

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

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

---

<i>Student</i> , <sup>1</sup>	)	Case No.: 2017-0169
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 9/1/17
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Date: 8/28/17
("DCPS"),	)	Hearing Room: 2003
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 Student had not been provided a sufficient Individualized Education Program (“IEP”) to make appropriate progress. DCPS responded that the IEP was appropriate when developed.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

**Procedural History**

Following the filing of the due process complaint on 6/22/17, the case was assigned to the undersigned on 6/23/17. DCPS filed a response on 6/29/17 and did not challenge jurisdiction. The resolution session meeting took place on 7/5/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 7/22/17. A

---

<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

## Hearing Officer Determination

Case No. 2017-0169

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 9/5/17.

The due process hearing took place on 8/28/17, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout most of the hearing.

Petitioner’s Disclosures, submitted on 8/21/17, contained documents P1 through P7, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 8/21/17, contained documents R1 through R17, which also were admitted into evidence without objection.

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. *Educational Advocate* (qualified without objection as an expert in Special Education Programming and Placement)
2. Parent

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

1. *School Psychologist* (qualified without objection as an expert in School Psychology)
2. *Special Education Teacher* (qualified without objection as an expert in Provision of Specialized Instruction)
3. *General Education Teacher*
4. *Social Worker* (qualified without objection as an expert in Social Work and Behavioral Support Services)
5. *LEA Representative* (qualified without objection as an expert in Special Education Programming and Placement)

The issue to be determined in this Hearing Officer Determination is:

**Issue:** Whether DCPS denied Student a FAPE by failing to develop an IEP reasonably calculated to provide educational benefit and make appropriate progress, where Student’s 3/31/17 IEP provided only 10 hours/week of specialized instruction inside general education even though Student was failing most of Student’s classes despite generally average cognitive and achievement scores. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.

## Hearing Officer Determination

Case No. 2017-0169

2. Within 15 business days, DCPS shall convene an IEP team meeting and increase Student's IEP to full-time (at least 20 hours/week), in a small, structured, self-contained classroom setting.
3. Within 15 business days, DCPS shall place and fund Student in an appropriate school program that can provide the academic and behavior services Student requires.
4. DCPS shall provide tutorial services as compensatory education for any denial of FAPE from 3/31/17 to present.<sup>2</sup>
5. Any other just and appropriate relief.

### Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>3</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>4</sup> Student is *Age, Gender* and now in *Grade at Public School*, where Student began in 2016/17.<sup>5</sup> Student was previously at *Public Charter School* for many years.<sup>6</sup>

2. Student is eligible for special education and related services as a child with an Other Health Impairment ("OHI") due to Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD").<sup>7</sup> Student's disability causes a "significant adverse impact" in work/assignment completion and maintaining focus in classroom lessons and

---

<sup>2</sup> 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 at the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

<sup>3</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>4</sup> Parent.

<sup>5</sup> Parent. All dates in the format "2016/17" refer to school years.

<sup>6</sup> Parent.

<sup>7</sup> P1-1; P2-1; School Psychologist.

## Hearing Officer Determination

Case No. 2017-0169

activities.<sup>8</sup> Student was first diagnosed with ADHD in 2012/13 and received a 504 Plan that was not carried over to subsequent years.<sup>9</sup>

3. A psychological evaluation was completed on 3/21/17 as a result of a settlement agreement that Petitioner entered into with DCPS on 1/19/17 to resolve a previous due process complaint; the terms of the settlement agreement did not require any other assessments.<sup>10</sup> The psychological evaluation concluded that Student met the eligibility criteria for OHI.<sup>11</sup> The psychological evaluation listed several “significant factors” that impact Student’s overall academic achievement, including “years of non-compliant medical treatment and compliance for ADHD, lack of work completion in all classes, and large classroom sizes.”<sup>12</sup>

4. The psychological evaluation administered the Reynolds Intellectual Assessment Scales (“RIAS”) and found that Student had a Composite Intelligence Index (“CIX”) of 95, in the Average range; a Verbal Intelligence Index (“VIX”) of 108, also in the Average range; and a Nonverbal Intelligence Index (“NIX”) of 83, in the Below Average range.<sup>13</sup> The psychological evaluation administered the Woodcock-Johnson Tests of Achievement III (“WJ-III”) and found Student’s Math standard score was 79 (Low) and 3 years below grade level; Student’s Reading standard score was 99 (Average), which “hovers around” grade level; and Student’s Writing standard score was 93 (Average).<sup>14</sup>

5. Student’s IEP team met on 3/31/17 and developed an initial IEP, with 10 hours/week of specialized instruction inside general education and a range of accommodations, both in the classroom and for taking statewide assessments.<sup>15</sup> Student’s accommodations included read aloud, calculation device, preferential seating, location with minimal distractions, small group testing, extended time, and frequent breaks.<sup>16</sup> At the 3/31/17 IEP meeting, Petitioner’s counsel sought full-time specialized instruction outside general education, but Special Education Teacher urged first trying Student inside general education with accommodations, supports and modifications before going outside general education; Student’s general education teachers agreed.<sup>17</sup> Student was “strong enough” to remain in general education.<sup>18</sup>

6. At the 3/31/17 IEP meeting, the team agreed with Petitioner’s request for a Functional Behavioral Assessment (“FBA”), which was conducted by 6/5/17, and a

---

<sup>8</sup> P1-4,5,6.

<sup>9</sup> P3-2; Parent; Educational Advocate; R7-4.

<sup>10</sup> P3; R1-1,2.

<sup>11</sup> P3-16.

<sup>12</sup> *Id.*

<sup>13</sup> P3-6,7,8.

<sup>14</sup> P3-9,10,16.

<sup>15</sup> P1-1,7,9.

<sup>16</sup> P1-9.

<sup>17</sup> R4-9; Special Education Teacher.

<sup>18</sup> Special Education Teacher.

## Hearing Officer Determination

Case No. 2017-0169

Behavioral Intervention Plan (“BIP”), which was developed by 6/15/17, along with an updated IEP.<sup>19</sup> The IEP was updated on 6/15/17 with the inclusion of Emotional, Social, and Behavioral Development concerns and 120 minutes/month of Behavioral Support Services (“BSS”), but no other changes.<sup>20</sup> As Special Education Teacher explained, specialized instruction was not increased on 6/15/17 because the team relied on data to drive decisions and the existing services were working for Student.<sup>21</sup>

7. Educational Advocate testified that Student’s IEP should have provided for a self-contained setting, like a Behavior and Education Support (“BES”) classroom within DCPS.<sup>22</sup> Student would not fit well in a BES classroom.<sup>23</sup> Student was functioning at a much higher level than children in self-contained placements, who are notably further behind and who have much less collaboration with their peers; putting Student in a self-contained placement would cause regression.<sup>24</sup> Student benefited from general education in order to collaborate with peers and sharpen Student; Student’s needs are fully met by support in general education as Student is cognitively capable.<sup>25</sup>

8. Student could access the general education curriculum with the supports provided in the 3/31/17 IEP; 10 hours/week inside general education was sufficient.<sup>26</sup> Student generally participated in class and accessed the curriculum; Student was engaged and handling the workload.<sup>27</sup> Student would be harmed by removing Student from general education; Student would be a very different child socio-emotionally.<sup>28</sup> In general education Student wanted to succeed; isolating Student would not be beneficial.<sup>29</sup>

9. Based on an iReady assessment at the beginning of 2016/17, Student was 3 years behind in Math.<sup>30</sup> In Math, Student had modest growth over 2016/17.<sup>31</sup> Student’s IEP Progress Report noted on 7/7/17 that Student made gains in Math and would have made more by turning in more homework.<sup>32</sup> Observation of Student’s Math class noted that Student processed information quickly and appeared to be following along with the lecture and not struggling.<sup>33</sup>

---

<sup>19</sup> R4-9,11.

<sup>20</sup> P2-1,6,7,8; Educational Advocate.

<sup>21</sup> Special Education Teacher.

<sup>22</sup> Educational Advocate.

<sup>23</sup> General Education Teacher.

<sup>24</sup> LEA Representative.

<sup>25</sup> *Id.*

<sup>26</sup> School Psychologist.

<sup>27</sup> LEA Representative.

<sup>28</sup> School Psychologist.

<sup>29</sup> *Id.*

<sup>30</sup> P1-4; P3-3.

<sup>31</sup> R14-1; LEA Representative.

<sup>32</sup> R12-2.

<sup>33</sup> School Psychologist.

## Hearing Officer Determination

Case No. 2017-0169

10. Based on the Scholastic Reading Inventory, Student initially was 4 years behind grade level in Reading upon arriving at Public School, although Student could read and decode words “on grade level.”<sup>34</sup> In Reading, Student increased 162 points in 2016/17 from beginning of year to middle of year, and then by another 80 points, which put Student 3 years behind grade level.<sup>35</sup> As of 7/7/17, Student had made some progress in Reading with an IEP for 2-1/2 months; LEA Representative reported that Student “grew two years” in Reading, but should be more consistent turning in homework.<sup>36</sup> Student enjoys reading.<sup>37</sup>

11. Student’s teachers determined that Student was “well below” grade level in Writing.<sup>38</sup> As of 7/7/17, Student was making consistent growth in Writing, including gains in organization in writing.<sup>39</sup>

12. Student’s core academic grades improved somewhat following the 3/31/17 IEP, as from Term 3 to Term 4 Math increased from an F to D+, Language Arts increased from a D to a B, Science increased from a C to a C+, and World Geography & Cultures increased from a D to a C+.<sup>40</sup>

13. Student’s low grades were a result of not turning in homework and focusing, not an indication that Student should be outside general education.<sup>41</sup> Student grasped content quickly but would not show what Student knew by completing classwork or homework, so had a Math grade of F in March 2017.<sup>42</sup> Several teachers commented when giving grades that Student needed to complete class assignments.<sup>43</sup> Special Education Teacher explained at the 3/31/17 IEP team meeting that Student’s poor grades were because Student “rarely” turned in assignments and did not make up work.<sup>44</sup> In addition to lack of focus and attention, Student’s unwillingness to complete in-class assignments and failure to complete homework assignments prevented teachers from being able to accurately measure Student’s progress.<sup>45</sup>

14. Student was an average student in Science and doing well enough that Student was helping other children in class.<sup>46</sup> Student did quite well in Science because Student liked the subject, even though the class size was large, at 25.<sup>47</sup> Changes in Science class were made

---

<sup>34</sup> P1-5; P3-3.

<sup>35</sup> R13-1; P3-3; P1-5; P5-3.

<sup>36</sup> R12-2.

<sup>37</sup> Educational Advocate; R4-7 (“loves to read”).

<sup>38</sup> P1-6.

<sup>39</sup> R12-3; Special Education Teacher.

<sup>40</sup> P5-1,2.

<sup>41</sup> LEA Representative.

<sup>42</sup> P3-4,5.

<sup>43</sup> P4-1,2; P5-2.

<sup>44</sup> R4-7.

<sup>45</sup> P3-3.

<sup>46</sup> General Education Teacher.

<sup>47</sup> School Psychologist.

## Hearing Officer Determination

Case No. 2017-0169

after Student's IEP was developed; Student was placed in a smaller group of 3 in which Student was the leader.<sup>48</sup> Student enjoys science and "is capable and can do the work."<sup>49</sup>

15. Student had no suspensions or comparable problems that would have triggered serious behavioral concerns prior to the 3/31/17 IEP.<sup>50</sup> Student's 6/5/17 FBA focused on inattentiveness and disruptive behavior, which was rated "mild" in intensity; Student's disruptive behavior was "banging and tapping with pencil on desk during instruction" and playing with fidgets.<sup>51</sup> Student was never disrespectful to teachers, unlike many other children.<sup>52</sup> A Scatter Plot Form determined that Student was engaged in appropriate behavior 57.5% of the time, was inattentive 37.5% of the time, and disruptive 5% of the time.<sup>53</sup>

16. A thorough BIP to address behavioral concerns was developed on 6/15/17.<sup>54</sup> Student made huge progress on socio-emotional issues.<sup>55</sup> A system of rewards initially was developed for Student for turning in Daily Progress Sheets; this year (2017/18) the reward requires positive behaviors, not merely turning in the sheets.<sup>56</sup>

17. Student was issued a tablet for use at both school and home, as is every child at Public School.<sup>57</sup> Student could video record Math lectures to use in doing homework.<sup>58</sup> Public School was "looking to sign [Student] up for mentoring"; a Public School teacher was available after school for tutoring to support Student with homework.<sup>59</sup> Student is also supported by a grade level school counselor, a school social worker, a grade level dean of students, and a behavior technician as needed.<sup>60</sup>

18. Credibility. Educational Advocate's credibility was somewhat undermined by her statement in her Compensatory Education Proposal that a BIP has "yet to be developed," even though it was completed and a part of the 6/15/17 IEP meeting attended by Parent and counsel.<sup>61</sup> Further, Educational Advocate's calculations for her Compensatory Education Proposal generated a number for allegedly missed services of over 800 hours that was much larger than it should have been due to her multiplying the number of hours missed per *week* by the number of *days* of missed services (which also was inaccurate by not accounting for

---

<sup>48</sup> General Education Teacher.

<sup>49</sup> R4-7; Parent (Science is Student's favorite class).

<sup>50</sup> LEA Representative.

<sup>51</sup> R7-1; P2-7.

<sup>52</sup> Special Education Teacher; Social Worker.

<sup>53</sup> R7-3; P2-6.

<sup>54</sup> R10.

<sup>55</sup> Social Worker.

<sup>56</sup> Social Worker; R16.

<sup>57</sup> P1-3; P3-3; School Psychologist.

<sup>58</sup> P3-3; School Psychologist.

<sup>59</sup> R4-8.

<sup>60</sup> P3-3.

<sup>61</sup> P6-5; P10; P9-1,2.

## Hearing Officer Determination

Case No. 2017-0169

Public School's extended school year, a smaller error in the opposite direction).<sup>62</sup> Finally, Educational Advocate argued on cross-examination that Student's Math grades did not improve from Term 3 to Term 4, despite unambiguous documentation showing that Student's grade went from an F to a D+.<sup>63</sup>

### Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, 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); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its recent decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing

---

<sup>62</sup> P6-5.

<sup>63</sup> Educational Advocate; P5-1.

## Hearing Officer Determination

Case No. 2017-0169

‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 137 S. Ct. at 1000.

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

**Issue:** *Whether DCPS denied Student a FAPE by failing to develop an IEP reasonably calculated to provide educational benefit and make appropriate progress, where Student’s 3/31/17 IEP provided only 10 hours/week of specialized instruction inside general education even though Student was failing most of Student’s classes despite generally average cognitive and achievement scores. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden of persuasion to Respondent, which met its burden of demonstrating that it provided an appropriate IEP for Student, as there was no clear indication at the time it was developed that Student needed more than the IEP provided.

The applicable legal standard for analyzing the appropriateness of an IEP has recently been articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEP was “reasonably calculated to produce meaningful educational benefit” and to permit

## Hearing Officer Determination

Case No. 2017-0169

Student to access the general education curriculum to the extent possible. *See Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEP are to be determined as of the time it was provided to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEP is analyzed by considering the specific concern raised by Petitioner over the lack of specialized instruction outside general education. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

Here, the question is simply whether Student's IEP team was reasonable in developing Student's 3/31/17 IEP with only 10 hours/week inside general education plus accommodations, or whether it should have provided more special education services in that initial IEP, up to a full-time, outside general education, self-contained program as urged by Petitioner's counsel.

The heart of Petitioner's advocacy in this case is that Student has average cognitive abilities but was getting bad grades. In response, Public School persuasively explained that Student's grades were the result of not turning in homework and inattentiveness, not an indication that Student should receive more special education services and be pulled out of general education. Teachers emphasized when giving grades that Student needed to complete class assignments. For instance, Student grasped content quickly in Math but would not show what Student knew by completing classwork or homework, so had a grade of F. Special Education Teacher explained that Student's poor grades were due to rarely turning in assignments and not making up work. In the view of the undersigned, it was reasonable for Student's teachers initially to seek to address these concerns with 10 hours/week inside general education plus accommodations, and to view that level of support as being as likely to impact Student's efforts as more hours outside general education.

While Petitioner's counsel argued that Student's IEP should have provided a self-contained setting, such as a DCPS BES classroom, the undersigned is persuaded that Student would not have fit well in a self-contained classroom, as Student was functioning at a much higher level. This Hearing Officer was convinced by Public School's witnesses that Student could access the general education curriculum with the IEP supports provided and would have been harmed by removal from general education. Moreover, maintaining Student in the least restrictive environment possible is of course required by the IDEA. *See Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

Petitioner's counsel further asserted that an FBA should have been conducted earlier and socio-emotional goals added in the initial 3/31/17 IEP. But the evidence in the case was that Student had no suspensions or comparable problems that would have triggered significant behavioral concerns prior to the 3/31/17 IEP. When Petitioner requested an FBA at the 3/31/17 meeting, the IEP team helpfully agreed. An FBA was conducted by 6/5/17 and a BIP developed by 6/15/17. The FBA analyzed Student's inattentiveness and disruptive behavior, which was only mild in intensity. Student's disruptive behavior was merely banging and tapping with a pencil and playing with fidgets, rather than being disrespectful to teachers or other more serious behaviors. Student's IEP was updated on

## Hearing Officer Determination

Case No. 2017-0169

6/15/17 with the inclusion of Emotional, Social, and Behavioral Development concerns and 120 minutes/month of BSS, all of which this Hearing Officer finds reasonable.

Even though the IEP is to be judged as of the time it was developed on 3/31/17, as set forth above in *Shank*, 585 F. Supp. 2d at 66, developments since that time confirm that the IEP team did not err. Focusing on grades, which were Petitioner's key measure, Student's core academic grades did improve modestly following the 3/31/17 IEP. From Term 3 to Term 4, Student's Math grade increased from an F to D+, Language Arts increased from a D to a B, Science increased from a C to a C+, and World Geography & Cultures increased from a D to a C+. The IEP Progress Report on 7/7/17 also showed that Student made at least some progress in Math, Reading and Writing. In particular, while Student arrived at Public School in 2016/17 some 4 years below grade level in Reading, Student made more than a year's progress – and possibly 2 years' growth – in 2016/17, thereby beginning to close the gap.

Furthermore, Public School sought to support Student in other ways, with a tablet on which Student could video record lectures, after-school tutoring to assist with homework, mentoring, a school counselor, a school social worker, and a behavior technician.

For all the reasons stated above, this Hearing Officer concludes that, viewed as of 3/31/17, Student's IEP was reasonably calculated to enable Student to make appropriate progress in the circumstances, so there was no denial of a FAPE. In fact, Student did make actual progress, even though there is no guarantee of positive outcomes under the IDEA. *See, e.g., Holman v. Dist. of Columbia*, 153 F. Supp. 3d 386, 389-90 (D.D.C. 2016) (while a FAPE is required, there is no guarantee of "any particular outcome or any particular level of academic success").

### **ORDER**

Petitioner has not prevailed on the issue in this case. Accordingly, **it is hereby ordered** that any and all 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).

**Hearing Officer Determination**

Case No. 2017-0169

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED ([due.process@dc.gov](mailto:due.process@dc.gov))

ODR ([hearing.office@dc.gov](mailto:hearing.office@dc.gov))

[Contact.resolution@dc.gov](mailto>Contact.resolution@dc.gov)