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Confidential

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| <p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) [LEA] Respondent.</p> <p>Case # 2018-0120</p> <p>Hearing Officer: Coles B. Ruff, Esq.</p> | <p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: July 3, 2018 July 17, 2018</p> <p>Counsel for Each Party listed in Appendix A</p> <p>Date Issued: July 29, 2018</p> |
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, July 29, 2018, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on July 3, 2018, and July 17, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, NE, Washington, D.C. 20003, in Hearing Room 112. The parties submitted written closing arguments on July 20, 2018.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² The student resides with Student’s mother (“Petitioner”) and father in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including emotional disturbance (“ED”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”).

On May 2, 2018, Petitioner filed this due process complaint asserting DCPS had denied Student a free appropriate public education (“FAPE”) by, inter alia, failing to provide Student with an appropriate individualized educational program (“IEP”), placement and/or location of services for school year (“SY”) 2017-2018.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find the LEA has denied the student a FAPE and order DCPS to do the following:

- fund placement and transportation to a non-public special education separate day school;
- alternatively, convene a MDT meeting to discuss and determine an appropriate placement;
- Provide a timely finalized version of Student’s April 3, 2018, amended IEP that incorporates appropriate hours of direct instruction outside general education, behavioral support services outside general education, appropriately comprehensive ESY goals, and consistent baselines throughout.
- Provide Student compensatory education for the denials of FAPE found;
- Fund and complete a modified functional behavior assessment (“FBA”) and behavior intervention plan (“BIP”), to the extent necessary;
- Timely convene a meeting to review any, and all, outstanding evaluations and review and revise Student’s IEP as warranted.
- Alternatively, convene a student evaluation plan meeting to determine any, and all,

² The student’s current age and grade are indicated in Appendix B.

evaluations/assessments required to ensure a FAPE.

LEA Response to the Complaint:

The LEA filed a response to the complaint on May 10, 2018. DCPS asserted that student has not been denied a FAPE. In its response DCPS asserted, inter alia, the following:

On November 7, 2016, a multidisciplinary team (“MDT”) at the DCPS school Student was attending (“School A”) developed an IEP for Student. On December 18, 2016, School A conducted an FBA and on December 26, 2016, developed a BIP for Student. On January 12, 2017, DCPS identified another DCPS school (“School B”) as Student’s location of service. Petitioner did not enroll Student in School B but maintained Student at School A. On April 11, 2017, the multidisciplinary team revised Student’s IEP to reflect the services Student was actually receiving at School A.

On May 30, 2017, DCPS identified another DCPS school (“School C”) as Student’s location of service for SY 2017-2018. However, Petitioner refused to enroll Student in School C and enrolled Student at Student’s neighborhood School (“School D”) with the IEP that Student last had at School A.

On October 30, 2017, the MDT convened to review and revise Student’s IEP. The team agreed that Student continued to qualify for special education as a student with a MD classification. Petitioner did not disagree with DCPS’ reevaluation. The team, including parent, agreed that Student requires 22 hours of specialized instruction per week and 180 minutes per month of behavior support services outside general education. Petitioner agreed with the recommendation that Student receive education outside of the general education setting. School D informed Petitioner that School D could not implement Student’s IEP.

On April 4, 2018, the MDT convened to review and revise Student’s IEP. Student’s IEP requires 22 hours per week of specialized instruction and 180 minutes per month of speech language pathology services outside the general education setting. DCPS advised Petitioner that School C continued to be the location of service identified by DCPS that can implement Student’s IEP and continues to be an appropriate location of service.

Resolution Meeting and Pre-Hearing Conference:

The parties held a resolution meeting on May 21, 2018. The complaint was not resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on June 2, 2018, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on July 16, 2018. The parties agreed to an extension of the HOD until July 29, 2018, to accommodate the requested hearing dates. Respondent’s counsel filed an unopposed motion to extend the HOD that was granted an extension of the HOD due date to July 29, 2018.

ISSUES: ³

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP/Placement/Location of Services from October 30, 2017, to April 30, 2018, because Student's IEP (a) was not based upon comprehensive evaluations and (b) failed to provide Student with the appropriate LRE⁴, and (c) lacked math baselines.
2. Whether DCPS denied the student a FAPE by failing to timely and appropriately update Student's BIP during SY 2016-2017 and/or during SY 2017-2018 and/or timely comprehensively reevaluate Student in each area of disability.

Petitioner alleges: (a) although the FBA was completed in December 2016, DCPS failed to timely complete Student's BIP, (b) DCPS failed to complete and review Student's comprehensive psychological evaluation until February 2018, when it should have been completed and reviewed by the fall of 2017, and (c) DCPS failed to conduct speech and language and OT evaluations in a timely manner following the manifestation of deficits which were apparent in fall 2017; however, the evaluations were not authorized until April 2018.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 100 and Respondent's Exhibits 1 through 44) that were admitted into the record and are listed in Appendix A.⁵ Witnesses are listed in Appendix B.⁶

³ At the outset of the hearing the Hearing Officer and the parties discussed and agreed to the issues to be adjudicated. Issue # 1 was modified from the issue stated in the PHO when it became evident there was no IEP dated April 3, 2018. The draft IEP discussed at the April 3, 2018, meeting was never finalized due to changes Petitioner's representative requested following the April 3, 2018, meeting. Thus, the only IEP being challenged is dated October 30, 2018.

⁴ Petitioner asserts Student's LRE is all services outside general education in a therapeutic separate day school.

⁵ Any items disclosed and not admitted, or admitted for limited purposes, was noted on the record and summarized in Appendix A.

⁶ Petitioner presented six witnesses: (1) Student's mother (Petitioner), (2), Student's father, (3) Student, (4) Program Director of the non-public school where Petitioner is seeking to have Student placed, (5) an independent psychologist, and (6) an educational advocate employed by the law firm representing Petitioner, designated an expert witness. Respondent presented two witness: (1) The LEA representative for the School D proposed for Student, and (2) Student's special education teacher.

SUMMARY OF DECISION:

Petitioner established a prima facie case on issue #1 before the burden of persuasion fell to Respondent. Petitioner held the burden of persuasion on issue #2. Respondent sustained the burden of persuasion by a preponderance of the evidence that student's IEP was reasonably calculated to provide Student educational benefit at the time the IEP was developed and Student's placement as prescribed by the October 30, 2017, IEP was also appropriate. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #2. The Hearing Officer dismissed Petitioner's due process complaint with prejudice.

FINDINGS OF FACT:⁷

1. Student has been determined eligible for special education and related services pursuant to IDEA with a MD disability classification including ED and OHI due to ADHD. DCPS is Student's LEA. (Petitioner's Exhibits 8-1, 19-1)
2. Student was initially found eligible for special education and related services during SY 2014-2015 when Student attended a public charter school in the District of Columbia that was its own LEA. (Petitioner's Exhibit 22-1)
3. A comprehensive psychological evaluation was conducted of Student in October 2014, while Student was attending the public charter school, with an evaluation report dated November 6, 2014. The evaluation assessed Student's cognitive, academic, behavioral and social-emotional functioning. The evaluator administered, inter alia, the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”), the Wechsler Individual Achievement Test-Third Edition (“WIAT-III”) and the Conners Comprehensive Behavior Rating Scale. Student's verbal and non-verbal reasoning and processing speed were in the Average Range. Student's working memory fell in the Average to Below Average range. Overall, Student was assessed as having Average cognitive functioning. Student's academic achievement reading, math and written language were all Below Average, approximately two grade levels below Student's grade at the time. The evaluator determined that with regard to behavior and social emotional functioning Student was experiencing significant emotional problems with a persistent pattern of anger/irritable mood and argumentative and defiant behaviors as well as inattentiveness and impulsivity at school. The evaluator concluded Student met the criteria of the MD disability classification due to ED and OHI for ADHD. (Petitioner's Exhibit 23-1, 23-5, 23-6, 23-11, 23-12, 23-16)
4. In September 2015 Student transferred from the public charter school to School A, a DCPS school. (Respondent's Exhibit 23-1, 23-2, Petitioner's Exhibit 11-10, 19-3)

⁷ The evidence (documentary and/or testimony) that is the source of the Finding of Fact (“FOF”) is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

5. On October 4, 2016, and November 7, 2016, School A convened a multidisciplinary team (“MDT”) to review and revise Student’s IEP. The team included Student’s parents. The team determined that Student required 20 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, and 180 hours per month of behavior support services. Prior to that, Student’s IEP had prescribed 5 hours per week of specialized instruction outside general education, 5 hours per week inside general education, and 180 minutes of behavioral support services per month. (Petitioner’s Exhibits 11-1, 11-10, 12-1, 12-10)
6. On November 22, 2016, Petitioner provided consent by telephone for Student to be evaluated. (Petitioner’s Exhibit 75-1)
7. On December 18, 2016, DCPS conducted an FBA. School A developed a BIP to address Student’s work avoidance, distracted and disengaged behaviors as well as difficulty regulating emotions escalating to screaming, crying, self-harm, and harming other students. (Respondent’s Exhibits 11, 14-1, 15-1)
8. On January 12, 2017, DCPS identified another DCPS school (“School B”) as Student’s location of service. Student did not enroll in School B. DCPS identified and offered Petitioner another school location other than School B. Petitioner also rejected that school location and maintained Student at School A. (Respondent’s Exhibits 8, 10, Petitioner’s Exhibit 19-3)
9. On April 11, 2017, the MDT revised Student’s IEP to reflect the services Student was actually receiving at School A, which was 8 hours of specialized instruction per week inside the general education setting, 5 hours per week of specialized instruction outside the general education setting, and 180 minutes per month of behavioral support services. (Petitioner’s Exhibit 10-1, 10-10)
10. On May 30, 2017, DCPS identified another DCPS, School C, as Student’s location of service for SY 2017-2018. Petitioner refused to enroll Student in School C and enrolled Student at School D, Student’s neighborhood School for SY 2017-2018 with the Student’s April 11, 2017, IEP. (Petitioner’s Exhibits 10-1, 19-3)
11. School D frequently telephoned Student’s parents to inform them of Student’s behavioral difficulties and often requested that they pick Student up early from school due to a behavior incident. (Father’s testimony, Mother’s testimony)
12. School D maintained a daily behavior tracking point sheet to monitor Student in three areas of behavior, and the degree to which Student displayed the behaviors in each of Student’s classes. The three areas were: (1) Work Avoidance/Distracted and Disengaged, (2) Emotional Dysregulation/Poor Communication /Expression of Feelings, and (3) Defiance. The levels of Student’s display of these behaviors was measured as either (1) Little to no display of Behavior, (2) Moderate Display of Behavior, and (3) High Display of Behavior. The point sheets indicate that Student often displayed these behaviors in various classes. However, there were many days during this period where

there were no entries made on the point sheets regarding Student's behaviors. (Petitioner's Exhibit 17)

13. On September 23, 2017, an MDT at School D, including Petitioner, convened to review Student's existing data and determine if any additional assessments were necessary for Student's triennial reevaluation. The School D psychologist stated during the meeting, that because the student's cognitive scores were Average in previous evaluations and there were no new concerns about Student's cognitive functioning, she would conduct updated educational and behavior assessments of Student. (Witness 5's testimony, Respondent's Exhibits 4, 5-2, 6)
14. DCPS conducted a psychological re-evaluation of Student with an evaluation report was dated October 28, 2017. The DCPS psychologist relied on Student's previous cognitive assessment from 2014, conducted updated academic achievement and behavioral assessments, and conducted interviews and classroom observations. Student's academic scores were three to four years below Student's age equivalence. Student's teachers noted Student was easily distracted and need a smaller class size and behavior supports in class to be successful. The behavior rating scales indicated Student had Clinically Significant rating for externalizing, behavior problems, and hyperactivity. The psychologist endorsed Student's continued eligibility for special education with the MD disability classification for ED and OHI due to ADHD. (Petitioner's Exhibit 19-1, 19-2, 19-3, 19-6, 19-12, 19-8, 19-9 19-17)
15. The DCPS psychologist noted in the evaluation report that the level of special education and behavioral support that Student was provided at School D was minimally successful. She noted that Student willingly engaged in negative interactions with peers and frequently required removal from a class when Student's behaviors escalated. Student was difficult to calm once separated, resulting in kicking, screaming, throwing objects, storming away, and uncontrolled crying. The psychologist noted that when Student's behavior was addressed, Student sometimes became defiant, shut down, and self-dismissed from class. This negatively impacted Student's classwork production and academic output. Student had multiple conduct referrals logged into the school database that included temporary removal from class, Student's parent being contacted, and on one occasion a short-term off-site suspension. (Petitioner's Exhibits 19-5, 45, 47)
16. On October 30, 2017, the MDT convened to review evaluations and review and revise Student's IEP. The team agreed that Student continued to qualify for special education as a student with the MD classification. The team reviewed the psychological evaluation. There was no discussion about the need for additional evaluations. No one raised the need to assess Student's cognitive scores or for a new FBA to be conducted. Student had a BIP that described behaviors consistent with the behaviors Student was exhibiting at School D. At that time, School D staff recommended a behavior education support ("BES") program for Student. At the meeting, the team discussed Student attending School C. Petitioner agreed that the student needed more support but did not think that School C was acceptable and did not believe School C had a full-time nurse to address Student's medical concerns. Petitioner also stated that she had visited School C and was

not treated well and did not want Student there. The team stated that it would explore other school location possibilities. (Witness 5's testimony, Respondent's Exhibits 2, 3, 7)

17. The October 30, 2017, MDT which included Petitioner determined Student required a more restrictive placement, and updated Student's IEP to prescribe 22 hours of specialized instruction per week, and 180 minutes per month of behavior support services outside general education. (Respondent's Exhibit 2-8, Petitioner's Exhibit 8-1, 8-10, 8-11)
18. The October 30, 2017, IEP included academic goals in math, reading, written expression. The IEP included three math goals two of which had baseline statements. (Petitioner's Exhibit 7-4, 7-5)
19. Petitioner agreed with the goals and level of services in Student's IEP. Her area of disagreement was with the school location proposed. School D could not fully implement the October 30, 2017, IEP and made that clear to Petitioner. Petitioner understood, and because she disagreed with the location proposed, requested that Student remain at School D until another was proposed. (Witness 5's testimony)
20. In November 2017, School D convened another meeting at which the team discussed an alternative location to School D. Again, Petitioner did not want Student to attend School C. In December 2017, DCPS sent Petitioner a letter which stated that School C was the school location to which Student was assigned and someone from location of services office from DCPS central office would reach out to discuss what other locations of BES programs would be suitable. However, DCPS was not able to reach Petitioner to have that discussion. School D later sent Petitioner a letter stating that Student's last day attending School D would be January 5, 2018. (Witness 5's testimony, Petitioner's Exhibits 51, 53)
21. On January 8, 2018, Petitioner filed a due process complaint challenging among other things, the appropriateness of the October 30, 2017, IEP that School D developed, and challenging the psychological evaluation DCPS conducted. Petitioner expressed concerns with DCPS' proposal to move Student to School C and insisted that Student remain at School D until Student "gets into the private school [Student] needs to be in." In attempts to resolve the complaint DCPS authorized Petitioner to obtain an independent evaluation. Under stay put provisions Student was permitted to remain at School D. (Witness 3's testimony, Respondent's Exhibit 1-1, 1-3, 1-4)
22. During the first and second advisory of SY 2017-2018, Student earned passing grades in all subjects except Creative Drama, which Student failed in the first advisory. During these two advisories Student had 14 total absences of which 7 were excused absences. Student's IEP progress report for the second advisory, after Student's IEP was updated, indicated that of the goals introduced, Student made progress on two math goals, made no progress on two of three reading goals and made no progress on written expression goals. Student made progress on two of three emotional/social/behavioral development goals.

(Respondent's Exhibits 17, 18)

23. On February 10, 2018, an independent psychologist evaluated Student and issued an evaluation report ("IEE") dated, February 20, 2018. The evaluation assessed Student's cognitive, academic, and social emotional functioning. Student's cognitive functioning was in the Low Average range when compared to same age peers. There was no indication of incidents that would have impacted Student's cognition and Student's overall cognitive scoring remained about the same. Student's academic functioning was assessed at approximately four grade levels below Student's current grade in the areas of reading, math and written language. Student displayed marginal improvement in academic achievement scores from Student's 2014 evaluation. The evaluator identified the same social emotional concerns that were identified in DCPS' October 2017 evaluation. (Witness 2's testimony)
24. The evaluator confirmed Student's diagnosed ADHD, Disruptive Mood Dysregulation Disorder, and Unspecified Anxiety Disorder. The evaluator also administered the Bender Gestalt-II to evaluate the degree to which Student's eye-hand movements are well coordinated. Student had a Low Average Score on this assessment. The psychologist concluded Student met the criteria for ED and OHI disability classifications. The psychologist recommended Student be provided at least 15 hours per week of special education supports in reading, math and writing in a "pull out" paradigm and inclusion supports for all other subjects with an academic base that required reading, writing and math. Although the psychologist had not seen any behavior tracking information to indicate that the BIP Student had was insufficient or was not working, she concluded Student required an FBA and BIP. The evaluator acknowledged Student having not been in the program DCPS recommended in November 2016 could have been negatively impacted both Student's academic and behavioral progress. (Witness 2's testimony, Petitioner's Exhibit 18-1, 18-7, 18-8, 18-19, 18-20, 18-21)
25. On April 4, 2018, the MDT at School D convened to review and revise Student's IEP. Petitioner, her attorney, and educational advocate participated in the meeting. The team reviewed the IEE and concluded that the IEE was consistent with, and corroborated, the evaluations previously completed. There was no new information on cognitive abilities as the evaluation reconfirmed cognitive information from Student's previous evaluations. At the meeting the MDT developed an IEP that prescribed services consistent with a DCPS BES program outside the general education classroom. Although Petitioner voiced her disagreement, Petitioner's disagreement was with the location of service offered rather than the hours or types of services provided in the IEP. Petitioner requested an updated FBA and BIP. Petitioner also requested that DCPS conduct a speech language evaluation and an occupational therapy ("OT") evaluation. (Witness 5's testimony, Respondent's Exhibit 33-1, 33-2, 33-4, 33-5, 33-8, 33-9, 33-10)
26. DCPS did not agree to Petitioner's request for a dedicated aide or that Student be placed in a non-public separate special education school. School D updated Student's IEP to include ESY services and added ESY goals. The IEP prescribes a least restrictive environment ("LRE") of 22 hours per week of specialized instruction outside general

education, and 180 minutes per month of behavior support services outside general education. (Witness 5's testimony Petitioner's Exhibit 8-1, 8-10, 8-11)

27. During the meeting, the DCPS team members did not support Student being totally removed from non-disabled peers in a separate special education school because they believed that Student could be supported in a smaller classroom with behavior and academic support. With a BES, Student would be in a school building with non-disabled peers with whom Student could interact during non-instructional time. Student would also receive staff support during non-instructional time, as needed. (Witness 5's testimony)
28. At the April 2018 meeting, Petitioner signed a consent form for the evaluations to be conducted. Student's IEP was amended to include goals for extended school year ("ESY"). Petitioner and her representatives expressed their belief that the program that DCPS proposed for Student to attend at School C was inappropriate because the class size, 12:1 is not small enough to meet Student's needs, and Student required a school with fewer students and no general education peers. Petitioner expressed that teachers at School A were not able to handle Student's behaviors and requested that DCPS place Student in a non-public separate special education school ("School E"). (Respondent's Exhibit 33-1, 33-2, 33-4, 33-5, 33-8, 33-9, 33-10)
29. The BES program located at School C provides a self-contained special education setting specifically for Students identified with the ED classification and/or with challenges with behaviors. The BES program at School C has two BES classrooms with 15 students in total. During SY 2017-2018, one classroom had 7 students and the other had 8, and each classroom had a special education teacher, a behavior technician and classroom aide. (Witness 4's testimony)
30. Each BES classroom provides a more restrictive setting with behavior specialists to analyze goals, record behavior, and assess academic data, working with teachers, aides, behavior technicians, and the LEA representative to ensure students' needs are met. Each BES staff member has received training in a behavior management program. The academic program has licensed special education certified teachers and is aligned with general education curriculum. The BES program has a class-wide behavior modification program and the teachers offer students weekly incentives based on teachers' data collection sheets. (Witness 4's testimony)
31. Students are provided special classes, Art and Engineering, with their BES cohort and the BES staff joins those students in these classes. There are no non-BES students in those special classes. Students in the BES program transition in the School C building 3 minutes prior to the transition of the other students in the building to limit interaction with non-disabled peers during transitions. Students in the BES program have interaction with non-disabled peers during lunch. BES students are allowed during lunch to sit with general education students and/or remain seated with their BES cohort. A behavior technician and an aide remain with the BES students during lunch. School C has a full-

time nurse to help ensure Student's medical concerns are addressed. School C is able to implement Student's most recent IEP. (Witness 4's testimony)

32. Student's special education teacher drafted the goals and made changes based on Petitioner's advocate's concerns following the April 3, 2018, meeting. The primary disagreement regarding the goals was the number of goals rather than the content of the goals. An amended IEP was dated May 1, 2018, to include updated ESY goals. The team determined Student's needed 22 hours per week of specialized instruction and 180 minutes per month both outside the general education setting. (Witness 5's testimony, Petitioner Exhibit 6-1, 6-11)
33. DCPS agreed to the Petitioner's request for an OT evaluation and attempted to conduct an OT evaluation of Student but Student has not been available for testing. OT was not performed because of the difficulty in arranging times for Student to complete the evaluation. Student claimed to be over-tested with PARCC assessment taking place. (Witness 5's testimony)
34. On May 16, 2018, DCPS conducted a speech language evaluation with an evaluation report dated May 17, 2018. The evaluation indicated Student had Average speech-language abilities but recommended a more comprehensive evaluation be conducted before determining if Student was in need of speech language therapy. (Respondent's Exhibit 36-1, 36-11)
35. On May 14, 2018, DCPS issued to Petitioner a letter stating that Student's location of services, where Student's IEP would be implemented for SY 2018-2019, would be School C. (Respondent's Exhibit 42)
36. Student believes that at School D teachers often address Student's behavior but not that of other students. Student does not feel safe at School D and has gotten into fights with other students and is often placed in in-school suspension. Student feels that only two of the School D staff offer assistance but at times Student feels that Student does not get the assistance from teachers in the classroom that Student needs. At School D, Student generally has a class size of approximately 15 students, but Student believes Student would do best in a classroom of 5 to 6 students where there are fewer distractions. (Student's testimony)
37. Student needs individual support in academics. When given work Student can stay on task for a brief time but tends to have questions and wants them answered quickly. Student gets concerned that Student doesn't know the answer, and this causes Student to reach out to the teacher for help. Student is generally able to grasp the concept with repetition; however, Student has significant behavior needs and gets extremely upset and agitated, needs calm down time and often needs to be removed from class to de-stress. (Witness 5's testimony)
38. Student completed SY 2017-2018 at School D with passing grades in subjects and was promoted to the next grade. Student made progress in nearly all of Student's IEP goals in

the last two advisories of SY 2017-2018, except for one reading goal, one written expression goal and one emotional, social, behavioral development goal where Student made no progress. (Respondent's Exhibits 38, 39)

39. Petitioner and Student visited School E and the School E admission committee offered Student acceptance to attend School E. School E is a non-public separate special education school that has students with similar educational and behavioral profiles as Student. School E has no general education students. School E has an annual cost of approximately \$50,000.00. School E has a behavior management system that includes incentives for students who comply with behavior expectations, and each student carries a scorecard throughout the school day to assist in monitoring behaviors. Each wing of the school building has a behavior support area where Student may go when in crisis. All School E staff members are trained in a program to prevent and respond to behavior and emotional crisis. (Witness 1's testimony, Petitioner's Exhibit 83-3)

40. School E offers ESY services and has certified special education teachers and teachers also certified in content subject areas. The student to teacher ratio is approximately 9 to 1. School E has an OSSE Certificate of Approval ("C. of A."). The School E staff conducts periodic reviews of students' progress to make adjustments to any student's behavior supports or academic programming. School E would conduct a 30-day review of Student's IEP and progress if Student were to attend School E and modify Student's IEP consistent with the level of services and the LRE provided at School E. (Witness 1's testimony, Petitioner's Exhibit 83-3)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted at the hearing, Petitioner held the burden of production on all issues to be adjudicated. Respondent held the burden of persuasion on issue #1 after Petitioner established a prima facie case.⁸ Petitioner held the burden of persuasion on issue #2. The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the DCPS denied the student a FAPE by failing to provide the student an appropriate IEP/Placement/Location of Services from October 30, 2017, to April 30, 2018, because Student's IEP (a) was not based upon comprehensive evaluations and (b) failed to provide Student with the appropriate LRE, and (c) lacked math baselines.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's IEP was reasonably calculated to provide Student educational benefit in light of Student's circumstances. The preponderance of the evidence demonstrates that Student's October 30, 2018, prescribed an appropriate LRE for Student, was based on comprehensive evaluations and includes math baselines on two of the math goals. There was insufficient evidence to demonstrate that the lack of baseline on one of the IEP math goals made any significant detrimental impact on Student's academic performance so as to rise to the level of a denial of a FAPE.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial

⁸ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) The student's paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.⁹

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

⁹ Pursuant to 34 C.F.R. § 300.115 - Continuum of alternative placements (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Pursuant to DC Code § 38–2561.02. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The evidence demonstrates that DCPS concluded as early as November 7, 2016, that Student was in need of an IEP and educational placement that provided Student significantly greater special education services than Student had been provided while attending School A. DCPS offered Student at least two school locations where Student's IEP could be implemented in a BES program. Petitioner rejected both the school placements and chose to maintain Student at School A. As result, School A changed Student's IEP to reflect the services Student was actually receiving at School A. At the end of SY 2016-2017, DCPS proposed one of the two previously proposed BES programs, School C, as the school placement for Student for SY 2017-2018, as Student was promoted out of School A.

Petitioner again rejected School C and instead enrolled Student in Student's neighborhood school, School D, that could implement the final IEP Student had at School A. Student had significant behavioral challenges at School D and DCPS conducted a triennial psychological evaluation in October 2017. On October 30, 2017, an MDT developed Student's IEP that proposed 22 hours per week of specialized instruction outside the general education setting and 180 minutes of behavioral support services per month outside the general education setting.

The evidence demonstrates that initially Petitioner agreed with the MDT regarding Student's IEP and the LRE described therein, and Petitioner acknowledged that Student should be in a different school placement than School D. However, Petitioner remained opposed to Student attending School C. The evidence seems to indicate that Petitioner was not necessarily opposed at the time to Student being in a DCPS BES program, but was opposed to School C as the location, principally because when Petitioner visited the school and claims she was treated rudely and observed what she considered unprofessional behavior by the school staff.

DCPS continued to only offer School C as a school location, and School D sent Petitioner a letter stating Student's last day at School D was January 5, 2018. Petitioner retained counsel and filed a due process complaint. The evidence demonstrates that initially Petitioner alleged that there had been insufficient interventions and/or evaluations prior to School D moving Student to a more restrictive placement. Student remained at School D under stay-put and DCPS agreed to authorize an IEE.

The evidence demonstrates that after the IEE was completed and reviewed there was an IEP meeting on April 4, 2018, at which DCPS continued to maintain the level of services and LRE that had been prescribed in Student's October 30, 2017, IEP. At that meeting Petitioner requested that DCPS place Student at School E, a separate special education school. DCPS declined to do so. DCPS also declined Petitioner's request for a dedicated aide but agreed to additional evaluations that have yet to be completed and/or reviewed by a team. Ultimately,

DCPS offered the School C BES program as a placement and location services for Student for SY 2018-2019.

Petitioner asserts Student's appropriate LRE is all services outside general education in a therapeutic separate school and that Student's October 30, 2017, IEP is inappropriate because it lacks that LRE, because it was not based on comprehensive evaluations, and because it lacks math baselines.

As to the evaluations, the evidence demonstrates that prior to the January 8, 2018, due process complaint, Petitioner never raised a concern or challenge to the evaluation(s) that DCPS conducted prior to the October 30, 2017, IEP being developed. That IEP was developed based on data including the October 2017, psychological re-evaluation. Petitioner asserted the principal flaw in the October 2017 DCPS psychological re-evaluation was that Student's cognitive functioning was not reassessed. The evidence demonstrates that at a team meeting the DCPS psychologist discussed the reasons why additional cognitive assessments were not needed. The evidence also demonstrates that even after DCPS granted, and Petitioner obtained, an independent psychological evaluation, the independent evaluation revealed that Student's cognitive functioning was consistent with the data obtained in prior evaluations that the DCPS psychologist had reviewed and relied upon in her October 2017 psychological re-evaluation.

Although Petitioner later requested additional evaluations of Student including an updated BIP, speech-language evaluation and an OT evaluation, there was no request for those evaluations at the time the October 30, 2017, IEP was developed and no indication then that Student had any needs in those areas that would have warranted those evaluations being conducted. Although Student was clearly displaying behavior difficulties at school, School D determined that Student's needs were not being met at School D and Student needed an entirely more restrictive placement. There was no request at the time of the October 30, 2018, IEP meeting that Student be provided an updated BIP. The evidence demonstrates that the behaviors Student was displaying were already being addressed in Student's existing BIP, and that School D was keeping a daily point sheet to measure the behaviors. There was insufficient evidence to support a finding that an updated BIP would have been more effective than a change in Student's placement to the BES program that DCPS proposed. Consequently, the Hearing Officer concludes that Student's October 30, 2017, IEP was based on appropriate and comprehensive evaluations.

As to Petitioner's assertion that the LRE in the October 30, 2017, IEP was inappropriate because it was not restrictive enough and Student needed a separate special education school, the weight of the evidence does not support this assertion. Petitioner's first expert witness, who conducted the independent psychological evaluation of Student, did not recommend such a restrictive placement in her evaluation. The evaluation stated that Student was in need of only 15 hours of specialized instruction per week outside general education. In her testimony she attempted to explain that recommendation as being predicated on an effective BIP being in place for the Student and that Student is now in need of a more restrictive placement.

The Hearing Officer was unconvinced by this witnesses' testimony in this regard. The evidence demonstrates that much of the behavior Student displayed at School D was related to Student's

frustration with insufficient academic support being provided. School D fully acknowledged that it was an inappropriate placement for Student and could not, and did not, provide Student the services the October 30, 2018, IEP prescribed. The evidence demonstrates that even though Student was at School D in a placement unable to implement Student's IEP, Student was nonetheless able to make passing grades and be promoted to the next grade. The weight of the evidence supports a conclusion that it was reasonable to the IEP team at the October 30, 2017, IEP meeting to have increased Student's LRE to the level of restriction that provided more academic and behavior support outside general education, while allowing Student to continue to have access to non-disabled peers. There was insufficient evidence that when the October 30, 2017, IEP was developed or even thereafter, that Student was, or is, in need of an LRE and placement in a separate special education school.

Lastly, with regard to Petitioner's allegation that the October 30, 2017, IEP is inappropriate because it lacked math baselines, the evidence demonstrates that the IEP had baselines for two for the three math goals in the IEP. There was no testimony or evidence of a negative impact on Student's academic performance or progress from the lack of baseline for the third math goal. Consequently, the Hearing Officer concludes that Student's October 30, 2018, IEP remained reasonably calculated to provide Student educational benefit in light of Student's circumstances despite the lack of one math goal baseline.

There are clearly additional evaluations that need to be completed and/or reviewed by a team and Student's IEP may be updated to include additional services if warranted. However, it appears unlikely that these additional assessments will change the LRE that Student requires. Because the evidence demonstrates that Petitioner was at least not initially opposed to Student attending a DCPS BES program when Student's October 30, 2017, IEP was developed, the Hearing Officer strongly encourages the parties to meet and consider all DCPS school locations that are available for Student to attend in SY 2017-2018 such that both Petitioner and DCPS have greater assurance that Student's needs are appropriately met, and so that Student will no longer be detrimentally affected by remaining in a school setting that can not meet Student's needs and implement Student's IEP.

ISSUE 2. Whether DCPS denied the student a FAPE by failing to timely and appropriately update Student's BIP during SY 2016-2017 and/or during SY 2017-2018 and/or timely comprehensively reevaluate Student in each area of disability.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes clear that, "A local education agency ("LEA") *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years. Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability.

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

Petitioner alleges: (a) although the FBA was completed in December 2016, DCPS failed to timely complete Student's BIP, (b) DCPS failed to complete and review Student's comprehensive psychological evaluation until February 2018, when it should have been completed and reviewed by the fall of 2017, and (c) DCPS failed to conduct speech and language and OT evaluations in timely manner following the manifestation of deficits which were apparent in fall 2017; however, the evaluations were not authorized until April 2018.

The evidence demonstrates that DCPS conducted an FBA in December 2016 and developed a BIP shortly thereafter. There was no evidence of a delay in the BIP being developed. There was also insufficient evidence that there was any request for a comprehensive psychological to be conducted during SY 2016-2017 or any sooner than when DCPS conducted the October 2017 psychological reevaluation.

Although DCPS granted Petitioner authorization for an IEE that included a cognitive assessment, that the DCPS psychological reevaluation did not include, the evidence demonstrates there was no appreciable change in Student's cognitive functioning between Student's prior cognitive assessment(s) and the IEE. DCPS timely evaluated Student with a sufficiently comprehensive psychological reevaluation in October 2017.

Lastly, Petitioner asserts that DCPS should have conducted a speech and language evaluation and an OT evaluation after Student displayed deficits in those areas in fall 2017. There was insufficient evidence that Student was displaying any deficits in fall 2017 that would have warranted these evaluations.

Petitioner's expert witness, who evaluated Student, noted that Student scored Low Average in an assessment that could be considered at OT screener; however, there was insufficient evidence that Student's score on this assessment clearly warranted additional testing in that area. The evidence demonstrates that prior to Petitioner's request for these additional evaluations in April 2018, there was no indication these evaluations were warranted and no duty on DCPS to conduct them. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ORDER:

Petitioner's Due Process Complaint is hereby dismissed with prejudice and all requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the 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).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: July 29, 2018

Copies to: Counsel for Petitioner
 Counsel for DCPS
 ODR, OSSE & CHO