

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

OSSE  
Student Hearing Office

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Petitioner,  
v.  
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,  
Respondent.

Hearing Officer: Kimm Massey, Esq.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a \_\_\_\_\_ female, who presently attends a DCPS middle school.

Petitioner filed a Complaint against Respondent District of Columbia public Schools, alleging that DCPS provided Student with an inappropriate IEP and failed to provide an IEP reasonably calculated to provide educational benefit. As relief for these alleged denials of FAPE, Petitioner requested funding for an appropriate program that can meet Student's academic needs.

DCPS filed a Response to the Complaint, which denied the allegations of the Complaint and asserted, *inter alia*, that Student's \_\_\_\_\_ IEP is appropriate and Student is making academic progress under the IEP.

The parties participated in a Resolution Meeting on \_\_\_\_\_ There was no agreement and the parties determined to proceed straight to hearing. Therefore, the 45-day timeline began on \_\_\_\_\_ and will end on \_\_\_\_\_ which is the HOD deadline.

On \_\_\_\_\_ the hearing officer conducted a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer merged Petitioner's two claims into one claim, because they raised the same issue. The hearing officer issued a Prehearing Order on \_\_\_\_\_

By their respective letters dated \_\_\_\_\_ Petitioner disclosed ten documents (Petitioner's Exhibits 1-10) and DCPS disclosed eight documents (Respondent's Exhibits 1-8).

The hearing officer convened the due process hearing on \_\_\_\_\_ as scheduled.<sup>1</sup> All documents disclosed by the parties were admitted into the record without objection. The hearing officer received opening statement, testimonial evidence from each party, and closing statements prior to concluding the hearing.

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<sup>1</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

### ISSUE(S)

1. Did DCPS provide an inappropriate IEP that is not reasonably calculated to provide educational benefit because Student requires all services outside general education with smaller class sizes, but DCPS is providing 15 hours in general education and 5 hours outside general education?

### FINDINGS OF FACT<sup>2</sup>

1. Student is a \_\_\_\_\_ female. She attended \_\_\_\_\_ a DCPS middle school for SY \_\_\_\_\_
2. Student has a history of developmental delays. Hence, she did not walk until she was 15 months old and did not talk until she was 3 years old.<sup>4</sup>
3. Student began exhibiting delays in school when she began the Head Start program. However, it was not until the end of her first grade year that she was determined eligible for special education services and provided with 15 hours of service for her second grade year. Every year thereafter, the IEP team would hold a meeting and state that although Student was making only very little progress and was not making the progress the team wished to see, her hours of service were sufficient. Then for Student’s fifth grade year, the team decreased Student’s hours of services on the ground that she was making strides in reading, although they later agreed that the strides were very minute.<sup>5</sup>
4. During SY 2012/13, Student’s sixth grade year, DCPS determined that Student would receive inclusion services and stated that it would be better for Student because she would mimic the behavior of children who are performing.<sup>6</sup>
5. Although Student began receiving primarily As and Bs, Student absolutely could not do her homework during SY 2012/13 when Parent, Parent’s sister, or Student’s tutor tried to assist her with homework. Hence, Student did not turn in homework or any projects as the school year progressed.<sup>7</sup>

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<sup>2</sup> 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, then 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>3</sup> Testimony of Parent; *see* Petitioner’s Exhibit 4 at 1.

<sup>4</sup> Testimony of Parent; testimony of psychologist.

<sup>5</sup> Testimony of Parent; *see also*, testimony of school psychologist.

<sup>6</sup> Testimony of Parent.

<sup>7</sup> Testimony of Parent; *see* Respondent’s Exhibit 4.

6. Student's classwork samples reveal that she often leaves most of the items on the page blank and the answers she provides are often all or mostly incorrect.<sup>8</sup>
7. Student has a Full Scale IQ score \_\_\_\_\_ is in the Extremely Low range. Student's verbal comprehension and working memory abilities are in the Borderline range, her nonverbal reasoning abilities are in the Extremely Low range, and her processing abilities are in the Low Average range.<sup>9</sup>
8. Student's academic achievement abilities are below grade level, and a comparison of Student's formal test scores from 2011 and 2013 reveal that she has made only minimal progress over the last two years. Hence, in Broad Reading, Student was operating at the 2.4 grade level in 2011 and she is currently at the 3.1 grade level. In Broad Math, Student was working at the 1.1 grade level in 2011 and she is currently at the 2.6 grade level. In Broad Written Language, Student was operating at the 2.6 grade level in 2011 and she is currently at the 4.1 grade level.<sup>10</sup>
9. In June 2013, Student was diagnosed with Mild Intellectual Disability. However, this was an Axis II diagnosis based on the criteria set forth in the DSM-V, as opposed to a determination that Student meets the criteria for Intellectual Disability under IDEA.<sup>11</sup>
10. Student's current IEP, as amended on \_\_\_\_\_ identifies Student's primary disability as Specific Learning Disability ("SLD") and requires Student to receive 15 hours per week of specialized instruction in general education, 5 hours per week of specialized instruction outside general education, and 120 minutes per month of behavioral support services.<sup>12</sup>
11. The single hour per day of pullout services Student is to receive under the June 2013 IEP is not enough for Student, a rising \_\_\_\_\_ with skills at the elementary level. Indeed, even Student believes that she has not been getting the help that she needs at school and that she needs more help from adults with her classes.<sup>13</sup>
12. Student performs better when she receives one-on-one assistance.<sup>14</sup>
13. Student needs a highly-structured school setting with small class sizes of no more than 5 to 15 students so that she can receive the very close adult supervision and the individualized academic assistance that she requires to make academic progress.<sup>15</sup>
14. Student needs to be separated from her non-disabled peers for all academic instruction because she requires individualized attention and more specialized services.<sup>16</sup>
15. Student has been accepted to attend a private school for students in grades five through twelve with language-based learning difficulties. The school has a total population of \_\_\_\_\_

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<sup>8</sup> See Petitioner's Exhibit 9; testimony of Parent.

<sup>9</sup> Petitioner's Exhibit 4 at 5-7.

<sup>10</sup> Testimony of psychologist; Petitioner's Exhibit 4 at 9.

<sup>11</sup> Testimony of psychologist; testimony of school psychologist; Petitioner's Exhibits 5-7.

<sup>12</sup> Petitioner's Exhibit 3.

<sup>13</sup> Testimony of psychologist; Petitioner's Exhibit 4 at 10.

<sup>14</sup> Testimony of Parent; testimony of special education teacher.

<sup>15</sup> Testimony of psychologist; see Petitioner's Exhibit 4 at 13, Petitioner's Exhibit 5 at 3.

<sup>16</sup> Testimony of psychologist.

approximately 60 students, and the general student-teacher ratio is a maximum of 8 to 1 in class. The school provides its students with reading tutorials every day of the week, and the student-teacher ratio in the tutorials is three or four students to one teacher. The students also meet with an advisor every morning to help with organization and planning for the day. The school offers related services and has social workers on staff. The school's small classes, extra support, and modifications would be beneficial to Student. Tuition at the school is approximately \$36,900 per year, plus the cost for related services.

16. The education offered by the requested private school is reasonably calculated to enable Student to receive educational benefit, and the services offered by the school will meet Student's specialized educational needs, taking into account the nature and severity of her disability.
17. DCPS plans to implement an SLD program for SY 2013/14 that will serve students in grades five through twelve and offer a range of service hours from part-time services up to a self-contained classroom for Students receiving 20 hours or more of specialized services weekly. DCPS's plan is to have no more than 15 students per class, with one teacher and one special education paraprofessional, and in some instances, one behavior technician. However, the program was not yet up and running at the time of the due process hearing in this case, Petitioner was not made aware of the program prior to the due process hearing, and the sole witness who testified in favor of the program for Student had not spoken to any of Student's teachers about Student's needs and the witness's only familiarity with Student was gained through reading Student's IEP.<sup>17</sup>

### **CONCLUSIONS OF LAW**

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

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3<sup>rd</sup> Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3<sup>rd</sup> Cir. 2006). Now, for a consideration of Petitioner's claim.

#### **Appropriateness of IEP**

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, IDEA defines a FAPE to mean special education and related services that are provided, *inter alia*, in conformity with an IEP. *See* 34 C.F.R. § 300.17(d). The requirement to provide a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. In determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined "as of the time it is offered to the student." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10<sup>th</sup> Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

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<sup>17</sup> Testimony of DCPS director of specialized instruction.

In the instant case, Petitioner argues that Student's IEP is inappropriate, in that it is not reasonably calculated to provide educational benefit because Student requires all services outside general education with smaller class sizes, but DCPS is providing 15 hours in general education and 5 hours outside general education. DCPS disagrees, arguing that Student is doing well in the general education setting and that, pursuant to IDEA, she should not be removed from her nondisabled peers.

A review of the evidence in this case reveals that Student is performing on the 2<sup>nd</sup> to 4<sup>th</sup> grade level although she will be entering 7<sup>th</sup> grade in SY 2013/14, and she was unable to complete her homework or correctly and fully complete her classwork during SY 2012/13. The evidence further reveals that Student has received approximately 15 hours of service on her IEP since second grade, but she has made only minimal progress under those IEPs, and as a result, Student needs to be separated from her non-disabled peers for all academic instruction because she requires individualized attention and intensive specialized services. Nevertheless, on

DCPS developed an IEP for Student that required her to receive 15 hours per week of specialized instruction in general education, and only 5 hours per week of specialized instruction outside general education in addition to 120 minutes per month of behavioral support services. However, the evidence in this case proves that the single hour per day of pullout services Student is to receive under the June 2013 IEP is not enough for Student, who is a rising seventh grader with skills at the elementary level.

Based on the evidence outlined above, the hearing officer is persuaded that Student's

IEP was not reasonably calculated to provide Student with educational benefit at the time it was developed. Hence, the hearing officer concludes that Petitioner has met its burden of proof on this claim. *See Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999) (provision of a FAPE requires that a child receive "meaningful education benefit" and an IEP which provides only "more than a trivial educational benefit" does not meet that standard); *Alexis v. Bd of Educ. for Baltimore County Public Schools*, 286 F. Supp. 2d 551, (D.Md. 2003) (the instruction and special education services provided to a disabled child must provide more than trivial or *de minimis* benefits).

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). Hence, in light of DCPS's denial of a FAPE in this case, as well as the hearing officer's finding that the education offered by the requested private school is reasonably calculated to enable Student to receive educational benefit, the hearing officer will award Petitioner placement and funding, including transportation, for Student to attend the private school for SY

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<sup>18</sup> In reaching this decision, the hearing officer has taken into account the new SLD program DCPS intends to implement in SY 2013/14; however, given that the program was not yet up and running at the time of the due process hearing in this case, and given that the sole witness who testified in favor of the program had no real familiarity with Student, the hearing officer is not persuaded that the new SLD program will be able to provide Student with a FAPE.

