

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
September 08, 2016

<i>Student</i> , ¹)	Date Issued: 9/8/16
through his <i>Parent</i> ,)	
<i>Petitioner</i>)	Case No.: 2016-0161
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 8/31/16
("DCPS"),)	Hearing Location: ODR Room 2006
Respondent)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because his individualized education program (“IEP”) did not adequately address adaptive/daily living skills and emotional, social and behavioral development, nor was he provided an appropriate placement. DCPS responded that his IEP was appropriate and the public school selected for him can fully implement his fulltime IEP.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to 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 7/1/16, the case was assigned to the undersigned on 7/5/16. DCPS filed a response on 7/12/16 and did not challenge

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

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jurisdiction.

The resolution session meeting took place on 7/18/16, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 7/31/16. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 9/14/16.

The due process hearing took place on 8/31/16 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present in person during the entire hearing.

Petitioner’s Disclosures, filed on 8/24/16, contained documents P1 through P19, which were admitted into evidence without objection.

Respondent’s Disclosures, filed on 8/24/16, contained documents R1 through R10, which were admitted into evidence without objection.

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Educational Advocate* (qualified without objection as an expert in Special Education as It Relates to Educational Programming and Development of IEPs)
2. *Psychologist* (qualified without objection as an expert in Psychology)
3. *Admissions Director* of Nonpublic School
4. Parent

Respondent’s counsel presented one witness in Respondent’s case (*see* Appendix A): *LEA Representative* (qualified over 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 failing to provide an appropriate IEP on 1/12/16, where the IEP did not adequately address deficits in Adaptive/Daily Living Skills, Speech-Language,² and Emotional, Social and Behavioral Development.

² Although Petitioner’s counsel declined to omit a Speech-Language claim at the prehearing conference, no evidence was presented at the due process hearing relating to Speech-

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Issue 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate placement/location of services, where *Proposed Public School* cannot fully implement his IEP or provide a setting to address his disability.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Within 10 business days, DCPS shall convene an IEP team meeting to (a) revise Student's IEP to add additional Adaptive/Daily Living Skills goals, and Emotional, Social and Behavioral goals and services; and (b) discuss increasing the frequency of Student's speech-language therapy.
3. Within 5 business days, DCPS shall place Student at *Stay Put Public School* with transportation, or a specified private placement with transportation, at DCPS's option.
4. DCPS shall provide compensatory education³ for any denial of FAPE from 1/12/16 to the present.
5. Any other relief that is just and reasonable.

Respondent's counsel orally moved for a directed verdict at the end of Petitioner's case-in-chief, in addition to asserting that Petitioner had not established a prima facie case on either issue. The undersigned on the record denied the motion for a directed verdict and held that Petitioner had established a prima facie case on both issues.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

Language, so Petitioner failed to meet her burden of production or to establish a prima facie case as to Speech-Language, and it is not discussed further herein.

³ Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ 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

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age* and has just begun *Grade* in 2016/17⁶ at Stay Put Public School.⁷

2. Student has had an IEP as long as he has been in school; his classification is Autism Spectrum Disorder.⁸ Student's current IEP (dated 1/12/16, which is the only IEP at issue) clear states that his "expressive and receptive language concerns [are] severe enough to warrant separation from his non-challenged peers in order to best access learning."⁹ His IEP provides for 6.5 hours/day (32.5 hours/week) of specialized instruction outside general education, along with 45 minutes/month of speech-language pathology services also outside general education.¹⁰ Student's IEP states that he excels in small group settings, but not in general education.¹¹ Student is more than 2 years behind grade level in both math and reading and because of communication challenges is "unable to access the general education curriculum in a general education setting."¹²

3. In his IEP's Adaptive/Daily Living Skills area, the Present Levels section states that Student needs to work on skills to be able to navigate in his school and community and that his behavior of giggling and avoiding eye contact when he is nervous, anxious or does not understand something should be replaced with positive behaviors, such as asking for help from an adult.¹³ The description of how his disability affects Student states that he needs skills that will benefit him in the real world, including telling time, counting money, and tying his shoes; developing relationships with his peers; using information to navigate the community; and developing strategies to ask for help.¹⁴

4. In the Adaptive/Daily Living Skills area of his IEP, Student's only Objective was to develop a schedule and his only Annual Goal was to follow daily routines in 8 out of 10 trials.¹⁵ Student's 3/20/13 IEP contained the exact same Adaptive/Daily Living Skills description of how his disability affects Student as in 2016 but included 2 goals, which were

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.

⁵ Parent.

⁶ All dates in the format "2016/17" refer to school years.

⁷ Parent; P1.

⁸ Parent; P1-1; 300 C.F.R. 300.8(c)(1).

⁹ P1-2.

¹⁰ P1-11.

¹¹ P1-3.

¹² P1-3,4.

¹³ P1-6; Psychologist (also found that Student has a lack of social confidence and when anxious will giggle, avoid eye contact, withdraw, and not ask for help).

¹⁴ P1-7.

¹⁵ *Id.*

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seeking to change Student's giggling or other inappropriate responses and being able to identify and use various sources of information.¹⁶

5. In the IEP's Emotional, Social, and Behavioral Development area, the Present Levels section states that Student demonstrates uncertainty in academic settings; frequently looks to adults for approval before responding to questions; and needs instruction on how to respond to nervousness, frustration and anger.¹⁷ The description of how his disability affects Student states that he needs explicit, step-by-step directions for full understanding; support to build his confidence in academic settings; and engagement in small group discussions with peers.¹⁸ No baseline, objectives, or goals were provided in this area; his IEP and IEP Progress Report repeatedly state, "Student does not require services to address this area at this time."¹⁹

6. An Emotional, Social, and Behavioral Development goal of being able to follow self-guided rules for class or small group discussion and carry out assigned roles in self-run small group discussions is listed on Student's 11/3/15 IEP Progress Report and 3/20/13 IEP.²⁰ DCPS's brief notes from the 1/12/16 IEP team meeting about the 2016 IEP make no mention of removing the goal.²¹ On 7/18/16, DCPS stated that information was not available at that time to update Student's goals, but information could be gleaned from ESY that Student was going to attend.²²

7. There was no discussion about goals for Student at his IEP meeting on 1/12/16, although Parent had raised concerns about lack of goals with Student's teacher.²³ Psychologist found that Student's IEP does not align with the needs she assessed when she met with Student; he needs to have goals in the Adaptive and Emotional, Social areas and needs support to gain confidence.²⁴ Relationships are important so Student needs specific goals relating to friendships.²⁵ Student needs goals in his IEP to assist him in progressing with real world skills.²⁶ Despite his age, Student is still not able to tell time, count change or tie his shoes, but there are no goals for them on his IEP.²⁷

¹⁶ P4-12.

¹⁷ P1-9; Psychologist (met with Student, briefly assessment him, and found he has no confidence and looks to adults for guidance).

¹⁸ P1-9.

¹⁹ P1-9,10; R10-3.

²⁰ P3-9; P4-15.

²¹ R1-2.

²² R6-2.

²³ Parent.

²⁴ Psychologist.

²⁵ *Id.*

²⁶ Educational Advocate.

²⁷ Educational Advocate; Parent.

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8. DCPS sent Parent a letter dated 6/10/16 stating that for 2016/17 Student was to attend the Communication & Education Support (“CES”) classroom for his grade at Proposed Public School, which is the school closest to Student’s home with space in a CES classroom.²⁸

9. During a June 2016 visit at Proposed Public School, a CES classroom special education teacher provided information about the autism program to Parent and Educational Advocate, stating that Student would receive his Specials, such as music, art, library and PE, as well as lunch, with general education students.²⁹ At the due process hearing, LEA Representative convincingly testified that the information reported from the June 2016 visit was incorrect.³⁰ Proposed Public School has 5 autism students in Student’s grade in the certificate-track CES classroom and 6 autism students in Student’s grade on the diploma track, all of whom are fulltime outside general education and have no classes with nondisabled students, although the diploma-track students have some classes with children with Specific Learning Disabilities.³¹

10. Student needs updated testing, including a new comprehensive psychological evaluation, a new Functional Behavioral Assessment (“FBA”), and a new Woodcock-Johnson assessment, which could happen at Proposed Public School in November or December 2016 or earlier if Parent wishes.³² FBAs and Behavioral Intervention Plans (“BIPs”) are required for all autism students at Proposed Public School, and would be developed or updated for Student.³³

11. Parent is concerned about Student’s safety at Proposed Public School, especially in getting from the bus to his classroom, and would favor having aides that would regularly assist in that transition.³⁴ LEA Representative testified that 2 educational aides meet the bus Student would be on and take the children to breakfast; aides then take the children on to their classroom.³⁵ At the end of the day, the autism class exits before everyone else to go back to their buses.³⁶

12. Proposed Public School provides “special Olympics” on a weekly basis for autistic and certain other disabled children who meet with disabled students from other schools.³⁷ Proposed Public School provides Living Skills field trips for autistic students to go into the community to restaurants, use public transportation, and have other real world

²⁸ R7.

²⁹ P10-1; Educational Advocate; Parent; P13-1.

³⁰ LEA Representative.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Parent.

³⁵ LEA Representative.

³⁶ *Id.*

³⁷ *Id.*

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experiences.³⁸ A Proposed Public School autism teacher is setting up a classroom to be used for more hands on experiences as a laundromat, grocery store and the like.³⁹ Proposed Public School has almost a 1:1 ratio of computers to students, as well as Smart Boards in the classrooms with interactive projection screens.⁴⁰

13. Proposed Public School can provide the services required by Student's fulltime IEP, and can provide specialized instruction and lunch for Student outside general education for 6.5 hours/day (32.5 hours/week).⁴¹ At Proposed Public School, 28.5 hours/week is considered fulltime, as lunch is not included since no specialized instruction occurs during lunch.⁴²

14. Student needs to interact with both disabled and nondisabled peers to improve his social skills.⁴³ Student's IEP states that he should be encouraged to engage with appropriate peers to reinforce pro-social behavioral development.⁴⁴ Lunch with nondisabled peers would be helpful, although Student wouldn't be able to manage by himself at lunch without an aide.⁴⁵

15. At Proposed Public School, the autism students transition to lunch with their cluster a little bit before everyone else, eat together at the same table, and then go back up to their classroom together.⁴⁶ Proposed Public School has not had any problems in the lunchroom this year with the autism students.⁴⁷ The hope is that eventually autistic students may make friends with nondisabled students and be able to leave their class table at lunch, but be able to return to it as needed as an anchor and place of safety.⁴⁸ Nonpublic School is not Student's LRE as socialization with his nondisabled peers with supervision is an important educational opportunity.⁴⁹

16. At the time of the due process hearing, Student had only completed 2 days of school at Stay Put Public School, but was doing ok at lunch with his autism class and a teacher in a

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Psychologist; Parent.

⁴⁴ P1-7.

⁴⁵ Psychologist; Parent.

⁴⁶ LEA Representative.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

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lunchroom with other nondisabled students.⁵⁰ Student could also handle having lunch in the lunchroom at Proposed Public School as long as he was with his own class and aide.⁵¹

17. Student attended a portion of ESY at Stay Put Public School and began school there a week late, on 8/28/16.⁵² Student has difficulties with transitions but with preparatory steps was able to transition without problem to Stay Put Public School.⁵³ Significant effort is made when transitioning autistic students to Proposed Public School by making initial contact and then easing them into the school smoothly, followed by an emphasis on consistency.⁵⁴

18. Psychologist concluded, based on her assessment and past records, that Student has made no growth or progress in the areas at issue due to the lack of specific, tailored and measurable goals in his IEP.⁵⁵ Among other things, Student remains withdrawn and giggles and lacks confidence as much now as in the past.⁵⁶ But for the denial of FAPE, Student would be further along given his grade, would not look to his Parent when asked to describe himself, would not procrastinate as much with tasks, and would act more appropriately.⁵⁷ Psychologist testified that as a result of lacking needed goals in his IEP since January 2015, Student needs 300 hours of mentoring, counseling and tutoring to put him in the place he would have been, based on an hour per day of missed services.⁵⁸ Psychologist subsequently acknowledged in her testimony that her analysis was off by a year and that she should be focusing on half a school year, rather than a year and a half, but nonetheless insisted that Student needed 300 hours of compensatory education, even though no number of hours was specified in her Compensatory Education Plan.⁵⁹

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*

⁵⁰ Parent.

⁵¹ *Id.*

⁵² Parent; P12-1; R6-2.

⁵³ Parent.

⁵⁴ LEA Representative.

⁵⁵ Psychologist.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Psychologist; P17.

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Columbia, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education”).

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

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *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).

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

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.

Petitioner shall carry the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent shall have the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall 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.

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Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 1/12/16, where the IEP did not adequately address deficits in Adaptive/Daily Living Skills, Speech-Language, and Emotional, Social and Behavioral Development.*

Petitioner established a prima facie case on the lack of appropriateness of Student's IEP through the testimony of her experts, thereby shifting the burden of persuasion to DCPS, which failed to prove that the IEP was appropriate.

To determine whether a FAPE has been provided through an IEP, a Hearing Officer must determine:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

A.M. v. Dist. of Columbia, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Specifically, the suitability of Student's IEP in this case is analyzed by considering the concerns raised by Petitioner about Student's deficits in Adaptive/Daily Living Skills and Emotional, Social and Behavioral Development. *See* 34 C.F.R. 300.320(a)(2),(4); *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). The measure and adequacy of Student's IEP are to be determined as of 1/12/16, the time it was offered to him. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

Here, in the Adaptive/Daily Living Skills area, Student's IEP is clear that he needs skills that will benefit him in the real world, including telling time, counting money, and tying his shoes; developing relationships with his peers; using information to navigate the community; and developing strategies to ask for help. Parent confirmed these needs at the due process hearing. Yet Student's only objective was to develop a schedule and his only goal was to follow daily routines. Petitioner's un rebutted experts readily concluded that this was not sufficient, and the undersigned agrees. In fact, Student's IEP has been moving in the wrong direction as his 3/20/13 IEP contained the exact same Adaptive/Daily Living Skills description of how his disability affects him as in 2016, but included 2 substantive goals in 2013, which were seeking to change Student's giggling or other inappropriate responses and being able to identify and use various sources of information.

Petitioner's experts were also convincing and un rebutted about the insufficiency of Student's IEP in the area of Emotional, Social, and Behavioral Development. The description of how his disability affects Student states that he needs explicit, step-by-step directions for full understanding; needs support to build his confidence in academic settings; and needs engagement in small group discussions with peers. Yet no baseline, objectives, or goals were provided in this area, and his IEP repeatedly states that Student does not

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require services to address this area.⁶⁰ A goal that had been on his previous IEP in this area was removed without discussion. In fact, there was no discussion of goals for Student at his IEP meeting on 1/12/16, although Parent had raised concerns about lack of goals with Student's teacher.

In sum, Student's IEP is deficient on its face by failing to include goals and services for Adaptive/Daily Living Skills and Emotional, Social and Behavioral Development. This is a procedural violation of the IDEA, which requires both academic and functional goals designed to meet the child's needs and a statement of both the special education and related services to be provided to the child. *See* 34 C.F.R. 300.320(a). However, only those procedural violations which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne, ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).

Here, the failure of DCPS to ensure that Student's IEP addressed his needs in the areas of Adaptive/Daily Living Skills and Emotional, Social and Behavioral Development deprived Parent of her right to participate in the IEP process. *See, e.g., Lofton v. Dist. of Columbia*, 7 F. Supp. 3d 117, 124 (D.D.C. 2013) (IDEA mandates that the parent be allowed to meaningfully participate in the development of her child's IEP); *Lague v. Dist. of Columbia*, 2015 WL 5467629, 4 (D.D.C. Sep. 15, 2015). A parent is not able to meaningfully participate in an IEP meeting if the student's goals and services are not set out in the IEP under review. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007). Moreover, Student was deprived of educational benefits that he greatly needs, from the basic skills of telling time, counting money, and tying his shoes, to more nuanced needs to be able to engage with peers and have more confidence in academic settings. *See* 34 C.F.R. 300.513(a). Thus, this Hearing Officer concludes that the lack of adequate goals and services in Student's IEP resulted in a denial of FAPE.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide an appropriate placement/location of services, where Proposed Public School cannot fully implement his IEP or provide a setting to address his disability.*

Petitioner established a prima facie case on the issue of the inappropriateness of Student's placement by introducing evidence that even though Student's IEP required him to be outside general education 32.5 hours/week, Parent was told on a visit to Proposed Public School that Student was going to have both his Specials and lunch in a general

⁶⁰ Respondent argued that merely listing Student's needs in these areas in his IEP made the goals obvious, and that they were simply placed in the wrong box on the IEP. But here the IEP did not merely omit goals and objectives but affirmatively stated that services were not required. *Cf. A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) (“[i]n evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself”).

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education setting.⁶¹ However, as discussed below, DCPS met its burden of persuasion⁶² through convincing testimony that Student would be outside general education for all of his specialized instruction and would have lunch with his autism class and aide.

Under the IDEA, to provide Student a FAPE 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). The IDEA requires an appropriate education, but it “does not require a perfect education.” *M.S. ex rel. Simchick v. Fairfax County Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009). Thus, the issue here is whether Proposed Public School offers a basic floor of opportunity to Student and, if not, whether Stay Put Public School could fully implement Student’s IEP or whether a separate day school is required to properly implement Student’s IEP and provide a FAPE. *See Smith*, 846 F. Supp. 2d at 202 (school needs to provide only basic floor of opportunity), *quoting Rowley*, 458 at 201, 102 S. Ct. 3034.

DCPS’s expert, LEA Representative, oversees the autism program at Proposed Public School and persuasively testified that Proposed Public School is an appropriate placement for Student as it can provide the services required by Student’s fulltime IEP by providing specialized instruction and lunch for Student outside general education for 6.5 hours/day (or 32.5 hours/week).⁶³ Proposed Public School has 5 autism students in Student’s grade in a certificate-track CES classroom and 6 autism students on the diploma track, all of whom are fulltime outside general education and have no classes with nondisabled students.

Student’s IEP states that he should be encouraged to engage with appropriate peers to reinforce pro-social behavioral development. Parent agreed that Student needs to improve his social skills by interacting with both disabled and nondisabled peers and that lunch with nondisabled peers would be helpful, although Student would need support at this stage. At Proposed Public School, the autism students transition to lunch with their cluster a little before everyone else, eat together at the same table, and then return to their classroom together. Parent testified that Student is in a similar situation at Stay Put Public School and

⁶¹ Indeed, Petitioner’s evidence – un rebutted at the time – was the basis for the undersigned to conclude that Proposed Public School could not implement Student’s IEP when granting Petitioner’s stay-put motion on 8/3/16.

⁶² DCPS argued that Issue 2 was simply a matter of “location of services” and not “placement,” so the burden of persuasion should not shift, but the undersigned concludes that Petitioner was making a claim about the appropriateness of Student’s proposed placement so the burden of persuasion should shift under STATUTE, but DCPS met its burden and prevailed as discussed herein. *Cf. Dist. of Columbia v. Vinyard*, 901 F. Supp. 2d 77, 85 (D.D.C. 2012) (the meaning of educational placement “falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP”); *Eley v. Dist. of Columbia*, 47 F. Supp. 3d 1, 16-17 (D.D.C. 2014).

⁶³ At Proposed Public School, 28.5 hours/week is considered fulltime; lunch is not included since no specialized instruction occurs during lunch. *Cf. Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 269 (D.D.C. 2013).

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even in his first days was doing ok at lunch with his autism class and a teacher in a lunchroom with nondisabled students. Parent thus believes that Student could handle having lunch in the lunchroom at Proposed Public School, as long as he is with his own class and aide.

LEA Representative further testified that Student needs updated testing, including a new comprehensive psychological evaluation, a new FBA, and a new Woodcock-Johnson, which could be done at Proposed Public School in November or December 2016 or earlier if Parent wishes. Proposed Public School requires FBAs and BIPs for all autism students, which would be developed or updated for Student. Further, while Parent was concerned about Student's safety at Proposed Public School, especially getting from the bus to his classroom, LEA Representative explained that 2 educational aides meet the bus Student would be on and take the children to breakfast and then aides take the children on to their classroom. Student does have difficulties with transitions, but with preparatory steps was recently able to transition without problem from *Previous Public School* to Stay Put Public School. LEA Representative described the significant efforts made when transitioning autistic students to Proposed Public School to make initial contact and ease them into the school smoothly, followed by an emphasis on consistency in their school experience.

Based on all the evidence, this Hearing Officer concludes that Proposed Public School is appropriate for Student and can provide a fulltime out of general education placement to carry out Student's IEP, address his needs and provide educational benefit. Since an appropriate public school program has been made available for Student at Proposed Public School, i.e., one "reasonably calculated to enable the child to receive educational benefits," DCPS need not consider the merits of either Stay Put Public School or a nonpublic placement. *Jenkins*, 935 F.2d at 304-305 (citing *Rowley*, 458 U.S. at 207).

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 ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *25 (D.D.C. Aug. 26, 2016) (IDEA prescribes broad discretion in fashioning relief for educational deprivation). The proper amount of compensatory education, if any, depends on how much more progress Student might have shown if he had received the required special education services, and the type and amount of services that would place Student in the same position he would have occupied but for DCPS's violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), citing *Reid*, 401 F.3d 516. In short, "compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial." *B.D.*, 817 F.3d at 798.

The Circuit Court for the District of Columbia recently made plain that "compensatory education awards require a 'flexible approach' tailored to the facts of each case, and, as we made clear in *Reid*, a mechanical award of services identical to those wrongly denied is inappropriate. *Reid*, 401 F.3d at 524." *B.D.*, 817 F.3d at 799. While there

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is “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *id.*, that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *See Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Based on careful consideration of the facts and circumstances resulting in the denial of FAPE found above, including the expert opinion of Psychologist that Student has not made progress due to the lack of specific, tailored and measurable goals in his IEP, this Hearing Officer awards 75 hours in total of counseling, mentoring and/or tutoring in the proportion determined best by Parent and her advisors. The hours awarded are based on the absence of sufficient and suitable goals for Student, which in the expert opinion of Petitioner’s witnesses unnecessarily held back Student from where he should be. While there was confusion over the time period to be covered by the compensatory education plan, the 300 hours advocated by Psychologist were adjusted by the undersigned to take the error into account along with other factors. Psychologist recommended counseling, mentoring, and tutoring, but with a limit of 75 total hours, the undersigned considers Parent and her advisors in the best position to determine the optimal mix of services for Student. This award of hours is to be used within 18 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent that would result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner prevails on Issue 1 as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 15 school days, DCPS shall convene an IEP team meeting to develop and add appropriate goals to Student’s IEP in the areas of (a) Adaptive/Daily Living Skills, and (b) Emotional, Social, and Behavioral Development.
- (2) Compensatory education for the denial of FAPE in this case shall consist of DCPS funding 75 hours of independent services to be divided between counseling, mentoring, and/or tutoring, at Petitioner’s option. DCPS shall authorize such services within 10 business days after Petitioner’s written election of the services selected. All counseling, mentoring, and tutoring hours are to be used within 18 months from the date of this HOD; any unused hours will be forfeited.

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

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Copies to:

Counsel of Record (Appendix A, by email)

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