

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

Office of Dispute Resolution  
1050 First Street, N.E., Third Floor  
Washington, D.C. 20002

OSSE  
Office of Dispute Resolution  
August 31, 2018

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2018-0143
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 8/24/18 (Proofed)
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Date: 8/20/18
("DCPS"),	)	ODR Hearing Room: 112
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been comprehensively evaluated and found eligible for special education and related services. DCPS responded that it had sufficiently evaluated Student and properly found Student ineligible for services.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

**Procedural History**

Following the filing of the due process complaint on 6/4/18, the case was assigned to the undersigned on 6/5/18. Respondent filed a timely response on 6/14/18 and did not challenge jurisdiction. The resolution session meeting was held on 6/28/18, but did not resolve the case or shorten the 30-day resolution period, which ended on 7/4/18. A final

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<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 2-week continuance, which requires a Hearing Officer Determination (“HOD”) by 9/1/18.

The due process hearing took place on 8/20/18, and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in most of the hearing.

Petitioner’s Disclosures, submitted on 8/13/18, contained documents P1 through P49, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 8/13/18, contained documents R1 through R8, which were admitted into evidence without objection.

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. *Private Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
2. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology and Special Education Evaluations)
3. *Educational Advocate* (qualified without objection as an expert in Special Education Eligibility)
4. Parent

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

1. *Teacher*
2. *School Psychologist* (qualified over objection as an expert in School Psychology)
3. *School Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)

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

**Issue 1:** Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student, where Parent requested evaluations in March 2017 to determine special education eligibility and DCPS (a) agreed to conduct a psychological evaluation, but misrepresented and misinterpreted crucial data and omitted academic data; (b) agreed to conduct a Functional Behavioral Assessment (“FBA”), but did not do so; and (c) did not conduct an occupational therapy evaluation. As a result, DCPS found Student was not eligible for special education services at a June 2017 eligibility determination meeting, although a new LEA later conducted evaluations and found Student eligible. *Petitioner has the burden of persuasion on this issue.*

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**Issue 2:** Whether DCPS denied Student a FAPE by failing to comply with its affirmative Child Find obligations and find Student eligible for special education services, where DCPS had data showing that Student was achieving below grade level in reading and math, as well as cognitive and behavior data showing that Student had elevated levels of hyperactivity and impulsivity in line with a disability classification of OHI due to ADHD and at least 38 disciplinary referrals during 2016/17,<sup>2</sup> and Student's new LEA found Student eligible. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall fund compensatory education, consisting of tutoring, counseling, occupational therapy, and summer camp for Student.<sup>3</sup>
3. Any other just and reasonable relief.

### Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>4</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age*, *Gender* and was in *Grade* at *Public School* in 2016/17 and in *Grade+1* at *Charter School* in 2017/18.<sup>6</sup> Student had to repeat *Grade-1* in 2015/16.<sup>7</sup>

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<sup>2</sup> All dates in the format "2016/17" refer to school years.

<sup>3</sup> Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denials of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denials of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> Parent.

<sup>6</sup> *Id.*

<sup>7</sup> Parent; Educational Advocate.

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2. Petitioner's counsel made a formal request for an evaluation of Student by letter dated 3/15/17.<sup>8</sup> Student was referred for a comprehensive psychological evaluation by Parent and the Multi-disciplinary Team ("MDT") as Student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD").<sup>9</sup> At a 4/26/17 meeting on the assessments to be conducted, Public School agreed to conduct a full educational psychological evaluation including Conners Behavior Rating Scales ("Conners"), an FBA, and possibly an occupational therapy evaluation and a BIP; Petitioner's counsel noted that if Outside Provider was responsible for Student's improved behavior in school then the services should be formally added to an IEP for Student.<sup>10</sup>

3. The comprehensive psychological evaluation conducted by DCPS on 5/9/17 and 5/30/17 determined that Student's "ability to learn" ranged from Low (Reynolds Intellectual Assessment Scales ("RIAS") Composite Intelligence Index ("CIX")=78) to Average (Test of Nonverbal Intelligence – Fourth Edition ("TONI") Index=104) ranges.<sup>11</sup>

4. Academics. The comprehensive psychological evaluation found that Student's DCPS report card contained many errors and was not valid for assessing academic performance; efforts to obtain a valid report card were unsuccessful.<sup>12</sup> The comprehensive psychological evaluation placed much weight on a 4-line teacher interview stating that Student was "well-rounded" academically and "very strong" in mathematics.<sup>13</sup> The comprehensive psychological evaluation stated that on the Woodcock-Johnson IV ("WJ-IV") Tests of Achievement, Student's math scores were in the Average range and Student's reading and writing scores ranged from Low to Average ranges.<sup>14</sup> The WJ-IV Table of Scores revealed that Student was not at age equivalency for any of the 26 clusters and tests, and was a year or more behind on 7 of the 26.<sup>15</sup>

5. In math in 2016/17, Student was below grade level with a Middle of Year ("MOY") iReady score of 388 when 400 (to nearly 500) was "on level" (with standard error +/- 6).<sup>16</sup> The 7/5/17 Evaluation Summary Report for determining eligibility of Student stated that 2 of the 4 MOY iReady tests were on level and the other 2 were "slightly below level."<sup>17</sup> The MOY iReady report revealed that 1 of the tests was more than 1 level below.<sup>18</sup> The End of Year ("EOY") iReady report showed a small decline in math, from 388 to 385.<sup>19</sup>

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<sup>8</sup> P45-1.

<sup>9</sup> P16-17.

<sup>10</sup> P37-1,2.

<sup>11</sup> P16-1,6,9,16; Clinical Psychologist (Student is "smart and has potential").

<sup>12</sup> P16-5,16.

<sup>13</sup> P16-3,5.

<sup>14</sup> P16-17.

<sup>15</sup> P16-14.

<sup>16</sup> P16-1; P26-1.

<sup>17</sup> P8-3.

<sup>18</sup> P26-1.

<sup>19</sup> R5.

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6. In reading in 2016/17, the comprehensive psychological evaluation erroneously stated that the Dibels reports for Student went from somewhat below grade level at Beginning of Year (“BOY”) to at or above grade level at MOY, and then back to somewhat below grade level at EOY.<sup>20</sup> The actual Dibels report showed that at BOY Student was on grade level at level “C,” which was the goal; by MOY Student had increased to a “D” while the goal was “F,” so was below grade level; and at EOY Student had increased to an “F” while the goal was by then an “I,” so was further below grade level.<sup>21</sup> Student was on grade level (or above goals) at MOY as measured by the DORF and NWF scores.<sup>22</sup> At the beginning of 2017/18, Student was over a year behind in reading.<sup>23</sup>

7. Behavior. Student had significant behavioral issues in 2016/17, with 38 behavioral incidents logged through 3/17/17.<sup>24</sup> Student had 3 incidents on 9/15/18, including 1 in which Student ran into the psychologist’s office and “proceeded to destroy” the office by throwing papers and other things all around the office, trying to break the glass and climb out a window, and standing on the desk and screaming “fuck you” at the adults.<sup>25</sup> Student was often sent out of class, which affected Student’s learning.<sup>26</sup>

8. By late in 2016/17, Teacher reported a decrease in Student elopement from class requiring behavioral support from staff.<sup>27</sup> Student did demonstrate difficulty transitioning with therapist for the occupational therapy screening due to eloping.<sup>28</sup> The Public School dean reported that Student’s behavior incident log reports had decreased over 2016/17 and correlated with Student receiving behavior support services from Outside Provider.<sup>29</sup> By 2/18/18, Student was not receiving any counseling or community services.<sup>30</sup> At Charter School in 2017/18, Student received 163 behavioral referrals from 8/28/17 to 4/26/18 for defiant behavior, verbal aggression, physical aggression, inattentive behaviors causing disruptions, inappropriate language and throwing objects.<sup>31</sup>

9. Eligibility. The comprehensive psychological evaluation concluded that Student did not meet the eligibility criteria for Other Health Impairment (“OHI”) based on ADHD because the Conners 3 results did not indicate clinically significant ADHD symptoms.<sup>32</sup> School Psychologist erred in the comprehensive psychological evaluation by not

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<sup>20</sup> P16-1.

<sup>21</sup> P27-1; Teacher; P17-1 (EOY).

<sup>22</sup> P8-4; P27-1; Teacher.

<sup>23</sup> P6-4.

<sup>24</sup> P30.

<sup>25</sup> P30-3; P31-1,2.

<sup>26</sup> Parent.

<sup>27</sup> P17-2.

<sup>28</sup> *Id.*

<sup>29</sup> P16-1; P30-1,2,3; R3-2,3; School Psychologist (behavior referrals declined once Student was working with Outside Provider).

<sup>30</sup> P14-3.

<sup>31</sup> P12-2; P22.

<sup>32</sup> P16-16.

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recognizing that the Conners 3 found Hyperactivity/Impulsivity to be clinically significant, which is a “symptom associated with ADHD.”<sup>33</sup> School Psychologist testified that her error in not noting that Hyperactivity/Impulsivity was clinically significant made no difference to her conclusion that Student was not impacted by ADHD, which the undersigned did not find credible, as School Psychologist did not appear to give any weight at all to the change.<sup>34</sup>

10. The comprehensive psychological evaluation noted that there was no FBA in Student’s record to assist in further interpretation of the Conners 3 findings.<sup>35</sup> The comprehensive psychological evaluation formally recommended that an FBA be conducted to collect concrete behavioral data, followed by a BIP to be incorporated in the classroom setting.<sup>36</sup> School Psychologist credibly testified that Student would have benefited from an FBA/BIP.<sup>37</sup> Student did not receive an FBA/BIP until 5/15/18 at Charter School.<sup>38</sup>

11. Following a medical diagnosis of ADHD on 1/25/17, Student was prescribed medication.<sup>39</sup> The comprehensive psychological evaluation stated that it was “important to note that [Student’s] ADHD symptoms may be more subdued [at that time] due to medication compliance.”<sup>40</sup> A Conners 3 in 2018 found significantly higher scores for the inattentive scale and noted that medications in 2017 “more than likely” assisted with regulating inattentive behaviors and accounted for the lower scores in 2017.<sup>41</sup> Student discontinued taking the medication prior to 2/18/18 as Parent preferred Student to “try other strategies.”<sup>42</sup> Medication consultation and medication management were recommended in the spring of 2018.<sup>43</sup>

12. The comprehensive psychological evaluation noted that even with a medical diagnosis of ADHD there was no data suggesting an adverse impact on Student’s ability to access the general education curriculum.<sup>44</sup> The comprehensive psychological evaluation concluded that Student demonstrated an ability to achieve academically despite an ADHD diagnosis, but that Student would benefit from a 504 Plan.<sup>45</sup> School Psychologist

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<sup>33</sup> P16-15,17; School Psychologist (acknowledging error); P14-2.

<sup>34</sup> School Psychologist.

<sup>35</sup> P16-3,16.

<sup>36</sup> P16-18.

<sup>37</sup> School Psychologist.

<sup>38</sup> P11; P10.

<sup>39</sup> P14-3.

<sup>40</sup> P16-15.

<sup>41</sup> P12-6.

<sup>42</sup> P14-3.

<sup>43</sup> P12-8; P14-11 (“highly recommended”).

<sup>44</sup> P16-17.

<sup>45</sup> P16-16; Educational Advocate. *See* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* “A Section 504 Plan ‘is designed to assist students with learning or behavior problems even if they do not qualify for an Individualized Education Plan (IEP) under the IDEA.’” *Z.B. v. Dist. of Columbia*, 202 F. Supp. 3d 64, 65 (D.D.C. 2016), *aff’d in*

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forthrightly testified that she needed more information for the comprehensive psychological evaluation and had notified Public School about what she needed for an eligibility determination, but in the absence of the needed information she concluded that Student was not eligible.<sup>46</sup> Parent disagreed with the comprehensive psychological evaluation and DCPS authorized an IEE on 12/6/17 which was conducted on 2/18/18 under the supervision of Clinical Psychologist.<sup>47</sup>

13. In a 7/5/17 eligibility determination, which focused on whether Student met the eligibility classification of OHI due to ADHD, the MDT concluded that Student was not a child with a disability who needed special education and related services.<sup>48</sup>

14. Occupational Therapy. Parent had concerns about Student's handwriting early in 2016/17; Parent saw significant improvement over the year so handwriting was no longer a concern; Student's teacher also reported major improvement in handwriting.<sup>49</sup> Work samples and notes from a teacher indicated no concerns regarding handwriting.<sup>50</sup> Petitioner and Petitioner's counsel continued to request an occupational therapy screener.<sup>51</sup>

15. The occupational therapy screening conducted late in 2016/17 by School Occupational Therapist found no sensory concerns and concluded that, with simplified lessons and movement breaks with minimum to moderate verbal cues, Student was able to access the general education curriculum and make progress.<sup>52</sup> If School Occupational Therapist had found deficits in the occupational therapy screening, she would have conducted more testing.<sup>53</sup> The occupational therapy screening report included "areas needing support" because School Occupational Therapist knew of those specific concerns from other sources.<sup>54</sup>

16. Private Occupational Therapist emphasized the areas of testing that an occupational therapy screener does not cover, which would have been explored by a full occupational therapy evaluation; Private Occupational Therapist did not convincingly point to facts or problems of Student that should have resulted in a full evaluation rather than a screener.<sup>55</sup>

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*part, vacated in part, remanded*, 888 F.3d 515 (D.C. Cir. 2018), *quoting Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 149 (D.D.C. 2016).

<sup>46</sup> School Psychologist.

<sup>47</sup> P39-1; P40-1; P14-1.

<sup>48</sup> P16-1; P8-1.

<sup>49</sup> P17-2; R3-3; School Occupational Therapist.

<sup>50</sup> P8-5.

<sup>51</sup> R3-3.

<sup>52</sup> P17-1,3 (the date of report was erroneously listed as 4/26/17, the date of the initial meeting, which made the 5/17/17 date of evaluation questionable).

<sup>53</sup> School Occupational Therapist.

<sup>54</sup> School Occupational Therapist; P17-3.

<sup>55</sup> Private Occupational Therapist.

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17. A 4/6/18 occupational therapy evaluation at Charter School concluded that Student's sensory profile resulted in increased distraction and fidgeting as well as an increased need for touch and movement throughout the day, which impacted social participation as well as overall academic performance.<sup>56</sup> The occupational therapy evaluation recommended 30 minutes/week of occupational therapy services for Student.<sup>57</sup>

18. Charter School. On 4/18/18, Charter School sent a letter to Parent stating that Student was "far below" grade-level benchmarks and was "likely" to be retained in the same grade for 2018/19.<sup>58</sup>

19. The 2/18/18 IEE concluded that Student met the criteria to receive special education due to Multiple Disabilities based on OHI (ADHD) and Emotional Disturbance ("ED") due to Oppositional Defiant Disorder ("ODD").<sup>59</sup> Student was then found eligible for special education and related services on 5/11/18 at Charter School as a child with Multiple Disabilities, with both ED (ODD) and OHI (ADHD).<sup>60</sup>

20. Student received an initial IEP on 5/15/18 at Charter School based on concerns in Reading; Emotional, Social, and Behavioral Development; and Motor Skills/Physical Development, which called for services of 30 minutes/day of specialized instruction outside general education, 30 minutes/day of specialized instruction inside general education, 30 minutes/week of occupational therapy outside general education, 120 minutes/month of behavior support services outside general education, and 60 minutes/month of behavior support services inside general education.<sup>61</sup> In the 5/15/18 IEP, occupational therapy was provided based on Student's sensory processing differences and difficulty with pencil control that limited progress in the general education curriculum.<sup>62</sup>

21. Compensatory Education. In her compensatory education plan, Clinical Psychologist sought to apply the *Reid* standard to determine what would put Student in the position Student would have been in but for the FAPE violations.<sup>63</sup> Clinical Psychologist recommended 60 hours of tutoring, delivered in 2 one-hour sessions a week; 50 hours of play therapy at a rate of 2 hours/week; and pro-social experiences such as summer camp based on Student being "big on relationships" and responding positively if the teacher/adult cares about Student; summer camp could not occur until the summer of 2019 but would help with socialization.<sup>64</sup> A 4/26/18 Behavioral Assessment of Student recommended mentoring

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<sup>56</sup> P13-6.

<sup>57</sup> *Id.*

<sup>58</sup> P38-1.

<sup>59</sup> P14-11; Clinical Psychologist.

<sup>60</sup> P5-1; P6-1.

<sup>61</sup> P5-1,3,5,7,9.

<sup>62</sup> P5-7.

<sup>63</sup> Clinical Psychologist.

<sup>64</sup> P46-2,3; Clinical Psychologist.



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for Student to explore various interests and provide additional support from an adult role model.<sup>65</sup>

### Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Andrew F.*, 137 S. Ct. at 1001.

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<sup>65</sup> P12-8.

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In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3.

The measure and adequacy of Respondent's actions must be based on what it knew or should have known at the time, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (rejecting "Monday Morning Quarterback").

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student, where Parent requested evaluations in March 2017 to determine special education eligibility and DCPS (a) agreed to conduct a psychological evaluation, but misrepresented and misinterpreted crucial data and omitted academic data; (b) agreed to conduct an FBA, but did not do so; and (c) did not conduct an occupational therapy evaluation. As a result, DCPS found Student was not eligible for special education services at a June 2017 eligibility determination meeting, although a new LEA later conducted evaluations and found Student eligible. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on this issue, as DCPS failed to adequately evaluate Student by not conducting an FBA at all and making errors in the comprehensive psychological evaluation. The importance of assessing children in all areas of suspected disability was recently emphasized by the U.S. Court of Appeals for the District of

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Columbia in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), quoting 20 U.S.C. § 1414(b)(3)(B).

The Court explained in *Z.B.*, 888 F.3d at 524, that failing to conduct adequate assessments, such as an FBA, was a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student's behaviors (in the absence of an FBA), leading to them being addressed in the IEP inadequately or not at all. See also *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) ("in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable [the student] to receive educational benefits" (citation omitted)); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at \*18 (D.D.C. 2016); 34 C.F.R. 300.304(c)(4).

Functional Behavioral Assessment. Student had numerous behavioral issues in 2016/17 and was often sent out of class, impacting Student's learning. Student had 38 behavioral incidents through mid-March, including a mid-September incident in which Student trashed the school psychologist's office, tried to break a window, and stood on the desk screaming an obscenity at school personnel. While the dean noted that Student's behaviors decreased over 2016/17, that change correlated with Student receiving behavior support services on an ad hoc basis from Outside Provider. The Outside Provider's services were not mandated or directed by an IEP, were not tied to IEP goals, and were not the subject of period progress reports, so are not given weight in the analysis by the undersigned. Thus, an FBA was needed due to Student's high level of behavioral issues.

In addition, based on the formal request of Petitioner's counsel, DCPS agreed on 4/26/17 to conduct an FBA, but inexplicably failed to do so. The comprehensive psychological evaluation noted the absence of an FBA, which was needed to assist in interpreting the vital Conners 3 findings relating to ADHD. Yet an FBA was not conducted by DCPS even after the comprehensive psychological evaluation formally recommended that it be undertaken to collect concrete behavioral data, followed by a BIP to be incorporated in the classroom setting for Student. School Psychologist credibly testified at the due process hearing that Student would have benefited from an FBA/BIP.

In certain circumstances failing to conduct an FBA and develop a BIP may go beyond a procedural violation to be a denial of a FAPE. See, e.g., *Z.B.*, 888 F.3d at 524; *Long*, 780 F. Supp. 2d at 61. Here, the failure to conduct an FBA created uncertainty about Student's behavioral needs as well as failing to provide insight into the Conners 3 which significantly impeded the MDT and Parent's decision-making and is thus held by the undersigned to be a substantive violation and a denial of FAPE pursuant to 34 C.F.R. 300.513(a). This denial of FAPE contributes to the compensatory education awarded below.

Comprehensive Psychological Evaluation. DCPS made a significant error in the comprehensive psychological evaluation by not recognizing that the Conners 3 found Hyperactivity/Impulsivity to be clinically significant, as hyperactivity and impulsivity are core symptoms associated with ADHD. This was critical because the comprehensive psychological evaluation concluded that Student did not meet the eligibility criteria for OHI

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based on ADHD because the Conners 3 results did not indicate clinically significant concerns for ADHD symptoms. School Psychologist testified at the due process hearing that this error made no difference to her conclusion that Student was not impacted by ADHD, but the undersigned did not find that testimony credible as School Psychologist did not appear to give any weight at all to the change or even acknowledge that it was a closer question when Hyperactivity/Impulsivity was clinically significant.

In addition, School Psychologist did forthrightly testify that she needed more information for her comprehensive psychological evaluation and had notified Public School about what was needed for an eligibility determination. School Psychologist noted the need for an FBA, as discussed above. Further, the evaluation repeatedly noted that Student's DCPS report card contained many errors and was not valid for assessing academic performance, but that efforts to obtain a valid report card were unsuccessful. However, in the absence of that needed information, the evaluation concluded that Student was not eligible for special education, which convinces the undersigned that the error and missing information did impact the MDT and Parent's decision-making and prevented Student from being found eligible for special education and related services. This was a substantive violation and a denial of FAPE pursuant to 34 C.F.R. 300.513(a) and also contributes to the compensatory education awarded below.

Occupational Therapy Evaluation. Finally, Parent had concerns about Student's handwriting early in 2016/17, but saw significant improvement over the year, so handwriting was no longer a concern by late 2016/17. Work samples and notes from a teacher also indicated no concerns regarding handwriting. Nonetheless, an occupational therapy screening by School Occupational Therapist conducted late in 2016/17 found no sensory concerns and concluded that with simplified lessons and movement breaks Student was able to access the general education curriculum and make progress. School Occupational Therapist credibly testified that if she had found deficits in her occupational therapy screening, she would have conducted more testing. Private Occupational Therapist did not point to facts or problems of Student that convinced the undersigned that a full occupational therapy evaluation was required following the screening. DCPS prevails here, as a full occupational therapy evaluation was not required.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to comply with its affirmative Child Find obligations and find Student eligible for special education services, where DCPS had data showing that Student was achieving below grade level in reading and math, as well as cognitive and behavior data showing that Student had elevated levels of hyperactivity and impulsivity in line with a disability classification of OHI due to ADHD and at least 38 disciplinary referrals during 2016/17, and Student's new LEA found Student eligible. (Petitioner has the burden of persuasion on this issue.)*

Petitioner contends that Student should have been found eligible by DCPS for special education and related services based on OHI due to ADHD at an eligibility meeting on 7/5/17. For the reasons set forth below, Petitioner did meet her burden of persuasion on this issue. *See, e.g., N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 30 (D.D.C. 2008) (compliance with IDEA procedures is first reviewed, followed by inquiry into "whether the

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ineligibility determination was proper under the Act,” quoting *Kroot By & Through Kroot v. Dist. of Columbia*, 800 F. Supp. 976, 981 (D.D.C. 1992)).

As an initial matter, the process for determining eligibility for special education is set forth in 34 C.F.R. 300.306, which requires a group of qualified professionals and the parent to determine whether the child has a disability by carefully considering not only the student’s assessments, but significant additional information, drawing on a variety of sources and including parental input, teacher recommendations and other information. To qualify as a child with a disability under the IDEA, Student must have both a listed concern, such as OHI, and as a result, be in need of special education and related services. See 34 C.F.R. 300.8; *Parker v. Friendship Edison Pub. Charter Sch.*, 577 F. Supp. 2d 68, 74 (D.D.C. 2008).

Here, there was no express challenge to the process, but serious questions were raised about the adequacy of the comprehensive psychological evaluation, given the serious error that failed to recognize clinically significant ADHD symptoms, as discussed above. This alone may have resulted in an erroneous conclusion of ineligibility of Student, when Student should have been found eligible for special education and related services. Moreover, the comprehensive psychological evaluation concluded that Student demonstrated an ability to achieve academically despite the ADHD diagnosis, with DCPS placing great weight on its view that Student was on grade level or very close to it. The undersigned concludes that Student’s academic success was exaggerated somewhat by DCPS in order to find Student ineligible, when Student actually was in need of special education and related services as demonstrated by being below grade level and by Student’s positive response to behavior support services from Outside Provider.

Considering Student’s academic abilities, the comprehensive psychological evaluation stated that on the WJ-IV Tests of Achievement, Student’s math scores were in the Average range and Student’s reading and writing scores ranged from Low to Average ranges. However, it is noteworthy that the WJ-IV Table of Scores reveal that Student was not actually at (or above) age equivalency for any of the 26 clusters and tests, but was a year or more behind on 7 of the 26 – more than a quarter. The comprehensive psychological evaluation placed undue weight on the 4-line teacher interview that stated Student was well-rounded academically and very strong in mathematics, although both assertions appear to be overstated. Student was actually below grade level in math in 2016/17, with a MOY iReady score of 388. A score of 400 (to nearly 500) would have been on level, so Student was close to the low end of on level, but by EOY had slipped just a bit further away. The 7/5/17 Evaluation Summary Report for determining eligibility of Student asserted that 1 of the individual tests was only “slightly” below level when in fact it was more than 1 level below, which has heightened significance given Student’s early Grade.

For reading in 2016/17, the comprehensive psychological evaluation erroneously reported Student’s Dibels results, asserting that they were at or above grade level in MOY, when in fact Student declined from grade level at BOY to below grade level (by 2 letter steps) at MOY, and then declined further below grade level (by 3 letter steps) at EOY. These declines are confirmed by the fact that at the beginning of 2017/18, Student was over a year behind in reading, which is of heightened concern in such an early Grade.

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In appropriate circumstances it is indisputable that ADHD may be considered an OHI disability classification under the IDEA. *See* 34 C.F.R. 300.8(c)(9)(i). But not every child with an ADHD diagnosis is eligible for special education, for Petitioner must prove that the condition adversely affected Student's academic performance. *See* 34 C.F.R. 300.8(c)(9)(ii). Here, Petitioner did convince this Hearing Officer that the IEP team denied Student a FAPE by concluding Student was ineligible even though Student was struggling academically and behaviorally. Moreover, the comprehensive psychological evaluation recognized that Student's ADHD symptoms were likely subdued at that time due to medication compliance, which could not be guaranteed going forward. As the Court explained in *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015),

If a school district fails to satisfy its "child-find" duty or to offer the student an appropriate IEP, and if that failure affects the child's education, then the district has necessarily denied the student a free appropriate public education. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (a FAPE denial is actionable if it "affect[s] the student's substantive rights") (emphasis omitted).

This Hearing Officer concludes that is the case here.

### Compensatory Education

In determining compensatory education for a denial of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid*, 401 F.3d at 523-24.

Here, the primary impact on Student was from being found ineligible for special education and related services on 7/5/17 as a child with ODI due to ADHD, which lasted until Student was found eligible and provided services some 10 months later. In addition, DCPS made errors in its comprehensive psychological evaluation which impacted Student, and failed to conduct an FBA and develop a BIP for Student at all, resulting in a delay until an FBA/BIP was put into place on 5/15/18.

Taking into account the Compensatory Education Plan prepared by Clinical Psychologist, as adjusted to fit the denials of FAPE found in this case, and carefully considering the totality of the circumstances, the undersigned concludes that it is appropriate to award (a) 60 hours of academic tutoring, and (b) 80 hours of play therapy and/or mentoring in order to put Student in the place Student should have been but for the denials of FAPE. The option for mentoring and/or additional play therapy is ordered in place of

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summer camp due to the inability of Student to benefit from any award of summer camp until the summer of 2019. Mentoring has been included as a “pro-social” alternative at the option of Parent, with input from her advisors, to determine whether or the extent to which the 80 awarded hours are divided between play therapy and mentoring.

**ORDER**

Petitioner has largely prevailed on her claims, as set forth above. Accordingly, **it is hereby ordered that:**

DCPS shall provide letters of authorization for (a) 60 hours of academic tutoring, and (b) a total of 80 hours of play therapy and/or mentoring (at Petitioner’s option) from independent providers chosen by Petitioner, with such letters to be provided within 10 business days after Petitioner’s request(s).

Any and all other claims and requests for relief are **dismissed with prejudice.**

**IT IS SO ORDERED.**

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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