

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: September 19, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2017-0190

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: August 28-29, 2017

Respondent.

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

INTERIM HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not ensuring that Student was provided appropriate Individualized Education Programs (IEPs) and educational placements beginning in January 2017 and by failing to implement the Specialized Instruction Services required by Student’s IEP in the 2016-2017 school year.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 7, 2017, named DCPS as respondent. The undersigned hearing officer was appointed on July 10, 2017. The parties met for a resolution session on August 3, 2017 and were unable to reach an agreement. My final decision in this case is due by September 20, 2017. On July 26, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned impartial hearing officer on August 28 and 29, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by RESOLUTION COORDINATOR and by DCPS' COUNSEL.

The Petitioner testified and called as additional witnesses BEHAVIOR ANALYST, INDEPENDENT PSYCHOLOGIST and NONPUBLIC SCHOOL DIRECTOR. DCPS called as witnesses SPECIAL EDUCATION TEACHER, SCHOOL SOCIAL WORKER, ASSISTANT PRINCIPAL, and DCPS MONITOR. Petitioner's Exhibits P-1 through P-31 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-47 were admitted into evidence except for Exhibit R-41, which was withdrawn. Exhibits R-14 through R-22 and R-36 were admitted over Petitioner's objections. Counsel for the Petitioner made an opening statement. Counsel for the respective parties made closing arguments. Neither party requested leave to file a post-hearing written memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the July 26, 2017

Prehearing Order:

1. Whether DCPS denied Student a FAPE by failing to implement the Specialized Instruction Services in Student’s June 2016 IEP, as amended in August 2016;

2. Whether DCPS denied Student a FAPE by failing to review a DCPS Least Restrictive Environment (LRE) report in a timely manner to revise Student’s IEP from January 2017 to May 2017 and by failing to provide an appropriate educational placement at City School 1 for the 2016-2017 school year;

3. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP in May 2017, by failing to provide Specialized Instruction for lunch, recess, arrival, dismissal and transitions and by failing to provide an appropriate LRE in a separate special education school and

4. Whether DCPS denied Student a FAPE by issuing a location of services letter for City School 2 and by failing to offer an appropriate program in the CES classroom at City School 2.

For relief, Petitioner requests that DCPS be ordered to fund Student’s nonpublic placement, with transportation, at Nonpublic School; that DCPS be ordered to revise Student’s IEP to provide for Specialized Instruction outside general education for lunch, recess, arrival, dismissal and transitions and for an appropriate LRE in a separate special education school. The Petitioner also requested compensatory education relief for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this hearing officer’s Findings of Fact are as follows:

1. Student, an AGE child, resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education under the IDEA disability classification Multiple Disabilities, based on an Other Health Impairment (OHI) and a concomitant Speech Language Impairment. Exhibit R-4.

2. Student was diagnosed with GENETIC DISORDER² at approximately 16 months of age and with Pervasive Developmental Disorder, Not Otherwise Specified, a diagnosis on the autism spectrum, at 22 months of age. Exhibit P-3.

3. In 2011, Student was evaluated by DCPS Early Stages. An occupational therapist attempted to administer the Peabody Developmental Motor Scales – Second Edition, but determined Student’s limited ability to attend to and engage with the examiner prevented appropriate administration. A physical therapist reported delayed overall gross motor skills and functional mobility and slightly decreased muscle strength and tone in trunk and bilateral extremities. Clinical observation indicated limited fine motor skills, limited visual motor skills, poor sensory processing and integration for effective participation in educational activities, and limited independent self-care skills. Additionally, an attempt to administer the Wechsler Preschool and Primary Intelligence Scales – Third Edition failed due to poor engagement with the examiner. Results from the Gilliam Autism Rating Scale – Second Edition, completed by Mother, indicated “possible likelihood of Autism” (Autism Index = 74). Following this evaluation Student was found eligible for special education services as having an Autism Spectrum Disorder (ASD). Exhibit P-3.

4. Student was enrolled in City School 1 since the 2012-2013 school year

² In order to protect Student’s personally identifiable information, the specific condition which Student has is provided only in Appendix A.

through the 2016-2017 school year. For the 2017-2018 school year Student was promoted to GRADE B. Testimony of Mother, Exhibit R-28.

5. On April 4, 2015, PHYSICIAN wrote a letter “To whom it may concern” reporting that Student’s Genetic Disability can affect a child’s ability to learn in the form of a learning disability and that expressive language skills are also impacted. He wrote that given Student’s current level of functioning, it was extremely important that Student have consistent and meaningful inclusion opportunities with exposure to typically developing and cognitively comparable peers. Physician wrote that the modeling behavior that Student will develop in a setting with typical children was likely to be extremely beneficial. Physician wrote that Student’s then-current classroom setting was in a primarily autism classroom where the majority of the students were nonverbal and had significant behavioral difficulties. Physician requested that Student be placed in an appropriate environment to allow Student to grow academically, personally and socially. This would require inclusion with typical children in Student’s age group. Physician asserted that his recommendation should be considered a “medical necessity.” Exhibit R-13. Physician’s April 4, 2015 recommendation was never updated or withdrawn. Testimony of Mother.

6. Mother provided Physician’s April 4, 2015 letter to City School. At an IEP team meeting on April 28, 2015, Mother talked about the letter and stated that she felt that the IEP team needed to provide Student with opportunities for exposure to typically developing children. In an April 30, 2015 written statement, Mother wrote that for the next school year, she wanted Student placed in a general education classroom for GRADE A. Exhibits R-14, R-15.

7. On May 15, 2015, Student’s IEP team at City School met to amend

Student's IEP to edit present levels of performance and to edit the Specialized Instruction Setting. In the amended IEP, Student's Special Education Services included 59 hours per month of Specialized Instruction outside general education and 39 hours per month in general education. Exhibit R-17.

8. In the fall of 2015, Independent Psychologist conducted an Independent Educational Evaluation (IEE) comprehensive psychological evaluation of Student. Student was administered the Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV). On this measure, Student's full-scale IQ (FSIQ) indicated overall intellectual functioning in the "lower extreme" range (standard score = 51, 0.1 percentile). In addition to the WISC-IV, Student was administered the Leiter International Performance Scale-Third Edition (Leiter-3) to assess cognitive abilities in a nonverbal format. On this measure, Student's Nonverbal IQ score indicated overall intellectual functioning in the "below average" range (standard score = 80, 9th percentile). Student's overall intellectual functioning fell in the "below average" to "lower extreme" range. Independent Psychologist concluded that Student's language difficulties were likely to have negatively affected performance on the WISC-IV, indicating that Student's language difficulties may make Student appear less capable than Student's true ability. Exhibit P-3.

9. For academic achievement, Independent Psychologist administered the Wechsler Individual Achievement Test - Third Edition (WIAT-III) to Student. Student showed variable academic achievement on this measure. Composite scores ranged from "borderline" to "low average" and subtest scores from "borderline" to "very superior." Scoring of the written expression composite of academic achievement testing was not possible due to Student's significant difficulty with producing written work. In

regard to oral expression skills, Student showed a particular weakness in expressive vocabulary. In contrast, Student's receptive language skills were a particular strength.

Exhibit P-3.

10. Student's results on the Visual-Motor Integration (VMI) assessment were in the "very low" range (standard score = 69; 2nd percentile), suggesting that Student experiences significant difficulty coordinating visual perception and finger-hand movements. Exhibit P-3.

11. To assess Student's behavior, the Child Behavior Checklist (CBCL) was given to Mother to complete and the Teacher Report Form (TRF), a parallel form, was provided to Student's teacher. Results on the behavior rating scales from both Mother and the teacher were within normal limits on all scales. The Vanderbilt Assessment Scale was also completed by both Mother and the teacher. This scale is designed to assess for the presence of Attention Deficit Hyperactivity Disorder (ADHD) symptoms as well as screen for symptoms of Oppositional Defiant Disorder (ODD), Conduct Disorder, Anxiety and Depression. All results were within normal limits from both informants. Independent Psychologist concluded that these results indicated that Student was displaying emotions and behaviors within normal limits in both home and school environments. In order to assess Student's social and communication behaviors, the Social Communication Questionnaire (SCQ) and Social Responsiveness Scale, Second Edition (SRS-2) were administered. Student's mother completed the SCQ questionnaire and her results were within normal limits. While the results were not significant, some items endorsed by Mother included using odd phrases or saying the same thing over and over in almost exactly the same way, having mannerisms or odd ways of moving hands or fingers, such as flapping or moving fingers in front of the eyes,

not spontaneously pointing at things around Student just to show mother (not because Student wanted them), not spontaneously joining in and trying to copy actions in social games, and not ever playing imaginative games with another child in such a way that one could tell that each child understood what the other was pretending. Student's teacher reported behavior "within normal limits" on both the Social Communication Interaction and Restricted Repetitive Behaviors scales. Mother also reported behavior "within normal limits" on both the Social Communication Interaction and Restricted Repetitive Behaviors. Although within normal limits, some items endorsed as often or almost always true included: "When under stress, shows rigid or inflexible patterns of behavior that seem odd," "Avoids eye contact or has unusual eye contact," "Has repetitive, odd behaviors such as hand flapping or rocking," and "Walks in between two people who are talking." Independent Psychologist concluded that the assessment for autism spectrum disorder (ASD) symptoms indicated that Student was not presently displaying clinical symptoms of autism spectrum disorder in either the home or school environments. Exhibit P-3.

12. On November 10, 2015, Student's IEP team at City School 1 met for the annual review of Student's IEP. For Special Education Services, Student's November 10, 2015 IEP provided for Student to receive 5 hours per week of Specialized Instruction outside general education and 8 hours per week of Specialized Instruction in general education. Exhibit R-22.

13. On June 8, 2016, Student's IEP team at City School 1 met again to finalize Student's eligibility determination and review Student's IEP. Mother and her former attorney attended. At the request of Mother and the attorney, the IEP team changed Student's disability classification from ASD to MD (Speech and Language Disorder and

OHI). The team agreed to continue Student's Specialized Instruction at 8 hours per week in the general education setting and 5 hours per week outside general education. Mother and Student's general education teacher urged that Student required the support of a dedicated aide. At that time, the IEP team did not agree to Student's need for an aide. At the meeting, there was discussion about Student's placement in the general education setting. Mother indicated that Student benefitted from the opportunity to be with typically developing peers. School representatives expressed concern about the appropriateness of the general education setting, given Student's social anxiety concerns and hypersensitivity to environmental stimuli and how this may impact Student emotionally and in academic progress. Exhibits R-11, R-12.

14. On August 31, 2016, Student's IEP was amended, without a meeting, to add a requirement for a dedicated aide for Student for 7.25 hours per day in the general education setting. Exhibits R-9, R-10.

15. At the beginning of the 2016-2017 school year, Special Education Teacher provided Student direct special education services for 5 hours per week outside general education and collaborated with the general education teacher for 8 hours per week. Mother wanted Special Education Teacher to provide direct services to Student both inside and outside of general education, so Special Education Teacher began to also provide Student 5 hours per week of direct services in the general education setting. Special Education Teacher also worked with Student's general education teacher for about 20 minutes per day and formally collaborated with Student's teacher for 2 hours per week. Testimony of Special Education Teacher.

16. In the 2016-2017 school year, Student was placed in the general education setting at City School 1. Student had behavioral challenges throughout the school year,

more toward the beginning of the year. Student's maladaptive behaviors included pulling classmates' hair, scratching others, grabbing teachers' glasses and similar conduct. Testimony of Assistant Principal.

17. In the 2016-2017 school year at City School 1, Student's school day ran from 8:45 a.m. to 3:15 p.m., for 6.5 hours per day or 32.5 hours per week. Lunch and recess were each 30 minutes per day. Testimony of Special Education Teacher.

18. On October 18, 2016, a multidisciplinary team (MDT) was convened at City School 1 to discuss Student's IEP progress. Mother and an educational consultant attended the meeting. At the meeting, there was discussion about designating a break area where Student could de-escalate and work away from the distractions of the general education classroom. Mother stated that such a space should only be used for timed breaks and that she hoped that the school could fade out adult interventions with Student and increase interactions with non-disabled peers. Exhibit R-37.

19. Following the October 18, 2016 meeting, Assistant Principal made a request to DCPS' central office to conduct a Least Restrictive Environment (LRE) classroom observation of Student. In the request for assessment, Assistant Principal reported that over the course of a school day, Student displayed multiple acts of aggression while in the general education setting; that on average, Student displayed more than 21 acts of aggression per day; that several incident reports had been filed due to other student and staff injuries from Student's behavior such as broken skin, bite marks, destroyed property, neck injuries, pulled hair, etc.; that Student's behavior was impeding Student's learning and the learning of others and that typical acts of aggression included scratching to break the skin, throwing heavy or sharp objects at students or staff members, biting, hitting, kicking, and elopement. Exhibit P-11.

20. The DCPS LRE observer made an observation of Student at City School 1 on December 14 and 18, 2016. The observer provided a written report to the school on or about January 17, 2017, in which she recommended, *inter alia*, that Student receive all instruction in a self-contained classroom to reduce physical and academic transitions. The DCPS observer asserted that a self-contained classroom would provide Student with a small structured setting that Student needs to be safe with others and would provide for increased monitoring and focused interventions. Exhibit P-11.

21. DCPS did not inform the parent that the LRE observation of Student had been done and did not provide the January 17, 2017 report to the parent until shortly before a May 16, 2017 IEP team meeting. Testimony of Assistant Principal.

22. Student's City School 1 IEP team convened on May 16, 2017 to update Student's IEP. Mother attended the meeting with a family friend. In its discussion of how Student's disability affects Student's progress in the general education curriculum, the May 16, 2017 IEP team reported, *inter alia*, that Student is challenged by hypersensitivity to the environment and has attention difficulties including hyperactivity and impulsivity; that Student is prone to hyper-arousal and social anxiety in all settings; that Student has communication challenges and processes information slowly; that Student experiences difficulty when making physical transitions over the course of the school day; that Student is easily distracted, which makes it difficult for Student to access the general education curriculum throughout the day; that Student requires significant verbal and visual prompting to participate successfully in all aspects of the general education classroom; that Student requires prompting, accommodations and modifications to access the general education curriculum; that Student's disability impacts Student's ability to focus on instruction and remain engaged in whole and small

group instructional activities; that Student requires the use of different instructional modalities to demonstrate academic progress; that Student engages in aggression and disruption across the school day and that Student requires maximum support with regard to emotional, social and behavioral skills. Exhibit R-4.

23. The IEP team agreed that Student required more extensive supports because Student was performing far below grade level. The school representatives on the team agreed that all of Student's services should be provided outside general education in a Communications and Education Support (CES) self-contained classroom. Mother did not disagree, but requested information about the specific CES program before giving her consent. The team decided to finalize the IEP with provision for 24 hours per week of Specialized Instruction outside general education, 6 hours per month of Speech-Language Pathology, 6 hours per month of Occupational Therapy and 120 minutes per month of Behavioral Support Services. Student would also be provided a dedicated aide. Exhibits P-14, P-15. The team decided that Student would have lunch and recess in a setting with nondisabled peers. Testimony of School Social Worker.

24. By letter of June 5, 2017, DCPS informed Mother that City School 2 had been identified as the location of services for Student for the 2017-2018 school year because City School 2 was the closest school to Student's home with space available in its CES classroom. Exhibit R-5.

25. The CES classroom at City School 2 has 6 students, taught by a special education teacher and 2 paraprofessionals. Most or all of the children are verbal. The classroom behavior approach is based on Applied Behavior Analysis (ABA) structure. If Student enrolls in the CES classroom, all of the staff would be trained to Student's individualized plan. Students in the CES classroom typically go to lunch and recess with

their general education peers. Testimony of CES Manager.

26. Mother made a classroom observation at City School 2 on June 5, 2017 and understood that children in the CES classroom attended specials classes at the end of the school day with typically developing peers. Testimony of Mother. This was confirmed in a June 6, 2017 email from the CES classroom teacher advising that “[o]ur students have been joining their general education [non-disabled] peers for specials, lunch and recess.” Specials classes are held daily for 50 minutes. Exhibit P-20.

27. In the summer of 2017, Student attended the Extended School Year (ESY) program at City School 1. Student was assigned to a self-contained classroom with a dedicated aide. Student did well in the program. This was the first time that Student had been placed in a self-contained program, with a dedicated aide, since Student’s Grade A year. Testimony of Mother.

28. Student has been accepted at Nonpublic School for the 2017-2018 school year. Nonpublic School is a private day school located in the District. In the classrooms proposed for Student, there are 4 to 8 students, taught by a lead teacher and an assistant. Nonpublic School does not use ABA techniques and its teachers are not trained in ABA. Nonpublic School has a current certificate of approval (COA) issued by the D.C. Office of the State Superintendent of Education (OSSE). The annual tuition is around \$45,000. There are no other children in the school with Student’s Genetic Disorder. Teachers would be trained on Student’s needs resulting from this disability. Testimony of Nonpublic School Director.

29. Nonpublic School has reviewed Student’s IEP and evaluations. Student visited Nonpublic School for two days and was observed by teachers to have a lot of difficulty initiating interactions and to be linguistically challenged. Nonpublic School

has children with similar needs. Testimony of Nonpublic School Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, the Conclusions of Law of this hearing officer are as follows:

Burden of Proof

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

Analysis

I.

Did DCPS deny Student a FAPE by failing to implement the Specialized Instruction Services in Student's June 2016 IEP, as amended in August 2016?

Petitioner's first claim arises from City School 1's mode of providing Specialized Instruction in the 2016-2017 school year. Student's June 8, 2016 IEP, as amended on August 31, 2016, provided for Student to receive 13 hours per week of Specialized Instruction, including 8 hours per week in the general education setting. Special Education teacher testified that in calculating the 8 hours per week of services she

provided Student in the general education setting, she included time used for collaboration with the general education teachers, with whom she formally collaborated for 2 hours per week, in addition to daily meetings lasting about 20 minutes. The balance of the 8 hours per week was provided as direct instruction to Student. After Mother objected to this arrangement, Special Education Teacher increased her direct instruction of Student in the general education classroom to 1 hour per day (5 hours per week). Petitioner contends that Special Education Teacher's use for consultation of part of the 8 hours per week, designated in Student's IEP for Specialized Instruction in the general education setting, constituted a failure to implement the IEP. Petitioner has the burden of persuasion on this issue.

Although Student's IEP provided that Student would receive 8 hours per week of Specialized Instruction in the general education setting, the IEP did not specify what the Specialized Instruction would include or who would provide these services. The term "Specialized Instruction" is not found in the IDEA. The common meaning of "Instruction" is the action, practice, or profession of teaching. *See, e.g., "Instruction."* Merriam-Webster.com. Merriam-Webster, n.d. Web. 19 Sept. 2017. While Special Education Teacher's collaboration with Student's general education teachers was presumably time well-spent, that did not relieve the school of providing Student the full 8 hours per week of special education *teaching*, in the general education setting, required by the IEP. Based on Special Education Teacher's testimony, I find that for the 2016-2017 school year, DCPS failed to provide some 3 hours per week of Specialized Instruction in the general education classroom required by Student's IEP. Assuming a 36-week school year, I find that Student was not provided some 108 hours of Specialized Instruction required by the IEP.

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party “must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000) To meet this standard, a moving party need not prove that the student suffered “educational harm” because “the Court has no way of knowing how much more progress” a student might have made in the absence of a failure to implement. *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275, 276 n. 2 (D.D.C.2011) (emphasis original). Generally, in analyzing whether a student was deprived of an educational benefit, “courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson*, 770 F.Supp.2d at 275. For example, in *Sumter County School District 17 v. Heffernan*, the court held that a 33% gap of 60 minutes per day between the required and provided hours of applied behavioral analysis therapy was substantial. 642 F.3d 478, 486 (4th Cir.2011). On the other hand, in *Savoy v. District of Columbia*, the court held that a 3% gap of 10 minutes per day between the required and provided hours of specialized instruction was not substantial. 844 F.Supp.2d 23, 34–35 (D.D.C.2012).

Beckwith, supra, 208 F. Supp. 3d at 49.

In the present case, Petitioner has established that in the 2016-2017 school year, Student was not provided some 108 hours of Specialized Instruction, or a gap of some 23% below the 468 total hours required by the August 31, 2016 revised IEP. I conclude that this shortfall was a failure to implement a substantial provision of Student’s IEP and that Student was denied a FAPE as a result.

II.

Did DCPS deny Student a FAPE by failing to review the DCPS LRE report in a timely manner to revise Student’s IEP from January 2017 to May 2017 and by failing to provide an appropriate educational placement at City School 1 for the 2016-2017 school year?

Following an October 18, 2016 MDT meeting for Student, Assistant Principal

requested DCPS' central office to conduct a classroom observation of Student to recommend whether Student required a more restrictive environment than the general education placement at City School 1. In her written justification for the observation, Assistant Principal reported that Student was displaying multiple acts of aggression every day and eloping from the classroom. A DCPS LRE observer made classroom observations in December 2016 and provided a written report on January 17, 2017, in which she recommended that Student receive all instruction in a self-contained classroom to reduce physical and academic transitions. The observer asserted that a self-contained classroom would provide Student with a small structured setting that Student needed to be safe with others and would provide for increased monitoring and focused interventions.

The school did not give this LRE report to Mother until shortly before the next IEP meeting on May 17, 2017, at which time Student's educational placement was changed to a full-time self-contained classroom. Assistant Principal testified that she did not provide the report to Mother earlier because of other things going on at the time. A behavior assessment was underway; Student's dedicated aide had left and Mother had filed a complaint with OSSE about implementation of Student's IEP. Mother alleges that DCPS' failure to provide the DCPS LRE report information sooner to her, or to Student's IEP team, delayed the review of Student's educational placement and resulted in a denial of FAPE. I agree.

The IDEA mandates that an LEA must ensure that the IEP team regularly revises a child's IEP in response to new information about the child's special education needs. *See, e.g., D.S. v. District of Columbia*, 699 F. Supp. 2d 229 (D.D.C. 2010) ("Because the IEP must be 'tailored to the unique needs' of each child, *Bd. of Educ. v. Rowley*, 458

U.S. 176, 181, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities." *Id.* at 234 (citing 20 U.S.C. §§ 1414(b)-(c).) The January 2017 written recommendation from the DCPS LRE specialist, that Student's placement should be changed to a self-contained classroom, was significant new information that DCPS was required to timely provide to Mother and to the other member of Student's IEP team. At the May 17, 2017 IEP meeting, after receiving this information, Student's IEP team changed Student's placement to a self-contained setting. I consider it likely that had the IEP team been provided the LRE report in January 2017, when it was received by the school, the IEP team would have changed Student's placement to a self-contained setting much sooner.

How quickly the IEP team should have been convened to review the LRE expert's report is not definite. The IDEA does not set a time frame for revising a child's IEP, except that the IEP must be reviewed at least annually. *See* 34 CFR § 300.324(b)(1). In an analogous analysis of the timeliness of a parent-requested special education reevaluation, the U.S. District Court for the District of Columbia decided that in light of the lack of statutory guidance, a Local Education Agency (LEA) must conduct a special education reevaluation, when requested by a parent, in a "reasonable period of time," or "without undue delay," as determined in each individual case. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). I conclude that, similarly, a child's IEP team must be convened in a reasonable period of time, or without undue delay, upon receipt of significant new information about the child's needs. On March 21, 2017, Student's IEP team held a meeting, convened quarterly to discuss Student's IEP progress. I conclude that at least by the date of that meeting, the

IEP team, including the parent, should have been provided the DCPS January 17, 2017 LRE observation report in order to informedly review Student's IEP. The failure of DCPS to timely provide this LRE information to the IEP team for review was a procedural violation of the IDEA.

Procedural violations of the IDEA may only be deemed a denial of FAPE 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 CFR § 300.513(a)(2). *See also, e.g., Brown v. District of Columbia*, No. 15-0043, 2016 WL 1452330 (D.D.C. Apr. 13, 2016). Here, the school's failure to timely provide the parent and other members of Student's IEP team the recommendations of DCPS' LRE specialist regarding changing Student's educational setting impeded Mother's opportunity to participate in the IEP decision-making progress. This was a denial of FAPE.

III.

- Did DCPS deny Student a FAPE by failing to develop an appropriate IEP in May 2017, by failing to provide Specialized Instruction for lunch, recess, arrival, dismissal and transitions and by failing to provide an appropriate LRE in a separate special education school?
- Did DCPS deny Student a FAPE by issuing a location of services letter for City School 2 and by failing to offer an appropriate program in the CES classroom at City School 2?

Petitioner's remaining issues concern the appropriateness of DCPS' May 16, 2017 IEP and Student's placement in the CES classroom at City School 2 for the 2017-2018

school year. At the May 16, 2017 IEP meeting, the school representatives agreed that all of Student's services should be provided outside general education in a Communications and Education Support (CES) self-contained classroom. Mother did not disagree, but requested information about the specific CES program before giving her consent. The final IEP provided for Student to receive 24 hours per week of Specialized Instruction outside general education, 6 hours per month of Speech-Language Pathology, 6 hours per month of Occupational Therapy and 120 minutes per month of Behavioral Support Services. Student would also be provided a dedicated aide. Mother alleges that the IEP is inadequate because Student would intermix with nondisabled peers outside of class. She argues that Student's least restrictive environment is a separate special education day school. DCPS, which has the burden of persuasion, maintains that this IEP was appropriate for Student.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA'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.

Moradnejad at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized education program.*" An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] ■ educational program must be appropriately ambitious in light of ■ circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

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

With regard to the May 16, 2017 IEP, Petitioner has not alleged any procedural irregularities. Therefore, I turn to the second prong of the *Rowley/Endrew F.* inquiry: Was this IEP reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances? Mother alleges that it was not – because the IEP allegedly does not provide Specialized Instruction for lunch, recess, arrival, dismissal

and transitions and because the IEP does not identify a separate special education day school as Student's least restrictive environment.

DCPS' expert witnesses maintain that the May 16, 2017 IEP is appropriate for Student. Student's special education teacher from City School 1 opined that Student does need a smaller learning environment, without the distractions of the prior general education setting. However she observed that Student could build relationships with other nondisabled students and advocated for an inclusion setting for Student at lunch and recess. School Social Worker testified that before Student was provided a dedicated aide, Student had challenges in the lunchroom and was not really engaged with other students at recess. She related that after Student was provided a dedicated aide for the 2016-2017 school year, Student's behavior in these setting improved. She opined that Student enjoys other people and, provided Student is assisted by a dedicated aide, it would be a disservice for Student not to have access to nondisabled peers. Assistant Principal opined that lunch and recess are good times for Student and that Student is able to participate with nondisabled peers in these settings. She was concerned that at a separate special education school, Student would lose the opportunity to interact with nondisabled peers and to do what other children are doing, as much as is possible for Student.

Petitioner called two expert witnesses, Behavior Analyst and Independent Psychologist. Neither of these experts refuted the opinions of DCPS' witnesses that Student would benefit from interacting with nondisabled peers at lunch and recess. in her December 14, 2015 Psychological Evaluation report, Independent Psychologist did not recommend that Student should be segregated from nondisabled peers. She recommended that for support in the regular education environment, Student needed a

dedicated aide. (Independent Psychologist had not evaluated Student since 2015.) I conclude that DCPS has met its burden of persuasion that the self-contained CES classroom in a DCPS public school, with the opportunity for Student to interact with nondisabled peers at lunch and recess, is an appropriate educational placement for Student.

Petitioner also alleges that the CES classroom at City School 2 is not a suitable placement for Student because it cannot implement the hours of Specialized Instruction required by the May 16, 2017 IEP. The IDEA requires that every special education placement must be “based on the child’s IEP,” 34 C.F.R. § 300.116(b)(2), and be “capable of fulfilling the student’s IEP.” *Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013). *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119, 2015 WL 5175885 (D.D.C. Sept. 3, 2015). The May 16, 2017 IEP provides for Student to receive 24 hours per week of Specialized Instruction outside general education. As Petitioner’s Counsel pointed out, assuming that City School 2 has the same school schedule as City School 1, Student would be in school for a total of 32.5 hours per week. After accounting for 3.5 hours per week for IEP related services and 5 hours per week for lunch and recess, only 24 hours would be left in the school week, the same numbers of hours the IEP designates for Specialized Instruction. Therefore, Specialized Instruction would necessarily be provided in all of Student’s academic classes including specials classes.

City School 2 does not offer a 24 hour per week, outside of general education, special education program. At City School 2, the children in the CES classroom receive less than 4 hours per day of instruction in the self-contained classroom. At the end of the school day, they attend specials classes with typically developing peers, for 50 minutes per day. This program would not meet the requirement of Student’s IEP that

Student be provided 24 hours per week of Specialized Instruction outside of general education. *Cf. N.W. v. District of Columbia*, No. CV 16-0573, 2017 WL 2080250 (D.D.C. May 15, 2017). (Sending all students to specials with general education students is incompatible with the plain language of J.W.'s IEP, which requires a small group or individual setting for all of J.W.'s instructional time.) In light of this discrepancy, I find that DCPS has not shown that City School 2's CES program is capable of implementing the May 16, 2017 IEP requirement for Student to receive 24 hours per week of Specialized Instruction outside of general education.

Remedy

In this decision, I have concluded that DCPS denied Student a FAPE by not fully implementing Student's 2016-2017 IEP requirement for 13 hours per week of Specialized Instruction and by not timely convening Student's IEP team to consider the DCPS LRE observer's January 17, 2017 recommendation that Student's educational placement be changed to a self-contained classroom. In addition, I have determined that DCPS' proposed location of services for Student for the 2017-2018 school year is not capable of implementing Student's IEP requirement for 24 hours per week of Specialized Instruction Services outside general education. For relief, Petitioner requests that DCPS be ordered to fund Student's immediate prospective placement at Nonpublic School.

In this case, DCPS has not shown that it has a suitable public school option available for Student. The District may be required to pay for private school placement if no suitable public school is available. *See, Q.C-C. v. District of Columbia*, 164 F. Supp. 3d 35, 52 (D.D.C. 2016) (Where private school is the only potential placement in the record that could satisfy student's needs, an order to fund nonpublic placement is

warranted.) However, the proposed private school must be appropriate for the student. In *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the D.C. Circuit Court of Appeals set forth a set of considerations “relevant” to determining whether a private school is appropriate for a particular student, including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student’s Disability

Student’s IDEA disability classification is Multiple Disabilities, based on Student’s Genetic Disorder, recognized as an Other Health Impairment (OHI), and a Speech Language Impairment. As a child with Genetic Disorder, Student’s challenges, as reported by IEP team, are very significant, including hypersensitivity to the environment, attention difficulties, hyperactivity and impulsivity. Student is prone to hyperarousal and social anxiety in all settings. Additionally, Student has communication challenges and processes information slowly. Student experiences difficulty when making physical transitions over the course of the school day. These challenges make it difficult for Student to access the general education curriculum throughout the day. Student requires significant verbal and visual prompting, accommodations and modifications to access the general education curriculum. Student requires the use of different instructional modalities to demonstrate academic progress. Because Student engages in aggression and disruption across the school day, Student requires maximum support with regard to emotional, social and behavioral

skills.

b. Student's Specialized Educational Needs

Student's IEP team determined that Student requires full-time specialized instruction in an outside of general education setting. Further, according to the credible opinion of Petitioner's expert, ABA Analyst, Student needs consistent implementation of function-based strategies, based on Applied Behavior Analysis (ABA) principles, to reinforce appropriate behaviors and to address problem behaviors.

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

Nonpublic School is a private special education day school located in the District. In the classrooms proposed for Student, there are 4 to 8 students, taught by a lead teacher and an assistant. Nonpublic School does not use ABA techniques and its teachers are not trained in ABA. Nonpublic School does not currently serve any other children diagnosed with Genetic Disorder and the instructors would have to be trained to work with Student. Nonpublic School uses interdisciplinary-based and evidence-based behavior interventions and the *Unstuck and On Target* executive functioning curriculum. There was no evidence that these behavior programs conformed to the consistent function-based strategies which ABA Analyst testified that Student requires.

d. Cost of Placement at Nonpublic School

The annual tuition at Nonpublic School is approximately \$45,000 per year. Nonpublic School has a current certificate of approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE).

e. Least Restrictive Environment

The IDEA contemplates a continuum of educational placements to meet the

needs of students with disabilities. Depending on the nature and severity of his disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. See 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA requires that students with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. See, e.g., *Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012).

Nonpublic School does not offer ABA techniques and principles, which are embedded in Student’s April 14, 2017 Behavior Intervention Plan (BIP), Exhibit R-30, and which Petitioner’s expert, ABA Analyst, opined that Student needs. DCPS’ Program Monitor, who was qualified as an expert in implementation of IEPs and Behavior Intervention Plans, has monitored DCPS students at Nonpublic School for four years. She opined that Nonpublic School could not implement effectively the level of support Student needs because, *inter alia*, she had not observed at the private school the type of reactive and response measures to Student’s aggressive and disruptive behaviors recommended in Student’s BIP. In addition, while Least Restrictive Environment concerns are of less importance than the IDEA’s “primary goal of providing disabled students with an appropriate education,” see *Q.C-C. v. District of Columbia*, 164 F. Supp. 3d 35, 55 (D.D.C. 2016), I found credible the testimony of DCPS’ experts that Student enjoys other people and that it would be a disservice for Student not to have access to nondisabled peers. I conclude, therefore, that Petitioner has not established that Nonpublic School is an appropriate prospective placement for Student and I decline to order DCPS to fund Student’s enrollment at this private school.

I will, instead, order DCPS to identify a school location, whether a DCPS school or a nonpublic school, that is capable of implementing Student's May 16, 2017 IEP. DCPS must be mindful that while the school "need not perfectly satisfy the IEP," it "cannot commit a material failure, or leave more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP."

N.W., supra (citations omitted.)

Compensatory Education

In her due process complaint, Petitioner requested compensatory education to compensate Student for the denials of FAPE alleged in the complaint. In this decision, I have determined that DCPS denied Student a FAPE by not fully implementing Student's IEP requirement for 13 hours of Specialized Instruction per week during the 2016-2017 school year and by not timely convening Student's IEP team to consider the DCPS LRE observer's January 17, 2017 recommendation that Student's educational placement be changed to a self-contained classroom. I also have determined that DCPS failed to offer Student a school location for the 2017-2018 school year that is capable of implementing the hours of Specialized Instruction Services required by the May 16, 2017 IEP. Student is entitled to a compensatory education award for these denials of FAPE.

In crafting a compensatory education award, "[t]he Hearing Officer should be guided by the principle that, '[t]o fully compensate a student, the award must seek not only to undo the FAPE denial's affirmative harm, but also to compensate for lost progress that the student would have made.' *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C.Cir. 2016) *B.D.* That inquiry requires 'figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to

that position.’ *Id.* at 799.” *Butler v. District of Columbia*, Case No. 16-cv-01033 (D.D.C. Aug. 14, 2017). At the due process hearing, Petitioner’s Counsel expressly declined to provide information on what would be an appropriate compensatory education remedy for Student, electing instead to seek only a prospective placement for Student at Nonpublic School. Consequently, I have received no evidence on what compensatory education is needed to get Student to the position Student would be in but for the denials of FAPE in this case.

In the *Butler* decision, U.S. District Judge Mehta held that a hearing officer may not deny, even without prejudice, a request for compensatory education. The Court instructed that a hearing officer who finds that he needs more information to make an individualized compensatory education assessment may invite the parent to submit additional evidence to help to fashion an award of compensatory education. *See, also, Lee v. District of Columbia*, No. 15-cv-01802, 2017 WL 44288 (D.D.C. Jan. 3, 2017). That approach precludes issuing a final decision in the time period normally required by the IDEA. *See* 34 CFR § 300.515 (a)(1) (The public agency must ensure that a final decision is reached in the hearing not later than 45 days after the expiration of the 30 day resolution period.) Notwithstanding, I will order a continuance of the final decision due date for this decision in order to allow the Petitioner to submit additional evidence on what would be an appropriate compensatory education award for the specific denials of FAPE found in this decision.

ORDER

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

1. Within 10 business days of the date of this order, DCPS shall identify to

the parent a suitable school location capable of implementing the May 16, 2017 IEP and shall ensure that the parent and her educational advisor are provided timely access to observe the proposed special educational program. This may be at a DCPS school or, with DCPS funding, at a nonpublic school;

2. Petitioner's request that DCPS be ordered to fund Student's prospective placement at Nonpublic School is denied;
3. Student is entitled to an award of compensatory education to compensate for the denials of FAPE found in this decision. In order for this hearing officer to have sufficient information to craft an appropriate award, Petitioner shall submit additional evidence to better inform the hearing officer of (1) what position Student would be in absent the specific denials of FAPE found in this decision and (2) what compensatory education award would be reasonably calculated to get Student to that position. Within 5 business days of the date of this order, Petitioner's Counsel shall advise me, in writing, of the expected length of time needed to obtain and submit this additional information. DCPS shall have the opportunity to respond to Petitioner's compensatory evidence submission within 3 business days of its submission. If warranted, I will reconvene the due process hearing to receive testimonial evidence and oral argument from counsel limited to the compensatory education remedy;
4. In order to allow time to receive the additional compensatory education evidence and to craft a compensatory education award, I will continue the final decision due date in this case for 30 calendar days from September 20, 2017 to October 20, 2017;
5. All other relief requested by the Petitioner herein is denied and
6. This case shall remain open solely to complete the crafting of a compensatory education remedy. This is not a final decision.

Date: September 19, 2017

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

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