

District of Columbia
Office of the State Superintendent of Education

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

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Case No. 2015-0305</p> <p>Date Issued: November 19, 2015</p> <p>Dates of Hearing: October 27, October 30, and November 10, 2015</p> <p>Hearing Room 2006</p> <p>Representatives:</p> <p>Margaret A. Kohn, Esq. and Anjali Parekh Prakash, Esq. for Petitioners</p> <p>Daniel L. McCall, Esq. for Respondent</p> <p>Impartial Hearing Officer: Charles M. Carron</p>
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The Student is a female of Current Age, and attends Current Grade at Non-Public School, as a result of a unilateral parental placement. The Student has been determined to be eligible for special education and related services under the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.* as a child

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

with Multiple Disabilities (“MD”), specifically, Other Health Impairment (“OHI”) based upon Attention Deficit Hyperactivity Disorder (“ADHD”) and Specific Learning Disability (“SLD”).

Petitioner claims that Respondent has denied the Student a Free Appropriate Public Education (“FAPE”) because the Individualized Education Program (“IEP”) developed for her, and the program and Location of Services (“LOS”) to which she was assigned by Respondent were inappropriate, as described in more detail in Section IV *infra*.

Respondent asserts that the Student’s IEP, program and LOS were appropriate.

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 *Student Hearing Office Due Process Hearing Standard Operating Procedures*.

III. PROCEDURAL HISTORY

The DPC was filed September 11, 2015, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent #1, against Respondent, District of Columbia Public Schools (“DCPS”).

On September 15, 2015, the undersigned was appointed as the Impartial Hearing Officer.

After business hours on September 21, 2015, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a FAPE.

The undersigned held a Prehearing Conference (“PHC”) by telephone on September 22, 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 October 20, 2015 and that the DPH would be held on October 27, October 30 and November 10, 2015. The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on September 22, 2015 and an Amended Prehearing Conference Summary and Order (the “Amended PHO”) on October 6, 2015.

A Resolution Session Meeting “RSM” was held on October 6, 2015 but it failed to resolve the DPC. The statutory 30-day resolution period ended on October 11, 2015.

The 45-day timeline for this HOD started to run on October 12, 2015 and will conclude on November 25, 2015.

On October 20, 2015 Petitioner filed her five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 39 proposed exhibits numbered P-1 through P-39.

On October 20, 2015 Respondent filed its five-day disclosures, comprising a cover letter with lists of witnesses and documents, and ten proposed exhibits numbered R-1 through R-10.

On October 20, 2015 the parties also filed joint exhibits numbered JT-1 through JT-7.

No motions were filed by either party and the DPH was held from 9:48 a.m. to 5:16 p.m. on October 27, 2015; from 9:36 a.m. to 11:21 a.m. on October 30, 2015; and from 9:34 a.m. to 5:14 p.m. on November 10, 2015, in Room 2006 at the Office of Dispute Resolution, 810 First Street, NE, Room 2006, Washington, DC 20002. Petitioner elected for the hearing to be closed.

Petitioner participated in the DPH in person.

At the DPH, the following documentary exhibits were admitted into evidence without objection: Petitioner’s Exhibits P-1 through P-27, P-28 with the exception of

pages 11 and 14 that were removed by Petitioner’s counsel at the DPH, P-29 with the exception of pages 35 through 38 that were removed by Petitioner’s counsel at the DPH, P-30, and P-33 through P-39²; Respondent’s Exhibits R-3 through R-10, and Joint Exhibits JT-1 through JT-7. Respondent’s exhibits R-1 and R-2 were excluded based upon Petitioner’s objection that they were identical to JT-6 and JT-5, respectively.

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

Petitioner;

Educational Consultant, who was admitted by stipulation as an expert in special education programming for children with learning disabilities, language delays and attention challenges;

Non-Public School Director of Occupational Therapy (“OT Director”), who was admitted by stipulation as an expert in occupational therapy for children with disabilities;

Non-Public School Speech Language Pathologist (“SLP”)³, who was admitted by stipulation as an expert in speech language pathology for children with disabilities; and

Non-Public School Curriculum and Technology Coordinator, who was admitted by stipulation as an expert in the provision of special education programming and placement of students with disabilities and as an expert in educational achievement assessments, *i.e.*, evaluations and testing instruments.

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

Public School SLP, who was admitted over Petitioner’s objection as an expert in speech language pathology;

² At the DPH, Petitioner’s counsel withdrew P-31 and P-32 that had been included in Petitioner’s five-day disclosures.

³ The acronym “SLP” also stands for speech language pathology.

Public School General Education Teacher;
Public School Counselor and Local Educational Agency (“LEA”) Representative, who was admitted over Petitioner’s objection as an expert in special education programming and placement;
DCPS Resolution Specialist #2; and
Public School Principal.

Petitioner filed a written closing argument on November 13, 2015. Respondent did not file a closing argument.

IV. ISSUES

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

(a) Since December 5, 2014, has Respondent denied the Student a FAPE because the IEP developed for her is not reasonably calculated to confer educational benefit in the following ways: (i) the IEP provides insufficient hours of specialized instruction because the Student requires at least 32.5 hours per week for specialized instruction and related services (combined) in the outside of general education setting; (ii) the Student requires a student to teacher ratio not to exceed 3:1 for math, 4:1 for reading, 9:1 for science, social studies, the arts, and writing, and 11:1 for Physical Education (“PE”); (iii) the Student requires individualized instruction and pacing for all instruction; (iv) the Student requires a class size of no more than six students for math and reading, nine students for science, social studies, the arts, and writing, 22 students for PE and 12 students for Homeroom; (v) the Student requires guided and individualized social learning

opportunities during lunch and any recess; and/or (vi) the Student required Extended School Year (“ESY”) services for the summer of 2015?

(b) Since December 5, 2014, has Respondent denied the student a FAPE because Public School cannot implement the IEP she requires and because it is not a sufficiently restrictive setting?

(c) Since December 6, 2014, has the Student received educational benefit at Non-Public School?

(d) Is Non-Public School an appropriate placement and program for the Student prospectively?

(e) Did Respondent violate IDEA’s procedural requirements, specifically 34 C.F.R. §300.503(b) because the Prior Written Notice (“PWN”) issued for the December 4, 2014 IEP Team meeting (i) inaccurately stated that no other options were considered, (ii) did not reflect that Petitioner disagreed with the program Respondent proposed, (iii) did not reflect that Petitioner requested a full-time outside of general education program at Non-Public School, and (iv) did not state the reasons why Respondent rejected Petitioner’s proposal?

V. RELIEF REQUESTED

Petitioner requests the following relief:

(a) an Order that Respondent convene an IEP Team meeting to revise the Student’s IEP to provide that all instruction (including lunch, recess and related services) will be provided in the outside of general education setting with no less than six hours of speech-language pathology (“SLP”) per month, 180 minutes of

occupational therapy (“OT”) per month, four hours of behavior support services (“BSS”) per month, and daily door to door transportation;

(b) an Order that Respondent reimburse Petitioner for tuition, related services of OT, SLP, BSS, and the cost of transporting the Student to and from Non-Public School from December 6, 2014 to the date on which Respondent offers the Student a FAPE, including ESY 2015;

(c) an Order requiring Respondent to place the Student with funding and transportation at Non-Public School for School Year (“SY”) 2015-2016;⁴ and

(d) an Order requiring Respondent to issue a corrected PWN for the December 4, 2014 IEP Team meeting and to comply with all procedural notice mandates of IDEA for the implementation of the relief ordered in this case.

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).

⁴ In her testimony, Petitioner repeated that she seeks reimbursement of tuition and fees at Non-Public School until Respondent offers the Student a FAPE. Thus, if Respondent offers the Student a FAPE at an LOS other than Non-Public School, Petitioner does not seek reimbursement of tuition at Non-Public School for the remainder of SY 2015-2016.

VII. CREDIBILITY

The undersigned found all of the witnesses to be credible, to the extent of their firsthand knowledge or professional expertise.

However, some of the testimony lacked foundation, and therefore was disregarded by the undersigned. Several examples follow:

(a) Public School SLP had been provided only some of Non-Public School's speech and language assessments and reports of the Student's speech and language progress and therefore her opinions were based on incomplete information.

(b) Public School General Education Teacher, who did not know the Student or her functioning level (he was not even aware that she has ADHD), testified in the abstract about how he could teach a child with disabilities, using as an example a child in his class who has "multiple disabilities." There is no evidence in the record that the unnamed child's disabilities and educational profile are similar to those of the Student.

(c) DCPS Resolution Specialist #2 opined that the Student would benefit from social interaction with non-disabled peers, but she never had met the Student.

VIII. FINDINGS OF FACT⁵

Facts Related to Jurisdiction

1. The Student is a female of Current Age. Stipulation of Counsel for the Parties at the DPH ("Stip").

2. Petitioner and the Student have been residents of the District of Columbia at all times relevant to the DPC. *Id.*

⁵ Documentary exhibits and testimony that are not probative of the issues in this case are not summarized in this HOD.

3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with MD, specifically OHI and SLD. *Id.*

July-August 2012 Psychological Evaluation

4. In July and August, 2012, a psychological evaluation of the Student was conducted by Clinical Psychologist. P-10-1.⁶

5. Clinical Psychologist diagnosed the Student with ADHD, Combined Type; Expressive Language Disorder; Mathematics Disorder; and Reading Disorder. P-10-27.

6. The Student's working memory score was in the third percentile, the Borderline range. P-10-13.

7. Clinical Psychologist recommended, *inter alia*, that the Student "attend an educational program with small class sizes and an exceptionally low teacher/student [sic student/teacher] ratio." P-10-27.

May 5, 2013 Occupational Therapy Evaluation

8. On May 5, 2013, an occupational therapist at Non-Public School conducted an Occupational Therapy Comprehensive Evaluation of the Student. P-11-1.

9. The occupational therapist noted that the Student had weaknesses with visual motor integration, ocular motor control, handwriting speed, gross motor skills, decreased hand development, postural control, and sensory processing. P-11-8.

⁶ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

May 21, 2013 Speech and Language Assessment

10. On May 21, 2013, Non-Public School SLP conducted a Comprehensive Speech Language Assessment of the Student. P-12-1.

11. The Student's social pragmatics "appeared vulnerable.... [S]he often provided only short, unelaborated responses in conversation, did not attempt to initiate or maintain conversations, and did not recognize when her conversational partner did not understand her intended message. Her weak oral expressive language skills also impacted her ability to take part in conversations...." P-12-20.

12. The Student had difficulty discriminating words as the same or different and blending sounds to form words. P-12-20 and -21.

13. Oral expressive language and auditory memory were areas of weakness for the Student. P-12-21 and -23.

14. Non-Public School SLP diagnosed the Student with Mixed Receptive-Expressive Language Disorder, Reading Disorder, Disorder of Written Expression, and Phonological Disorder. P-12-21 and -22.

15. Non-Public School SLP recommended that the Student be placed in "a full-time intensive program for students with learning disabilities where her needs can be programmed for and addressed across the curriculum." P-12-22.

16. Non-Public School SLP recommended that due to the Student's difficulty with auditory memory and verbal reasoning, she should have small class size (*Id.*) but she did not define "small" (P-12, *passim*).

The Student's Matriculation at Non-Public School

17. Petitioner enrolled the Student at Non-Public School for the summer of 2013.

Testimony of Petitioner.

18. The Student has attended Non-Public School continuously to date, including summer 2014 and summer 2015. *Id.*, Stip.

April 2014 Speech Language Report

19. In April 2014, a speech-language pathologist at Non-Public School wrote an annual speech language report on the Student. JT-6-3. Neither party introduced the report into evidence.

April 2014 Occupational Therapy Assessment

20. In April 2014, an occupational therapist at Non-Public School wrote an Occupational Therapy Progress Report on the Student. P-17.

21. The Student displayed periodic distractibility in the classroom and during her OT sessions, losing focus "in the presence of distracting visual or auditory stimulation." P-17-1.

22. The Student was making some progress on the ALERT program, designed to teach children how to monitor sensory input from their environment and determine successful strategies to improve their focus. P-17-1 and -2.

23. The Student had shown significant improvement in her cursive handwriting. P-17-2.

24. The Student had made a year's progress in motor skills in a year's time. *Id.*

The Student's Need for Support as of the End of SY 2013-2014

25. As of June 2014, the Student tended to focus excessively on details of interest to her rather than main ideas, had difficulty generating details and questions, and had difficulty with inferencing; accordingly, she required direct instruction and heavy teacher support. P-18-5 and -6.

26. As of June 2014, the Student required cuing and assistance to contribute to classroom discussions. P-18-23.

27. As of June 2014, the Student required one-on-one assistance with fine motor tasks. *Id.*

28. As of June 2014, the Student got along well with peers, although she was reluctant to initiate interaction and had

great difficulty reacting quickly to add comments, express her own needs or ideas, make decisions or declare her feelings. Only when her teacher observed what might have been some friction, and was really encouraged to speak her mind, did [the Student] express herself....

[W]ith coaching and structure, [the Student] began to implement some of the strategies that she has been taught, will benefit from continued support and practicing strategies in order for her confidence to continue building in social interactions.

P-18-22.

29. As of August 2014, the Student needed support in maintaining conversations with peers. P-20-1.

30. As of August 2014, the Student needed cuing to make her speech intelligible. P-20-2.

31. As of August 2014, the Student needed cuing at times to carry out addition and subtraction steps. P-21-2.

September 12, 2014 Psychological Evaluation

32. On September 12, 2014, DCPS School Psychologist conducted a psychological evaluation of the Student, with a report entitled “CONFIDENTIAL Psychological Triennial Reevaluation” dated October 22, 2014. JT-5-1.

33. DCPS School Psychologist did not conduct any assessments of the Student; rather, she reviewed the prior assessments, observed the Student in her Junior Great Books and Language Arts classes, interviewed Petitioner and a teacher, and reviewed parent and teacher reports. JT-5-1, -2, -6 and -8.

34. During the observations, the Student responded appropriately to instructional strategies, met classroom expectations, complied with directives, appeared capable of independent work with low task demand, engaged in age- and setting-appropriate social interactions, and initiated and maintained reciprocal conversations with peers and adults. JT-5-6.

35. The Student’s writing teacher stated that the Student often needed “‘processing time’ to decide what to write and to organize her thoughts” but otherwise was capable of doing the work. JT-5-7.

36. There were 12 students and two adults in the language arts class. JT-5-6.

37. The Student’s math teacher stated that the Student had difficulty with math vocabulary, memorization of facts, fact retrieval, and determining the proper operation to use on word problems. *Id.*

38. Petitioner rated the Student in the clinically significant range on hyperactivity/impulsivity but the Student’s teacher did not, indicating that the Student did not exhibit these behaviors to a significant degree in the classroom. JT-5-8.

39. Petitioner indicated that the Student had significant difficulty maintaining necessary levels of attention at home but the Student's teacher did not indicate difficulty maintaining attention at school. *Id.*

40. Petitioner indicated that the Student's expressive and receptive communication skills were below expectations, but the Student's teacher's report did not indicate that those skills were of clinical significance. JT-5-8 and -9.

41. On attentional screening, the Student's scores indicated that she had trouble controlling her impulses and remaining still, and that she exhibited hyperactive and impulsive behavior to the extent that a diagnosis of AD/HD, Hyperactive-Impulsive Type, might be warranted. JT-5-9.

42. DCPS School Psychologist concluded that it appeared the Student continued to meet the criteria for special education services as a student with OHI and/or SLD in the area of math. JT-5-10.

September 30, 2014 Observation of the Student by Educational Consultant

43. On September 30, 2014, Educational Consultant observed the Student in her "Morning Meeting" classroom at Non-Public School, which had 14 students. P-13-1, testimony of Educational Consultant.

44. The Student fidgeted with her pants, played with her fingers, attended to the lessons only intermittently, and failed to contribute to classroom discussion (P-13-2) except for participation in ritualistic/scripted activities (testimony of Educational Consultant).

45. The Student moved into a group of four students for writing instruction.

P-13-3, testimony of Educational Consultant.

46. The Student participated with prompting, cuing and “a lot of endorsement” from the teacher, although she fidgeted and her attention shifted. *Id.*

47. The Student then attended Musical Theatre class, with seven or eight students, where she had a more positive affect and was engaged and highly motivated, although she had difficulty maintaining an upright position and was frustrated when she volunteered but was not called on. P-13-3 and -4, testimony of Educational Consultant.

48. The Student then attended Reading class, with five students.⁷ Testimony of Educational Consultant.

49. The students were divided into groups and the Student was paired with one other student and instructed by a teaching assistant. *Id.*

50. The Student attended to the lesson with some difficulties, requiring a lot of support including prompting to follow when the other student was reading and “scaffolding” to respond to questions. *Id.*, P-13-4.

51. The Student then attended Science Club, with eight students, where she was highly motivated and participated actively, although she needed endorsement by the teacher as she worked through the task. Testimony of Educational Consultant, P-13-4 and -5.

October 9, 2014 Observation of the Student by Public School SLP

52. On October 9, 2014, Public School SLP observed the Student in a classroom at Non-Public School. JT-6-2.

⁷ The class normally has seven students but two were absent. Testimony of Educational Consultant.

53. There were 15 students and four adults in the classroom. *Id.*

54. The Student attended to writing/grammar lessons as presented without prompting, and she followed classroom routines and participated with minimal to moderate prompting. *Id.*

55. The Student's speech contained noticeable errors, although she was 100% intelligible to teachers and peers "with context." *Id.*

October 9, 2014 Observation of the Student by DCPS Occupational Therapist

56. On October 9, 2014, a DCPS occupational therapist observed the Student in her classroom at Non-Public School. R-3-1.

57. The Student had poor posture, appeared disengaged, frequently picked at her fingers, and was unable to follow directions consistently even for routine tasks. *Id.*

58. The Student's engagement increased significantly with movement and more stimulation during a small group activity. *Id.*

59. The DCPS occupational therapist spoke briefly with the classroom teacher, who stated that she did not routinely use sensory equipment such as a seat cushion. R-3-1 and -2.

October 19, 2014 Public School SLP's Review of May 21, 2013 and April 2014 Speech Language Assessments

60. On October 19, 2014, Public School SLP reviewed the May 21, 2013 and April 2014 speech language assessments of the Student that had been conducted by Non-Public School's speech language pathologists, which had found that the Student had below average phonology and auditory memory skills, impaired articulation skills,

inadequate velopharyngeal closure and nasal emissions, and limited pragmatic skills, resulting in diagnoses of Mixed Receptive-Expressive Language Disorder, Reading Disorder, Disorder of Written Expression, and a Phonological Disorder. JT-6-1 and -3.

61. Public School SLP did not recall having been provided copies of the July 2014 report on the Student's progress during the 2014 summer Language and Learning program at Non-Public School (P-19), or the August 2014 Lab School Summer Report (P-21). Testimony of Public School SLP. Because there is nothing in these reports that is inconsistent with the information in the May 21, 2013 and April 2014 speech language assessments (as summarized by Public School SLP in her review), the undersigned finds that even if Non-Public School failed to provide these documents to Respondent, that failure had no impact on the development of the Student's IEP in December 2014.

62. Public School SLP concurred with the May 21, 2013 and April 2014 speech language assessments as they related to the Student's oral language disorders, while noting that DCPS SLPs have no role in the identification or treatment of reading and written language (JT-6-1 and -4) so she did not review the reading and writing test results (Testimony of Public School SLP).

63. Public School SLP agrees that the Student makes articulation errors and that her pragmatic learning disorder requires support for her to interact with peers. Testimony of Public School SLP.

October 22, 2014 DCPS Occupational Therapist's Review of April 2014 OT Progress Report

64. On October 22, 2014, a DCPS occupational therapist reviewed Non-Public School's April 2014 Occupational Therapy Progress Report. R-3-1.

65. The DCPS occupational therapist recommended use of the ALERT program and sensory strategies integrated into the classroom environment. R-3-2.

November 12, 2014 Eligibility Determination

66. The Student's Multidisciplinary Team ("MDT") met on November 12, 2014. Stip.

67. The Team discussed the Student's assessments and reports. R-4-1 (first of two documents numbered R-4-1, also numbered DCPS-000022).

68. Respondent determined that the Student was eligible for special education under the category MD, based upon SLD and OHI (ADHD), and that she had needs in Mathematics, Reading, Communications/Speech and Language, Written Expression, and Motor Skills/Physical Development. JT-1-1 and -2.

69. The Team agreed to meet again on December 4, 2014 to develop the Student's IEP. Stip.

December 4, 2014 IEP Team Meeting

70. On December 4, 2014, Respondent convened a meeting of the Student's IEP Team. JT-2-1.

71. Among the attendees were several Non-Public School staff members who had been working with the Student. R-5-1 (incorrectly numbered R-4-1, also numbered DCPS-000024).

72. The IEP developed at the meeting contained goals for Mathematics; Reading; Written Expression; Communication/Speech and Language; Emotional, Social and Behavioral Development; and Motor Skills/Physical Development. JT-2-4 through -17.

73. The IEP noted that the Student's ADHD caused her to have a hard time sustaining her attention in a large group setting, affecting her ability to access the curriculum. JT-2-15.

74. The Team agreed to some changes in the goals that were requested by Petitioner and her representatives. JT-7-2 through -4.

75. Petitioner and Respondent's representatives disagreed on how much specialized instruction was needed, with Petitioner requesting a full time special education program. JT-7-4.

76. DCPS Private/Religious Office ("PRO") Specialist informed Petitioner and her representatives that Public School could "honor" the Student's IEP. JT-7-4.

77. Petitioner's counsel requested that Respondent place and fund the Student at Non-Public School. *Id.*

78. Respondent's representatives maintained their position that the Student's IEP would be implemented at Public School. Testimony of Petitioner.

The Student's December 4, 2014 IEP

79. The Student's IEP developed at the December 4, 2015 IEP Team meeting prescribed 3.75 hours per week of specialized instruction in Reading in the outside of general education setting, 7.5 hours per week of specialized instruction in Mathematics in the outside of general education setting, 3.75 hours per week of specialized instruction in

Written Expression in the outside of general education setting, 180 minutes per month of OT in the outside of general education setting, six hours per month of SLP in the outside of general education setting, 30 minutes per week of BSS in the general education setting, and 30 minutes per month of BSS in the outside of general education setting. JT-2-18.

80. The IEP stated that the Student should receive “small group instruction whenever possible” (JT-2-19) but did not specify the maximum group or class size, or the maximum student-teacher ratio.

81. The IEP did not provide any special education services or supports in social studies, science, computer, library, arts, physical education, lunch, recess, or some reading and writing instruction. JT-2, *passim*.

82. The IEP did not specify where the Student would take lunch or recess. *Id.*

83. The IEP did not provide SLP or OT consultation services.⁸ *Id.*

84. When Petitioner requested ESY services for the Student, the Team asked for “proof of regression,” but none was provided. Testimony of Public School SLP.

85. The Team deferred a decision on whether the Student was eligible for ESY. R-7-2 (incorrectly numbered R-6-2, also numbered DCPS-000030).

December 10, 2014 Draft IEP

86. A revised draft of the Student’s IEP was developed on December 10, 2014 to add goals requested by Petitioner and to increase service hours for SLP and OT. P-39c-1.

⁸ Public School SLP offered to add an hour per week of SLP consultation services, but Petitioner or her counsel stated they did not think that addition would be sufficient. Testimony of Public School SLP. In any event, the services were not added, although Respondent could have done so if Respondent believed the services were necessary, with or without Petitioner’s concurrence.

Neither party introduced the revised draft IEP into evidence.

87. Petitioner still considered the IEP to be inadequate because it provided insufficient total program hours and accommodations for testing. P-39c-1 and -2.

December 16, 2014 PWN

88. On December 16, 2014, Respondent issued a PWN regarding the proposed IEP for the Student. JT-3-5.

89. The PWN included the statement that “Proposed changes by parent, [Non-Public School] team and parent educational advocate were all considered in the development of the IEP.” *Id.* The undersigned finds that this statement was equivalent to stating that other options were considered.

90. The PWN did not specify that Petitioner and her Educational Advocate proposed a “full time” outside of general education program at Non-Public School, or why that proposal was denied. *Id.*

91. There is no evidence in the record that Respondent’s failure to include in the PWN a discussion of any specific requests made by Petitioner, her educational advocate (*i.e.*, Educational Consultant), or Non-Public School team members at the December 4, 2014 meeting, impeded the Student’s right to a FAPE, significantly impeded Petitioner’s opportunity to participate in the decisionmaking process regarding the provision of FAPE to the Student, or caused a deprivation of educational benefits.

December 31, 2014 Educational Consultant Report

92. On December 31, 2014 Educational Consultant issued an Educational

Consultant Report. P-13-1.

93. Educational Consultant opined that the Student had benefited from and continued to need full time special education services in a setting such as Non-Public School, where her behavior and performance needs are comparable to her peers “and where she can be provided with tailored, individualized multi-sensory instruction across all academic and non-academic areas.” P-13-7.

Petitioner’s January-February 2015 Observations at Public School

94. Petitioner made observations at Public School on January 20, January 22, and February 3, 2015. P-39d-1, P-39e-3, testimony of Petitioner.

95. The “resource room” (*i.e.* outside of general education setting) where the Student would receive her reading, writing and math instruction, had five or six students with one teacher, one assistant and one dedicated aide. Testimony of Petitioner.

96. The pace of instruction was adequate. *Id.*

97. The students were allowed very little movement. *Id.*

98. The students did not seem as distracted or fidgety as the Student is. *Id.*

99. The “resource room” instruction was a three-hour period without breaks, unlike Non-Public School which alternated academic and non-academic activities in shorter intervals. *Id.*

100. The social studies classroom had approximately 23 students, one teacher and no assistant. *Id.*

101. Petitioner considered the social studies instruction to be fast paced, with a high noise level. *Id.*

102. Public School General Education Teacher testified that the instruction was “rigorous,” but not fast paced, and that he did not recall the noise level. Testimony of Public School General Education Teacher.

103. Public School General Education Teacher also testified that the class was very “student-driven” and “open ended,” which “engaged” the students. *Id.*

104. Petitioner opined that the Student could not tolerate the social studies classroom. Testimony of Petitioner.

105. The undersigned finds that “student-driven” and “open ended” instruction in a general education classroom of 23 “engaged” students and only one teacher would be overly challenging for the Student given her attention and speech-language deficits, regardless of the pace or noise level of the instruction.

106. The science classroom had approximately 23 students, one teacher, and one dedicated aide. *Id.*

107. Science instruction was multisensory and fast paced. *Id.*

108. Petitioner opined that the science classroom would be overstimulating for the Student (*Id.*), which the undersigned finds to be the case due to the Student’s attention and speech-language deficits.

109. Petitioner was informed that if the Student attended Public School, she would be eating lunch and having recess with two grade levels, approximately 200 children. *Id.*

110. Public School offered “clubs” on some days of the week to provide smaller and more structured grouping for recess, but those of interest to the Student were not available every day, and Petitioner testified that she was informed that adults did not

provide structured facilitation or support of student interactions during these clubs. *Id.*

Petitioner's February 12, 2015 Notice to Respondent

111. On February 12, 2015, Petitioner notified Public School Special Education Teacher and DCPS PRO Specialist in writing that she disagreed with the proposed IEP for the Student and its implementation at Public School for the following reasons: The Student needed a full time outside of general education program with all instruction in small classes with a low student-teacher ratio; the Student needed more speech-language services; the Student was unable to cope with fast-paced academic activities such as those Petitioner observed in the social studies and science classes that she observed at Public School; the Student was likely to withdraw when overwhelmed academically and socially; the Student required frequent changes in pacing and activity level to maintain her attention, which Petitioner did not observe in the self-contained special education classroom at Public School; the pace and social expectations at Public School appeared to be far above what the Student could manage on her own; and the Student would be overwhelmed by the unstructured large group lunch room and recess environments lacking specialized support. P-35-1 and -2.

112. Notably, Petitioner did not express a concern that the Student would be harmed by contact with non-disabled peers; rather, her concerns related to class size, pace, and lack of structure and support. *Id.*

113. Petitioner stated that she would continue the Student's enrollment in Non-Public School and expected Respondent to pay her tuition and related services because Respondent had not offered the Student a FAPE. P-35-2.

Respondent's February 20, 2015 Response

114. On February 20, 2015, DCPS Resolution Specialist #1 replied to Petitioner, stating that Respondent would not bear the cost of a private school placement for the Student, because Public School could meet her special education needs and provide her educational benefit. P-36-1.

115. DCPS Resolution Specialist #1 invited Petitioner to meet with the IEP Team again to discuss her concerns and provided three dates in early March 2015. *Id.*

February 2015 Occupational Therapy Progress Report

116. In February 2015 an occupational therapist at Non-Public School wrote an Occupational Therapy Progress Report on the Student. P-23.

117. The Student continued to require her teacher to suggest a strategy to deal with waning attention. P-23-1.

118. The Student had made great progress in handwriting legibility and pencil pressure. P-23-2.

119. The Student had made a year's improvement in fine and gross motor skills over the past year, although she continued to have deficits in core strength. *Id.*

February 27, 2015 Provision of December 31, 2014 Educational Consultant Report to Respondent

120. On February 27, 2015, Petitioner's counsel emailed the December 31, 2014 Educational Consultant Report to Respondent, for discussion at an IEP Team meeting scheduled for the following month. P-39f-3.

March 17, 2015 Meeting

121. On March 17, 2015, the parties met informally to discuss the Student's IEP. Testimony of Petitioner, testimony of Resolution Specialist #2.

122. The attendees discussed Petitioner's concerns that she had expressed in her February 12, 2015 notice. *Id.*

123. Petitioner asked for a "full time" special education program for the Student at Non-Public School. *Id.*

124. Respondent's representatives were unwilling to modify the hours of service or setting. *Id.*

125. Respondent's representatives expressed their position that Non-Public School was not the Student's LRE and that she would benefit from interactions with typically developing peers with supports at lunch and recess. Testimony of Resolution Specialist #2.

126. Petitioner expressed concerns about the Student's lack of self-advocacy that had led to bullying at Non-Public School for a month. *Id.*

127. Respondent's representatives described the "Peace" group at Public School that would make sure bullying did not happen. *Id.*

128. Respondent's representatives stated that the "open space" classrooms at Public School had been replaced by trailers for the Student's then-current grade, and would be replaced by trailers for the entire school during SY 2015-2016. *Id.*

129. A special education teacher described the recess "clubs" in which the Student could participate in lieu of regular recess. *Id.*

130. No attendee made any statement regarding the Student's inability to be around nondisabled peers. *Id.*

March 2015 Speech-Language Progress Summary

131. In March 2015, Non-Public School SLP wrote an Annual Speech-Language Progress Summary of the Student. P-24-1.

132. The Student was passive when expected to begin less-structured activities and "waited for a teacher or clinician to recognize that she needs support rather than advocate by raising her hand or asking a question." *Id.*

133. When in small groups, *i.e.*, two to five students, the Student participated by raising her hand and sharing her ideas; however, she continued to need "to be asked directly or to be given a specific time to share her ideas." P-24-2.

134. The Student required support or prompting to tell a narrative effectively. *Id.*

135. The Student required specific directions on how to increase her written output and she required clinician questioning to elaborate on her ideas. P-24-6.

The Student's Academic Performance During SY 2014-2015

136. In reading, the Student learned strategies to deepen her comprehension, and she summarized linear plot lines with ease; however,

she struggled to comprehend or absorb as much from multi-layered texts. With multiple layers and/or abstract concepts, [the Student] required more frequent referencing of the text. Another area of struggle for [the Student] was generating her own ideas and opinions during literary discussions. ... With much encouragement, towards the end of the year [she] slowly gained the confidence to share her thoughts and participate in discussions. [She] benefited greatly from scaffolded instruction and multimodal instruction when initially learning specific strategies.

P-26-2.

137. In written language, the Student improved her sentence structure “by elaborating upon simple sentences and using more descriptive vocabulary” P-26-5.

138. In math, the Student showed growth in her ability to apply her knowledge of calculations to word problems and made significant progress in identifying and adding coins and telling time; however, “[d]ue to weakness in attention, confidence, organization, and expressive language, [the Student] benefited from very small or one-on-one instruction.” *Id.*

139. In science, the Student collaborated with others and “worked hard to document her science learning in her field guide using both words and pictures and persevered when writing was difficult. She asked questions when she needed clarification and grew in her willingness to take risks with trying new things in our classroom.”

P-26-7.

140. Overall, the Student remained about two years behind her grade level.
Testimony of Non-Public School Curriculum and Technology Coordinator.

Summer 2015

141. The Student attended a five-week summer session at Non-Public School during the summer of 2015. Testimony of SLP.

142. The summer session included a “Language and Learning” course working on academic language, following directions, critical thinking skills (including cause and effect and problem solving), and understanding figurative speech and words with

multiple meanings. *Id.* The Student made some gains on these goals during the summer.
Id.

143. The Student also received individual SLP therapy and tutoring. *Id.*

Petitioner's August 10, 2015 Notice to Respondent

144. On August 10, 2015, after confirming that Respondent intended to implement the Student's IEP at Public School again for SY 2015-2016 (P-39g-1 and -2), Petitioner wrote to DCPS Resolution Specialist #2 stating that she and Parent #2 did not think the Student's educational needs would be met at Public School, and that they were sending the Student back to Non-Public School (P-37-1).

145. Petitioner reiterated the reasons why she and Parent #2 disagreed with the proposed IEP and LOS. P-37-1 through -3.

146. Petitioner stated that she and Parent #2 expected Respondent to pay tuition and related services for the Student's attendance at Non-Public School for SY 2015-2016. P-37-3.

Respondent's August 20, 2015 Response

147. On August 20, 2015, DCPS Resolution Director replied to Petitioner, stating that Respondent would not bear the cost of a private school placement for the Student, because Respondent had made a FAPE available with an appropriate IEP and placement in the Student's Least Restrictive Environment ("LRE"). P-38-1.

October 8, 2015 Observation of the Student by Educational Consultant

148. On October 8, 2015, Educational Consultant observed the Student at Non-Public School. P-13-9, testimony of Educational Consultant.

149. In science class, with six students, the Student participated but needed to be cued to stay focused. P-13-9.

150. The Student attended to her own work, although she fidgeted, repeatedly got up from her chair, and moved around the classroom (which was permitted). Testimony of Educational Consultant, P-13-10.

151. Although the Student appeared not to be attending the classroom discussion, the teacher explained to Educational Consultant that the Student was attending while moving. P-13-10.

152. The Student then went to her writing class with seven students. *Id.*

153. The Student participated actively (P-13-10 and -11) although she had difficulty staying seated and focused and required frequent prompting and redirection by the teacher (Testimony of Educational Consultant).

154. The Student used therapeutic putty, but the teacher told her to stop because it seemed to be distracting her rather than helping her to focus. P-13-11, testimony of Educational Consultant.

Non-Public School SLP's Opinion of the Student's Speech and Language Deficits

155. Based upon her review of the Student's evaluations, her observations of the Student, her work with the Student, and her discussions of the Student with the Student's teachers and other speech language pathologists providing direct services to the Student,

Non-Public School SLP opined that the Student has continuing difficulties with speech production and articulation, social pragmatics, receptive and expressive language, and working and rote memory. Testimony of SLP.

156. Only fifty percent of the Student's speech is intelligible to strangers. *Id.*

157. The Student has difficulty understanding nonverbal communication (including understanding facial expressions), expressing herself (including initiating and reciprocating conversation), and advocating for herself. *Id.*

158. The Student has difficulty repeating information she has heard, and even more difficulty manipulating information she has heard. *Id.*

159. The Student has difficulty following multi-step directions, requiring repetition and direct assistance. *Id.*

160. The Student has difficulty connecting information with other information. *Id.*

161. The Student has difficulty with critical thinking (such as understanding cause and effect), and has a hard time with figurative language and words with multiple meanings. *Id.*

162. The Student tends to express herself in very short sentences and needs direct intervention across all of her classes to structure and sequence ideas. *Id.*

163. The Student's speech and language deficits interfere with her ability to interact with peers in class as well as outside of class. *Id.*

164. Teachers and staff members other than speech language pathologists can provide the speech-language supports the Student needs if a speech language pathologist helps them understand the Student's needs and how to address them. *Id.*

Non-Public School OT Director's Opinion of the Student's Current Motor Skills Deficits

165. Based upon her observations of the Student and her discussions of the Student with the Student's teachers and the occupational therapists providing direct services to the Student, Non-Public School OT Director opined that the Student currently has deficits in sensory processing, gross motor, fine motor, ocular motor, and visual-motor integration skills; that the Student requires a lot of movement to attend to lessons; that the Student has difficulty filtering background noise; and that the Student has poor body awareness. Testimony of OT Director.

166. According to OT Director, these deficits slow the Student's school work, tax her endurance, and require more assistance, particularly in reading and writing, and also interfere with her peer interactions (*e.g.* because she stands too close to others). *Id.*

167. OT Director believes that the Student requires assistance with motor planning, extra cues from teachers, and use of the ALERT program or a similar program to guide her in self-regulation. *Id.*

Non-Public School Curriculum and Technology Coordinator's Opinion of the Student's Educational Needs

168. Based upon her observations of the Student and her discussions with the Student's teachers, Non-Public School Curriculum and Technology Coordinator opined that the Student requires the following maximum student-to-teacher ratios to access the curriculum: three- or four-to-one in math and reading; nine- or ten-to-one in science, social studies, and the arts; nine-to-one in writing; and 11-to-one in PE. Testimony of Non-Public School Curriculum and Technology Coordinator.

169. Although these ratios conveniently match the program at Non-Public School, the undersigned finds that the evidence in the record supports the Student's need for such ratios, particularly because she still has attentional and speech-language difficulties even with such low ratios.

Educational Consultant's Opinion of the Student's Educational Profile and Needs

170. Based upon her review of the Student's various evaluations, her discussions with Petitioner and the Student's teachers and Non-Public School staff, and her own observations of the Student, Educational Consultant has the following opinion of the student's educational profile and needs:

(a) The Student learns only in stages, beginning with concrete, experiential learning with "a great deal of repetition," which allows her to move on to learning with pictures, and eventually to abstract understanding (mentally imaging and manipulating). Testimony of Educational Consultant.

(b) One of the Student's greatest challenges is maintaining her attention, which affects her ability to process information, code that information, and retrieve that information. *Id.*

(c) Another of the Student's significant challenges is her expressive language delay, which impairs her ability to be understood easily and therefore adversely affects her social development. *Id.*

(d) The Student has a strong social intent and makes good surface connections, particularly with routines and rituals in the classroom; however, she

struggles with deeper social interactions that require attention to detail and nuances. *Id.*

(e) The Student’s social skills are developing, albeit slowly, as a result of the constant “engineering” and “scaffolding” support she receives from teachers and staff at Non-Public School, without which she likely would withdraw. *Id.*

(f) The Student benefits from the short (*i.e.*, 30-35 minute) instructional periods at Non-Public School. *Id.*

(g) Despite the Student’s numerous learning challenges, she is enthusiastic and motivated, which is a direct consequence of the structure and intensive supports being provided at Non-Public School; without such structure and supports, she likely would lose motivation to be a learner. *Id.*

(h) The Student “continues to be appropriately served by [Non-Public School] because it provides all of the components of programming that are essential for her.... The [program] provides full time special education for all areas of learning including those that require her to develop meaningful interactions with her peers (lunch, recess, Music etc.).” P-13-12.

(i) Without the experiential teaching model and a very small and personalized learning environment, the Student’s “distractibility and anxiety would prevail and minimal learning would occur....[I]n her current small learning environment, she can successfully self-regulate to gain the information.” *Id.*

(j) A typically developing child of Current Age would be expected to have internalized strategies such as time management, how to monitor the environment,

and how to avoid distractions, which the Student has not yet learned. Testimony of Educational Consultant.

(k) The Student would be overwhelmed by a general education environment that was large (*i.e.*, 21 to 28 students) and busy, and she would shut down. *Id.*

(l) In a general education classroom, instruction is at a pace that the Student cannot meet. *Id.*

(m) The Student requires a student-teacher ratio not to exceed four-to-one in Math, three-to-one in Reading, three-to-one in some aspects of Writing and seven-to-one in other aspects, nine-to-one in social studies and science, 11-to-one in Musical Theater, and 12-to-one in PE.⁹ *Id.*

(n) The Student requires adult support in social problem solving at lunch and recess, and minimal distractions, in order to have meaningful interactions with peers necessary for her social emotional development. *Id.*

171. Educational Consultant did not testify that the Student would be harmed by contact with non-disabled peers, only that the general education setting of 20 or more students in a class would be too large for her. *Id.*

The Student's Current Social-Emotional Development

172. The Student does not tend to socialize with peers of her own age, preferring younger children. Testimony of Petitioner.

⁹ Educational Consultant did not explain how she determined such specific ratios.

173. Without adult support in interactions with same-age peers the Student withdraws, becomes frustrated and dysregulated, cries, gives up, walks away, and shuts down. *Id.*

174. Although the Student showed some social-emotional progress during SY 2014-2015, including beginning to show risk-taking and self-advocacy skills in the classroom and developing several friendships, she has regressed during SY 2015-2016. Testimony of Non-Public School Curriculum and Technology Coordinator. She still does not know how to navigate social situations and needs a lot of support to “engineer” social interactions. *Id.*

Differences Between Non-Public School and Public School and the Impact of Those Differences on Meeting the Student’s Needs

175. Non-Public School is a non-public (*i.e.*, private) school designed to address the needs of students with SLD and/or ADHD in grades one through 12. Testimony of Non-Public School Curriculum and Technology Coordinator.

176. Non-Public School holds a Certificate of Approval from the Office of the State Superintendent of Education (“OSSE”) for students with, *inter alia*, MD, OHI, and SLD. *Id.*, P-15-1 and -2.

177. Each student at Non-Public School has an Individual Learning Plan (“ILP”) if privately funded, or an IEP if funded by an LEA, *i.e.*, Non-Public School has no non-disabled students.¹⁰ Testimony of Non-Public School Curriculum and Technology Coordinator.

¹⁰ Non-Public School Curriculum and Technology Coordinator testified that Non-Public School is the Student’s LRE because her disability affects her across all areas at all times

178. At Non-Public School, the Student receives all of her instruction in small classes with a low student-teacher ratio. *Id.*

179. At Public School, the class size is approximately 17 to 22. Testimony of Public School SLP.

180. Public School has one or more SLPs, OTs, reading specialists, math specialists, and behavior support specialists. Testimony of LEA Representative.

181. Public School has a “Peace” teacher who teaches the “Peace Class” which instructs children in mindfulness and understanding and managing feelings. *Id.*

182. Public School offers teacher-supervised “club” options during recess, including the “Peace Club” that comprises structured games and other activities to facilitate social interaction and practice skills learned in the behavior support social skills group sessions. *Id.*

183. The Peace Club met three days per week during SY 2014-2015, and has met daily on the playground during clement weather during SY 2015-2016. *Id.*; testimony of Public School Principal. An indoor location is being sought for days of inclement weather. *Id.*

184. Most of Public School’s recess clubs have eight to ten participants, although “flag football” has more. *Id.*

185. LEA Representative testified that she thought “Peace Club” would help the Student with her social interactions; however, she had never met the Student or attended

during the school day (Testimony of Non-Public School Curriculum and Technology Coordinator. However, that is a *non sequitur*, as discussed in Section IX, *infra*).

any meetings where the Student was discussed¹¹ (Testimony of LEA Representative), so the undersigned gives this testimony no weight.

186. Public School has a school-wide positive behavior intervention and support program. Public School Principal.

187. Public School SLP opined that the Student would be successful in a class of 23 students with supports (Testimony of Public School SLP); however, neither she nor any other representative of Respondent observed the Student in such a setting (*Id.*, testimony of LEA Representative), so the undersigned gives this opinion testimony no weight.

188. Based upon the entire record, the undersigned finds that the Student would be unable to attend sufficiently in a class of 20 or more children to access the general education curriculum, with the exception of some non-core subjects such as music.

189. Public School General Education Teacher testified that he (and presumably other general education teachers at Public School) “individualize” instruction for every child, implying that a general education teacher can teach every child effectively. If that were so, there would be no need for special education, a conclusion that the Congress rejected by enacting the IDEA.

190. At Non-Public School, the Student receives SLP on an “integrated” basis in the classroom as well as individual services twice per week and a group session once per week. Testimony of Non-Public School SLP; testimony of Non-Public School Curriculum and Technology Coordinator.

¹¹ LEA Representative was even unaware that the Student is unable to introduce herself. Testimony of LEA Representative.

191. The “integrated” SLP services at Non-Public School consist of SLPs collaborating with teachers, sharing a student’s needs, and modeling strategies teachers can use. *Id.*

192. At Non-Public School, the Student receives social skills training provided by a speech-language pathologist. Testimony of Petitioner, P-28-4 through -15, testimony of Non-Public School SLP (who referred to these skills as “pragmatic¹² language” skills).

193. Teachers and staff at Non-Public School pair the Student with peers based upon similar developmental levels. Testimony of Petitioner.

194. At Non-Public School, the Student eats lunch with her class of 12 or 13 students in the classroom, at a “pod” with four other students, and she receives close supervision and facilitation support from the teacher or aide to enhance her conversation skills. Testimony of Educational Consultant; testimony of Non-Public School SLP.

195. At Public School, during SY 2014-2015, the Student’s grade had lunch with another grade, totaling approximately 160 students. Testimony of Public School Principal.

196. At Public School, during SY 2015-2016, Current Grade students have lunch with two other grades, in a tent with approximately 280 students. *Id.*

197. However, Public School students may have lunch in an alternative setting if required. *Id.*

¹² Similarly, Public School SLP defined “pragmatics” as social language skills, the rules that govern social interactions including conversation, understanding nonverbal cues, standing the appropriate distance from others, and problem solving in social interactions. Testimony of Public School SLP.

198. At Public School, SLPs consult with general education teachers, special education teachers, and reading specialists on how to serve children with reading and writing issues. Testimony of Public School SLP.

199. At Public School, SLPs can provide “push-in” services to students in the classroom, including non-core academic classes and “specials”; “pull-out” services outside of the classroom; and at lunch and recess, all if and as specified in the student’s IEP. *Id.*

200. Public School convenes a weekly multidisciplinary team meeting attended by the school psychologist, the school counselor, the SLP, the OT, special education teachers, and usually the principal. *Id.* The team discusses, *inter alia*, students who are experiencing difficulties and how to help them. *Id.* Special education teachers routinely consult with general education teachers. Testimony of LEA Representative.

201. At Non-Public School, teachers and therapists confer periodically about the Student in weekly team meetings. Testimony of OT Director; testimony of Non-Public School SLP.

202. At Non-Public School, the Student receives OT on an “integrated” basis in the classroom as well as individual services once per week, and she is taught sensory strategies such as the use of manipulatives such as therapeutic putty and movement. Testimony of OT Director.

203. The “integrated” OT services consist of occupational therapists coming into the classroom to assist all of the students, to provide suggestions, and to educate teachers on how to assist students with their OT needs. *Id.*

204. There is no evidence in the record that Non-Public School's "integrated" OT and SLP service model plus individual services once per week is more appropriate for the Student than the combination of individual services outside the classroom combined with occasional "push in" services in the classroom and consultation services that Public School could provide.

205. Based upon the entire record, the undersigned finds that either model of delivery of OT and/or SLP services would be adequate for the Student.

Whether the Student Has Received Educational Benefit at Non-Public School

206. At Non-Public School, the Student made a year of academic progress in reading, math, science and social studies in SY 2013-2014 and a year of academic progress in reading, math, science and social studies in SY 2014-2015. Testimony of Non-Public School Curriculum and Technology Coordinator.

207. The Student's progress in written language at Non-Public School has not been commensurate with her progress in other subjects. *Id.*

208. The Student's teachers have stated that the Student is making academic progress during SY 2015-2016. *Id.*

209. From March 2014 to March 2015, the Student made a year of progress in her motor proficiency. *Compare, P-17-6 with P-23-6* (standard scores, which compare the Student with typically developing peers, remained about the same).

210. The Student has progressed on all of her occupational therapy goals. Testimony of OT Director.

211. The Student is making slow steady progress on her speech-language goals including social pragmatics. Testimony of Non-Public School SLP.

212. Based upon the entire record, the undersigned finds that the Student has received and continues to receive educational benefit at Non-Public School.

Hearing Officer's Findings Regarding the Student's Educational Profile and Needs

213. Based upon the entire record, the undersigned finds that, since December 4, 2014, the Student has required a small class size (not to exceed 12 students) for her instruction in English/Language Arts (including reading and written expression), math, science, social studies, and PE.

214. Based upon the entire record, the undersigned finds that the Student's social-emotional needs would not be met by having lunch in a room with more than 25 students or a table with more than four other students, because she would be too distracted to engage in appropriate social interaction.

215. At the same time, the undersigned finds that the Student's social-emotional needs would not be met by having lunch alone or with only one peer because that would not give her sufficient opportunity to practice social pragmatics.

216. Based upon the entire record, the undersigned finds that the Student requires specialized instruction in English/Language Arts (including reading and written expression), math, science, social studies, and arts, and that such instruction must be provided in the outside of general education setting due to the impact of her attention and speech-language deficits on her ability to access the curriculum of those core subjects.

217. Based upon the entire record, the undersigned finds that the Student requires specialized instruction in the remaining subjects (including PE and music, if offered) due to her attention and speech-language deficits, but that Petitioner has not established by a preponderance of the evidence that the Student requires such instruction to be provided in the outside of general education setting.

218. Based upon the entire record, the undersigned finds that the Student requires a student-adult ratio not to exceed three-to-one for English/Language Arts (including reading and written expression) and math, nine-to-one in other academic subjects; and 15-to-one in PE.

219. Based upon the entire record, the undersigned finds that the Student requires adult support during non-instructional time including lunch and recess to improve her interactions with peers, which support can be provided by OT and SLP services delivered in those settings, and/or by teachers or staff with whom occupational therapists and speech language pathologists consult.

220. Because the IEP developed for the Student on December 4, 2014 did not provide the small class size, low student-adult ratios, specialized instruction and related services the Student needed—and continues to need—that IEP was not reasonably calculated to confer educational benefit upon the Student.

221. Based upon the entire record, the undersigned finds that the Student would not be harmed by contact with non-disabled peers if properly supervised and supported by teachers or school staff who are aware of her social-emotional and speech-language needs and goals.

The Student's Need for ESY

222. Petitioner testified that the Student regressed over winter breaks, specifically, that her attention and memory declined, and she went from being bubbly to more withdrawn; and that even with summer school, she came back to school each fall less attentive; however, Petitioner provided no examples of such regression or of the educational impact of such regression. Testimony of Petitioner.

223. Educational Consultant testified that the Student requires ESY to maintain her skill levels, but she acknowledged that there is no evidence of the Student having regressed during school breaks. Testimony of Educational Consultant.

224. Non-Public School SLP testified that she was “concerned” about regression and opined that the Student would have a hard time maintaining her skills over the summer. Testimony of Non-Public School SLP. However, Non-Public School SLP offered no testimony that the Student actually regressed, for example, during the winter or spring breaks, or during the weeks between the end of the summer program and the beginning of the next school year.

225. Non-Public School Curriculum and Technology Director testified that Non-Public School does not gather regression data consistently, and she does not know if such data were gathered regarding the Student. Testimony of Non-Public School Curriculum and Technology Director.

226. Non-Public School Curriculum and Technology Director testified that the Student attended the 2015 summer program because her parents signed her up based upon a recommendation of the ILP team that she continue to receive support to maintain her skills. *Id.*

227. Non-Public School Curriculum and Technology Director testified that the over the summer of 2015 the Student maintained at least the “level” at which she had left off, and did not demonstrate “a huge amount of ‘summer slide.’” *Id.*

228. Based upon the entire record, the undersigned finds Petitioner has not established by a preponderance of the evidence that the Student would have regressed without ESY services to a greater extent than a typically developing child would regress over the summer (*i.e.*, that the student’s academic gains would be significantly jeopardized without the reinforcement of a summer program); and Petitioner never provided any evidence of regression to Respondent.

Impact of Moving the Student to a Different School Mid-Year

229. Educational Consultant testified that the Student could be moved successfully to another school in the middle of SY 2015-2016 if the new school would meet her needs. Testimony of Educational Consultant.

230. Petitioner testified that if a school other than Non-Public School were appropriate to meet the Student’s needs, she would give it consideration, although she would worry about moving the Student to a place she would not be comfortable.

Testimony of Petitioner.

231. Petitioner visited Public School during January and February 2015 when she was considering whether to accept the IEP offered by Respondent. Had she concluded that Public School was appropriate for the Student, the Student would have moved to Public School no earlier than mid-February 2015, which would not only have been mid-year, it would have been mid-semester.

232. Thus, Petitioner has been consistent in her opinion that the Student would not necessarily be harmed by a mid-year change in schools.

233. Non-Public School Curriculum and Technology Coordinator testified that it would be detrimental to the Student's academic and social-emotional functioning to change schools mid-year because she would have to learn classroom routines that already were familiar to the other students, and she would have to become acquainted with peers and teachers who already were acquainted with each other. Testimony of Non-Public School Curriculum and Technology Coordinator. However, Non-Public School Curriculum and Technology Coordinator was not admitted as an expert in child psychology, counseling, social work, or any other area of social-emotional development; accordingly, the undersigned gives her opinion testimony on this issue little weight.

234. Based upon the entire record, particularly the expressed willingness of Petitioner and Educational Consultant to consider a mid-year change in schools, the undersigned finds that Petitioner has not established by a preponderance of the evidence that a mid-year change in the physical school would pose a serious educational risk to the Student.

Petitioner's Expenditures for the Student's Education at Non-Public School

235. Petitioner paid the Student's tuition at Non-Public School, in the amount of \$38,095.00, for SY 2014-2015, comprising ten installments of \$3,809.50. P-29-7 through -23, testimony of Petitioner.¹³

¹³ Petitioner testified that there was also a \$2,000.00 deposit. However, the documents in evidence do not reflect such a deposit, and the "online.factsmgt.com" printout indicates that the total cost of the Student's reenrollment was \$38,095.00. P-28-3. Inasmuch as

236. Non-Public School's school year comprises approximately 180 school days.
Stip.

237. There were approximately 111 school days from December 6, 2014 through the end of SY 2014-2015. Testimony of Petitioner.

238. Accordingly, the prorated tuition paid by Petitioner for the Student's attendance at Non-Public School from December 6, 2014 through the end of SY 2014-2015 was $111/180 \times \$38,95.00 = \$24,019.16$.

239. Petitioner paid the Student's tuition at Non-Public School in the amount of \$7,090.00 for the summer of 2015. P-28-1, -2, -3, and -24; P-29-40.

240. The Non-Public School tuition for SY 2015-2016 is \$41,580.00.

241. Petitioners have paid a \$2,000.00 deposit and five of ten \$3,958.00 installments of the Student's tuition at Non-Public School for SY 2015-2016, totaling \$21,790.00. P-29-29 through -38, testimony of Petitioner.

242. Petitioner paid the following amounts to Non-Public School for the Student's related services:

(a) SLP:

December 6-18, 2014	\$ 463.00
January 2015	\$ 998.00
February 2015	\$ 998.00
March 2015	\$ 998.00
April 2015	\$ 1,242.00
May 2015	\$ 901.00
June 2, 2015	\$ 97.00
June 24-30, 2015	\$ 602.00
July 2015	\$ 2,286.00
September 2015	\$ 535.00

Petitioner has the burden of proof, the undersigned finds that Petitioner has not met that burden with regard to the claimed \$2,000 deposit.

P-28-2 through -15.

(b) Occupational Therapy (60 minute sessions no more than once per week):¹⁴

December 8-15, 2014	\$ 405.00
January 2015	\$ 270.00
February 2015	\$ 405.00
March 2015	\$ 540.00
April 2015	\$ 540.00
May 2015	\$ 540.00
July 2015	\$ 270.00
September 2015	\$ 535.00

P-28-16 through -23.

243. Petitioner and other family members have transported the Student to and from Non-Public School. P-30-1, testimony of Petitioner.

244. During a typical week, transporting the Student to and from Non-Public School comprised a total of approximately 100 miles. *Id.*

245. Petitioner has requested reimbursement at the rate of \$0.555 per mile, which the undersigned finds to be reasonable as it is below the Internal Revenue Service tax-deductible rate for business use of a vehicle during 2014 or 2015.

<https://www.irs.gov/Tax-Professionals/Standard-Mileage-Rates>

246. Accordingly, the cost of transporting the Student to and from Non-Public School was approximately 100 miles per week x \$0.555 per mile = \$55.50 per week, an average of \$11.10 per school day.

247. The Student was absent from school eight of the 111 school days between December 6, 2014 and the end of SY 2014-2015. P-30-30.

¹⁴ At the DPH, Respondent's counsel stipulated that Respondent would not challenge the request for relief of reimbursement of 60 minutes per week of OT or SLP for any period that the undersigned ordered reimbursement of tuition at Non-Public School.

248. Accordingly, the cost of transporting the Student to and from Non-Public School on 104 school days from December 6, 2014 through the end of SY 2014-2015 was approximately $104 \times \$11.10 = \$1,154.40$.

249. During summer 2015, transportation of the Student to and from Non-Public School comprised 23 miles per day. P-30-1.

250. The Student attended 19 school days during the 2015 summer session at Non-Public School. P-28-11 and 14 (indicating the Student attended 20 school days); *but see*, P-30-3 (the Student was absent on July 23, 2015).

251. Accordingly, the cost of transporting the Student to and from Non-Public School during summer 2015 was approximately $23 \text{ miles per day} \times 19 \text{ days} \times \$5.55 \text{ per mile} = \242.54 ; however, Petitioner requested reimbursement of a lesser amount, \$229.94. P-30-1.

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 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 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.

Contents of the 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;

* * *

(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. 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).

6. Because the IEP developed by Respondent on December 4, 2014 was not reasonably calculated to confer educational benefit on the Student (Finding of Fact 220), it denied the Student a FAPE.

Location of Services

7. When determining the school that a student with an IEP should attend—sometimes referred to as the Location of Services (“LOS”)—the LEA must select a setting that is able to substantially implement the IEP *as written* rather than how a parent believes the IEP ought to be written. *Hinson v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008).

8. In the instant case, Petitioner does not assert that Public School is unable to implement the IEP that Respondent developed for the Student; rather, Petitioner asserts that Public School cannot implement the IEP that *she believes* the Student needs.

9. However, there is no evidence in the record that Public School cannot implement the IEP that *the undersigned has determined* the Student needs.

10. If mid-year change in the physical school would pose a serious educational risk, a hearing officer can order the LEA to keep the student at the present physical school. *Block v. District of Columbia*, 748 F. Supp. 891 (D.D.C. 1990). However, in the

instant case, Petitioner has not established by a preponderance of the evidence that such a serious educational risk exists. Finding of Fact 234.

Extended School Year

11. ESY services must be provided “only if a child’s IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.” 34 C.F.R. §300.106(a)(2).

12. ESY services are only necessary to a FAPE ““when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.’ *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537–38 (4th Cir. 2002); *see also S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F.Supp.2d 56, 68–69 (D.D.C. 2008) (adopting the standard from *MM*).” *Johnson v. District of Columbia*, 873 F. Supp. 2d 382 (D.D.C. 2012) (“*Johnson*”).

13. Petitioner’s argument that the severity of the Student’s disabilities alone warrants ESY services is not supported by the controlling case law in the District of Columbia. While other jurisdictions may be more flexible (*See, e.g., Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991) and *Reusch v. Fountain*, 872 F. Supp. 1421 (D. Md. 1994)), the undersigned must follow the case law in this jurisdiction.

14. Petitioner’s argument that OSSE policy requires consideration of factors other than regression and recoupment is similarly unavailing. The undersigned has no authority to adjudicate compliance with policies, only IDEA and its implementing regulations.

15. Petitioner’s argument that basing the need for ESY on regression would require Petitioner and Parent #2 to withhold summer services that they believe the Student needs is alarmist and inaccurate. Petitioner could have presented evidence of academic and/or social-emotional regression during other school breaks, *i.e.*, the winter break, the spring break, and the weeks between the end of the summer program at Non-Public School and the new school year.

16. Although there was testimony that the Student benefited from summer services, “that is not sufficient to establish that it is ‘necessary’ to a FAPE. *MM*, 303 F.3d at 538 (finding that ‘the mere fact of likely regression is not a sufficient basis’ to establish the need for ESY).” *Johnson*.

Furthermore, “all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’ ” [*MM*], citing *Polk v. Centr. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir.1988).

Johnson.

17. Petitioner has not established by a preponderance of the evidence that the Student’s academic gains would be significantly jeopardized without the reinforcement of a summer program. Finding of Fact 228. Accordingly, the undersigned concludes that Petitioner has failed to meet her burden of proving that the Student required ESY during summer 2015.

Prior Written Notice

18. An LEA is required to provide prior notice to a child’s parents before the LEA proposes to initiate or change the identification, evaluation, or educational placement of

the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. §300.503(a).

19. That notice must include, *inter alia*:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;

* * *

- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected....

34 C.F.R. §300.503(b).

20. In the instant case, the PWN did not describe the action proposed by Petitioner and her representatives, *i.e.*, a “full time” outside of general education program at Non-Public School or why that proposal was denied. Finding of Fact 90.

21. A parent may file a DPC over an LEA’s procedural violations of IDEA. However, a procedural violation does not necessarily equate to a denial of FAPE. Rather, a hearing officer’s determination of whether a child received a FAPE must be based on substantive grounds:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006); *but see*, *G.G. v. District of Columbia*, 924 F. Supp. 2d 273 (D.D.C. 2013).

22. Because the incomplete PWN issued by Respondent on December 16, 2014 had no impact upon the Student’s education or Petitioner’s opportunity to participate in the IEP process (Finding of Fact 91), the undersigned concludes that this was a procedural violation of IDEA rather than a denial of FAPE.

Least Restrictive Environment

23. IDEA requires that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, *i.e.*, in the child’s LRE.

34 C.F.R. §300.114(a)(2)(i).

[S]pecial 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. §1412(a)(5)(A); *accord*, 34 C.F.R. §300.114(a)(2)(ii) and DCMR §5-E3011.

24. IDEA’s LRE provision does *not* require a fact-specific showing that a child would benefit from interaction with non-disabled peers; the law assumes such a benefit absent evidence that the child cannot be educated in regular classes.

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

26. District of Columbia law adds another element to LRE, that the placement must be “based upon consideration of the proximity of the placement to the student’s

place of residence.” DC ST §38-2561.01(6)(C). Implementing regulations in the District of Columbia require that the child be educated in the school that the child would attend if not disabled unless the IEP requires some other arrangement (DCMR §5-E3013.1); and if a placement outside the LEA is required, the placement must be in the program that meets the requirements of the child’s IEP that is closest to the child’s residence (DMCR §5-E3013.7).

27. In the instant case, the undersigned has found that the Student requires specialized instruction in the outside of general education environment to access the curriculum in core subjects. Finding of Fact 216. However, the fact that her ADHD and speech-language deficits “affect” the Student throughout the school day does not mean that she cannot be educated at least part of the time with non-disabled peers—such as during PE, music, lunch, recess, and assemblies, if provided with appropriate supports. Findings of Fact 217 and 221. There is no evidence in the record that the Student would be harmed by contact with non-disabled peers.

28. Accordingly, the undersigned concludes that Non-Public School, which has no non-disabled students, is not the Student’s LRE.

Authority of Hearing Officer to Order Tuition Reimbursement and/or Prospective Placement in Private School

29. 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). That relief may include compensatory award of tuition reimbursement or prospective services. *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*”).

30. A hearing officer “may require the agency to reimburse the parents for the cost of . . . enrollment [in a private school] if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. §300.148(c); *see also*, DCMR §5-E3018.3 and *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985) (“*Burlington*”). Moreover, “equitable considerations are relevant in fashioning relief.” *Id.* at 374.

31. Reimbursement of the cost of private special-education services is authorized under IDEA when a school district fails to provide a FAPE and the private-school placement is appropriate “regardless of whether the child previously received special education or related services through the public school.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

32. A 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) (“*N.T.*”), *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).

33. Because the Student’s December 4, 2014 IEP failed to offer her a FAPE (Conclusion of Law 6), and because the Student received educational benefit at Non-Public School (Finding of Fact 212), the undersigned concludes that Non-Public School was a proper placement for the Student even though it was not her LRE.

34. With regard to a child's prospective placement, although an inadequate IEP is a *necessary* condition for private school placement and reimbursement, it is not a *sufficient* condition for such placement. If a public school could offer a FAPE, and the LEA 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.

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

N.T., citing *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) and *Burlington*; see also, *Pinto v. District of Columbia* (D.D.C. Civ. No. 12-01699 (DAR), September 29, 2014).

35. Although Respondent has not to date offered to modify the Student's IEP, the undersigned concludes that ordering Respondent to do so—and to identify an LOS capable of implementing that modified IEP—is the appropriate prospective remedy in the instant case. Ordering Respondent to continue funding the Student's attendance at Non-Public School would be inappropriate because Non-Public School is not her LRE.

Summary

1. Since December 5, 2014, Respondent has denied the Student a FAPE because the IEP developed for her was not, and is not, reasonably calculated to confer educational benefit in the following ways: (i) the IEP provides insufficient hours of specialized instruction because the Student requires more hours of specialized instruction in the outside of general education setting; (ii) the Student requires low student to teacher ratios; (iii) the Student requires individualized instruction and pacing for all instruction;

(iv) the Student requires small class sizes; and (v) the Student requires guided and individualized social learning opportunities during lunch and any recess.

2. Petitioner did not establish by a preponderance of the evidence that the Student required ESY services during the summer of 2015.

3. Since December 5, 2014, Public School has been capable of implementing the Student's IEP as written; however, there is insufficient evidence in the record for the undersigned to determine whether Public School can implement the IEP the Student requires (and such a determination is not necessary to award appropriate relief herein).

4. Since December 6, 2014, the Student has received educational benefit at Non-Public School.

5. Non-Public School is not an appropriate placement and program for the Student prospectively because it is not her LRE; specifically, her disabilities do not preclude her from having some contact with non-disabled peers provided such contact is properly supervised and supported.

6. Respondent violated IDEA's procedural requirements, specifically 34 C.F.R. §300.503(b) because the PWN issued on December 16, 2014 based upon the December 4, 2014 IEP Team meeting (i) did not reflect that Petitioner disagreed with the program Respondent proposed, (ii) did not reflect that Petitioner requested a full-time outside of general education program at Non-Public School, and (iii) did not state the reasons why Respondent rejected Petitioner's proposal; however, Respondent's procedural violation did not constitute a denial of FAPE.

7. The PWN issued on December 16, 2014 accurately conveyed that other options were considered.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:¹⁵

1. No later than December 7, 2015 Respondent shall issue an amended PWN regarding the December 4, 2014 IEP Team Meeting, including statements that Petitioner disagreed with the program Respondent proposed, that Petitioner requested a full-time outside of general education program at Non-Public School, and the reasons why Respondent rejected Petitioner's proposal.

2. No later than December 7, 2015 Respondent shall convene a meeting of the Student's IEP Team, with Petitioner and as many other members as are available, at Non-Public School. Petitioner may invite Non-Public School teachers and/or staff members to participate. The Student's IEP shall be revised as follows:

(a) The Student's Present Levels of Performance, Annual Goals, Common Core Standards, Baselines, Anticipated Dates of Achievement, Evaluation Procedures and Schedules shall be updated.

(b) All of the Student's academic instruction in English/Language Arts (including reading and written expression), math, science, and social studies shall be specialized instruction and shall be provided in the outside of general education setting in classrooms with no more than 12 students (including the Student).

¹⁵ The short deadlines in this Order are necessary to ensure that the Student has an appropriate placement and LOS by the beginning of the second semester of SY 2015-2016.

(c) All of the Student's instruction in other academic subjects shall be specialized instruction and shall be provided in the general education setting in classrooms with no more than 12 students (including the Student).

(d) If Respondent's IEP software requires a number of hours of specialized instruction to be specified, Respondent may specify the hours based upon the schedule for Current Grade at DCPS public schools; provided, that if Respondent subsequently determines a Location of Service ("LOS") for the Student that has a different number of hours of instruction in these subjects, Respondent may unilaterally amend the number of hours of specialized instruction in the Student's IEP to match the number of hours of instruction in these subjects provided in the schedule of the LOS.

(e) The Student shall receive 180 minutes per month of individual OT services, of which 45 to 60 minutes shall be in settings other than an office or therapy room (such as the Student's classrooms, PE, lunch and recess).

(f) The Student shall receive one hour per month of OT consultation services.

(g) The Student shall receive six hours per month of individual SLP services, of which 45 to 120 minutes shall be in settings other than an office (such as the Student's classrooms, PE, lunch and recess).

(h) The Student shall receive one hour per month of SLP consultation services which shall include advising teachers and staff that supervise the Student's lunch and recess regarding her social-emotional needs and how to help her with her social pragmatics.

(i) The Student shall receive 30 minutes per week of behavioral support services in the general education setting and 30 minutes per month of behavioral support services in the outside of general education setting.

(j) The Student's PE class and any recess period shall have a maximum of 12 students including the Student under the supervision of a teacher or staff member, provided that additional students not under the supervision of that teacher or staff member may be utilizing other areas of a gym, other room, or playground at the same time. The teacher or staff member supervising recess shall assist the Student with her social pragmatics.

(k) The Student shall have lunch in a room (or quiet partitioned area of a room) with a minimum of four and a maximum of 25 students (including the Student), whether or not that is the typical arrangement for lunch at the LOS. The Student shall have access to a table with a minimum of two and a maximum of four other students (although there may be tables accommodating larger groups in the room). The teacher or staff member supervising lunch shall assist the Student with her social pragmatics.

(l) The student-to-adult ratio in the Student's classes shall not exceed three-to-one for math and reading, nine-to-one in all other academic subjects; and 15-to-one in PE.

(m) When the Student has contact with nondisabled peers there must be a teacher or staff member within 25 feet who has received a copy of the provisions of the Student's IEP addressing social-emotional development and speech-language needs, goals and objectives.

(n) The Student's classroom and testing accommodations shall include the ability to move about the classroom and the ability to use manipulatives such as "fidgets" or therapeutic putty for the Student to maintain her attention to her tasks. This shall be the Student's IEP for the remainder of School Year 2015-2016 (not including summer 2016), as though agreed to by the parties, unless Petitioner and Respondent agree otherwise.

3. At the IEP meeting described in the preceding paragraph, the parties shall discuss the LOS or LOSs where Respondent proposes to implement the amended IEP. Petitioner and Parent #2 shall be provided the opportunity to visit and observe classes at any proposed LOS prior to the LOS's winter break.

4. No later than December 18, 2015, Respondent shall provide Petitioner a Prior Notice of Placement or other document identifying the LOS to implement the Student's amended IEP, to be effective on that LOS's first school day in January 2016. Petitioner shall not have the right to reject that LOS. However, nothing in this Order precludes Petitioner from filing a new Due Process Complaint if she does not believe the LOS is capable of implementing the IEP as amended pursuant to Paragraph 2 above.

5. If Respondent fails to provide notice of the LOS to Petitioner by December 18, 2015, Non-Public School shall be the Student's LOS from January 1, 2016 through the end of School Year 2015-2016 (not including summer 2016), funded by Respondent, with transportation, even though it is not the Student's LRE.

6. No later than December 31, 2015, without the need for Petitioner to submit any additional documentation other than a W-9 form (if required), Respondent shall

reimburse Petitioner the following amounts, which may be combined in one check or electronic payment:

<u>Amount</u>	<u>Description</u>
\$ 24,019.16	Tuition paid to Non-Public School for the period from December 6, 2014 through the end of SY 2014-2015;
\$ 5,697.00	SLP services paid to Non-Public School for the period from December 6, 2014 through the end of SY 2014-2015;
\$ 2,700.00	OT services paid to Non-Public School for the period from December 6, 2014 through the end of SY 2014-2015;
\$ 1,154.40	Transportation of the Student to and from Non-Public School for the period from December 6, 2014 through the end of SY 2014-2015;
\$ 21,790.00	Tuition paid to Non-Public School for the first half of SY 2015-2016;
\$ 535.00	SLP services paid to Non-Public School for September 2015; and
\$ 535.00	OT services paid to Non-Public School for September 2015.

7. No later than January 31, 2016, Petitioner shall provide Respondent a notarized statement of the number of miles Petitioner and her family have driven to transport the Student to and from Non-Public School from the beginning of SY 2015-2016 through December 31, 2015. Within 30 days of receipt of this notarized statement, Respondent shall reimburse Petitioner at the rate of \$0.555 per mile, not to exceed \$11.10 per day that the Student attended Non-Public School.

8. No later than January 31, 2016, Petitioner shall provide Respondent with copies of cancelled checks or bank statements evidencing the payments to Non-Public School for SLP and OT services received by the Student from October 1 through December 31,

2015. Once these documents are received, Respondent shall reimburse Petitioner within 30 calendar days.

9. Between February 15 and 29, 2016, Respondent shall convene a meeting of the Student's IEP Team, including all necessary members, at the Student's then-current LOS, to review the Student's IEP, the Student's academic and social-emotional progress, and any other information from teachers, staff, Petitioner, and Petitioner's representatives. If Petitioner and Respondent agree, the IEP may be revised; otherwise, the IEP will remain unchanged until the end of SY 2015-2016 (not including summer 2016).

10. During May 2016, Respondent shall convene a meeting of the Student's IEP Team, including all necessary members, at the Student's then-current LOS, to review the Student's IEP, the Student's academic and social-emotional progress, and any other information from teachers, staff, Petitioner, and Petitioner's representatives. The Team shall revise the Student's IEP as appropriate to be effective the first day of SY 2016-2017. The Team also shall determine whether the Student requires ESY services during summer 2016.

11. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

12. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

13. Petitioner's other requests for relief are DENIED.

Dated this 19th day of November, 2015.



Charles Carron
Impartial Hearing Officer

Copies to: Petitioner's Counsel Margaret A. Kohn, Esq.
 Petitioner's Counsel Anjali Parekh Prakash, Esq.
 Respondent's Counsel Daniel L. McCall, Esq.
 Office of Dispute Resolution
 Chief Hearing Officer Virginia Dietrich, Esq.
 OSSE Division of Specialized Education
 Contact.Resolution@dc.gov

XII. 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).