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 Office of the State Superintendent of Education
 Office of Review and Compliance
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Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”)</p> <p>Respondent.</p> <p>Case # 2017-0270</p> <p>Date Issued: December 28, 2017</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: December 8, 2017 December 12, 2017</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></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, December 28, 2017, 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 December 8, 2017, and December 12, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003 and Hearing Room 2006 respectively.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides with Student’s parent in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including specific learning disability (“SLD”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). Student attends a District of Columbia Public Schools (“DCPS”) high school (“School A”). DCPS is the student’s local educational agency (“LEA”).

Student’s mother (“Petitioner”) filed the current due process complaint on September 29, 2017, alleging DCPS denied the student a free appropriate public education (“FAPE”) by failing to, inter alia, timely identify, locate and evaluate Student under its Child Find obligations.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find the LEA has denied the student a FAPE and that the Hearing Officer order the LEA to fund appropriate assessments, develop a behavior intervention plan (“BIP”), fund a psychiatric evaluation, develop an appropriate individualized educational program (“IEP”), place and fund the student at a non-public school, provide transportation and provide Student compensatory education.

LEA Response to the Complaint:

DCPS filed a response to the complaint on October 12, 2017, and asserts Student has not been denied a FAPE. DCPS asserts Petitioner signed consent to have the student evaluated on June 2, 2017. In response, DCPS conducted a speech and language, occupational therapy and psychological evaluation. Thereafter, on August 30, 2017, DCPS found Student eligible for special education services and developed an IEP. DCPS asserts Student’s initial IEP and placement at School A is appropriate. School A would like to see how Student performs under the IEP before making any modification. DCPS asserts Petitioner has not come to School A requesting to view Student’s records, and DCPS has provided Petitioner all the Student’s records that exist.

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

Resolution Meeting and Pre-Hearing Conference:

The parties did not participate in a resolution meeting. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on October 29, 2017, and ends [and the Hearing Officer's Determination ("HOD") was originally due] on December 13, 2017. Respondent's counsel was not available for the original hearing date proposed, and filed an unopposed motion to extend the HOD due date to allow for the requested hearing dates. The motion was granted and the HOD is now due December 28, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on November 1, 2017, and issued a pre-hearing order ("PHO") on November 6, 2017, outlining, inter alia, the issues to be adjudicated.

On December 6, 2017, DCPS counsel filed a motion to dismiss the complaint citing 34 C.F.R. 300.510(b)(3) and (4) alleging Petitioner had failed to participate in a resolution meeting. The Hearing Officer denied the motion on the record on December 8, 2017, because the motion was filed untimely pursuant to the OSSE Standard Operating Procedures ("SOP") § 401(C) (4).

The hearing was convened on December 8, 2017, and no testimony was taken because DCPS counsel was ill and only available by telephone. The parties agreed to resume the hearing on the second scheduled day, December 12, 2017. The hearing concluded on December 12, 2017, and the parties submitted written closing arguments on December 22, 2017.

ISSUES:³

The issues adjudicated are:

1. Whether the DCPS denied the student a free appropriate public education ("FAPE") by failing to identify, locate and evaluate, the student pursuant to Child Find during SY 2015-2016, including conducting an FBA and developing a BIP, so that the student had an IEP in place at the start of SY 2016-2017.⁴
2. Whether DCPS denied the student a FAPE by failing to timely evaluate the student pursuant to parental request that occurred on May 24, 2017.⁵
3. Whether DCPS denied the student a FAPE by failing to provide an appropriate placement for SY 2017-2018 because (a) the September 27, 2017, IEP team determined that Student required an IEP that prescribed 27.5 hours of special education per week outside general

³ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated except as noted.

⁴ Petitioner's counsel during the PHC clarified that Petitioner was not asserting any claim pursuant to 34 C.F.R. 300.530 et. seq. or any matter that would give rise to an expedited hearing.

⁵ Petitioner asserts that the evaluation should have been expedited pursuant to 34 C.F.R. 300.534(d)(2)(i).

education and (b) because School A cannot implement an IEP that prescribes 27.5 hours of services per week outside general education.⁶

4. Whether DCPS denied the student a FAPE by failing to provide Petitioner with Student's educational records from May 2017 until the date complaint was filed, specifically any response to intervention ("RTI") or student support team ("SST") documents.

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 101 and Respondent's Exhibits 1 through 6) that were admitted into the record and are listed in Appendix A.⁷ Witnesses' identifying information is listed in Appendix B.⁸

SUMMARY OF DECISION:

Petitioner held the burden of production and the burden of persuasion on issues #1, #2, and #4. Respondent held the burden of persuasion on issue #3 after a Petitioner established a prima facie case on that issue. Petitioner established a prima facie case with regard to issue #3(a), but not as to issue #3(b). Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #3. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that the DCPS should have identified and evaluated Student pursuant to Child Find

⁶ The PHO stated this issue as follows: Whether DCPS denied the student a FAPE by failing to provide an appropriate placement for SY 2017-2018 because [School A] cannot implement an IEP that prescribes 27.5 hours of services per week. The issue was modified at the outset of the hearing, over DCPS' objection to incorporate the allegation from the due process complaint ("DPC") that the Student's IEP team concluded Student required a placement of 27.5 hours per week outside general education (paragraphs #56 & #57 on Page 9 of the DPC). DCPS counsel asserted DCPS was prejudiced by the Hearing Officer amending issue # 3 because the PHO required that if either party had objections to the PHO, the objections were to be raised within three business days of the PHO being issued and Petitioner did not raise an objection to the PHO. In addition, DCPS asserted that had the issue had been initially styled as it was being amended, DCPS would have disclosed and called a witness who attended the September 27, 2017, IEP meeting. To achieve equity, the Hearing Officer offered to continue the hearing for five business days to allow for that DCPS witness to be disclosed. Petitioner's counsel objected. In balancing the equities the Hearing Officer gave Petitioner's counsel the choice of either proceeding to adjudicate issue #3 as delineated in the PHO or amending the issue and allowing DCPS additional time to disclose the witness in accordance with the five-business day disclosure requirement. Petitioner's counsel chose to proceed with the hearing and for the issue to be amended, but initially maintained her objection to DCPS being given additional time to disclose a witness. Petitioner's counsel eventually withdrew the objection to the witness testifying on December 12, 2017, despite that witness not being disclosed so that the hearing would be concluded on December 12, 2017, rather than the additional hearing date offered of December 22, 2017.

⁷ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁸ Petitioner presented four witnesses: Petitioner, two educational advocates employed by the law firm representing Petitioner, and representative of the non-public school where Petitioner is seeking to have Student placed. Respondent presented four witnesses: the principal of Student's former DCPS school, the dean of students from Student's former DCPS school, the LEA representative of Student's former DCPS school, and a LEA representative of Student's current DCPS school.

during SY 2015-2016, but did sustain the burden of persuasion on that issue as to SY 2016-2017. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #2 and #4. The Hearing Officer grants Petitioner's request for an independent evaluation and compensatory education and directs that DCPS convene an IEP meeting at School A to review Student's independent evaluation and student's most recent academic and behavior performance since attending School A and review and revise Student's IEP as appropriate. The Hearing Officer grants the student compensatory education in the amount of 120 hours of independent tutoring.

FINDINGS OF FACT:⁹

1. Student resides with Petitioner in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of MD including SLD and OHI due to ADHD. Student attends School A, a DCPS high school, where Student began attending at the start of school year ("SY") 2017-2018. Prior to attending School A, the student attended another DCPS school ("School B") during SY 2015-2016 and SY 2016-2017. (Petitioner's testimony, Petitioner's Exhibit 5-1)
2. Prior to attending School B, the student attended a private religious school ("School C") for a several years where Student struggled both academically and behaviorally. Student had good and bad days behaviorally and was suspended for goofing off, instead of completing class work. Student attended summer school every year Student attended School C. (Petitioner's testimony)
3. Student began attending School C during school year SY 2012-2013. Student's final Progress Report for that year indicate Student received an "F" in Language Arts, Reading, English, Spelling, Mathematics, and Science. Student received a "D" in Social Studies. Although Student's conduct was noted as "Satisfactory" for all academic quarters, Student's teachers commented, among other things, that Student "does not apply acquired skills to daily work", "produces incomplete or inconsistent work", "is easily distracted", and "needs to improve study habit". (Petitioner's Exhibit 23-1)
4. Student received "Satisfactory" to "Good" evaluations in Physical Education, Art and Music; however, Student was retained at the end of SY 2012-2013 and advised to attend summer school, due to a poor academic performance. Student had been absent from school for 9 days and entered school late 51 times. (Petitioner's Exhibits 23-1)
5. Petitioner was advised by School C to take Student to Children's Hospital due to Student's failing grades and need to be retained. Petitioner brought a form to School C that indicated Student needed psycho-educational testing. Petitioner signed a form on

⁹ The evidence (documentary and/or testimony) that is the source of the Findings 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 (or the page number of the entire disclosure document) 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.

October 8, 2013, to permit the health examiner to share information with Student's school, or appropriate DC Government agency. (Petitioner's Testimony; Petitioner's Exhibit 21-1)

6. During SY 2013-2014, Student repeated the grade at School C and received a "C" in Language Arts, Mathematics, Social Studies, and Science. Student's teachers' comments included, Student "works to minimum expectations", "produces incomplete or inconsistent work", and "performance in influenced by absence. Student had been absent 9 days and late for school 71 times. (Petitioner's Exhibits 31-1, 32-1)
7. The principal at School C sent a letter to Petitioner dated, March 31, 2014, in which the Principal advised Petitioner that she recommended that Student attend School C's summer school, to receive extra instruction to fill gaps in learning, and reinforce skills to prepare for the next school year. School C's summer program was scheduled to begin on June 23, 2014, and last until July 25, 2014. The program was 8 hours per day and would concentrate on Reading and Mathematics skills. The principal's letter contained a signature line for Petitioner but does not bear her signature. (Petitioner's Exhibit 33-1)
8. Student was promoted to the next grade for SY 2014-2015 at School C. By the second academic quarter, Student received a grade of "F" in Language Arts, Mathematics, Social Studies, and Science. However, Student had "Satisfactory", "Excellent", and "Good" grades in Art, Music and Physical Education respectively. Student also managed to achieve "Satisfactory" in Conduct. Student's teachers commented that Student, "needs to improve work and/or study habits", "does not apply acquired skills to daily work", and "fails to complete assignments". (Petitioner's Exhibit 34-1)
9. By March 20, 2015, Student's Progress Report reflected the grade of "F" in all academic subjects and the grade of "Excellent" in Physical Education, Art and Music. Student's teachers continued to comment on the Student's need for improvement, incomplete assignments and lack of skill application. (Petitioner's Exhibit 40-1)
10. Petitioner obtained a May 14, 2015, letter from Student's Language Arts teacher at School C that appears to be a letter of recommendation supporting Student's respectful nature and stating Student needs to work hard to improve reading skills. (Petitioner's Testimony, Petitioner's Exhibit 41-1)
11. At the end of SY 2014-2015 Petitioner enrolled student in DCPS.¹⁰ (Petitioner's testimony)
12. On June 9, 2015, the DCPS School Improvement Specialist issued a letter to School C's principal formally requesting that School C provide Student's educational to School B, to enroll and register Student for SY 2015-2016. The request specifically included

¹⁰ Although Petitioner asserted that Student had been expelled from School C and that she informed DCPS when she enrolled Student that Student had been expelled, the Hearing Officer did not credit this portion of Petitioner's testimony because no documents reflect Student was expelled.

Student's last report card, IEP, if applicable, evaluations/reports, and any standardized assessment information. (Petitioner's Exhibit 42-1)

13. During SY 2015-2016, Student had 5 unexcused absences from school, 10 days total absences, and was tardy to school 135 times. Student passed all courses except two and was promoted to the next grade. Student's June 28, 2016, report card indicates Student received a grade of "F" in Math and was absent from class 21 times, and an "F" in Computer Literacy with 4 absences. Student earned a "C-" in English with 10 absences, "D+" in Science with 9 absences, "D+" in World History & Geography I with 7 absences, "A-" in Health and Physical Education with 1 absence, "B-" in Academic Enrichment with 3 absences, "C" in Reading Workshop with 11 absences, "C+" in Projects & Problem Solving with 1 absence. This final report card encouraged Petitioner to enroll Student in summer school. (Petitioner's Exhibit 44-1, 44-2)
14. Student's Incident Report from School B chronicles Student's behavioral incidents since attending School B. During SY 2015-2016 Student incurred seven (7) disciplinary incidents that resulted in Petitioner being telephoned because of Student's behavior. These infractions include, but are not limited to, "throwing objects that may cause injury or property damage", "lying to, or giving misleading information to school staff", "causing disruption on school properties or at any DCPS-sponsored or supervised activity", "behaviors that disrupt or interfere with classroom teaching and learning", and "unauthorized presence in hallway during class time." Student had one incident in October 2015, four incidents during February 2016 and two incidents in April 2016. On April 27, 2016, the student was given a one (1) day in-school suspension, for "causing disruption on school properties or at any DCPS-sponsored or supervised activity". (Petitioner's Exhibit 55-3)
15. During SY 2016-2017 Student's behavior incidents increased. Student began having documented behavioral issues every month from October 2016 through March 2017. These disciplinary issues resulted in five (5) off-site Short-Term Suspensions and one (1) in-school disciplinary action. (Petitioner's Exhibit 55-1, 55-2, 55-3)
16. Early in SY 2016-2017 Petitioner met with School B's staff and asked for assistance to address Student's behavior. School B recommended that they would refer her to outside agencies for a mentor and mental health services. School B was not concerned at that time about Student's academic performance and did not interpret Petitioner's concerns as an indication that Student should be considered for special education evaluation. There was no data maintained by School B regarding interventions that were implemented during Student's time at School B. (Petitioner's testimony, Witness 4's testimony)
17. During SY 2016-2017, Student received i-Ready testing in Math twice. From August 31, 2016, the date of the first i-Ready Math test to February 6, 2017, the date of the second test, Student achieved an overall improvement of 4 points from 443 to 447. Both scores are greater than one (1) grade level behind an "on level" performance which is between 525 and 575. Student's Quantile Measure from the August 2016 test is 520Q and the February 2017 Quantile Measure is 545Q, both of which at performance levels below

Student's grade at the time. Each i-Ready test lists Student's Placement Level as "Needs Improvement" (Petitioner's Exhibits 45-1, 49-9, 50-1)

18. Student's School B Progress Report, dated December 5, 2016, lists Student' 2nd Quarter grades as "Fs" in English, Math, Health & Physical Education, Science and Academic Enrichment. Student received a "C" in U.S. History & Geography, a "C+" in Computer Science Concepts, a "D" in Early Coll. Sem. & Tutorial NC, and an "A" in Middle School Support. Student's teachers' comments included, "request conference with parents", "poor behavior", "is failing", "possibility of failing", and "does not complete assignments". (Petitioner's Exhibit 46-1, 46-2)
19. School B measured Student's reading progress through the Scholastic Reading Inventory ("SRI") assessment. The student made steady progress in reading skills according to this assessment since attending School B. Nonetheless, by September 2016 Student was assessed as still reading far below grade level and by February 2017, Student had only progressed to a score that was indicative of a third grade reading level. (Petitioner's Exhibit's 43-1, 56-1, LEA Exhibit 2-2)
20. Student's third term progress report for SY 2016-2017 indicates Student earned a grade of "F" in the following courses: Math, with 13 absences, English, with 16 absences, Middle School Support, with 19 absences, Science with 15 absences, and U.S. History & Geography with 14 absences. Student received a grade of "D" in Computer Science Concepts with 15 absences and Early Coll. Sem. & Tutorial NC with 11 absences. As of end of the third term Student had accumulated for the school year 12 unexcused absences from school, 28 total days absent and no days tardy. (Petitioner's Exhibit 57-1)
21. On April 6, 2017, Student engaged in a behavioral incident at School B in which Student used a piece of broken glass to smear feces on classroom doors. Student refused demands by school staff to surrender the glass and School B security summoned police to assist. Student was eventually stopped and the piece of glass was confiscated. It was determined that Student was not a danger to Student or others and was allowed to leave the school building escorted by Student's aunt. (Petitioner's Exhibit 51-1)
22. On April 7, 2017, School B issued a Notice of Proposed Disciplinary Action in which School B proposed a 55-day, Off-site Long-Term Suspension for Student's violation of DCMR- §B2502.1, an infraction involving a biohazard. Student received additional infractions which included, "directing profanity or obscene /offensive gestures toward staff, a Tier 2 violation, "verbal, written, or physical threat to person or property (including intimidating postures)", a Tier 3 violation, "using an article that is not normally considered a weapon to intimidate to threaten another individual", a Tier 4 violation, and "documented pattern of persistent Tier 3 behavior", a Tier 4 violation. Petitioner received Parent/Guardian and Student Rights, and Notification of Scheduling Hearing Date. (Petitioner's Exhibits 52-1, 52-2, 53-1, 54-1)
23. School B recommended Student's long-term suspension from April 7, 2017, through the end of the school year on June 14, 2017. Student continued to attend School B pending

DCPS review of the proposed 55-day suspension. Petitioner was informed of her right to appeal the proposed suspension and filed an appeal with the D.C. Office of Administrative Hearings (“OAH”). The administrative hearing at OAH was originally scheduled for May 1, 2017. (Petitioner’s Exhibits 1-7, 53-1)

24. On May 22, 2017, Petitioner executed a DCPS Authorization for Release of Education Records requesting that Student’s education records be sent to her attorney. (Petitioner’s Exhibit 90-4)
25. On May 24, 2017, OHA convened the appeal hearing on Student’s April 6, 2017, incident in which the Administrative Law Judge upheld the DCPS recommendation of a 55-day Long-Term Suspension for Student. (Petitioner’s Exhibit 1)
26. On May 24, 2017, DCPS issued a Notice of Final Disciplinary Action advising Petitioner that Student’s Long-Term Suspension had been approved and that Student should be immediately enrolled at a DCPS school specifically for students serving long-term suspensions (“School D”) from April 7, 2017, through July 14, 2017, with Student returning to school on July 31, 2017. (Petitioner’s Exhibit 58-1)
27. On May 24, 2017, at the OAH hearing Petitioner formally requested DCPS conduct initial evaluations to determine Student’s eligibility for special education services. (Petitioner’s Exhibit 13-2, LEA Exhibit 6-4)
28. On May 26, 2017, the Assistant Principal at School B issued a letter to Petitioner acknowledging that on May 24, 2017, the LEA received her referral of Student for initial evaluation to determine whether Student is a child with a disability. (Petitioner’s Exhibit 59-1)
29. On June 2, 2017. Petitioner executed a form consenting to DCPS conducting initial evaluations of Student. (Petitioner’s Exhibits 62-1)
30. On June 15, 2017, DCPS issued a Prior Written Notice (“PWN”) indicating it would conduct evaluations of student to determine eligibility for special education. The PWN noted Student’s school as School D. (Petitioner’s Exhibit 64-1)
31. On June 28, 2017, School B convened a multi-disciplinary team (“MDT”) to review the Analysis of Existing Data (“AED”) DCPS had compiled regarding Student and to determine if additional assessments were needed. Members of School B team participated along with Petitioner, her attorney and her educational advocate. The team determined that additional assessments were warranted and scheduled dates for the assessments to be conducted. School B acknowledged that the assessments were due by July 25, 2017, which was 45 days from Petitioner’s May 24, 2017, request for evaluations. (Petitioner’s Exhibit 65, LEA Exhibit 6-1, 6-4)
32. During the June 28, 2017, meeting School B’s principal made recommendation that Petitioner consider placing Student at different school other than School A because

Student was at risk of being retained. She suggested Petitioner consider a new DCPS school that focused on student's at risk of retention for Student's grade. (Witness 7s testimony)

33. Student's long-term suspension at School D lasted 37 days. Student was permitted to return to School B starting June 29, 2017. (LEA Exhibits 2-1, 6-1, 6-5)
34. On June 30, 2017, DCPS performed a Speech and Language Evaluation which revealed Student has "below average" receptive and expressive vocabulary skills as evidenced by Student's performance on the Receptive One Word Picture Vocabulary Test-Fourth Edition ("ROWPVT-4) and the Expressive One Word Picture Vocabulary Test-Fourth Edition ("EOWPVT-4"). DCPS administered the Clinical Evaluation of Language Fundamentals-Fifth Edition ("CELF-5) that revealed "Average" to "Below Average" subtest scores. (LEA's Exhibit 3-3, 3-4, 3-5)
35. On July 6, 2017, DCPS conducted an Occupational Therapy ("OT") evaluation of Student. Student demonstrated "Low" visual perceptive skills, "Very Low" visual motor skills for each subtest of the assessment, "Average" visual motor/integration, "Average" Fine Manual Control, and "Average" Manual Coordination. Among other things, the evaluator recommended that Student be permitted to have extended time to complete written assignments, use manipulatives and visuals to increase participation with math assignments, and use graphic organizers to help brainstorm ideas when composing essays/sentences. The evaluator also recommended that visual and auditory stimuli be decreased to increase Student's attention to detail. (LEA's Exhibit 4-5, 4-6, 4-7, 4-8, 4-9)
36. On July 12, 2017, DCPS completed a psychological evaluation of Student that assessed Student using the Reynolds Intellectual Assessment Scales ("RIAS"), the Woodcock Johnson Tests of Achievement-Fourth Edition, the Behavior Assessment System for Children, 3rd Edition ("BASC-3"), and the Conner's-3. Student's Composite Intelligence Index on the RIAS is 68 (Significantly Below Average), the Verbal Intelligence Index is 74 (Moderately Below Average), Nonverbal Intelligence Index is 71 (Moderately Below Average), Composite Memory Index is 79 (Moderately Below Average). (LEA's Exhibit 2-5, 2-6, 2-7)
37. On the Woodcock Johnson-IV, Student earned a standard score ("SS") in Broad Math of 89 (Low Average range), a SS of 76 in Broad Reading (Low range), and SS of 93 in Broad Written Language (Average range). (LEA's Exhibit 2-8, 2-9)
38. On the BASC-3, Student's ratings by a teacher, Petitioner and self, ranged from "Average" to "At-Risk". The Conner's-3 revealed "Clinically Significant" findings, with features of ADHD evident at home and at school. (LEA's Exhibit 2-13, 2-14, 2-15, 2-16, 2-17)
39. The DCPS school psychologist completed evaluating Student on July 12, 2017, and issued her evaluation report on August 7, 2017. The psychologist noted in the evaluation

report that Student's progress in reading was being measured at School B using the SRI, a computer assessment and that Student's Lexile score of 589, comparable to that of a third grader. The psychologist found Student met the eligibility criteria for SLD and OHI related to Student's ADHD. Among other things, the evaluator recommended Student be permitted to videotape the math lecture, so Student can review all instructional demonstrations at home, use computer technology and other technology to help with spelling, and grammar, and facilitate collaboration with peers, and receive direct instruction in phonics, grammar, and language mechanics. The evaluator also recommended that a BIP be developed to address all maladaptive behaviors, and that Student participate in supportive counseling groups that address stress, conflict resolution and more to improve Student's social interactions. (LEA's Exhibit 2-20, 2-21, 2-22)

40. A Functional Behavior Assessment ("FBA") dated July 13, 2017, was performed. Student received a "Very High" score for overall stress, a "High" score for emotional distress, a "Very High" score for behavioral difficulties, a "Very High" score for hyperactivity and concentration difficulties, a "Slightly Raised" score for difficulties getting along with other children and a "Very Low" score for kind and helpful behavior. The evaluator's recommendations included considering the development and implementation of a BIP at Student's next placement, and a family referral for community-based intervention to address possible therapeutic assistance within the home or community. (LEA's Exhibit 5-3, 5-4)
41. On August 22, 2017, School B convened an eligibility meeting and reviewed the evaluations DCPS conducted. The team was not able to complete the eligibility meeting because of the need to review remaining data for the psychological evaluation and agreed to reconvene the meeting. (Witness 2's testimony, Petitioner's Exhibit 16-1)
42. On August 23, 2017, Student was admitted to the Psychiatric Department at Children's National Medical Center. Student was diagnosed with ADHD, Oppositional Defiant Disorder ("ODD") and Conduct Disorder ("CD"). Student was discharged home on August 25, 2017. (Petitioner's Exhibit 22-1, 22-2, 22-3, 22-6)
43. On August 30, 2017, School B reconvened the student's eligibility meeting. The team reviewed Student's hospital discharge summary. The team determined Student eligible for special education under the category of MD for SLD and OHI for ADHD. At that point School A had been identified as Student's next school location, and a representative from School A was supposed to participate in the meeting was not available. The team did not develop an IEP and determined that it would be developed once Student began attending School A. The team did not make a determination at that meeting regarding Student's least restrictive environment ("LRE") (Witness 2's testimony, Witness 5's testimony, Petitioner's Exhibits 67)
44. On August 31, 2017, DCPS issued a PWN documenting its determination that student was found eligible under the MD disability classification for SLD and OHI. The PWN noted that student's assigned school was School A. (Petitioner's Exhibit 68-1)

45. Student began attending School A at the start of SY 2017-2018. From August 21, 2017 through September 26, 2017, Student has been marked absent 11 times, with 6 excused absences, and 5 unexcused absences. Student has been tardy to school 4 times. During the same period, Student earned an “F” in English I, Extended Literacy 9, Spanish I, Algebra IA, and Biology. Student received a “D” in World History & Geography and Health Education, and an “A” in Academic Support HS. (Petitioner’s Exhibits 69-1, 70)
46. On September 27, 2017, School A convened a meeting to develop Student’s initial IEP. Petitioner, and Petitioner’s counsel attended the meeting via telephone. The Speech Pathologist, Social Worker, School Counselor, Special Education Teacher, LEA Representative, Teacher, Evaluator, and Petitioner’s Advocate attended the meeting in-person. (Petitioner’s Exhibit 5-1)
47. During the September 27, 2017, IEP meeting, the team discussed Student’s grades and performance at School A. The team discussed Student’s areas of concern in Math, Reading, Communication/Speech Language, Emotional, Social and Behavioral Development, and Motor Skills and Physical Development, and the team developed goals, objectives, and baselines in each area. The team developed an IEP that required that Student receive 15 hours per week of specialized instruction outside general education: 5 hours per week in reading, 5 hours per week in written expression and 5 hours per week in math. (Petitioner’s Exhibit 5)
48. The IEP also provided Student with 60 minutes per month of OT outside general education, 90 minutes per month of speech-language pathology outside general education, and 90 minutes per month of behavior support services in general education. The team determined Student required accommodations such as preferential seating, small group testing, frequent breaks, and use of a calculation device on non-calculator sections. The team found the student eligible for extended school year (“ESY”) with transportation. Student’s ESY goals are in the areas of math, reading and written expression. (Petitioner’s Exhibit 5-16)
49. During the September 27, 2017, IEP meeting Petitioner’s advocate requested that Student be provided all services outside general education. The DCPS team members noted there was not enough data to support providing a full-time out of general education IEP. School A performed a second WJ-IV on September 12, 2017, and that the test did not reflect any changes, since the same test was administered in June 2017. The DCPS team advised that it had not had a reasonable time to implement services to the maximum extent to determine whether Student could make sufficient progress with the proposed IEP. Petitioner’s advocate informed the team that the psychological evaluation the team had made reference to another student and had assessment scores that were higher than the scores in the evaluation the team reviewed at the August 22, 2017, and August 30, 2017, eligibility meetings. School A later verified that the evaluation it had was the same evaluation provided by School B. (Witness 2’s testimony, Witness 6’s testimony, Petitioner’s Exhibits 19-2, 20-2, 20-7, 19-2)

50. On September 28, 2017, Petitioner, through her counsel, forwarded a written request to the principal at School A to forward a copy of Student's "entire academic file" to Petitioner's attorneys via facsimile transmission or email or that School A provide three (3) dates on which a Petitioner's representative could review Student's educational file and make copies. Receipt of the records request, which was forwarded to School A via email, was acknowledged by the School A principal on September 28, 2017. The principal advised that School A would follow-up. (Petitioner's Exhibit 90-1, 90-2, 90-3)
51. DCPS presented Petitioner with Student's draft IEP on September 29, 2017. Student's finalized IEP was provided to Petitioner in mid-October 2017. (Witness 2's Testimony Petitioner's Exhibits 5, 6)
52. Petitioner filed a due process complaint on September 29, 2017. (Petitioner's Exhibit 2)
53. DCPS developed a BIP for Student on October 31, 2017. (Petitioner's Exhibit 12)
54. On November 27, 2017, Petitioner's attorneys' office advised DCPS that they had received various documents that were a part of the educational record they requested. These documents included, but were not limited to, Student's June 28, 2017, meeting notes, Fall 2017 Progress Report, 2017-2018 First Term Report Card, and Current Attendance. Thereafter, School B responded that they had no other documents pertaining to Student. (Petitioner's Exhibit 94-3)
55. The student has interviewed at, and been accepted to, a non-public separate special education day school ("School E"). School E has remedial reading and math programs and will allow Student to earn credits toward graduation. School E also offers vocational programs. School E has student to adult ratio is 3 to 1. The School provides related services and has social workers to address Student's social emotional and behavioral needs. School A also as a clinical psychologist and social workers and certified special education teachers on staff. School E has an OSSE certification of approval ("C. of A."). The approximate annual cost of attendance is \$60,000 annually. (Witness 1's testimony, Petitioner's Exhibit 98)
56. Petitioner presented a compensatory education plan developed by Petitioner's educational advocates. Petitioner has requested at least 360 hours of tutoring to be provided 5 hours per week over a two (2) year span to compensate Student for the alleged two-year delay in Student being identified, found eligible and provided special education services. One of the educational advocates who prepared the report also testified that Student should be reevaluated to determine if Student also meets criteria for emotional disability ("ED") or intellectual disability ("ID"). (Witness 3's testimony, Petitioner's Exhibit 100)

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").

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

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

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)

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 in the PHO and at the hearing Petitioner held the burden of production and the burden of persuasion on issues #1, #2, and #4. Respondent held the burden of persuasion on issue #3. Petitioner had to establish a prima facie case on issues #3 before the burden of persuasion fell to Respondent. 11

¹¹ 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) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

The normal standard is preponderance of the evidence. See, *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 FAPE by failing to identify, locate and evaluate, the student pursuant to Child Find during SY 2015-2016, including conducting an FBA and developing a BIP, so that the student had an IEP in place at the start of SY 2016-2017.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS should have identified and evaluated Student for special education services in SY 2016-2017. The Hearing Officer did not conclude that the evidence supported a finding of a Child Find violation during SY 2015-2016.

The "Child Find" requirements of IDEA at 20 U.S.C. 1412 (a); 34 C.F.R. Section 300.11 require every state to effectuate policies and procedures to ensure that all children with disabilities residing in the state, including wards of the state, who are in need of special education and related services are "identified, located and evaluated." This Circuit in *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005) held: "School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that "all children with disabilities residing in the State...regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated." See also *Branham v. District of Columbia*, 427 F. 3d 7, 8 (D.C. Cir. 2005)

In *Scott v. District of Columbia*, 2006 U.S. Dist. LEXIS 14900, the Court held: "The Circuit's holdings require DCPS to identify and evaluate students in need of special education and related services, whether or not parents have made any request, written or oral." The "Child Find" requirement is an affirmative obligation on the school system. A parent is not required to request that a school district identify and evaluate a child. In *N.G., et al. v. District of Columbia*, 556 F. Supp. 2d 11, (U.S.D.C. 2008) the Court stated: "This Court has held on numerous occasions that as soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process."

This "affirmative obligation" does not necessarily hinge on parents' flagging issues -- though parental concerns are still relevant. *D.L. v. District of Columbia*, 109 F. Supp. 3d 12, 35 (D.D.C. 2015); see *Reid*, 401 F.3d at 518 ("School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction."); *Horne*, 2016 WL 3962788 (describing "affirmative duty"); see also *Kruvant v. District of Columbia*, No. 03-1402, 2005 WL 3276300 (D.D.C. Aug. 10, 2005) ("A child may be suspected of having a disability based on written parental concern."). The process instead begins once the district is "on notice of substantial evidence that [the student] may have qualified for special education ... such that she should have been evaluated." *N.G.*, 556 F. Supp. 2d at 26.

The evaluation component of "Child Find" requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days as mandated by the District of Columbia) and to

determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

Petitioner asserts that DCPS should have located, identified and evaluated the student pursuant to Child Find by SY 2015-2016, including conducting an FBA and developing a BIP, so that the student had an IEP in place at the start of SY 2016-2017.

Petitioner asserts that based on Student's poor academic performance at School C, combined with student's academic and behavioral concerns at School B, DCPS should have been put on notice that student should have been identified and evaluated under Child Find during SY 2015-2016. The Hearing Officer does not conclude that the evidence supports such a conclusion. First the Hearing Officer did not credit Petitioner's testimony that Student was expelled from School C or that Petitioner informed DCPS of this when she enrolled Student at School B. There was no documentation of an expulsion from School C. In fact, School C provided a letter of recommendation for Student to enroll in DCPS. In addition, School B's principal credibly testified that she was never informed Student had been expelled from the prior school Student attended.

The evidence demonstrates that during SY 2015-2016, while Student was far from stellar academically and behaviorally, Student's academic performance and behavior was not significantly enough below average to put School B on notice that Student was possibly a child with a disability and should have been evaluated for special education eligibility.

Although during SY 2015-2016 Student was tardy to school 135 times, Student managed to achieve passing grades in all classes except two and was promoted to the next grade.¹² During SY 2015-2016, Student incurred seven (7) disciplinary comments that resulted in only one (1) in-school suspension on April 27, 2016, for "causing disruption on school properties or at any DCPS-sponsored or supervised activity". Based upon this evidence, the Hearing Officer concludes that Student academic and behavioral performance was not significantly troublesome that DCPS' Child Find obligations were triggered during SY 2015-2016.

However, the evidence is starkly different for SY 2016-2017 when Student's behavioral and academic difficulties increased. Petitioner met with School B and requested assistance to address Student's behavior. Although School B was not at the time concerned about Student's academic performance and did not interpret Petitioner's concerns as an indication that Student should be considered for special education evaluation, the evidence demonstrates that by December 2016 Student's academic and behavioral concerns had drastically deteriorated.

Student's December 5, 2016, progress report reveals Student's 2nd quarter grades as "Fs" in English, Math, Health & Physical Education, Science and Academic Enrichment. Student's teachers' comments included, "request conference with parents", "poor behavior", "is failing", "possibility of failing", and "does not complete assignments".¹³ The student's SRI reading

¹² FOF # 13

¹³ FOF # 18

assessments in September 2016 reflected that Student was still operating far below grade level despite the progress Student made in the assessment during SY 2015-2016.¹⁴

Student had documented behavioral issues every month starting in October 2016 with an out of school suspension. These disciplinary issues resulted in a total of five (5) off-site short-term suspensions and one (1) in-school disciplinary action for SY 2016-2017.¹⁵

The Hearing Officer determines that as of the issuance of Student's 2nd quarter progress report on December 5, 2016, DCPS was sufficiently put on notice that Student was perhaps a child with a disability and should have initiated evaluations of the student pursuant to its obligations under Child Find. This determination is supported the combination of by Student's academic failure, teachers' comments, and escalating disciplinary issues. Consequently, The Hearing Officer concludes that Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue and Student should have been evaluated and had an eligibility determination and an IEP within 120 days of December 5, 2016: by April 5, 2017.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to timely evaluate the student pursuant to parental request that occurred on May 24, 2017.

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

Petitioner made a written request for Student to be evaluated for special education and related services on May 24, 2017, and executed a consent form for the evaluation on June 2, 2017.

Petitioner asserts that 34 C.F.R. §300.534(d)(2)(i) provides for expedited evaluations for students involved in disciplinary actions, such as the one involving Student on April 6, 2017. Notwithstanding the Child Find determination in the issue above, there is no evidence that Student was referred for evaluation prior to the May 24, 2017, request. 34 C.F.R. §300.534(d)(2)(i) provides for expedited evaluations, but does not give a specific time frame for an expedited evaluation.

D.C. Code § 2561.02 (a)(1) provides an LEA shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment.

D.C. Code § 2561.02 (a)(2)(A) that beginning July 1, 2017, an LEA shall assess or evaluate a student who may have a disability and who may require special education services within 60 days from the date that the student's parent or guardian provides consent for the evaluation or assessment. The LEA shall make reasonable efforts to obtain parental consent within 30 days from the date the student is referred for an assessment or evaluation.

At the time of Petitioner's May 24, 2017, evaluation request D.C. Code § 2561.02 (a)(2)(A) had not yet taken effect. Thus, the 120-day time line applied. The evidence demonstrates that DCPS

¹⁴ FOF 19

¹⁵ FOF # 15

completed Student's evaluation in mid July 2017 and determined eligibility by August 30, 2017. Thus, the evaluations were completed within 60 days of the May 24, 2017, request and just over a month after written consent to evaluation was provided. Student was determined eligible slightly over 90 days of the May 24, 2017, request. The overwhelming evidence demonstrates that Student was timely evaluated and that the evaluations were conducted well within the timeline required. Although Student's IEP was not developed until September 27, 2017, after Student arrived at School A, the Hearing Officer concludes that the six days beyond the 120 day time frame required was de minimis. Consequently, the Hearing Officer concludes that there was insufficient evidence presented that supports a finding of a denial of a FAPE on this issue and Petitioner did not sustain the burden of persuasion by a preponderance of the evidence.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide an appropriate placement for SY 2017-2018 because (a) the September 27, 2017, IEP team determined that Student required an IEP that prescribed 27.5 hours of special education per week outside general education and (b) because School A cannot implement an IEP that prescribes 27.5 hours of services per week outside general education.

Conclusion: Petitioner met a prima facie case that the September 27, 2017, IEP team determined that Student required an IEP that prescribed 27.5 hours of special education per week outside general education. Petitioner presented no evidence that School A could not implement an IEP that prescribed 27.5 hours of specialized instruction outside general education. Consequently, a prima facie case was not made on that portion of this issue. After consideration of the evidence the Hearing Officer determined that Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) 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; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that 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; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

As IDEA demands, 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; 34 C.F.R. §300.114 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.")

Although Petitioner's educational advocate testified that the September 27, 2017, IEP team did not agree upon the IEP that was sent to Petitioner in mid October 2017, and testified that she, on behalf of Petitioner, requested a "full-time" IEP with 27.5 hours of specialized instruction per week, the record does not reflect a team decision or agreement to provide an IEP with all services outside general education.

Petitioner's educational advocate testified that no one at the August 22, 2017, eligibility meeting disagreed that Student needed a less restrictive placement than "full time." However, her testimony did not support a finding that team agreed at that meeting or the subsequent eligibility meeting on August 30, 2017, or more importantly, at the September 27, 2017, IEP meeting that Student required a placement with all services outside general education.

Although Petitioner's other educational advocate testified that Student would require a therapeutic setting and all services outside general education, this was not the placement that the IEP team determined Student required. In addition, the Hearing Officer did not find this witness' testimony convincing. There was no evidence that this witness had ever met or evaluated Student or conferred with any of Student's teacher or participated in any of the meeting for Student.

The evidence demonstrates that the September 27, 2017, DCPS members of the IEP team specifically stated that they needed an opportunity to provide Student with all the services contained in the initial September 27, 2017, IEP before making changes. The Hearing Officer agrees that it is appropriate to provide Student with an IEP that responds to Student's needs in the least restrictive environment before changing the Student's placement to one that would restrict Student to no interaction with non-disabled peers.

There was insufficient evidence presented to demonstrate that School A is not an appropriate placement for Student who has an IEP which requires that Student receive 15 hours per week of specialized instruction outside general education. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to provide Petitioner the student's educational records from May 2017 to the date complaint was filed, specifically any RTI or SST documents.

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

34 C.F.R. § 300.613 provides: that an LEA must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the LEA and the LEA must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Sec. 300.507 or Sec. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made.¹⁶

¹⁶ 34 C.F.R. § 300.613 provides:

5E DCMR §3021 in provides in pertinent part: In accordance with the confidentiality procedures of 34 C.F.R. §§ 300.560-300.576 and 34 CFR § 99, the parent of a child with a disability shall be given the opportunity to inspect and review and to copy at no cost to the parent all of the child's records relating to the identification, evaluation, and educational placement, and the provision of a Free Appropriate Public Education (FAPE).

A review of the evidence in this case reveals that on May 22, 2017, Petitioner executed a DCPS authorization for release of educational records requesting that Student's education records be sent to her attorneys. There is no indication regarding whether, or to whom, this authorization was sent.

On September 28, 2017, Petitioner, through her counsel, forwarded a written request to the principal at School A to forward a copy of Student's "entire academic file" to Petitioner's attorneys or that School A provide dates on which a Petitioner's representative could review Student's educational file and make copies.

Petitioner's counsel acknowledged receipt of specific records, but requested other records that DCPS witnesses from School A and School B credibly testified do not exist. Although there was evidence that at the June 28, 2017, meeting School B's principal indicated that RTI data existed, DCPS' witnesses credibly testified that he checked the DCPS database and no RTI or SST data exists and there were no additional educational records that DCPS has beyond those that DCPS has already provided Petitioner. Consequently, the Hearing Officer concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Sec. 300.507 or Sec. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes--

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

Petitioner has requested that Student be placed at School E. However, the evidence does not support a conclusion that Student should be totally removed from non-disabled peers. Therefore, the Hearing Officer does not grant Petitioner's requested relief that Student be placed at School E.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The Hearing Officer concluded based on the evidence that as of April 5, 2017, DCPS should have evaluated and made an eligibility determination for Student. Given that Student was ultimately determined eligible and provided an IEP on September 27, 2017, the Hearing Officer concludes that Student is due compensatory services from April 5, 2017, until Student's IEP was developed. Given that Student's September 27, 2017, IEP when it was developed prescribed ESY services, compensation for missed services should be for approximately three months of SY 2016-2017 and ESY for summer 2017 and approximately one month of services during SY 2017-2018.

In addition, Petitioner has requested as relief that she be provided an independent evaluation and compensatory education. The evidence that Petitioner presented as to compensatory education and the resulting request for 360 hours of independent tutoring is based upon a claim of missed services that is more than twice what the Hearing Officer has determined Student missed as a result of the denial of FAPE found. Based upon the evidence the Hearing Officer concludes that Student would, nonetheless, benefit from some tutoring, and the amount of tutoring awarded should be reduced to approximate the difference in amount of services actually missed from the amount tutoring recommended. Consequently, the Hearing Officer awards in the order below that Petitioner is provided an independent clinical psychological evaluation and 120 hours of independent tutoring at the OSSE prescribed rates.

ORDER: ¹⁷

1. DCPS, shall within ten (10) school days of the issuance of this order, provide Petitioner authorization for an independent clinical psychological evaluation at the OSSE prescribed rate.

¹⁷ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

2. DCPS shall, within ten (10) school days of its receipt of the independent evaluation, convene an IEP meeting to review the independent evaluation and student's most recent academic and behavior performance and the effectiveness of Student's BIP since attending School A and review and revise Student's IEP as appropriate.
3. DCPS shall, within ten (10) school days of the issuance of this order, provide Petitioner authorization for compensatory education in the amount of 120 hours of independent tutoring at the OSSE prescribed rate.
4. All other relief requested by Petitioner 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: December 28, 2017

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