for the reasons discussed above concerning Student's 2/28/18 IEP and placement, this Hearing Officer concludes that DCPS did deny Student a FAPE, which results in the remedy discussed below.

Issue 3: *Whether DCPS denied Student a FAPE by completing an inappropriate psychological assessment and changing Student's special education classification from specific learning disability to an emotional disability. (Petitioners have the burden of persuasion.)*

Petitioners have not met their burden on this issue of School Psychologist's evaluation and DCPS changing Student's disability classification. Proper classification of students is important under the IDEA as discussed above and does contribute to providing appropriate and needed services, which relate to the denial of FAPE in the issues above, but in the view of the undersigned is not a separate FAPE violation here.

The IDEA is clear that Local Education Agencies ("LEAs") such as DCPS are not required to classify children by their disability as long as they have been found eligible to receive the special education and related services they need. *See* 20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. 300.111(d). It is a student's identified needs, not the disability category, that determine the services that must be provided to the child. 34 C.F.R. 300.320(a)(2)(i); *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (the "IDEA charges the school with the responsibility of developing an appropriate education, not with coming up with a proper label").

If Parents had not recently had their own psychological evaluation conducted by Private Psychologist, they might have chosen to obtain an independent educational evaluation ("IEE"), but instead relied on the evaluation they had. Further, the disability classification only makes a difference as it impacts the services and program offered to Student, which was thoroughly analyzed in the previous issue. Accordingly, the undersigned concludes that there was no substantive violation and no denial of FAPE here based on erroneous classification or lack of adequate evaluation by DCPS.

Issue 4: *Whether DCPS denied Student a FAPE by failing to allow Parents to have meaningful input into the IEP meeting and IEP team decisions. (Petitioners have the burden of persuasion.)*

Petitioners did not meet their burden of proving that DCPS improperly prevented their meaningful participation in the 2/28/18 IEP meeting and related IEP team decisions.

The IDEA clearly requires parental involvement in IEP development. *See Endrew F.*, 137 S. Ct. at 999 (crafting an appropriate program of education contemplates the input of the child's parents or guardians); *Lofton v. Dist. of Columbia*, 7 F. Supp. 3d 117, 124 (D.D.C. 2013) (the IDEA mandates that parent be allowed to meaningfully participate in the

development of child's IEP)*; Lague v. Dist. of Columbia*, 130 F.Supp.3d 305 (D.D.C. 2015). On the other hand, however, parents have no veto power over such decisions. *Pavelko v. Dist. of Columbia*, 288 F. Supp. 3d 301,306 (D.D.C. 2018) ("plaintiffs' disagreement with the *output* of the IEP process does not mean that they were denied the chance to provide meaningful *input* into that process" (emphasis in original)); *Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power over the IEP team's decisions).

Here, the evidence is uncontroverted that Parents were fully a part of the crucial 2/28/18 IEP meeting. Parents participated, provided input and were ably supported by their counsel, consultant, and other professionals. Everyone was able to express their views during the lengthy discussion, especially around the central issue of disability classification. The rub is that School Psychologist – who was critical in the meeting to discuss his evaluation and recommendation to shift Student to ED – participated by telephone. Parents had trouble hearing and understanding him, to the point that Petitioners' counsel requested that the meeting be postponed so that School Psychologist could attend in person, but DCPS refused, seeking to avoid further delay.

While the bad phone connection was certainly unfortunate, the undersigned holds that it did not prevent Parents from having meaningful input. Parents, their counsel and other professionals all strongly opposed a change in Student's primary disability classification from SLD to ED, and clearly expressed their opposition to the eight individuals representing DCPS, most of whom were present in person. Meaningful input is all the law requires. Parents were no doubt frustrated by the poor connection and might have felt that if they could only understand School Psychologist's position better, they might be able to rebut it more effectively. But over six months of litigation since the IEP meeting suggests otherwise. This was not a mere misunderstanding that could have been talked through with a better connection. It is clear that Parents were not about to change their minds on the ED classification at the IEP meeting with a little better explanation, and it is equally clear that School Psychologist and DCPS were not about to walk away from their evaluation and its ED conclusion if only they had heard something more or different from Parents. Similarly, the issue of the number of specialized instruction hours and whether Student needed Nonpublic School or a DCPS placement was no different in terms of Parents having sufficient "input" at the meeting, even though they were not satisfied with the "output" from the IEP team. Thus, this Hearing Officer concludes that Petitioners did have meaningful input, so failed to meet their burden of proof on this issue.

Issue 5: *Whether Nonpublic School is a proper placement. (Petitioners have the burden of persuasion on this issue.)*

Finally, Petitioners readily demonstrated that Nonpublic School, where Student is doing well and has been educated for many years, is proper and appropriate for Student. The legal standard for proper placement is the same for school districts and for parents. *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). Under *Endrew F.*, 137 S. Ct. at 1001, the question is whether Parents' unilateral private placement was reasonably calculated to enable Student to make appropriate progress given Student's circumstances. *Cf. Leggett*, 793 F.3d at 71, *quoting Rowley*, 458 U.S. at 207, 102 S. Ct. 3034. *See also*

Wirta v. Dist. of Columbia, 859 F. Supp. 1, 5 (D.D.C. 1994), *quoting Rowley*, 458 U.S. at 176, 102 S. Ct. at 3034; *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008). Petitioners' witnesses convincingly testified that Student's program at Nonpublic School is effective and Student's socio-emotional needs are being met. Nonpublic School is providing meaningful educational benefit and Student is making progress appropriate for Student's circumstances. For these reasons, just as in the previous HOD, this Hearing Officer concludes that Nonpublic School is proper and appropriate for Student. *See* 34 C.F.R. 300.148.

Remedy

As the remedy for the denials of FAPE found above, Petitioners seek reimbursement of payments to Nonpublic School for 2017/18, as well as for Student to be funded at Nonpublic School for the remainder of 2018/19. Judge Colleen Kollar-Kotelly recently confirmed that "if there is no public school which is suitable, the school district 'must pay the cost of sending the child to an appropriate private school.'" *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005). *See also Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991) (if a public school program were available to enable student to receive educational benefits, DCPS would not need to consider nonpublic placement).

Under the IDEA, however, parents who unilaterally place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993), *quoting Burlington*, 471 U.S. at 374. The Court of Appeals explained in *Leggett v. Dist. of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015), that,

> As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise "proper under the Act"; and (3) the equities weigh in favor of reimbursement – that is, the parents did not otherwise act "unreasonabl[y]."

Here, the first prong of *Leggett* is met due to the denials of FAPE by DCPS failing to provide Student an appropriate IEP and placement, as discussed at length above.

The second prong of *Leggett* focuses on whether Nonpublic School is proper for Student as found in Issue 5, above. The second prong of *Leggett* is satisfied.

The final prong of *Leggett* is to consider whether the equities weigh in favor of reimbursement or whether Petitioners acted unreasonably. Here, Parents interacted reasonably with DCPS and Proposed Public School and there was no serious assertion by DCPS that the third prong is not satisfied.

Accordingly, this Hearing Officer concludes that Parents should be reimbursed from

the start of 2017/18 and that funding Student at Nonpublic School for 2018/19 meets the Court's guidance that the essence of equity jurisdiction is "to do equity and to mould each decree to the necessities of the particular case." *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). The undersigned is also mindful of the Appellate Court's concern in *Leggett*, 793 F.3d at 74, about whether a mid-year transfer would "unduly" disrupt student's education, as well as *Branham v. Gov't of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (asking whether setting aside remedial order might disrupt child's education).

ORDER

Petitioners have prevailed on the key issues in this case, as set forth above. Accordingly, **it is hereby ordered that**:

1) Upon receipt of documentation of payment by Petitioners, DCPS shall within 30 days reimburse Petitioners for tuition and related expenses for Nonpublic School for the 2017/18 school year.

2) DCPS shall fund Student at Nonpublic School for the remainder of the 2018/19 school year, including tuition and all related fees and costs.

Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*
Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

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