

**District of Columbia
Office of the State Superintendent of Education**

**Office of Dispute Resolution
810 First Street, N.E., Suite 2001
Washington, DC 20002**

OSSE
Office of Dispute Resolution
May 08, 2015

<p>STUDENT', By and through PARENTS,</p> <p style="text-align: center;"><i>Petitioners,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Date Issued: May 8, 2015</p> <p>Impartial Hearing Officer: Charles M. Carron</p>
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The Student is female, Current Age, and attends Current Grade at Private Special Education School, a private special education day school. The Student has been

determined to be eligible for special education and related services as a child with a disability, Other Health Impairment (“OHI”), under the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

Petitioners claim that Respondent has denied the Student a Free Appropriate Public Education (“FAPE”) by failing to offer her an appropriate educational program and placement for School Year (“SY”) 2014-2015, as described in more detail in Section IV *infra*.

Respondent asserts that it offered the Student an appropriate educational program and placement for SY 2014-2015.

II. SUBJECT MATTER JURISDICTION

This is a Due Process Complaint (“DPC”) proceeding pursuant to the IDEA. The Due Process Hearing (“DPH”) was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA’s implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the Hearing Officer Determination (“HOD”) pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Office of Dispute Resolution Due Process Hearing Standard Operating Procedures*.

III. PROCEDURAL HISTORY

The DPC was filed March 11, 2015 on behalf of the Student, who resides in the District of Columbia, by Petitioners, the Student’s parents, against Respondent, District of Columbia Public Schools (“DCPS”).

On March 12, 2015 the undersigned was appointed as the Impartial Hearing Officer.

On March 20, 2015 Respondent filed its timely Response, stating, *inter alia*, that Respondent has not denied the Student a FAPE.

A Resolution Meeting was held on March 23, 2015 but it failed to resolve the DPC. The statutory 30-day resolution period ended on April 10, 2015.

The 45-day timeline for this HOD started to run on April 11, 2015 and will conclude on May 25, 2015.

The undersigned held a Prehearing Conference (“PHC”) by telephone on April 1, 2015 at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by April 21, 2015 and that the DPH would be held on April 28 and 29, 2015. The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on April 1, 2015.

On April 21, 2015, Petitioners filed their five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 49 proposed exhibits numbered P-1 through P-49.

On April 21, 2015, Respondent filed its five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 24 proposed exhibits numbered R-1 through R-24.

No prehearing motions were filed by either party and the DPH was held on April 28, 2015 from 8:58 a.m. to 4:55 p.m. and on April 29, 2015 from 10:07 a.m. to 2:05 p.m. at the Office of Dispute Resolution, 810 First Street, NE, Room 2006, Washington, DC 20002. Petitioners elected for the hearing to be closed.

Petitioners participated in the DPH in person.

At the DPH, the following documentary exhibits were admitted into evidence without objection: Petitioners’ Exhibits P-1 through P-32, P34 through P-36, P-38, P-40, and P-43 through P-49; and Respondent’s Exhibits R-1 through R-24. Petitioners’ Exhibits P-33, P-37, P-39, P-41 and P-42 were admitted over Respondent’s objections for the reasons stated on the record at the DPH.

The following witnesses testified on behalf of Petitioners at the DPH:

1. Parent #2/Petitioner #2;
2. Educational Consultant, who was admitted, over Respondent's objection, as an expert in programming for and instruction of Learning Disabled and Other Health Impaired students;
3. Curriculum and Technology Coordinator, Private Special Education School ("Curriculum and Technology Coordinator"), who was admitted by stipulation of counsel as an expert in educational programming for and instruction of Learning Disabled and Other Health Impaired students;
4. Director of Speech and Language, Private Special Education School;
5. Former Head of Occupational Therapy, Private Special Education School, who was admitted by stipulation of counsel as an expert in occupational therapy; and
6. Clinical Psychologist, Private Special Education School, who was admitted, by stipulation of counsel, as an expert in psychology.

At the close of Petitioners' case, Respondent moved for a directed finding in favor of Respondent, which the undersigned denied for the reasons expressed on the record.

The following witnesses testified on behalf of Respondent at the DPH:²

1. Local Educational Agency ("LEA") Representative, Public School #1, who was admitted by stipulation of counsel as an expert in programming and instruction of Learning Disabled and Other Health Impaired students;
2. Special Education Coordinator ("SEC"), Public School #2; and

² For the reasons explained on the record at the DPH, Respondents' witnesses were limited to rebuttal testimony.

3. DCPS Occupational Therapist, who was admitted by stipulation of counsel as an expert in occupational therapy.³

The parties gave oral closing arguments and did not file written closing arguments or briefs; however, Petitioners' counsel provided lists of case citations.

IV. ISSUES

As discussed at the PHC and confirmed in the PHO, the following issues were presented for determination at the DPH:

(a) Did Respondent deny the Student a FAPE by failing to propose an appropriate Individualized Educational Program ("IEP") for her for School Year ("SY") 2014-2015 because the IEP (i) lacked measurable goals, (ii) lacked adequate baselines, (iii) inappropriately combined calculation and word problems in the mathematics goal, (iv) inappropriately combined goals for fluency and decoding in the reading goal, (v) inappropriately combined goals for organization and other executive functioning deficits, (vi) lacked the Occupational Therapy ("OT") goals in areas of need identified in Private Special Education School's OT evaluation, (vii) failed to provide for direct OT services, (viii) failed to provide for specialized instruction in small classes throughout the entire school day, and/or (ix) failed to program for the Student's needs as a "twice-exceptional"

³ DCPS Occupational Therapist credibly testified that the Student was capable of writing legibly and therefore did not need direct occupational therapy services to access that aspect of her education; that the Student's need to improve her trunk strength and control could be satisfied with compensatory strategies and devices in the classroom (*e.g.*, a cushion seat and a modified stool that supports her back), with consultation by an occupational therapist; and that the Student's executive functioning deficits could be successfully addressed by a social worker rather than an occupational therapist. However, all of this testimony exceeded the scope of rebuttal testimony and therefore has been disregarded.

student because Respondent had failed fully to evaluate the Student psychologically?

(b) Did Respondent deny the Student a FAPE by failing to propose an appropriate placement for her for SY 2014-2015 because she requires specialized instruction throughout the entire school day?

(c) Is Private Special Education School a proper placement for the Student?

Significantly, the issues in this case do *not* comprise assertions that the Student was denied a FAPE for any of the following reasons: (1) because she required all of her specialized instruction to be provided in the outside of general education setting, (2) because she should not have contact with non-disabled peers at school, (3) because she should be educated only with students who are as bright as she, (4) because she requires a low student-to-teacher ratio, (5) because she has anxiety and social-emotional problems that require behavioral support services from a social worker or psychologist, (6) because her anxiety would be triggered by being removed from a general education classroom for specialized instruction in the outside of general education setting, (7) because she has speech-language deficits that require services from a speech-language pathologist, or (8) because she should be educated in a small building. Many of Petitioners' exhibits, and much of Petitioners' witnesses' testimony addressed these concerns, which are beyond the scope of the instant case and therefore not addressed in this HOD.

V. RELIEF REQUESTED

Petitioners request the following relief: placement and funding of the Student at Private Special Education School for SY 2014-2015, with all related services and costs.⁴ DPC (Exhibit P-1) at 12.

VI. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VII. CREDIBILITY

Educational Consultant was referred to Petitioners by their counsel (and “others”) after all of the following events had occurred: the Student had attended Private Special Education School for SY 2013-2014, Petitioners had reenrolled her at Private Special Education School for SY 2014-2015, Petitioners had rejected Respondent’s public school placement, and Petitioners were seeking public funding for the private school placement. Educational Consultant was known to have a favorable opinion of Private Special Education School, testifying that she has known that school for 32 years, visits frequently, and has had a child there. Educational Consultant conducted her evaluation in

⁴ In closing argument, Petitioners’ counsel also requested prospective relief.

early September 2014 but did not produce a report until November 2014, and that report and her proposed changes to the Student's June 2014 IEP were not provided to Respondent until March 13, 2015, after the DPC had been filed herein. The circumstances of Petitioners retaining Educational Consultant, and the timing of her report and recommendations, suggest strongly to the undersigned that the purpose of Educational Consultant's evaluation was to support Petitioners' claim for tuition reimbursement for the Student's attendance at Private Special Education School, not to identify the Student's educational needs or to encourage Respondent to amend the Student's IEP. Moreover, in her report and testimony, Educational Consultant had nothing even slightly negative to say about Private Special Education School and she never identified any other school that she thought would be appropriate for the Student. The undersigned concludes that even if Petitioners thought they were obtaining an unbiased evaluation of the Student and unbiased recommendations for her educational placement, in reality it was a foregone conclusion that Educational Consultant would find Private Special Education School appropriate and public school inappropriate. For all of the above reasons, the undersigned has discounted the opinions of Educational Consultant expressed in her report and her testimony as being biased in favor of Private Special Education School.

The undersigned found all of the other witnesses to be credible.

VIII. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a female of Current Age. P-27-1.⁵
2. The Student resides in the District of Columbia. *Id.*
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with OHI based upon Attention Deficit/Hyperactivity Disorder (“ADHD”). P-14-4.

School Year 2010-2011

4. During SY 2010-2011, the Student attended Private General Education School. Testimony of Petitioner #2.

5. The Student’s teachers noticed that she was inattentive, emotional, had to excuse herself ten times per day to ground herself so that she could return to the classroom, and was not picking up reading. *Id.*

6. The Student’s teachers suggested that she may have ADHD and need medication. *Id.*

August 2011 Neuropsychological Evaluation

7. On August 1 and 5, 2011, a neuropsychological evaluation of the Student was conducted at Children’s National Medical Center. P-8-1.

8. The Student was found to struggle significantly with inattention and inhibition and broader executive functions, specifically in the area of self-regulation. P-8-2.

⁵ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

9. The Student was diagnosed with ADHD Combined Subtype, and Anxiety Disorder. *Id.*

School Year 2011-2012

10. During SY 2011-2012 the Student attended Private General Education School. P-8-3.

11. The Student worked with a reading specialist up to twice a week. R-8-3, testimony of Petitioner #2.

June 2012 Reading Evaluation

12. On June 27, 2012, the Student's reading skills were evaluated at the Metropolitan Speech Pathology Group ("Metropolitan"). P-2.

13. The Student had not taken her medication for ADHD that day. P-2-2.

14. The Student was diagnosed with a moderate to severe Reading Disorder, "characterized by deficits in word reading efficiency, a depressed reading rate and accuracy at the connected text level, and naming speed weaknesses." P-2-5.

15. Metropolitan recommended therapy sessions comprising the "Phono-Graphix" program and the "Read Naturally" program. *Id.*

16. Metropolitan recommended that at school "it would be helpful for directions to be read aloud." P-2-6.

17. Metropolitan did not recommend specialized instruction in reading at school. P-2, *passim.*

Summer 2012 Reading Therapy

18. From June 27 through August 2012, Metropolitan provided the Student five 60-minute individual treatment sessions, which she enjoyed and she made good progress.

P-2-9.

School Year 2012-2013

19. During SY 2012-2013 the Student attended Private General Education School.

P-8-3.

20. The Student “did consistently not well.” Testimony of Petitioner #2.

21. With regard to social-emotional behavior, the Student “held it together” at school, but fell apart when she came home. *Id.*

December 2012 Reading Evaluation

22. During December 2012, Metropolitan reevaluated the Student’s reading ability. P-3.

23. By then, she had received 25 60-minute individual treatment sessions. P-3-1.

24. The Student had made significant progress, improving her reading accuracy and fluency. P-3-2.

25. The Student’s reading skills that were significantly below average in June 2012 had improved to the low average, average, and above average range. P-3-4.

26. The Student’s comprehension was better when she was given additional time and/or permitted to revisit the text she had read; accordingly, Metropolitan recommended that she be given additional time when completing reading assignments and tests at

school and be allowed to have something in her mouth to chew or suck on or something small to manipulate in her hand. *Id.*

27. Metropolitan recommended that the Student “continue reading and writing intervention to continue to strengthen her abilities and self-confidence.” *Id.*

28. Metropolitan did not recommend specialized instruction in reading at school. P-3, *passim.*

January 11, 2013 “Admissions Assessment”

29. On January 11, 2013, Educational Assessment Associates (“EAA”) conducted an “Admissions Assessment” of the Student. P-4.

30. On the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”) the Student’s Full Scale rating was Superior, with a score of 127, which is in the 96th percentile. P-4-1.

31. EAA found the Student to be a very bright child functioning overall in the Superior range of cognitive ability and the Very Superior range in the Verbal section. P-4-6.

32. EAA found the Student to have many intellectual strengths and a strong working memory. *Id.*

Petitioner #2’s January 2013 Meeting With the Principal of Public School #1

33. In January 2013, Petitioner #2 met with the principal of Public School #1, the

Student's neighborhood school, and inquired about special education eligibility and services. Testimony of Petitioner #2.

34. Public School #1's principal informed Petitioner #2 that she did not need to begin the special education eligibility or IEP process through Respondent because Public School #1 had great teachers and could provide all the services the Student needed. *Id.*

April 25, 2013 Referral for Initial Evaluation

35. Notwithstanding the advice of the principal of Public School #1, Petitioner #2 began the eligibility process on April 25, 2013 by filing a referral for an initial evaluation of the Student to determine whether she was a child with a disability. R-6-1, R-1-1.

June 24, 2013 Metropolitan Reading Progress and Discharge Report

36. Metropolitan issued a Progress and Discharge Report dated June 24, 2013, noting that since the December 2012 progress report she had received 26 60-minute individual treatment sessions. P-5.

37. The Student had made "a tremendous amount of progress across all treatment areas." P-5-2.

38. In one year, the Student's sight word efficiency had improved from poor to average; her phonemic decoding efficiency had improved from the 25th percentile to the 30th percentile, her reading rate had increased from poor to low average, her accuracy and fluency had increased from poor to average, and her comprehension had increased from poor to high average on an untimed test and from below average to above average on a

timed test.⁶ *Id.*

39. The Student was currently successful in the classroom. P-5-4.

40. Based upon the Student's progress, Petitioner #2 decided to discontinue reading therapy. *Id.*

July 11, 2013 Eligibility Meeting

41. On July 11, 2013 Respondent convened an eligibility meeting at which Petitioner #2 expressed that her greatest concerns with the Student's academic performance were her frustration and impulsivity. P-8-4.

42. The Student had been diagnosed with dyslexia, ADHD and anxiety. R-8-2.

43. Petitioner #2 reported that the Student "had a hard time keeping up with her peers due to her attention and being able to sit still," that the Student's anxiety prohibited her from full attention to learning, that the Student had sensory regulation concerns (in particular being distracted by environmental lights and sounds), and that the Student had impulsive behaviors. R-8-3.

44. Petitioner #2 described the Student's continued academic struggles despite a small class size⁷, 2:14 teacher-student ratio⁸, individualized attention, outside therapies, and medication. *Id.*, P-8-4.

⁶ According to Metropolitan, the different results on these tests of reading comprehension indicated that the Student still benefited from having more time to process what she read. *Id.*

⁷ The fact that the Student experienced problems in a small class does not mean that she necessarily would experience greater problems in a large class.

⁸ Teacher to student ratio is not an issue in the instant case. *See*, Section IV, *supra*.

45. The Student already had been accepted at Private Special Education School for SY 2013-2014. R-8-3.

46. The participants in the meeting determined that more information was required to determine the Student's eligibility and decided to conduct psychological and OT assessments. *Id.*, P-6-1.

47. The participants in the meeting agreed that there were no concerns with the Student's communication and language. R-8-3.

August 1, 2013 OT Assessment

48. An OT assessment, which was called an OT Screening, was conducted on August 1, 2013. P-7-1.

49. Petitioner #2 informed the assessor that the Student had difficulty with attending to classroom instruction and difficulty with overall sensory regulation abilities during classroom activities. P-7-1 and -2.

50. However, during the OT Screening, the Student was able independently to perform tasks such as maneuvering through cluttered hallways and she tolerated noises without observable over-stimulated or over-reactive responses. P-7-2.

51. The sensory processing questionnaire completed by Petitioner #2 indicated that the Student had "typical" sensory processing abilities in all areas. *Id.*

52. Because the OT Screening was performed during the summer, no teacher input was available. *Id.*

53. The OT Screening concluded that because the Student demonstrated adequate and functional fine motor, sensory motor, visual motor, and handwriting

abilities, there was no need to conduct a full OT assessment because the Student could perform school based tasks adequately and functionally. P-7-3.

August 23, 2013 Review of Independent Educational Evaluation

54. On August 23, 2013, DCPS Psychologist #1 completed a Review of Independent Educational Evaluation (“IEE”), reviewing previous evaluations. P-8.

55. DCPS Psychologist #1 administered additional assessments, *i.e.*, the Structured Developmental History (“SDH”), Behavior Assessment System for Children, Second Edition (“BASC-2”); the Behavior Rating Inventory of Executive Function (“BRIEF”), Parent Form; the Conners 3-Parent; the Comprehensive Test of Phonological Processing (“CTOPP”); and the Woodcock Johnson III Tests of Achievement (“WJ-III ACH”). P-8-3.

56. DCPS Psychologist #1 reviewed interview forms that had been completed by the Student’s teachers at Private General Education School, which indicated that the Student was functioning below average in all areas of reading and written expression despite small group and one-on-one instruction, a modified work load, frequent breaks, and nightly fluency reading practice. P-8-4.

57. DCPS Psychologist #1 interviewed the Student and Petitioner #2. *Id.*

58. DCPS Psychologist #1 noted that the Student was cooperative during testing, but had variable levels of attention and activity, frequently changed seated positions, moved her feet, twisted in her seat, and played with her fingernails. *Id.*

59. The Student exhibited frustration and demonstrated difficulty writing her responses to writing samples on the proper lines. *Id.*

60. The Student made numerous spelling errors. *Id.*
61. The Student scored in the Average range for Phonological Awareness, which is the understanding of words and their smaller sound components. P-8-5.
62. The Student scored in the Superior range for Phonological Memory, which is the ability to keep auditory information briefly in mind in order to create an output. *Id.*
63. The Student scored in the Below Average range for Rapid Naming, which measures the efficiency with which an individual can retrieve phonological information from long-term memory, which is associated with the ability to read fluently. P-8-6.
64. The Student scored in the average range on academic testing in all subject areas “with little or no scatter among subtests.” P-8-6, -7 and -9.
65. The Student’s scores on behavior rating scales strongly indicated ADHD. P-8-9 and -10.
66. DCPS Psychologist #1 opined that the Student did not appear to demonstrate a Specific Learning Disability (“SLD”) because her results on the WJ-III ACH did not demonstrate a pattern of strengths and weaknesses among her cognitive and achievement profiles. P-8-11.
67. Given the Student’s reported difficulties with sustained attention, focus, and maintaining appropriate levels of physical activity, DCPS Psychologist #1 concluded that the Student may have difficulties expressing herself in writing, completing timed assignments, and grasping new academic concepts the first time. P-8-9.
68. DCPS Psychologist #1 recommended multiple modalities of presentation, multiple exposures to grasp new information, positive feedback and reinforcement, extra response time, and extra practice of basic math facts. P-8-9, -12 and -13.

The Student's Matriculation at Private Special Education School

69. Petitioners unilaterally enrolled the Student at Private Special Education School for SY 2013-2014. Testimony of Petitioner #2.

70. Private Special Education School is a private, full-time, special education school for children with learning differences.⁹ P-21-1.

September 9, 2013 Eligibility Meeting

71. On September 9, 2013, Respondent convened an eligibility meeting. P-9-1.

72. Respondent issued an Analysis of Existing Data, summarizing of information Respondent had reviewed. R-1.

73. Petitioners requested additional observations of the Student and a teacher interview at Private Special Education School prior to the eligibility determination. R-8-4 and -5.

74. Petitioner #2 signed a Consent for Initial Evaluation/Reevaluation. R-2-1.

75. The parties agreed to reconvene on October 25, 2013. R-7-2.

September 25, 2013 Classroom Observation

76. On September 25, 2013, DCPS Psychologist #1 observed the Student in her classroom at Private Special Education School. P-12-3.

⁹ Educational Consultant testified that Private Special Education School is for "bright children" with various educational disabilities. However, Curriculum and Technology Coordinator, Private Special Education School, testified that the large majority of their students are at the "low end of average" intelligence. Petitioner #2 testified that the Student requires an environment with "smart" peers. Thus, Petitioner #2 may have been misinformed as to the intelligence level of the Student's peers at Private Special Education School. Inasmuch as the intelligence of the Student's peers is not an issue in the instant case (*see*, Section IV *supra*), these discrepancies are not material.

77. The Student “appeared to be preoccupied with picking at her arm,” left the classroom, and returned with a Band-Aid on her arm. *Id.*

78. The Student appeared to listen and follow teacher directions. *Id.*

79. The Student appeared fidgety, switched from seated to standing positions, and leaned against her chair several times. *Id.*

80. At one point the Student had her head down on the table and picked at her arm and fingernails; however, she was able to answer questions. P-12-4.

October 18, 2013 OT Evaluation

81. On October 18, 2013, Private Special Education School conducted an OT evaluation of the Student. P-10.

82. The Student’s teacher completed a questionnaire indicating that the Student demonstrated sensory processing issues in the classroom; that she was overly sensitive to noise; that she frequently sought out movement (fidgeting, swinging, jumping, spinning); that she demonstrated issues with organization, attention, and social/emotional skills; that she often had difficulties with changes in routine; and that she frustrated easily in the classroom. P-10-2.

83. The Student demonstrated difficulty with auditory processing, reacting negatively to loud or unexpected noises and having difficulty with listening in general. P-10-4.

84. The Student demonstrated difficulty with vestibular system (movement) processing, as her “constant seeking out of all kinds of movement interferes with completing her daily routines.” *Id.*

85. The Student demonstrated low strength and endurance, including postural stability in her trunk muscles. P-10-5.

86. The Student demonstrated low ability to self-regulate emotional/social responses. *Id.*

87. The Student demonstrated difficulty with handwriting and fatigued quickly with writing activities. P-10-7.

88. The Student demonstrated ocular motor difficulties. P-10-8.

89. The evaluator recommended weekly OT sessions with regular consultation with teachers and parents; an optometric assessment; an individualized “sensory diet” including the use of sensory-motor modalities and environmental modifications to promote attention, appropriate levels of alertness and availability for learning; and a multi-sensory handwriting program coordinated with the occupational therapist, school and parents. P-10-10.

October 21, 2013 Addendum to Review of Independent Educational Evaluation

90. On October 21, 2013, DCPS Psychologist #1 issued an Addendum to Review of Independent Educational Evaluation, to incorporate the additional information from a telephone interview of the Head of Private General Education School on September 20, 2013; a classroom observation of the Student on September 28, 2013; a telephone interview of the Student’s teacher at Private Special Education School on October 3, 2013; a BRIEF Teacher Form completed by the Student’s teacher at Private Special Education School; and a Conners-3 Teacher Form completed by the Student’s Teacher at Private Special Education School. P-11-1, -2 and -4.

91. The head of Private General Education School reported that the Student had difficulties with reading, demonstrated anxiety, became overstimulated by peers and noise, became emotional in school, was frequently tardy, appeared exhausted, and went home sick frequently. P-12-2.

92. The Student's teacher at Private Special Education School expressed concern with the Student's organization of language ("mainly having many ideas and not being able to get them down on paper"). P-12-2 and -3.

93. The Student's teacher at Private Special Education School stated that the Student may appear not to be looking at the teacher or paying attention but was listening. P-12-3.

94. The Student's teacher at Private Special Education School stated that she did not see distractibility and over-activity as affecting the Student. *Id.*

95. The Student's teacher at Private Special Education School stated that the Student had difficulty socializing with other children. *Id.*

96. The BRIEF report completed by the Student's teacher at Private Special Education School identified elevated concerns for possible areas of executive dysfunction including the Global Executive Composite (a summary score of executive functioning); the "Shift" and "Emotional Control" aspects of the Behavioral Regulation Index (which assesses the ability to "shift gears" cognitively and to apply control to emotions and behaviors); and the "Monitor" aspect of the Metacognition Index which assesses task-oriented and self-monitoring behaviors.. P-12-4 and -5.

97. The Conners-3 report completed by the Student's teacher at Private Special Education School identified Very Elevated and Elevated concerns for Hyperactivity/

Impulsivity, Inattention, and Defiance/Aggression, all indicating that the Student demonstrated poor concentration and attention, was overly active/restless/impulsive, and may be argumentative or have poor control of anger. P-12-5 and -6.

98. DCPS Psychologist #1 concluded that the Student demonstrated behaviors typically seen in children diagnosed with ADHD. P-12-7.

99. DCPS Psychologist #1 concluded that the Student did not demonstrate a pattern of strengths and weaknesses among her cognitive and achievement profiles that would indicate SLD. P-12-8.

October 23, 2013 OT Assessment Report Addendum

100. On October 23, 2013, a “Report Addendum” to the August 5, 2013 OT screening report was prepared, apparently by a DCPS occupational therapist, to summarize the results of “Sensory Processing Measures” questionnaires that had been completed by one of the Student’s teachers at Private General Education School and one of her teachers at Private Special Education School. P-13-1.

101. Both teachers reported that the Student frequently performed inconsistently on daily tasks and had difficulty with problem solving effectively. P-13-2.

102. Overall, the Student scored in the “Typical” range, meaning that she did not have significant difficulty receiving sensory information from her environment, processing it and producing an appropriate response. *Id.*

103. The Student was able effectively to interpret and process sensory stimuli in the areas of visual, hearing and touch awareness. *Id.*

104. The Student's *relative* weakness was in the sensory processing area of planning and ideas. *Id.*

October 25, 2013 Eligibility Meeting

105. Respondent reconvened the eligibility meeting on October 25, 2013. P-14-1.

106. The team reviewed the evaluations to date, work samples, report cards, teacher input and parent input. *Id.*

107. The team, including Petitioners, agreed that the Student met the criteria for OHI. *Id.*

108. Petitioners stated that the Student also should be classified as having an SLD but Respondent's representatives rejected the SLD classification. *Id.*, R-8-6 and -9. The Student's disability classification is not an issue in this case. *See, Section IV, supra.*

October 28, 2013 Individual Learning Plan at Private Special Education School

109. On October 28, 2013, Private Special Education School prepared an Individual Learning Plan ("ILP") for the Student, prescribing 35 hours per week of specialized instruction, with no individual speech/language or OT therapy.¹⁰

P-15.

110. The ILP specified goals for Reading (P-15-2 and -3), Written Language (P-15-4 and -5), and Math (P-15-6 and -7).

¹⁰ Private Special Education School provides speech/language and OT services as "integrated" services even when a student does not have individual therapy sessions, meaning that a related service provider comes into the classroom once a week to assist students and provides the classroom teacher with consultation. Testimony of Former Head of Occupational Therapy, Private Special Education School. A public school may provide related services with the same effect as "integrated" services. *Id.*

111. The ILP identified the Student's needs in the area of Academic Behavior/ Executive Functioning. P-15-8.

October 30, 2013 DPC and December 2013 Settlement

112. On October 30, 2013, Petitioners filed a DPC challenging Respondent's failure to develop an IEP for the Student. P-16.

113. On December 24, 2013, Petitioners' October 30, 2013 DPC was withdrawn due to settlement. P-17.

114. Under the settlement of the October 30, 2013 DPC, Respondent agreed to conduct additional evaluations and to convene a meeting on or before June 19, 2014 to review the evaluations, to review and revise the Student's IEP if determined appropriate by the IEP Team, and to determine and issue a Location of Services ("LOS") for the Student (for SY 2014-2015). R-9-2.

January 2014 Progress Report

115. The Student's January 2014 Progress Report from Private Special Education School indicated that she was making "notable progress" in reading and math and had made substantial progress in spelling, but still had poor ability to recall, retrieve and express information and had a hard time explaining how she arrived at answers to math problems. P-19-1 through -4.

116. The Student continued to show discomfort if involved in peer conflicts and continued to hold grudges, but those instances had "decreased greatly." P-19-4.

117. The Student was a leader among her classmates and well respected by them, although she could become defensive if a peer disagreed with her. P-19-4 and 5.

118. The Student's anxiety was less frequent than at the beginning of the year. P-19-5.

119. The Student still could become overwhelmed, demonstrated by restlessness and non-productive movement. *Id.*

March 7, 2014 IEP at Private Special Education School

120. On March 7, 2014, Private Special Education School developed an IEP for the Student, reducing the Student's hours of specialized instruction to 34.25 per week and adding 0.75 hour per week of individual OT. P-20-1.

121. The IEP specified goals for Reading (P-20-6 and -7), Written Language (P-20-8), Math (P-20-10), Academic Behavior/Executive Functioning (P-20-11 and -12), OT (P-20-13 and -14), and Oral Language (P-20-14).

March 21, 2014 Observation of the Student at Private Special Education School

122. On March 21, 2014, a DCPS social worker observed the Student at Private Special Education School. P-22-5.

123. The Student was observed fidgeting with a pencil during a transition when she should have been getting in line, and she was observed writing on a peer's paper at lunch without permission. P-22-5 and -6.

124. In the classroom, the Student participated in discussion, gave appropriate feedback, and she was engaged, participatory and compliant. P-22-6.

125. The Student's only inappropriate behavior was when she "violated the space of her peer." *Id.*

March 21, 2014 OT Assessment

126. On March 21, 2014, Respondent conducted an OT assessment of the Student, with a report issued on April 29, 2014. P-24.

127. The Student's teacher reported that she had problems putting ideas on paper and difficulty spelling, and that her handwriting was legible but letters were inconsistently formed. P-24-3.

128. Petitioner #2 reported that the Student was easily overwhelmed, sensitive to noise, withdrew from over-stimulating environments, needed to rest after social events, did not sustain interest in extracurricular activities, had difficulty with transitions and family outings, and complained of aches and pains as anticipated events approached. *Id.*

129. The Student's occupational therapist at Private Special Education School reported that she participated in activities mostly independently. *Id.*

130. The evaluator interviewed and observed the Student, noting that her eye movements were jerky, her focus shifted, she was distracted by sounds outside the testing room, and she swung her feet back and forth. P-24-4.

131. On testing, the Student demonstrated decreased trunk and upper extremity muscle tone, poor motor planning and poor postural control. *Id.*

132. The Student's pencil grip was immature, she complained of hand discomfort when writing, and her copying speed was slower than grade-level expectations. P-24-7.

133. The evaluator concluded that the Student's delays in neuromotor skill foundation (muscle tone, muscle planning, postural-ocular control) and ineffective responses to sensory experiences adversely "impacted" her ability to engage in functional tasks at varying degrees at home and at school. *Id.*

April 2014 Psychological Evaluation

134. During April 2014, DCPS Psychologist #2 conducted a "Psychological Triennial Reevaluation" of the Student, including observations of the Student on April 1 and 10, 2014 and an interview of Petitioner #2 on April 28, 2014. P-23-1 and -6.

135. Efforts to interview the Student's teacher were unsuccessful, but Private Special Education School provided a progress report. P-23-6.

136. DCPS Psychologist #2 issued a report of the evaluation on April 28, 2014. P-23-1.

137. DCPS Psychologist #2 observed the Student twirling around in her chair, extending her leg, fidgeting in her seat, twirling a pencil, disengaged, exhibiting a sad affect, getting up to touch the railing behind her, and rarely looking at the teacher. P-23-4 and -5.

138. When standing in the hallway waiting for an instructor, the Student was observed to be disengaged and appeared angered. P-23-5.

139. The Student's teacher reported to Psychologist #2 that the Student worked best with "2 to 1" instruction. P-23-4.

140. The Student frequently isolated herself from peers. P-23-5.

141. DCPS Psychologist #2 concluded that although the Student was progressing academically, “executive functioning, attention and hyperactivity, along with mood regulation difficulties have impacted [her] ability to fully access the curriculum.” P-23-7.

142. DCPS Psychologist #2 noted that her observations of the Student were consistent with “teacher and parent reports of maladaptive behaviors, and overall behaviors consistent with ADHD symptoms.” *Id.*

143. DCPS Psychologist #2 opined that the Student remained eligible for special education under the classification OHI due to ADHD. *Id.*

144. DCPS Psychologist #2 stated that due to the lack of Index scores from the January 11, 2013 psychological evaluation it was “difficult to determine if any discrepancy exists between [the Student’s] cognitive and academic scores” that would form the basis for a finding of SLD. *Id.*

145. DCPS Psychologist #2 made a number of recommendations including “small group setting.” *Id.*

April 28, 2014 Social Work Assessment Report

146. On April 28, 2014, the DCPS social worker who had observed the Student on March 21, 2014, issued a Social Work Assessment Report. P-22.

147. Petitioner #2 had reported to the evaluator that the Student was “maturing and experiencing a greater sense of happiness and success with her educational placement which is believed to have significantly reduced behavior symptoms.” P-22-2 and -3.

148. The Student no longer engaged in self-harming behaviors. P-22-3.

149. The Student no longer was on medication. P-22-5.

150. The evaluator interviewed the Student's teacher at Private Special Education School who expressed no concerns about her level of social-emotional or behavioral functioning. *Id.*

151. The evaluator interviewed the Student who stated that she liked her current school and had no issues or concerns with attending there. *Id.*

152. The evaluator concluded that the Student "has been challenged with anxiety and emotional distress throughout her life which is compounded when she is academically frustrated. When overly frustrated, [the Student's] history is remarkable for physical/verbal aggression, impulsivity and emotional dysregulation." P-22-7.

153. The evaluator concluded that the Student required significant academic and emotional support "to facilitate her successfully accessing her academic program." *Id.*

154. The evaluator recommended that the Student's Multidisciplinary Team ("MDT") reconvene to review current evaluations and discuss "educational implications and interventions," and that school staff should consider maintaining contact with [the Student's] community-based mental health providers and her parents. *Id.*

June 2014 Private Special Education School Progress Report

155. The Student's June 2014 Progress Report from Private Special Education School indicated that she was demonstrating "good effort and measurable progress on all of her educational goals," but she still was "working toward demonstrating independence in the classroom, staying on task, confidence, increased academic performance, and mastery of math, reading, written expression, executive functioning, and social skills." P-25-1.

156. The progress report also noted that the Student continued to struggle with “generalization of new skills across settings.” *Id.*

157. In reading, the Student continued to struggle with decoding. *Id.*

158. In writing, the Student continued to demonstrate weak organization and ability to recall, retrieve and express information. P-25-1 and -2.

159. In math, the Student continued to struggle to explain her answers. P-25-2.

160. With regard to social-emotional functioning, the Student continued to have difficulty with social problem solving although her avoidance of difficult or uninteresting activities had decreased. *Id.*

161. The Student’s anxiety and physical nervousness had decreased although she still sometimes became overwhelmed as exhibited by restlessness and non-productive movement. *Id.*

June 9, 2014 IEP Team Meeting

162. Respondent convened the Student’s IEP Team on June 9, 2014. P-27-1.

163. Petitioner #2 and her representatives were permitted to participate, ask questions, and make proposals. Testimony of Petitioner #2.

164. The IEP Team developed an IEP for the Student. P-27.

165. The IEP contained the following Mathematics goals and baselines:

Annual Goal 1: [The Student] will demonstrate an understanding of numbers up to 6 digits by reading, writing, comparing, and rounding them, in 8 out of 10 trials.

Baseline: [The Student] demonstrates number sense to the thousands place.

Annual Goal 2: When given graph paper, part/whole boxes, or other appropriate organizational tools, [the Student] will use the four operations with whole numbers to solve addition and subtraction problems with numbers up to 4 digits, to multiply 3-digit by 2-digit numbers, and to divide 3-digit by 2-digit numbers; choose an[d] execute the appropriate operation to solve one- and two-step word problems, in 8 out of 10 trials.

Baseline: [The Student] needs continued practiced (sic practice) to correctly line up 3-digit numbers when solving problems. Her fact fluency is improving.

Annual Goal 3: Given manipulatives, [the Student] will demonstrate an understanding of fractions by naming, labeling and comparing fractions, in 8 out of 10 trials.

Baseline: [None]

Annual Goal 4: [The Student] will commit to memory and fluently recall addition/subtraction and multiplication/division math facts for numbers 0-12, in 8 out of 10 trials.

Baseline: [The Student] continues to build addition and subtraction math fact fluency.

Annual Goal 5: [The Student] will learn, comprehend, and use grade-level math vocabulary necessary for comprehension of directions, solving of problems, and explanation of her work, in 8 out of 10 trials.

Baseline: [The Student] has difficulty learning and using math vocabulary.

P-27-4 and -5.

166. The IEP contained the following Reading goals and baselines:

Annual Goal 1: Given on-level text, [the Student] will read accurately, fluently, and with comprehension in 8 out of 10 trials.

Baseline: [The Student's] reading level is not known.

Annual Goal 2: [The Student] will demonstrate one year's growth in her ability to recognize and apply sound/letter associations in words; to recognize spelling patterns; to apply phonics and word analysis skills in decoding words; and to increase efficient reading of common sight words, with 85% accuracy reading on-level text.

Baseline: [The Student] decodes words containing vowel digraphs, words with open and closed syllables, and phonetically regular multisyllabic words.

Annual Goal 3: Given on-level fiction and non-fiction text, [the Student] will ask and answer questions to demonstrate understanding of material read, referring explicitly to the text as a basis for her answers, with 85% accuracy.

Baseline: [The Student] is encouraged to formulate and answer questions before, during, and after reading to strengthen comprehension.

Annual Goal 4: Given on-level text, [the Student] will determine the main idea of a text and explain how it is supported by key details, summarize the text.

Baseline: With support, [the Student] uses graphic organizers to identify key ideas and connect them to determine the main idea.

P-27-6 and -7.

167. The IEP contained the following Written Expression goals and baselines:

Annual Goal 1: Given a graphic organizer, a clear rubric, an editing checklist, and minimal teacher support, [the Student] will plan, revise, and edit written pieces to improve the overall product, in 8 out of 10 opportunities.

Baseline: [The Student] uses graphics (sic graphic) organizers effectively and independently, but struggles to transfer ideas into coherent paragraphs. With cuing from an adult, she revises word choices and edits for proper capitalization and punctuation.

Annual Goal 2: [The Student] will demonstrate one year's growth, based on current baseline information, in her application of phonics knowledge and common spelling patterns to spell on-level words correctly, in 8 out of 10 trials.

Baseline: [The Student] correctly uses suffixes (ed, es, s, ing) and is improving her ability to spell multisyllabic words containing long and short vowels. She has learned to "tap" sounds within words to spell them more accurately, but does not use this strategy independently.

Annual Goal 3: Given graphic organizers and minimal teacher support, [the Student] will write narrative pieces to describe real or imagined events in a logical order with sufficient detail, to earn a score of 3/4 on a teacher-created rubric.

Baseline: [The Student] has many ideas to share, but has difficulty sequencing and prioritizing those ideas. She is working to include more descriptive words when writing sentences.

Annual Goal 4: Given graphic organizers, on-level resources, and minimal teacher support, [the Student] will conduct short research projects that build knowledge about a topic then present that information clearly in an appropriate format, to earn a score of 3/4 on a teacher-created rubric.

P-27-7 through -9.

168. The IEP contained the following Emotional, Social and Behavioral

Development goals and baselines:

Annual Goal 1: Through the use of visual/verbal schedules, therapeutic games and role-plays, [the Student] will work on strategies ... (raising her hand, using whole body listening, seeking help from adults) to increase her attention, improve her organizational skills before becoming overwhelmed or frustrated with 4 out of 5 trials (sic trials).

Baseline: Reports indicate that [the Student] becomes easily frustrated and distracted during academic instruction.

Annual Goal 2: Through the use of modeling, therapeutic games and role-plays, [the Student] will work on increasing her overall self-esteem and peer relationships with the use of feeling words (happy, sad, angry, frustrated, mad) to express to others how she is feeling and improve her relationships with others with 4 out of 5 trials.

Baseline: According to documents reviewed [the Student] has difficulties with peer relationships across all environments.

P-27-10.

169. The IEP contained the following Motor Skills/Physical Development goals and baselines:

Annual Goal 1: [The Student] will demonstrate an improved ability to regulate her level of alertness and stay on task, by using predetermined

sensory motor strategies (hand fidgets, movement breaks, chair push ups, desk push-ups, pushing against wall, drinking liquids using straw, etc[.]) with minimal assistance 80% of the time.

Baseline: [B]ased on the [Private Special Education School] report [the Student] has difficulty in maintaining her alertness in classroom and engages in sensory seeking behavior to regulate herself in classroom.

Annual Goal 2: Given visual aids (highlighting, bold lines, guided notes, alphabet strip) [the Student] will be able to write anchored letters, with correct letter formation consistently 80% of [the] time.

P-27-11.

170. The IEP provided 21 hours per week of specialized instruction in the outside of general education setting—six hours in math, eight hours in reading, and seven hours in written expression; 120 minutes per month of direct behavioral support services; 30 minutes per month of behavioral support consultation services; and 60 minutes per month of OT consultation. P-27-12.

171. It follows that the Student would receive the remainder of her instruction, including “specials,” in the general education setting and have contact with non-disabled peers.

172. Petitioner #2 stated that she was grateful that Respondent recognized that the Student needed services, but the services offered were not enough. Testimony of Petitioner #2.

173. Petitioner #2 stated that she was worried about the Student’s social life and sense of emotional security if she were “pulled out” of her class frequently for specialized instruction, because she did not like to “stand out.” *Id.*

174. There is no evidence in the record that Petitioners objected to the lack of direct OT services in the proposed IEP.

175. Former Head of Occupational Therapy, Private Special Education School testified that the Motor Skills/Physical Development section of the IEP failed to address the Student's needs in executive functioning, sensory problems experienced in the classroom, planning, and initiating. Testimony of Former Head of Occupational Therapy, Private Special Education School.

176. To the contrary, Written Expression Goal 1 addressed planning (Finding of Fact 167); Emotional, Social and Behavioral Development Goal 1 addressed organizational skills (Finding of Fact 168); and various goals addressed the use of graphic organizers and visual aids (Findings of Fact 167-169).

177. Former Head of Occupational Therapy, Private Special Education School acknowledged on cross-examination that organization and planning were addressed in the June 9, 2014 IEP, albeit in sections other than Motor Skills/Physical Development. Testimony of Former Head of Occupational Therapy, Private Special Education School.

178. According to Former Head of Occupational Therapy, Private Special Education School, the student requires direct OT services because she is only beginning to learn keyboarding. *Id.* However, the Student was not learning keyboarding as of June 2014 so that need was not known by the IEP Team at that time. *Id.*

179. At the June 9, 2014 IEP Team meeting, Petitioners did not present any information about the Student's handwriting or posture. Testimony of DCPS Occupational Therapist.

180. There is no evidence in the record that at the June 9, 2014 IEP Team

meeting, Petitioners raised any concerns about the goals in the proposed IEP not being measurable or lacking adequate baselines.

181. There is no evidence in the record that at the June 9, 2014 IEP Team meeting, Petitioners raised any concern that the proposed IEP combined calculation and word problems in one mathematics goal.

182. There is no evidence in the record that at the June 9, 2014 IEP Team meeting, Petitioners raised any concern that the reading goal in the proposed IEP contained too many skills.

183. There is no evidence in the record that at the June 9, 2014 IEP Team meeting, Petitioners raised any concern that the IEP lacked a reading goal for learning to compare and contrast text and answer questions about the text.

184. There is no evidence in the record that at the June 9, 2014 IEP Team meeting, Petitioners raised any concern that the proposed IEP combined organization and other executive functioning goals.

185. There is no evidence in the record that at the June 9, 2014 IEP Team meeting, Petitioners raised any concern that the OT goals in the proposed IEP did not include all areas of need identified in the OT evaluation by Private Special Education School.

186. At the June 9, 2014 IEP Team meeting, Petitioners did not raise any concern about the number of hours of specialized instruction in any subject. Testimony of Petitioner #2.

187. At the June 9, 2014 IEP Team meeting, Petitioners did not state that they were rejecting the proposed IEP. *Id.*

188. At the June 9, 2014 IEP Team meeting, although they already had paid a \$1,500.00 deposit to Private Special Education School for SY 2014-2015, Petitioners did not state that they intended to place the Student at Private Special Education School or any other private school for SY 2014-2015, or that they would seek public funding for a private school placement. *Id.*

June 12, 2014 Prior Written Notice

189. On June 12, 2014, Respondent sent Petitioner #2 a Prior Written Notice (“PWN”) informing her that Respondent proposed to provide the Student with the special education services set forth in the June 9, 2014 IEP. R-16-1.

190. There is no evidence in the record that Petitioners objected to the PWN prior to August 11, 2014.

June 26, 2014 Request for Consent

191. On June 26, 2014, Respondent sent Petitioners a form entitled “Consent for Initial Provision of Special Education and Related Services,” requesting their consent for Respondent to provide the services described in the Student’s IEP. R-17-1.

192. The form had boxes for Petitioners to check indicating that they consented or did not consent. *Id.*

193. There is no evidence in the record that Petitioners executed the form, either consenting or not consenting.

June 2014 Private Special Education School Final Report

194. In June 2014, Private Special Education School issued a Final Report for SY 2013-2014. P-28.

195. The Student had made marked progress in reading (P-28-6) although her decoding remained almost one grade below her then-current grade (P-28-2).

196. The Student had made steady progress in written language although she continued to make errors in capitalization and punctuation and mixing upper and lower case letters. P-28-11.

197. The Student had made progress in math, although she still had difficulty maintaining attention; her application of strategies was weak and she had difficulty determining when to apply each most efficiently; and she rushed to finish her work leading to errors. P-28-23 and -24.

198. The Student's ability to compromise and social interactions improved although she continued to have difficulty recognizing how her behavior affected others "especially when she felt she had been wronged in some way." P-28-25.

199. According to the Final Report, the Student responded positively to the high structure and predictable nature of the program. P-28-25.

200. The Student excelled in "Club Discovery," described as a cross-curricular, multi-sensory exploration of Social Studies, Science and Art. P-28-26.

201. The Student also excelled in Science, although she sometimes was distracted by her peers and had to be redirected. P-28-27.

202. The Student also excelled in Art. P-28-28.

203. In Physical Education, the Student earned all “4”s (“Is an area of relative strength for this student”). P-28-29.

204. In Social Development, the Student earned all “E”s (“Excellent”). *Id.*

205. Based upon the entire record, the undersigned finds that the Student made academic and social-emotional progress at Private Special Education School during SY 2013-2014.

206. Based upon the entire record, the undersigned finds that the Student’s profile as of June 2014 was that of a child who had only minor to moderate academic and social-emotional deficits and who did not appear to require as restrictive a setting as a separate special education school.

Respondent’s Proposed LOS for SY 2014-2015

207. On July 15, 2014, Petitioners received Respondent’s letter dated July 1, 2014, identifying Public School #2 as the Student’s LOS for SY 2014-2015. P-29, P-30.

208. Petitioners visited the principal of Public School #2, who had not seen the Student’s IEP and could not provide any detailed information about the program she would have except that the classroom would contain a mixture of children at different grades. Testimony of Petitioner #2.

209. There is no evidence in the record as to the size of the class the Student would have attended at Public School #2.

210. Petitioner #2 was concerned about the location of Public School #2, which was much further from their residence than Private Special Education School. *Id.*

Petitioners' Notification to Respondent of Unilateral Placement and Rejection of IEP

211. On August 11, 2014, Petitioners notified Respondent that they were rejecting the proposed IEP, placing the Student at Private Special Education School for SY 2014-2015, and seeking public funding for that placement. P-31.

212. Respondent replied on August 15, 2014, rejecting public funding of Petitioners' unilateral placement of the Student for SY 2014-2015 and stating, *inter alia*, that Respondent had made a FAPE available with an appropriate IEP and placement in the Student's Least Restrictive Environment ("LRE"). P-32.

September 6-8, 2014 Diagnostic Educational Evaluation and November 19, 2014 Report

213. On September 4 and 16, Educational Consultant "formally" observed the Student at Private Special Education School. P-33-14.

214. Educational Consultant "informally" observed the Student at Private Special Education School three¹¹ additional times. P-33-18.

215. The Student was observed to swing her legs vigorously on a bar attached to a table. P-33-14 and -15.

216. The Student appeared to be paying attention only intermittently. P-33-16.

217. There was nothing else remarkable about the Student's conduct during the observations. P-33-14 through -18.

218. On September 6 and 8, 2014, Educational Consultant evaluated the Student. P-33-1.

¹¹ Educational Consultant testified that she conducted four informal observations of the Student. The undersigned does not consider the discrepancy to be material.

219. Two months later, on November 19, 2014, Educational Consultant issued a report of the evaluation. P-33-1.

220. Educational Consultant described the Student as “twice-exceptional,” *i.e.*, intellectually gifted and educationally disabled. P-33-1.

221. Educational Consultant provided links to websites describing the research literature on “twice-exceptional” students, some of which are “broken” links or require login credentials. P-33-2.

222. One of the website links provided by Educational Consultant is to the National Education Association’s publication, *The Twice Exceptional Dilemma*, <http://www.nea.org/assets/docs/twiceexceptional.pdf> (“NEA website”).

223. The NEA website states that a student may be “twice exceptional” if she is intellectually gifted and has ADHD, even if she does not have SLDs. *Id.*

224. The NEA website describes the characteristics of gifted students with disabilities as follows:

- Struggle with basic skills due to cognitive processing difficulties; need to learn compensatory strategies in order to master basic skills
- Show high verbal ability but extreme difficulty in written language area; may use language in inappropriate ways and at inappropriate times
- Experience reading problems due to cognitive processing deficits
- Demonstrate strong observation skills but have difficulty with memory skills
- Excel in solving “real-world” problems; have outstanding critical thinking and decision-making skills; often independently develop compensatory skills
- Show attention deficit problems but may concentrate for long periods in areas of interest

- Have strong questioning attitudes; may appear disrespectful when questioning information, facts, etc. presented by teacher
- Display unusual imagination; frequently generate original and at times rather “bizarre” ideas; extremely divergent in thought; may appear to daydream when generating ideas
- May be unwilling to take risks with regard to academics; take risks in non-school areas without consideration of consequences
- Can use humor to divert attention from school failure; may use humor to make fun of peers or to avoid trouble
- Appears immature since they may use anger, crying, withdrawal, etc. to express feelings and to deal with difficulties
- Require frequent teacher support and feedback in deficit areas; highly independent in other areas; can appear stubborn and inflexible
- Sensitive regarding disability area(s); highly critical of self and others including teachers; can express concern about the feeling of others even while engaging in antisocial behavior
- May not be accepted by other children and may feel isolated. May be perceived as loners since they do not fit typical model for either a gifted or a learning disabled student; sometimes have difficulty being accepted by peers due to poor social skills
- Exhibit leadership ability. Is often a leader among the more nontraditional students demonstrating strong “street-wise” behavior; or the disability may interfere with the student’s ability to exercise leadership skills
- Show a wide range of interests but may be thwarted in pursuing them due to processing or learning problems
- Very focused interests, for example, a passion about certain topics to the exclusion of others, often not related to school subjects.

Id.

225. Educational Consultant asserted that Respondent failed “to consider [the Student’s] intellectual ability in favor only of her educational disabilities.” P-33-1.

226. To the contrary, in the June 9, 2014 IEP, Respondent recognized that the Student is “twice-exceptional,” without using that term, and identified her specific needs as a very bright individual with a disability:

[The Student] is a highly intelligent student. She has excellent comprehension of spoken language and a vast vocabulary. She struggles at times to organize her thoughts and express herself accurately. She has below grade level reading and writing skills so print material at her level must be available for learning. Multiple methods of presentation of new information should be available as [the Student] often does not access instruction in the way that it is first presented. [The Student] responds well to positive reinforcements, verbal praise, and an overall positive environment. Teachers working with [the Student] should be patient when [she] needs additional time to process information or organize her thoughts. [The Student] demonstrates optimal focus in a one-to-one setting.

* * *

She responds well to a multi-sensory system for learning

* * *

Due to weaknesses with organization and a poor ability to recall, retrieve, and express information, [the Student] has difficulty effectively expressing her thoughts.

P-27-3, -6, and -7.

227. Based upon the entire record, the undersigned finds that Respondent fully understood that the Student is “twice-exceptional,” and developed an IEP appropriate to that combination of characteristics, *i.e.*, her unique needs.

228. During testing, the Student put pressure on herself to perform well on everything; and she demonstrated anxiety when she did not immediately know the answer or how to obtain it, motoric hyperactivity, difficulty with smooth oral formulation affected by poor retrieval, slow output, poor executive skills for planning and flexible problem solving, and fatigue affecting her speech production. P-33-5.

229. Educational Consultant identified deficits in phonological processing, extreme difficulty coding sounds with letters, underperformance in reading comprehension¹² when retrieval was required, dyslexia,¹³ and learning disabilities in math, spelling and written language. P-33-6.

230. Educational Consultant asserted that the Student's IEP was inappropriate because she had not been found eligible under the disability classification SLD. Testimony of Educational Consultant. However, eligibility and disability classification are not issues in this case. *See, Section IV, supra.*

231. The Student's results on the Phonological Awareness and Reading Profile-Intermediate Level ("PARP") disclosed significant deficits, including poor sound perception, sequencing, manipulation, and code knowledge. P-33-7 and -8.

232. The Student's score on the Spelling of Sounds subtest of the Woodcock-Johnson Tests of Achievement-Fourth Edition ("WJ-4") further indicated that she has dyslexia. P-33-8.

233. The Student's scores on various reading tests, while in the average range, were lower than would be expected given her cognitive ability. P-33-9.

234. The Student's best score was on an untimed reading test that allowed the Student to review what she had read and therefore did not tax her retrieval skills. *Id.*

¹² To the contrary, Curriculum and Technology Coordinator, Private Special Education School testified that reading comprehension was a relative *strength* for the Student.

¹³ Educational Consultant asserted that dyslexia had not previously been diagnosed. P-33-6. To the contrary, the Student had been diagnosed with dyslexia prior to July 2013, which Respondent knew. R-8-2.

235. The Student's scores on math testing were her lowest, two grade levels below Current Grade. P-33-11.

236. Doing math causes the Student stress and anxiety. P-33-10 and -11.

237. The Student scored low on spelling, well below age and grade expectations, despite her high cognitive ability. P-33-11.

238. The Student scored in the average range on writing samples, below expectations based on her cognitive ability, and her written sentences were very simple in contrast to her complex spontaneous oral language. *Id.*

239. The Student made many spelling and punctuation errors. *Id.*

240. Educational Consultant asserted that the IEP that had been developed at the June 9, 2014 IEP Team meeting was deficient because many of the goals were not measurable and did not contain adequate baselines. P-39-4 through -11.

241. According to Educational Consultant, the Student's Math goals should separate calculation and work problems. P-39-4.

242. According to Educational Consultant, the Student's Reading Goal #2 contained too many skills that should be separated, including separate goals for fluency and decoding. P-39-6.

243. According to Educational Consultant, the Student's Reading goals should include a goal for learning to compare and contrast text and answer questions about the text. P-39-7.

244. According to Educational Consultant, the Student should have separate goals for organization and all of her other executive functioning deficits, rather than combining them in one goal. P-39-10.

245. The undersigned finds that Educational Consultant's proposed changes to the wording of the Student's baselines and goals were improvements, but the changes were not necessary because the original wording was sufficient to develop educational programming for the Student. In fact, Educational Consultant did not mark up the page of the IEP that specified the specialized instruction and related services the Student was to receive. P-39-12. She testified that this was an "oversight," which the undersigned rejects as a *post hoc* rationalization.

246. According to Educational Consultant, the Student's OT goals should include all areas of need identified in the OT evaluation conducted by Private Special Education School. P-39-11.

247. According to Educational Consultant, the Student's anxiety and social-emotional deficits required her always to be in a small group with supervision when not in class, including lunch and recess. Testimony of Educational Consultant. However, there is no issue in this case related to non-instructional time. *See*, Section IV, *supra*. Moreover, for the reasons discussed in Section VII, *supra*, the undersigned discounts this conclusion as biased.

248. According to Educational Consultant, the Student requires specialized instruction in small classes with a low student to teacher ratio throughout the entire school day because "she has skill deficits across the board and needs remediation across the board." Testimony of Educational Consultant. However, there is no issue in this case related to non-instructional time or student to teacher ratio. *See*, Section IV, *supra*.

249. According to Educational Consultant, non-core classes (sometimes referred to as "specials") such as art, physical education, and social science, require the same

skills as core classes; accordingly, the Student required specialized instruction in those courses. Testimony of Educational Consultant.

250. The undersigned rejects Educational Consultant's conclusion that because a child has a skill deficit in reading or writing, the child requires specialized instruction in all subjects throughout the school day. If that were the case, almost every child with a disability would require full time specialized instruction. Moreover, for the reasons discussed in Section VII, *supra*, the undersigned discounts Educational Consultant's conclusion that the Student requires specialized instruction in non-core subjects as biased.

251. Educational Consultant concluded that Private Special Education School "is completely appropriate for her and, at this time, constitutes the least restrictive environment." P-33-18. As discussed in Section VII, *supra*, the undersigned discounts this conclusion as biased.

252. Educational Consultant opined that Public School #2 is inappropriate for the Student because that school cannot implement a "full time" IEP. Testimony of Educational Consultant. However, Educational Consultant did not state that Public School #2 was incapable of implementing the June 9, 2014 IEP.

January 6, 2015 Prior Written Notice

253. On January 6, 2015, Respondent sent Petitioner #2 a PWN noting that the Student had not been enrolled in a DC Public School and stating that because Respondent's offer of FAPE had been rejected, the Student's special education file was being closed. R-19-1.

January 13, 2015 DPC and February 6, 2015 Withdrawal

254. On January 13, 2015, Petitioners filed a DPC against Respondent. P-34.

255. On February 6, 2015, Petitioners withdrew the DPC without prejudice. P-35.

February 2015 OT Annual Progress Report

256. In February 2015, Private Special Education School issued an OT Annual Progress Report. P-37.

257. The Student was able to sit for 15-20 minutes using specific aides, although her normal sitting and standing postures demonstrated muscular imbalance and hip instability. P-37-1.

258. The Student met her objective of developing shoulder and trunk stability; however, she still had motor planning difficulties compromising the smooth control of her arms and legs and her movements were disorganized when she was excited or unfocused. P-37-2.

259. Although the Student failed to adopt the desired grasp to control her pencil, she was able to control her pencil, school tools and small manipulatives with relative ease and precision. *Id.*

260. The Student continued to require assistance “to scan and accurately track visual information, and to perceive part of whole relationships, and missing visual elements.” P-37-3.

261. The Student’s handwriting demonstrated difficulties with spatial organization, inconsistent spacing between words, inconsistent letter size, confusing of upper and lower case, as well as omissions of letters, words and sentences when copying. *Id.*

262. Overall, the Student “struggled with self-regulation, motor planning, timing and pacing for motor activities, postural control, strength and endurance, initiation of tasks, shifting focus, and organizing information, finger strength, visual tracking and written communication.” P-37-3 and -4.

263. The report recommended continuation of weekly individual OT therapy sessions as well as integrated services. P-37-4.

264. Based upon the entire record, including this report and the March 21, 2014 OT Assessment (P-24), the undersigned finds that Petitioners have not established by a preponderance of the evidence that the Student needed individual OT therapy sessions to access her education, *i.e.* that her motor, posture, handwriting, and organizational deficits could not be addressed by the classroom teacher with consultation by an occupational therapist. While individual OT therapy may have been *more effective* than consultation, Petitioners have not established that such individual therapy was *necessary* for the student to make meaningful educational progress. To the contrary, the Student made “notable” educational progress during the first half of SY 2013-2014 (Finding of Fact 115) despite having no individual OT therapy (Finding of Fact 109).

March 13, 2015 IEP at Private Special Education School

265. On March 13, 2015, Private Special Education School developed an IEP for the Student, reducing the Student’s hours of specialized instruction to 33.5 per week, continuing her 45 minutes (previously stated as 0.75 hour) per week of individual OT and adding 45 minutes per week of psychological service with a clinical psychologist. P-42-1.

266. The IEP specified goals for Reading (P-42-11 and -12), Written Language

(P-42-13 and -14), Math (P-42-15), Social Emotional/Executive Functioning (P-42-16), OT (P-42-17 and -18), and Psychological Services (P-42-19).

March 2015 Individual Psychotherapy Progress Report

267. In March 2015, Private Special Education School issued an Individual Psychotherapy Progress Report summarizing “several” weekly individual therapy sessions that the Student recently had received. P-41.

268. The Report provided no insight into the Student’s level of anxiety or the impact of the therapy sessions. *Id.*

March 23, 2015 Resolution Session Meeting

269. The RSM on the instant DPC was held on March 23, 2015. R-20-1.

270. Petitioners stated their agreement with the Present Levels of Performance in the Student’s IEP. R-20-2.

271. Petitioners acknowledged that some of Educational Consultant’s recommended changes in the IEP were unimportant word differences; however, Petitioners wanted the IEP to incorporate executive functioning goals, under either the social-emotional heading or the OT heading, and they wanted the reading fluency goal to be separated from the decoding goal. *Id.*

272. Respondent agreed to the changes in the IEP requested by Petitioners. *Id.*

March 30, 2015 IEP Team Meeting

273. Respondent reconvened the Student’s IEP Team on March 30, 2015. P-44-1.

274. Petitioners did not attend but their counsel did. *Id.*

275. Respondent proposed an IEP¹⁴ for the Student that continued the hours of specialized instruction in the June 9, 2014 IEP, continued the minutes of direct behavioral support services and OT consultation, and increased the behavioral support consultation services from 30 minutes per week to 60 minutes per week. P-44-13.

The Student's Social-Emotional State During SY 2014-2015 to Date

276. Starting in September 2014, the Student frequently became overwhelmed, crying, and several times per week had to be escorted from her class to meet with a social worker. Testimony of Clinical Psychologist, Private Special Education School; testimony of Curriculum and Technology Coordinator, Private Special Education School.

277. By October or November 2014, the Student, her parents and teachers requested psychological services, because the Student was very worried, very upset, and experiencing a lot of stress. Testimony of Clinical Psychologist, Private Special Education School.

278. Due to the Student's subsequent absence due to illness, and Private Special Education School's procedures to approve psychological services, the Student did not begin to receive such services until February 5, 2015. *Id.*

279. Since February 5, 2015, the Student has been meeting weekly for 45 minutes with Clinical Psychologist, Private Special Education School, talking about her fears and worries and doing guided relaxation and "mindfulness" exercises. *Id.*

280. The Student has not been crying in recent months. *Id.*

¹⁴ This IEP was developed weeks after the filing of the DPC herein, and is not challenged in this case. *See*, Section IV, *supra*.

The Student's Educational Progress During SY 2014-2015 to Date

281. During SY 2014-2015 to date, the Student has made meaningful educational progress at Private Special Education School. Testimony of Curriculum and Technology Coordinator, Private Special Education School; *compare*, Current Levels of Functioning as of March 7, 2014 (P-20) *with* Current Levels of Functioning as of March 13, 2015 (P-42).

282. Based upon the entire record, the undersigned finds that the Student has received, and is receiving, educational benefit at Private Special Education School.

283. Based upon the entire record, the undersigned finds that Petitioners have not met their burden of proving that the Student requires as restrictive a setting as Private Special Education School because they have not introduced any evidence that the Student cannot be educated with non-disabled peers, even part of the day (*i.e.*, in non-core classes, lunch, recess, and other non-instructional time).¹⁵

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education

¹⁵ Curriculum and Technology Coordinator, Private Special Education School, gave an example of an interaction the Student had with a (disabled) peer who sat too close to her and she needed step by step instructions from her teacher to deal appropriately with the peer. That testimony does not establish that the Student needs to be segregated from non-disabled peers, or that a general education teacher would be unable to provide guidance to the Student on social interaction strategies.

and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1), *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general: The term “individualized education program” or “IEP” means a written statement for each child with a disability that is

developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and

to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications

20 U.S.C. §1414(d)(1)(A).

4. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982) (“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 201.

5. In the instant case, Petitioners have introduced substantial evidence that Private Special Education School is providing the best possible education to the Student (*See*, Findings of Fact 115, 117, 118, 124, 155, 161, 195-204 and 281) and that the Student still is experiencing some difficulties (*See*, Findings of Fact 116, 117, 119, 123, 156-161, 197, and 198). That evidence does *not* prove that the June 9, 2014 IEP, including placement, proposed by Respondent would have failed to provide the Student a “basic floor of opportunity,” which is the standard for FAPE.

6. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor 'in determining whether an IEP is reasonably calculated to provide education benefits.'”) (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student's progress, courts should defer to the administrative agency's expertise. *See Cerra v. Pawling Cent. Sch. Dist.*,

427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP’s substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, need not conform to a parent’s wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an “education ... designed according to the parent’s desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep’t of Educ.*, Hawaii, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while “sympathetic” to parents’ frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

K.S. v. District of Columbia, 962 F. Supp. 2d 216 (D.D.C. 2013).

7. Based upon the entire record, the undersigned concludes that Respondent, through the June 9, 2014 IEP, to be implemented at Public School #2,¹⁶ offered services

¹⁶ There is no evidence in the record that Public School #2 could not implement the IEP developed for the Student on June 9, 2014. Thus, Petitioners have not met their burden of proving that Public School #2 is an inappropriate LOS for the Student.

that were reasonably calculated to confer the Student with a meaningful benefit. Whether Private Special Education School was calculated to, or has provided, a *greater* benefit to the Student is beyond the scope of this DPC proceeding because the IDEA does not require a public agency such as Respondent to maximize a child’s potential.

Least Restrictive Environment

8. IDEA requires that special education be provided in the Student’s LRE:¹⁷

To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 412(a)(5)(A); *accord*, DCMR §5-E3011.1. *See also*, 34 C.F.R.

§300.114(a)(2).

9. Parental choice does not supersede the LRE requirement. *See* 71 Fed. Reg. 46541 (August 14, 2006).

¹⁷ However, for purposes of tuition reimbursement in the case of a unilateral parental placement when the public agency has denied the Student a FAPE, the private placement “need not be the least restrictive environment” to be “proper” under the IDEA. *N.T. v. District of Columbia*, 839 F.Supp.2d 29 (D.D.C. 2012) *citing*, *Warren G. v. Cumberland Count Sch. Dist.*, 190 F.3d 80, 83-84 (3d Cir. 1999) and *Knable v. Bexley City Sch. Dist.*, 238 F.3d 775, 770 (6th Cir. 2001). However, a hearing officer may consider whether the private placement is the LRE in evaluating whether private placement is the proper remedy. *N.T. v. District of Columbia*, *supra*, *citing* *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005); *Kerkham v. Superintendent, D.C. Public Schools*, 931 F.3d 84, 87 (D.C. Cir. 1991); and *Pinto v. District of Columbia*, (D.D.C. Civ. No. 12-01699 (DAR), September 29, 2014).

10. Other than the opinion of Educational Consultant that the undersigned has found to be biased, and the inexpert opinion of Petitioners, there is no evidence in the record that the Student requires specialized instruction in her non-core subjects.

11. There is no evidence in the record that the Student would be harmed by interaction with non-disabled peers at lunch and other non-academic time during the school day.

12. In closing argument, Petitioners' counsel asserted that there is no evidence that a less restrictive program than Private Special Education School would meet the Student's needs. However, the burden of proof is on Petitioners, and it is they who have not shown that the *highly* restrictive program at Private Special Education School is necessary to educate the Student.

13. Petitioners have not met their burden of proving that the less restrictive placement proposed by Respondent in the June 9, 2014 IEP was inappropriate.

Authority of Hearing Officer to Order Tuition Reimbursement

14. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) ("*Reid*"). That relief may include compensatory award of tuition reimbursement. *Id.* In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) ("*Branham*").

15. The IDEA provides that a public agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if, as in the instant case, the agency made a FAPE available to

the child and the parents elected to place the child in such private school or facility.

20 U.S.C. §1412(a)(10)(C)(i); *accord*, DCMR §5-E3018.1.

16. As noted by the U.S. Court of Appeals for the District of Columbia Circuit:

If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.

Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991) (internal citations omitted); *see also*, *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (“Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent’s desires.”) and *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (“Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”).

17. Although an inadequate IEP is a *necessary* condition for private school placement and reimbursement, it is not a *sufficient* condition for such placement and reimbursement. *N.T. v. District of Columbia*, 839 F.Supp.2d 29 (D.D.C. 2012). If a public school could offer a FAPE, and the public agency has not demonstrated unwillingness or inability to modify the student’s IEP, then a hearing officer may order a modification in the IEP rather than private school placement or reimbursement:

Because DCPS can craft an appropriate IEP to provide a FAPE, it is not required to pay for [the student’s private] placement.

Id., citing *Jenkins v. Squillacote*, *supra* at 305 (D.C. Cir. 1991) and *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *see also*, *Pinto v. District of Columbia* (D.D.C. Civ. No. 12-01699 (DAR), September 29, 2014).

18. In the instant case, even if the June 9, 2014 IEP were inappropriate—which the undersigned has not found—Respondent has not demonstrated unwillingness or inability to modify the Student’s IEP; in fact, Respondent modified the Student’s IEP in March 2015 to incorporate some changes recommended by Educational Consultant. Finding of Fact 272.

Authority of Hearing Officer to Reduce or Deny Tuition Reimbursement

19. Tuition reimbursement may be reduced or denied if:

[a]t the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense.

34 C.F.R. §300.148(d)(1)(i), *accord*, DCMR §5-E3018.4.

20. The same equitable principles apply if the student never received special education services. As the U.S. Supreme Court explained in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009):

When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted.

21. In the instant case, the most recent IEP Team meeting that the parents attended prior to the private placement was the June 9, 2014 meeting. Finding of Fact 162.

22. Petitioners did not, at that meeting, express concerns about the goals or baselines in the proposed IEP or that the IEP failed to program for the Student as a “twice-exceptional” student. Findings of Fact 180-186.

23. Petitioners did not, at that meeting, inform the IEP Team that they were rejecting the proposed IEP and that they intended to enroll the Student at a private school at public expense. Findings of Fact 187 and 188.

24. Based upon the entire record, the undersigned concludes that Petitioners did not provide appropriate timely notice to Respondent of all of their concerns with the proposed IEP, that they were rejecting the proposed IEP, and that they intended to place the Student in private school for SY 2014-2015 at public expense.

25. Accordingly, the undersigned concludes that even if the proposed IEP were not reasonably calculated to confer educational benefit upon the Student, the equities would not support reimbursement of Private Special Education School tuition and related expenses.

Summary

26. The IEP proposed by Respondent for the Student for SY 2014-2015 was reasonably calculated to confer educational benefit, because (i) the goals were sufficiently measurable, (ii) the baselines were adequate, (iii) the combination of calculation and word problems in the mathematics goal did not render that goal inappropriate, (iv) the combination of fluency and decoding in the reading goal did not render that goal inappropriate, (v) the combination of goals for organization and other executive functioning deficits did not render that goal inappropriate, (vi) the OT goals in

the areas of need identified in Private Special Education School’s OT evaluation were addressed adequately in the IEP, (vii) Petitioners have not met their burden of proving by a preponderance of the evidence that the Student required direct OT services, (viii) the Student did not require specialized instruction throughout the entire school day, and (ix) the educational programming was sufficient to address the Student’s needs as a “twice-exceptional” student.

27. Petitioners failed to meet their burden of proving that Respondent denied the Student a FAPE by proposing a placement for SY 2014-2015 that included some non-specialized instruction in the general education setting, because Petitioners did not meet their burden of proving that the Student requires specialized instruction throughout the entire school day.

28. If Respondent had denied the Student a FAPE—which the undersigned has *not* found—Private Special Education School would have been a proper placement for the Student because she received and continues to receive educational benefit there even though it is more restrictive than she requires.

29. Even though Private Special Education School was a proper placement for the Student, tuition reimbursement would not have been an appropriate remedy for a denial of FAPE—if there had been such a denial—because (a) Petitioners did not provide timely notice to Respondent of their rejection of the IEP and intent to seek public funding for their unilateral placement, and (b) Respondent was willing and able to revise the Student’s IEP.

X. ORDER

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

ORDERED:

Petitioner's DPC dated March 11, 2015 is dismissed in its entirety, with prejudice.

Dated this eighth day of May, 2015.



Charles Carron
Impartial Hearing Officer

XI. NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).