

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

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

OSSE
Office of Dispute Resolution
September 12, 2015

Student, ¹)	Date Issued: 9/12/15
through his Parent,)	
Petitioner,)	Case No.: 2015-0220
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates and Location:
("DCPS"),)	September 1, 2, 4, 2015
Respondent.)	ODR Room 2006 (all days)
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s mother, filed a due process complaint on 6/29/15, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because DCPS did not provide full-time special education services out of general education, as Student has Multiple Disabilities (both severe autism and severe Intellectual Disability), and needs more intense Applied Behavior Analysis (“ABA”) and Occupational Therapy (“OT”), as well as an updated Functional Behavioral Assessment (“FBA”) and Behavioral Intervention Plan (“BIP”). DCPS responded that it had not denied Student a FAPE as the Individualized Education Programs (“IEPs”) were appropriate when developed and Student has made progress and benefits from his general education classes and interactions.

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; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

¹ Personally identifiable information is provided in Appendix A.

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Procedural History

Following the filing of the due process complaint on 6/29/15, the case was assigned to the undersigned on 6/30/15. DCPS's response to the complaint was timely filed on 7/9/15 and did not challenge jurisdiction apart from whether Hearing Officers have jurisdiction over challenges to qualifications of personnel.

The resolution session meeting took place on 7/9/15, but the parties neither resolved the case nor ended the resolution period early. The 30-day resolution period ended on 7/29/15. 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 9/12/15.

The due process hearing took place on 9/1/15, 9/2/15, and 9/4/15. The hearing was open to the public at the request of Petitioner, although no one attended who would not have been present in a closed hearing. Petitioner was represented by Petitioner's Counsel. DCPS was represented by Respondent's Counsel. Counsel discussed settlement just prior to the hearing without success. Petitioner was present throughout the entire hearing.

Neither party objected to the testimony of witnesses by telephone. The parties agreed on no stipulations.

Petitioner's Disclosure statement, submitted on 8/25/15, consisted of a witness list of 7 witnesses and documents P1 through P45. Petitioner's Disclosure statement and documents were all admitted into evidence, as Respondent withdrew objections to P14 (selected pages), P20, P32, and P33, while objections were overruled as to P1, P5, and P39.

Respondent's Disclosure statement, submitted on 8/25/15, consisted of a witness list of 8 witnesses and documents R1 through R21. Respondent's Disclosure statement and documents were admitted into evidence without objection.

Petitioner's counsel presented 7 witnesses in Petitioner's case-in-chief (*see* Appendix A):

1. Private Occupational Therapist – qualified without objection as an expert in Occupational Therapy
2. Parent
3. ABA/Autism Expert – qualified without objection as an expert in Applied Behavior Analysis and Autism
4. Speech-Language Expert – qualified without objection as an expert in Speech and Language Pathology with a Focus on Students with Autism
5. Nonpublic School Director

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6. Prior Educational Advocate
7. Educational Advocate – qualified over objection as an expert in Special Education Programming

Respondent's counsel presented 3 witnesses in Respondent's case (*see* Appendix A):

1. Public School Occupational Therapist
2. Assistive Technology Program Manager – qualified without objection as an expert in Assistive Technology for Children with Disabilities and Communication Impairments
3. Special Education Teacher – qualified without objection as an expert in Special Education Programming for Children with Autism

Petitioner presented no rebuttal witnesses.

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

Issue 1: Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on (a) 2/27/14 and (b) 1/29/15, when Student needed a full-time out of general education setting, with no inclusion hours, in a separate special education day school.

Issue 2: Whether DCPS denied Student a FAPE by failing to revise an FBA and update a BIP to address Student's severe behavioral needs, as his FBA and BIP have not been modified since May 2012.

Issue 3: Whether DCPS denied Student a FAPE by providing an inappropriate educational placement from August 2013 to present, because (a) it failed to provide appropriate ABA through qualified personnel, (b) the curriculum was not developmentally appropriate for Student, as it was based in part on Common Core standards and required classes providing no educational benefit to Student, (c) Student was not provided a consistent communication system since he cannot communicate verbally, (d) it did not contain an appropriate space for Occupational Therapy and meet Student's sensory needs, (e) for his safety, Student was being segregated even from disabled peers during many activities, which was overly restrictive, and (f) there was a lack of progress and Student's severe needs were not being met.

Issue 4: Whether DCPS denied Student a FAPE by failing to implement his 2/27/14 and 1/29/15 IEPs by failing to: (a) provide appropriate Assistive Technology, (b) implement ABA therapy, (c) train personnel in American Sign Language, (d) provide classroom aids and services, including a weighted vest and seat cushion, and (e) properly implement goals and programming by over-reliance on Student's dedicated aide for everything including academics and all behavior management.

Petitioner seeks the following relief:

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1. A finding that Student was denied a FAPE by DCPS.
2. DCPS shall (a) fund tuition and transportation to a non-public full-time separate special education day school within 15 days,² and (b) revise Student's IEP to provide full-time support out of general education at a separate special education day school within 15 school days.
3. Alternatively, DCPS shall hold an IEP meeting within 15 school days to revise Student's IEP in accordance with any holdings relating to placement or other changes needed in Student's IEP.
4. DCPS shall conduct or authorize an FBA within 10 days and have an IEP meeting to review the completed evaluation within 15 school days.
5. DCPS shall fund compensatory education³ for any denial of FAPE.

Oral closing arguments were made by counsel for both parties at the end of the due process hearing, and both parties submitted memoranda listing legal citations.

Findings of Fact

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

² At the due process hearing, Petitioner reported that she had been able to obtain acceptance for Student at Nonpublic School, so did not request that the Hearing Officer order DCPS to refer Student to another nonpublic school for possible acceptance as contemplated at the time of the Prehearing Conference and memorialized in the Prehearing Order.

³ Petitioner's counsel had been 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.

The Prehearing Order required Petitioner's counsel to file a compensatory education plan by 8/21/15, which she timely served on DCPS's counsel, but did not file until the 5-day disclosures with leave of the undersigned.

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 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.

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is Age and is now in Grade.⁶

2. Student is eligible for special education and related services as a child with Multiple Disabilities, pursuant to his recent IEPs.⁷ Student suffers from severe autism and severe Intellectual Disability ("ID"), and was harmed by lead poisoning.⁸ A recent evaluation concluded that in addition to autism, Student's disabilities include a speech and language impairment and ADHD.⁹ Earlier this year, Student received a Psychological Re-evaluation,¹⁰ Occupational Therapy Assessment,¹¹ and Speech-Language Re-evaluation.¹²

3. The 2/27/14 and 1/29/15 IEPs at issue in this case both provide for 20 hours per week of specialized instruction outside general education, and 5 hours per week of specialized instruction in general education for "specials" classes, with the support of a dedicated aide¹³ who is assigned to Student 7.5 hours per day.¹⁴ In addition, both IEPs provide for:

- 6 hours per month of Speech-Language Pathology
- 4 hours per month of OT
- An additional 30 minutes per month of OT as consultation services
- Assistive Technology for Communication through a Speech generating device (AAC system)
- Assistive Technology for Learning and Studying through a tablet and apps
- Treatments such as ABA based practices
- Weighted vest and seat cushion
- 1:1 paraprofessional trained in basic ASL signs, ABA strategies including discrete trial (DTI), and use of AAC devices¹⁵

⁵ Parent.

⁶ *Id.*

⁷ P13, P12, P11.

⁸ Parent; P22-4; P25-2; P27-1; P34-7,8.

⁹ P34-13.

¹⁰ R34, 3/15/15.

¹¹ R36, 3/13/15 (draft was finalized per Public School Occupational Therapist).

¹² R37, 3/11/15.

¹³ Unless otherwise indicated, all mention of Student's aide refers to his dedicated aide.

¹⁴ P12-26,27; P13-22,23 (while the 1/29/15 IEP is marked "draft," DCPS counsel "stipulated" in his closing argument that the service hours in the final document are the same as the draft).

¹⁵ P12-26; P13-22.

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4. Student has the cognitive abilities of no more than an 18-month-old toddler.¹⁶ Student prefers the toys of an 8-month-old baby in the family.¹⁷ Student has to be watched constantly or will eat inedible things such as putty and detergent, put many other items into his mouth, and play in the toilet.¹⁸

5. Student is essentially non-verbal; he can speak only a couple of words.¹⁹ Student is also able to use only a couple of signs and a few gestures.²⁰ Student often makes loud vocalizations, sometimes as often as every 30-60 seconds.²¹ Student communicates through his behavior; for instance, he expresses frustration through hitting, yelling and eloping.²²

6. Student very often claps objects together in front of his face, from pool noodles to straws, and also claps in front of others' faces, which is often perceived as aggressive and frightens other students.²³ Student does not intend to offend others, but has no more boundaries than a 1 or 2 year old child, which makes him very disruptive.²⁴ Student is physically fit and very strong.²⁵

7. At home, Student will spend all day clapping items together, with only short breaks.²⁶ Student also engages in intense clapping of items at school and on the bus.²⁷ When drinking straws were taken from Student on the bus (as supposed weapons), Student managed to obtain pieces of the bus flooring to clap.²⁸

8. Those who work with Student agree that he is not malicious, but Student is quite aggressive and has injured his aides and service providers.²⁹ Public School teacher and aide cannot control Student's aggression (in 2014/15) and he hits and fights them.³⁰

9. In December 2014, Student was hitting and slapping faces, biting, jumping on staff, running around, throwing chairs and his iPad, and jumping off the walls.³¹ Student has also been aggressive toward other children, putting his arm around their necks and squeezing,

¹⁶ Parent; P13-25-30; ABA/Autism Expert.

¹⁷ Parent.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ R3-7; Special Education Teacher.

²¹ R2-10.

²² P13-13; P14-12.

²³ Private Occupational Therapist; Parent; P36-4; P6-10; P14-19.

²⁴ Private Occupational Therapist.

²⁵ Private Occupational Therapist; P23-3.

²⁶ Parent; P1.

²⁷ Parent.

²⁸ Educational Advocate; Parent; P4-9,10.

²⁹ Private Occupational Therapist; Parent; R10-9; R10-17; R11-7,9,11.

³⁰ P3-33; P6-11.

³¹ P6-12.

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which they find frightening.³² Student's "heavy hugging" results in choking, even though he intends no harm.³³ Student's aggression toward other children on the bus has threatened his ability to ride the bus.³⁴

10. Student causes harm to himself as well, routinely biting his right wrist to the extent he bleeds, even though callouses have developed.³⁵ Simply looking at the state of his calloused wrist shows how he is doing.³⁶ Student bites himself less when he is regulated and not frustrated.³⁷

11. Student likes to spit and play with his spit, and also plays with himself with his hand in his pants.³⁸

12. Student is sensitive to noise; a radio in the background at the OT Center results in Student covering his ears with his hands.³⁹ Over stimulation causes problems for Student.⁴⁰

13. Student needs very frequent sensory input, which he gets from clapping items together, biting himself, and banging his head against the wall, and more benignly from extensive use of OT equipment, including trampolines, swings, and other things.⁴¹

14. Student has high thresholds for sensory inputs, including oral, tactile, vestibular and proprioceptive input.⁴² In OT, Student loves jumping on the trampoline and being bodily thrown into a foam pit, as well as pressure from being pressed between 2 mats or wrapped up with big hugs, among other things.⁴³

15. Student benefits from frequent movement breaks, including climbing and running.⁴⁴ Student very much needs sensory input with access to a large space without many other children in his way.⁴⁵

³² Private Occupational Therapist; Parent; P23-7; P20-11; Prior Educational Advocate.

³³ Educational Advocate.

³⁴ P6-10.

³⁵ P1; Private Occupational Therapist; R11-4,5,6,7.

³⁶ Parent.

³⁷ Private Occupational Therapist.

³⁸ Private Occupational Therapist; P20-1; P20-2.

³⁹ Private Occupational Therapist.

⁴⁰ P6-8.

⁴¹ Private Occupational Therapist; P1.

⁴² Private Occupational Therapist; P13-19.

⁴³ Private Occupational Therapist; P1.

⁴⁴ R7-8; P13-19.

⁴⁵ Private Occupational Therapist.

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16. When deciding to put Student in Public School, Parent was told that the school would have an OT room with swings and balls and other equipment like Prior Public School, but Public School never got the promised equipment.⁴⁶

17. The OT room at Public School (in April 2015) only had games like Monopoly and tables and chairs, and did not have balls or other OT equipment.⁴⁷ Public School does not have a trampoline or swing for OT, although additional OT equipment has been ordered for 2015/16.⁴⁸

18. At Public School, Student resisted deep pressure, weighted vests and lap buddies.⁴⁹ At times, an aide was able to get Student to put on a compression vest.⁵⁰ Other strategies were used instead, and Student did like his backpack and a lap pad.⁵¹ Student also likes the playground equipment.⁵²

19. Student went to an OT Center from March 2014 to March 2015 and was much calmer and got progressively better.⁵³ But when the outside OT services stopped (due to insurance no longer paying), Student returned to his “crazy stuff.”⁵⁴

20. Student would often “run over” other children in the OT Center, so needed to have his appointments when few other children were present.⁵⁵ By the end of a year at the OT Center, Student was better about not running into other children.⁵⁶

21. After sensory input, Student is often calm for a short period, during which time he is available for learning, although that learning was never done by trying to make Student sit still.⁵⁷

22. Student’s communication ability is “emergent” or “pre-linguistic.”⁵⁸ Student’s communication deficit is severe to profound.⁵⁹

⁴⁶ Parent.

⁴⁷ P4-12,13; Parent.

⁴⁸ Public School Occupational Therapist.

⁴⁹ R7-8.

⁵⁰ R10-3.

⁵¹ Public School Occupational Therapist.

⁵² *Id.*

⁵³ Parent.

⁵⁴ *Id.*

⁵⁵ Private Occupational Therapist.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Assistive Technology Program Director.

⁵⁹ Speech-Language Expert.

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23. Student's behavior, including aggression, is an attempt to communicate.⁶⁰ Student communicates through crying, vocalizing, facial expression and body language.⁶¹

24. Student needs a total communication or multi-modal approach.⁶² A multi-modal approach is always recommended.⁶³

25. Student can't generate consistent words now except "bye" and "yes," although he could say 4 words in 2008.⁶⁴ In 2013/14 Student could orally imitate a few words and a few sounds.⁶⁵ In 2014/15 Student could only greet or say goodbye with prompts.⁶⁶ His 2/27/14 and 1/29/15 IEPs state that Student can imitate and say "sound approximations" for 5 words.⁶⁷

26. Student has the comprehension skills of a 1-2 year old.⁶⁸ Student sometimes understands what is being said to him, including when he is given instructions.⁶⁹

27. Student has a very limited sign vocabulary, using only 1 or 2 signs, while supposedly learning another half dozen at any given time.⁷⁰ Student used about 10 signs in 2011/12.⁷¹

28. Due to Student's motor impairments, it is often difficult for him to make proper ASL signs; instead, he uses his own "sign gestures."⁷² Student uses rudimentary approximations of signs, rather than using classic form, but he is communicating with his aide and others and they are reciprocally communicating with him.⁷³

29. DCPS set up ASL training for Student's aide for 5/5/15.⁷⁴ A practical solution of providing "consultative ASL services" to all necessary staff to teach only the signs needed by Student was found reasonable by DCPS and Parent's Educational Advocate at the end of 2014/15.⁷⁵

⁶⁰ Speech-Language Expert; Public School Occupational Therapist.

⁶¹ P37-8.

⁶² Speech-Language Expert; P30-7; P37-13.

⁶³ Assistive Technology Program Director.

⁶⁴ Speech-Language Expert; P9-3.

⁶⁵ R2-3; R2-7; R3-5; R4-5; R5-5.

⁶⁶ R7-5; R8-4.

⁶⁷ P12-5,13; P13-5,12.

⁶⁸ P37-11; Speech-Language Expert.

⁶⁹ P37-3; Speech-Language Expert.

⁷⁰ R2-4; R3-7; R4-4; P3-16; P12-10.

⁷¹ P30-3; Parent.

⁷² Speech-Language Expert.

⁷³ Assistive Technology Program Director.

⁷⁴ P3-97.

⁷⁵ P3-118.

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30. A communications device is Student's voice, so he should have something available all the time, whether high-tech or low-tech.⁷⁶ At times, this could simply be pictures on a ring.⁷⁷

31. An outside Speech/Language pathologist working with Student in 2012/13 noted that along with progress in manual signs, gestures, and verbalization, Student had shown the most progress and efficiency using the Picture Exchange Communication System ("PECS").⁷⁸ In the summer of 2015, Student appeared to be using PECS but not signs or his Dynavox or iPad for communication.⁷⁹

32. A PECS book was being created in 2012/13 as an option for communication. P14-4. PECS cards were also being created for Student in January 2015.⁸⁰

33. During 2012/13, Student had trouble with the fine motor control needed to use an iPad, so Prior Public School provided Student an expensive Dynavox with Maestro software.⁸¹ Dynavox devices can also be used with Compass software, which would be inappropriate for Student as Compass software is much too advanced.⁸²

34. Parent initially chose the Dynavox over an Augmentative and Alternative Communication ("AAC") app on the iPad.⁸³ Parent also chose the Dynavox over the ProxTalker and GoTalk that she was considering in 2012/13.⁸⁴ In addition to the Dynavox from DCPS, a second Dynavox was obtained for Student to use at home through insurance.⁸⁵

35. The Dynavox had around 50 pictures programmed into it, including Student's food items.⁸⁶ Parent sought fewer pictures so it would be less confusing for Student.⁸⁷ The iPad had about 20 pictures programmed into it.⁸⁸ While core vocabulary words would not change, fringe vocabulary words could be added as needed, in theory as often as daily.⁸⁹

⁷⁶ Speech-Language Expert; Assistive Technology Program Director.

⁷⁷ Assistive Technology Program Director.

⁷⁸ P33-5.

⁷⁹ ABA/Autism Expert.

⁸⁰ P14-12.

⁸¹ Parent.

⁸² Assistive Technology Program Director. Unless otherwise indicated, all references to Dynavox herein refer to use of Maestro software on the device.

⁸³ P6-5.

⁸⁴ P14-2.

⁸⁵ Parent.

⁸⁶ *Id.*

⁸⁷ Special Education Teacher.

⁸⁸ Parent.

⁸⁹ Assistive Technology Program Director.

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Parent was concerned about any changes being made to the Dynavox that might make it harder for Student to use.⁹⁰

36. Student may have used the Dynavox more effectively in the past, but currently can only use it to indicate that he needs to go to the toilet, and even that requires prompting and assistance from a teacher or aide; he can more easily gesture when he needs to go to the toilet.⁹¹

37. Student struggled to use his Dynavox and doesn't like to carry it around; it is 4-5 pounds.⁹² Public School's front desk and security personnel did not see Student routinely carrying his Dynavox.⁹³

38. The Speech/Language Pathologist regularly used the Dynavox in Student's therapy.⁹⁴ Student does not use the Dynavox independently. P14-19. Public School reported that the Dynavox was being used with regularity.⁹⁵ Student's Public School teacher sought to coordinate work on the Dynavox with Student's private speech pathologist.⁹⁶

39. Student did not like to use his Dynavox in 2014/15 and would become extremely difficult if instructed to use it.⁹⁷ The Dynavox is not needed, as the iPad can handle Student's needs for a communications device.⁹⁸

40. Parent told Public School that she doesn't want Student using the Dynavox since he doesn't like carrying it.⁹⁹ Parent wants Student to use his iPad for communications, rather than the Dynavox.¹⁰⁰

41. An iPad was added to Student's IEP on 1/14/14 (although it took until 4/30/14 to receive it). Parent; P3-18. There were challenges in having access to the necessary apps, which caused significant frustration for Parent, and the glass broke, although it was still possible to use the device. Parent; P3-104; P3-19. Confusion was caused in part by DCPS changing its approach to iPads, so that the Assistive Technology group restricted iPads to communication access and no longer supported learning software. Assistive Technology Program Director. At the same time, Parent was interested in trying the iPad version of

⁹⁰ Special Education Teacher.

⁹¹ Assistive Technology Program Director.

⁹² R2-5; Parent; Assistive Technology Program Director; R7-3.

⁹³ Parent; P4-6.

⁹⁴ R11-2.

⁹⁵ R3-6; R3-9; R4-4; P12-10.

⁹⁶ P3-16.

⁹⁷ P37-3.

⁹⁸ Speech-Language Expert.

⁹⁹ P14-14.

¹⁰⁰ Parent.

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Dynavox Compass software, but was not allowed to access it and was not told that it was not suitable for Student. Parent; Assistive Technology Program Director.

42. Student received another iPad late in 2014/15 and had it about 2 weeks before having to give it back at the end of the school year.¹⁰¹ At the beginning of 2015/16, Student did not have an iPad because Parent had turned it in at the end of 2014/15, but Public School believed Student still had it.¹⁰²

43. Late in 2014/15, Public School thought the Dynavox was too advanced and the Compass app for the iPad was too advanced, so they ordered Student a mid-tech device – a ProxTalker – instead, which had just arrived but not been given to Student at the time of the hearing.¹⁰³

44. Student's IEP goals changed little from year to year, although he seemed to be more advanced in 2011/12 than in 2014/15; Student could almost write his name (with assistance) in 2011/12, but was later back to drawing lines.¹⁰⁴

45. Parent was frustrated that Student was still drawing lines in 2014/15, but lines remain difficult for Student.¹⁰⁵ While Student does learn things, he quickly forgets them, and may regress over as short a span as a weekend.¹⁰⁶ In teaching basic colors and shapes, Student couldn't remember what he learned from session to session, even with 3 sessions a week. *Id.*

46. Student was in a special education class of 8 children at Public School, but was the only low functioning student.¹⁰⁷ Others in Student's special education class were doing multiplication and word problems, and 2 mainstreamed back to general education.¹⁰⁸

47. Special Education Teacher was credible and expressed a great deal of concern and caring for Student, to the extent of shedding tears during the hearing.¹⁰⁹ Special Education Teacher credibly emphasized doing ABA properly and convincingly testified about her involvement with Student during 2013/14.¹¹⁰ Special Education Teacher sought to coordinate efforts with Student's outside ABA instructor.¹¹¹

¹⁰¹ Parent; P3-104; P4-16.

¹⁰² P3-120; Parent.

¹⁰³ P14-24; Assistive Technology Program Director.

¹⁰⁴ Parent; P4-5.

¹⁰⁵ Parent; P3-11; P7-10,14.

¹⁰⁶ Private Occupational Therapist.

¹⁰⁷ Special Education Teacher.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ P3-16.

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48. ABA needs to be comprehensive throughout the school day, and requires constant data collection.¹¹² The ABA data, in turn, needs to be constantly analyzed to make decisions about how to proceed with Student.¹¹³

49. Public School claimed to be collecting extensive data as required by ABA protocols, but could not find any when repeatedly asked by Petitioner's counsel.¹¹⁴ Prior Educational Advocate also had asked for Public School's data collection sheets for Student in prior years, but never received any.¹¹⁵

50. Special Education Teacher felt it would be helpful to keep Student in her class another year and Parent agreed, but did not submit the written request.¹¹⁶ However, at the beginning of 2014/15 Parent aggressively attacked Special Education Teacher via email for having "failed my son miserably" during 2013/14.¹¹⁷

51. Student's doctor sent Student to Autism Center to receive ABA on a full-time basis a few weeks before the end of 2014/15, because Student was becoming increasingly difficult after he stopped getting the benefits of outside OT.¹¹⁸

52. Student's self-injury and aggression both decreased while at Autism Center.¹¹⁹ Student stopped biting himself while there.¹²⁰ When Student came home from being at Autism Center full-time, he didn't engage in his clapping behavior, and was much quieter.¹²¹

53. Following 3 months full time at Autism Center during Summer 2015, both aggression and self-injury increased significantly in Student after just 1 week back at Public School in 2015/16.¹²²

54. All specials at Public School are with general education students, which is not appropriate for Student.¹²³ Public School does not have the capability of providing specials apart from general education.¹²⁴

¹¹² ABA/Autism Expert.

¹¹³ *Id.*

¹¹⁴ P5-12,15.

¹¹⁵ Prior Educational Advocate.

¹¹⁶ Special Education Teacher.

¹¹⁷ P3-23.

¹¹⁸ Parent.

¹¹⁹ ABA/Autism Expert.

¹²⁰ Parent.

¹²¹ *Id.*

¹²² ABA/Autism Expert; Parent.

¹²³ Educational Advocate.

¹²⁴ P14-16; Special Education Teacher.

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55. General education is not appropriate for Student.¹²⁵ The general education setting upsets Student's sensory system.¹²⁶ Student's behavior shows that general education is not appropriate for him.¹²⁷

56. Student's loud high-pitched vocalization during general education is very disruptive to the general education children, so he needs to be removed to not be disruptive.¹²⁸ Student's aide removed him from specials.¹²⁹

57. Specials included French/Art and Spanish.¹³⁰ It is no more appropriate for Student to be in general education art or Spanish classes than for a 1-year-old to be in the classes; it is a waste of time for Student who lacks comprehension, and a disruption for everyone else in the class.¹³¹

58. Student often has lunch with his aide away from other children because there is too much stimulation in the cafeteria.¹³² Being alone for lunch is too restrictive, as Student should be with his similarly-disabled peers.¹³³

59. Student got so he was more aware of other children in the OT Center over the course of a year, but did not have much interaction with them; the impact on Student would not have differed regardless of whether they were disabled or nondisabled.¹³⁴

60. There is no value to being with peers at this point, although there may be benefit in the future.¹³⁵ Peer modeling with children with autism may be important eventually, but not now.¹³⁶

61. Student's FBA and BIP have not been updated since 2012.¹³⁷ The 2012 FBA was conducted when Student was in a different class, in a different school, with very different OT facilities.¹³⁸ Student has changed as well, for almost no aggression was reported in the

¹²⁵ ABA/Autism Expert.

¹²⁶ Speech-Language Expert.

¹²⁷ *Id.*

¹²⁸ P23-2; P23-8.

¹²⁹ Educational Advocate.

¹³⁰ Special Education Teacher; P14-20.

¹³¹ Private Occupational Therapist.

¹³² Parent; P34-4; Educational Advocate.

¹³³ Educational Advocate.

¹³⁴ Private Occupational Therapist.

¹³⁵ ABA/Autism Expert.

¹³⁶ Speech-Language Expert.

¹³⁷ R17.

¹³⁸ Educational Advocate.

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2012 FBA and his self-injury through biting had not resulted in lesions or breaking the skin.¹³⁹

62. A formal Diagnostic Evaluation Report by a psychiatrist and psychologist from a leading institution recommended an FBA in June 2013 to address Student's wrist biting.¹⁴⁰ FBAs should be updated every year, if not more often, and with any change in school.¹⁴¹ The resulting BIP should be reviewed and updated every 6 weeks or so, especially when Student is upset.¹⁴²

63. The data analyzing context in the 2012 FBA showed that Student's stereotypy was much greater during specials than any other time.¹⁴³ Similarly, Student's self-injury was much greater during specials than any other time.¹⁴⁴

64. Nonpublic School is receptive to the needs of Student.¹⁴⁵ Nonpublic School uses ABA and emphasizes data collection and daily review.¹⁴⁶ Nonpublic School integrates OT and Speech therapy in the classroom.¹⁴⁷ Nonpublic School has no general education students.¹⁴⁸

65. Student needs a very small class size.¹⁴⁹ The maximum size of the class Student would attend at Nonpublic School is 4 or 5 students, including Student.¹⁵⁰

66. The OT room at Nonpublic School is like a miniature OT Center and includes a trampoline.¹⁵¹ The OT room is very near the classroom at Nonpublic School that Student would be in.¹⁵²

67. Nonpublic School uses iPads as AAC communication devices, with about 30 in use in that way.¹⁵³

¹³⁹ P26-2.

¹⁴⁰ P31-7.

¹⁴¹ ABA/Autism Expert.

¹⁴² Educational Advocate.

¹⁴³ R17-6.

¹⁴⁴ R17-9.

¹⁴⁵ Educational Advocate.

¹⁴⁶ Nonpublic School Director.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ ABA/Autism Expert.

¹⁵⁰ Nonpublic School Director.

¹⁵¹ Parent.

¹⁵² Nonpublic School Director.

¹⁵³ *Id.*

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68. No suitable and available school for Student is geographically closer than Nonpublic School, which would require a long bus for Student; the benefits of the school outweigh any harm from the extra time on the bus.¹⁵⁴ Student currently has a bus ride to school of about 45 minutes each way.¹⁵⁵ Student enjoys the bus when he has widgets available.¹⁵⁶

69. Nonpublic School is on the OSSE list of approved special education schools.¹⁵⁷

70. Educational Advocate convincingly explained: the iPad model recommended in the Compensatory Education Plan had been used previously by Student; the value of a protective case; and the usefulness of the recommended software.¹⁵⁸

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 [FAPE] 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").

"[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, DCPS is obligated to conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a). If the child is found eligible, DCPS must then 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).

¹⁵⁴ Educational Advocate.

¹⁵⁵ Parent.

¹⁵⁶ Educational Advocate; Parent.

¹⁵⁷ P45-2.

¹⁵⁸ Educational Advocate; P2-3.

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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).

In addition, DCPS 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.

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.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Legal Issues

Student, suffering from severe autism and ID, is becoming increasingly aggressive as he grows and gets physically stronger, posing increasing safety risks to himself and others. Student experiences frustration from not being able to communicate, not having his sensory needs met, and other reasons. Parent understandably wants to maximize his opportunities to communicate in an effort to reduce his frustration and make his education as meaningful as possible. Parent also seeks to maximize use of ABA and OT, as outside providers have used them to help Student. DCPS has provided significant support over the years, but has refused to provide a full-time IEP for Student. DCPS has continued to keep Student with general education students for specials, which not only include art, music and

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physical education, but also French, Spanish, science and social studies, despite his very limited cognitive ability.

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on (a) 2/27/14 and (b) 1/29/15, when Student needed a full-time out of general education setting, with no inclusion hours, in a separate special education day school.*

Petitioner has met her burden of proving a denial of FAPE on the issue of appropriate IEPs, for it was clear when the IEPs were developed that Student needed to be out of general education and have no inclusion hours, given his behavioral issues and lack of cognitive ability.

To determine whether a FAPE has been provided through the 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.

Here, Petitioner has not alleged that DCPS failed to comply with the IDEA’s administrative procedures, so this analysis begins with the second part of the inquiry, where the measure and adequacy of the IEPs are determined as of the time they were offered to Student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

Student’s IEPs over time have become more restrictive, with less time in the general education setting, until both the 2/27/14 and 1/29/15 IEPs included only 5 hours in general education, which were for specials or electives, including art, music, PE, French, Spanish, social studies and science, as well as lunch and recess. Public School does not have the capability of providing specials apart from general education, requiring Student to try to fit the school, rather than the school accommodating Student’s needs.

It is abundantly clear that Student cannot benefit from general education lessons or materials being presented in French, Spanish, science or social studies, given his cognitive limitations. Nor is Student’s behavior conducive to him receiving educational benefit in general education classes, as Student frequently has loud high-pitched vocalizations, which are also very disruptive to the rest of the class. As a result, Student’s aide often takes him out of class to a room without other children, going from an insufficiently restrictive location to an overly restrictive one, where he does not have the presence of similarly disabled peers. *See G.B. v. Dist. of Columbia*, 78 F. Supp. 3d 109, 116 (D.D.C. 2015).

The longstanding inappropriate nature of specials with general education students is confirmed by the 2012 FBA which analyzed the context of Student’s self-injury and found it to be much greater during specials than any other time. Similarly, Student’s stereotypy was much greater during specials.

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Lunch and recess do not work well for Student with nondisabled peers either. Due to the over stimulation of the noisy lunchroom in the large Public School, Student often is removed by his aide to a quiet room where he has lunch alone without any peers, which is overly restrictive, just as in *G.B.*, 78 F. Supp. 3d at 116 (overly restrictive to require lunch with aide rather than disabled peers). At recess, Student often has unhappy encounters with peers in which he claps items together in their faces as a way of getting their attention or seeking to communicate with them, and often pushes or hits them. Student often does not pay attention to others and knocks peers down in his rush to get to play equipment. At other times, Student puts his arm around other students' necks and squeezes in a "heavy hug" that results in choking, and which they of course find frightening, even if Student intends no harm.

Thus, this Hearing Officer concludes that Petitioner has shown that the nature and severity of Student's disability is such that his education can only be achieved satisfactorily in a full-time special education setting. However, the failure of DCPS to offer a full-time out of general education setting does not automatically entitle Student to nonpublic school placement at the LEA's expense. If there is an "appropriate" public school program available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," DCPS need not consider nonpublic placement, even though a nonpublic school might be more appropriate or better able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (*citing Rowley*, 458 U.S. at 207).

But, in this case, there has been no evidence offered that DCPS is able or willing to make available to Student an appropriate program which is full-time out of general education in the small, structured setting which he requires. DCPS apparently does not itself have any more restrictive setting to offer, and satisfies the IDEA requirement of providing a continuum of alternative placements, including "special schools," by relying on nonpublic schools. *See* 34 C.F.R. 300.115. If no suitable public school is available to fulfill Student's IEP needs, DCPS must pay the costs of sending him to an appropriate nonpublic school. A nonpublic school placement is proper under the IDEA if the education provided by Nonpublic School is reasonably calculated to enable Student to receive educational benefits. *Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994). *See also, e.g., N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008).

An award of nonpublic school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Dist. of Columbia*, 427 F.3d 7, 11 (D.C. Cir.2005) (citations omitted). Placement awards must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of relevant considerations to determine whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the nonpublic school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Each of these considerations is addressed below.

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(a) Nature and Severity of Student's Disability: The evidence unambiguously establishes that Student suffers from both severe autism and severe ID, with limited cognitive ability, and is essentially nonverbal. DCPS does not dispute the severity of Student's disabilities.

(b) Student's Specialized Educational Needs: The evidence is that Student needs a full-time special education program suited to children like him, and needs that level of support even during specials, recess and lunch, which DCPS cannot provide at Public School.

(c) Link Between Student's Needs and the Services Offered by Nonpublic School: It is clear from Student's visit to Nonpublic School that it is likely to be a good fit for him. Nonpublic School not only has a suitable small classroom with children similar to him, but also uses ABA and integrates OT and Speech/Language services in the way that Student needs.

(d) Cost of Placement at Nonpublic School: Nonprofit School is on OSSE's list of approved nonpublic day schools. DCPS did not question Nonprofit School's rates and offered no evidence that the cost of placement at Nonpublic School would be higher than at other local nonpublic schools serving students with similar disabilities.

(e) Least Restrictive Environment: While DCPS stressed the benefit to Student from exposure to nondisabled peers, Petitioner's experts persuasively conveying how little Student notices others around him, and how little he benefits from exposure to general education peers. Experts for Petitioners were also credible in testifying that it is important for Student to be with other disabled peers rather than routinely being pulled out of general education and isolated by his aide without any peers, and the increasing importance of this over time. A placement such as Nonpublic School, where Student has interaction with students like himself, but no interaction with nondisabled peers, is the least restrictive environment for Student at this time. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) ("[i]n determining the least restrictive environment, consideration is given to the types of services that the child requires," *citing* 34 C.F.R. 300.552(d)); *N.T. v. Dist. of Columbia*, 839 F. Supp. 2d 29, 35 n.3 (D.D.C. 2012) (Hearing Officer could consider whether nonpublic school was the least restrictive environment in evaluating whether nonpublic placement was the proper remedy).

Considering all of the above factors, it is the conclusion of this Hearing Officer that Nonpublic School is a proper and appropriate placement for Student.

Issue 2: *Whether DCPS denied Student a FAPE by failing to revise an FBA and update a BIP to address Student's severe behavioral needs, as his FBA and BIP have not been modified since May 2012.*

Student's behaviors are increasingly challenging and difficult to address. Student and those working with him need all the support provided by law, including FBAs and BIPs.

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The IDEA mandates an FBA in specified circumstances. Respondent must conduct an FBA and develop behavioral intervention services and modifications after a child with a disability has been removed from his current placement for over 10 school days in the same school year. *See* 34 C.F.R. 300.530(d)(1)(ii). Alternatively, an FBA and BIP may be required in connection with a determination after a change in placement that misconduct was a manifestation of a child's disability. *See* 34 C.F.R. 300.530(f)(1)(i). Here, Student's aide routinely removes Student from his "current placement" in general education classes when he disturbs others to take him to another room to calm him. Student's behavioral issues and needs are so basic and so apparent that this removal is routinely accomplished without the need to administratively invoke any code of conduct or generate disciplinary paperwork. Indeed, Student's behavioral issues are so clearly a manifestation of his disability that it is simply assumed with no need for the school to determine manifestation in a formal review. Yet the apparent nature of Student's behavioral issues does not mean that an FBA and BIP would not be helpful in caring for Student, to the extent Student fits these requirements.

Moreover, the IDEA requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 C.F.R. 300.324(a)(2)(i); *Harris*, 561 F. Supp. 2d at 68. In *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011), the Court stated "it is important to note that 'the IDEA . . . recognizes that the quality of a child's education is inextricably linked to that child's behavior,' and '[an] FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.'" *Id.*

In this case, DCPS has long recognized the obvious importance of Student's behavior to his ability to obtain any educational benefit, as well as the impact of his behavior on those around him. It is no excuse to say that Student's FBA and BIP from 2012 addressed the same or similar behavioral issues, as they were conducted when Student was in a different class, in a different school, with very different OT facilities. The causes of Student's behaviors and possible remedies change over time as Student has grown and has had new experiences over the years. Indeed, as early as June 2013, a diagnostic evaluation by a psychiatrist and psychologist from a leading institution recommended an FBA to address Student's wrist biting. Accordingly, DCPC is ordered below to fund an independent FBA and BIP to be conducted once Student has enrolled in Nonpublic School, unless Parent (with the advice of Nonpublic School) determines it is not needed given the implementation of Nonpublic School's other supports and strategies.

Issue 3: *Whether DCPS denied Student a FAPE by providing an inappropriate educational placement from August 2013 to present, because (a) it failed to provide appropriate Applied Behavior Analysis through qualified personnel, (b) the curriculum was not developmentally appropriate for Student, as it was based in part on Common Core standards and required classes providing no educational benefit to Student, (c) Student was not provided a consistent communication system since he cannot communicate verbally, (d) it did not contain an appropriate space for Occupational Therapy and meet Student's sensory needs, (e) for his safety, Student was being segregated even from disabled peers*

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during many activities, which was overly restrictive, and (f) there was a lack of progress and Student's severe needs were not being met.

The need for Student's placement to be changed to full-time out of general education, discussed in Issue 1 above, is bolstered by certain items that Petitioner challenges here, for a "student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP." *S.S. by & through St. v. Dist. of Columbia*, 68 F. Supp. 3d 1, 18 (D.D.C. 2014), *citing Roark*, 460 F. Supp. 2d at 44. The Court in *Andersen v. Dist. of Columbia*, 1988 WL 33506, 3 (D.D.C.1988), *aff'd* 877 F.2d 1018, explains that a FAPE "is 'educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.'" *Id.* (quoting *Rowley*, 458 U.S. at 188-89).

(a) While ABA is very important for Student, Special Education Teacher convincingly testified that ABA is important and applied with fidelity at Public School, at least in her classroom, so that in 2013/14 (at least) Student received benefits from ABA. Parent was as critical of 2013/14 as 2014/15, so a similar emphasis on ABA may have been provided by DCPS in 2014/15 as well, although Student's 2014/15 teacher did not testify. While Student's IEPs require his aides to be trained in ABA strategies, and each of his aides may not have been suitably trained, this would be at most a procedural violation as this Hearing Officer is not convinced that lack of training deprived Student of educational benefit. It did cause this Hearing Officer concern that ABA data collection sheets were supposedly generated in large quantities on an ongoing basis, but none could not be provided for either 2013/14 (when a large binder was reportedly lost) or thereafter, despite diligent efforts by Petitioner's counsel to obtain them in recent weeks and efforts by Prior Educational Advocate to obtain them earlier. In any case, this need not be analyzed further here as Student will benefit from ABA in Nonpublic School, which emphasizes ABA.

(b) Curriculum issues have been resolved by determining that Student should not be in specials with his general education peers. It was not demonstrated to this Hearing Officer that there were any other curriculum issues needing action.

(c) Since Student is essentially nonverbal, a consistent communications system is vital, but nothing has worked for Student as well as would be desired. The evidence shows that the optimal strategy for Student is a "multi-modal" approach, providing multiple ways for Student to communicate using as many words and sounds as possible; signs and gestures of various sorts, including American Sign Language ("ASL"); and pictures and graphics from paper (PECS) to tablets and computers (iPad, ProxTalker, Go Talker, Dynavox). While frustrations are understandably from Student's difficulties communicating, this Hearing Officer is not convinced by Petitioner's evidence that DCPS denied Student a FAPE in the area of communications. DCPS has consistently worked with Student on saying words and sounds, on learning and using signs, and on using PECS, as well as providing a Dynavox, then adding an iPad, and most recently acquiring a ProxTalker for Student, all with the input and direction of Parent and her advocates. These efforts have not always gone as smoothly as would be desirable, which has caused upset. Yet that does not equal a denial of FAPE. Student's IEP does require his aides to be trained in basic ASL

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signs, and some of his aides may not have been, but this is again a procedural violation as this Hearing Officer is not convinced that lack of training deprived Student of educational benefit, where the evidence is that Student was able to use informal gestures and other means to reciprocally communicate with his aides. With both the use of signs and the Dynavox there is a circularity – or chicken-and-egg quality – to the arguments, where it seemed clear that Public School staff didn't much use signs or the Dynavox with Student because they were not helpful to him, but Parent felt they would be helpful if only staff would use them.

(d) OT is very important because Student has very high sensory needs and is not available for learning if they are not met. Prior Public School had a range of OT equipment that was very helpful for Student, as did OT Center. Public School did not have the OT equipment needed and did not meet Student's sensory needs, which further supports placement of Student in Nonpublic School, which has the OT equipment and integration of OT into the school day that Student needs.

(e) As discussed in Issue 1, removing Student from the general education setting so that he was segregated even from disabled peers during lunch and specials is not appropriate and supports placement at Nonpublic School.

(f) There has been a definite lack of progress at Public School. That may not be the fault of DCPS, but in any case Student will have every opportunity to progress at Nonpublic School. *Dist. of Columbia v. Walker*, 2015 WL 3646779, at *2 (D.D.C. June 12, 2015) (receiving a FAPE “does not guarantee any particular outcome or any particular level of academic success”), *citing Rowley*, 458 U.S. at 192.

Issue 4: *Whether DCPS denied Student a FAPE by failing to implement his 2/27/14 and 1/29/15 IEPs by failing to: (a) provide appropriate Assistive Technology, (b) implement ABA therapy, (c) train personnel in American Sign Language, (d) provide classroom aids and services, including a weighted vest and seat cushion, and (e) properly implement goals and programming by over-reliance on Student's dedicated aide for everything including academics and all behavior management.*

Finally, Petitioner asserts that DCPS failed to adequately implement his IEPs, which this Hearing Officer finds was not proven beyond what has already been remedied above. For a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007).

Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing*

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Wilson v. Dist. of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). While it is not possible to make mathematical comparisons here, as when a portion of hours is missed, it is apparent that the allegations of what was not implemented are relatively modest compared to what has been provided pursuant to Student's IEPs.

(a) Petitioner was understandably frustrated by not getting all the Assistive Technology and support needed on a timely basis. While DCPS might have done a better job explaining its new rules relating to iPads and keeping track of the iPad returned at the end of 2014/15, this Hearing Officer concludes that DCPS did substantially provide the Assistive Technology required by Student's IEPs, providing a Dynavox and at the end of 2014/15 ordering a ProxTalker, along with providing iPads with apps.

(b) As discussed above, Special Education Teacher convincingly testified that ABA is important and applied with fidelity at Public School, at least in her classroom in 2013/14, and in any case Student will benefit from ABA in Nonpublic School, which emphasizes ABA.

(c) Lack of ASL training is not a material deviation from his IEP where, as discussed above, Student uses only a couple of signs but is able to use informal gestures to reciprocally communicate with his aides.

(d) Petitioner did not demonstrate a failure of IEP implementation due to a lack of classroom aids and services. A weighted vest and lap pad were used with Student; a lack of a seat cushion was not proven, but would be *de minimis* in any case.

(e) Finally, while Petitioner alleged that Public School overly relied on Student's aides for everything including academics, Special Education Teacher convincingly testified about her deep involvement in Student's education in 2013/14. In any case, Nonpublic School will provide the balance of teachers, assistants and aides that it considers optimal going forward.

Compensatory Education Request

Petitioner seeks an award of compensatory education to compensate for the past denial of FAPE. 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). The proper amount of compensatory education, if any, depends on how much more progress a student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he would have occupied but for the LEA'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.

The challenge of determining what additional educational benefits would have accrued, if DCPS had provided full-time special education services for Student from

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February 2014, revised Student's FBA/BIP appropriately, and provided additional OT to meet Student's sensory needs, 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).

Educational Advocate, who prepared the Compensatory Education Plan and testified as an expert for Petitioner, states in the Plan that if Student had received appropriate supports he would have made progress behaviorally, which would have led to academic gains which were not quantified. To restore Student to that unquantified level, Educational Advocate proposed 120 hours of OT, 1,000 hours of ABA, and 100 hours of Speech and Language Services, along with an iPad with specified applications and case. During the due process hearing, Petitioner's counsel acknowledged that being placed at Nonpublic School would reduce the amount of compensatory education needed. Further, the testimony of Private Occupational Therapist about how Student could not retain a lesson over a weekend, combined with the repetition required in Student's academics, convinces this Hearing Officer that an award of anywhere close to the requested number of hours is not appropriate and might actually interfere with Student's focus at Nonpublic School, where Student should have every opportunity to gain traction.

Considering the equities in an exercise of broad discretion, this Hearing Officer concludes it is appropriate that DCPS fund: (a) 125 hours of independent services divided between OT, ABA, and/or Speech-Language services as determined by Parent in consultation with Student's teachers and advocates, to achieve optimum benefits for Student, with the hours to be used by the end of Summer 2016; and (b) an Apple iPad Air 2 64GB (retail \$599) and protective case (\$39.99), with the following applications: Proloquo2Go (\$249.99), Point to Pictures (\$4.99), Autism iHelp (\$7.99), and Essential Apps for OTs (\$9.99).

ORDER

Petitioner has met her burden of proof on certain issues, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS shall within 10 business days place Student at Nonpublic School and fund Student's tuition, related services, and transportation for the 2015/16 school year.
- (2) DCPC shall fund within 10 business days an independent FBA and BIP to be conducted once Student has enrolled in Nonpublic School, unless Parent with the advice of Nonpublic School determines it is not needed given the other supports and strategies being implemented at Nonpublic School.

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- (3) As compensatory education, DCPS shall provide a letter of funding within 10 business days for:
- (a) 125 hours of independent services divided between OT, ABA, and/or Speech-Language services as determined by Parent and completed by the end of Summer 2016; any hours of compensatory education not completed before the first day of school in the 2016/17 school year (based on the DCPS schedule) shall be forfeited; and
 - (b) Apple iPad Air 2 64GB (retail \$599) and protective case (\$39.99), with the following applications: Proloquo2Go (\$249.99), Point to Pictures (\$4.99), Autism iHelp (\$7.99), and Essential Apps for OTs (\$9.99).
- (4) 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)
OSSE-SPED (due.process@dc.gov)
ODR (hearing.office@dc.gov)
Contact.resolution@dc.gov
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