

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
December 15, 2017

<i>Student</i> , ¹)	Case No.: 2017-0256
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 12/9/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
<i>Public Charter School</i> ,)	Hearing Dates: 11/30/17 & 12/1/17
Respondent.)	ODR Hearing Rooms: 2006 & 2004
)	

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 Public Charter School did not comprehensively evaluate Student, find eligibility and provide a timely and appropriate IEP. Public Charter School responded that it adequately evaluated Student, determined eligibility and developed an appropriate IEP on a timely basis.

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 9/21/17, the case was assigned to the undersigned on 9/25/17. Respondent filed a response on 10/2/17 (with leave of Petitioner) and did not challenge jurisdiction. The resolution session meeting took place on 10/3/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 10/21/17. A final decision in this matter must be reached no later than 45

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

Hearing Officer Determination

Case No. 2017-0256

days following the end of the resolution period, as extended by a 10-day continuance, which requires a Hearing Officer Determination (“HOD”) by 12/15/17.

The due process hearing took place on 11/30/17 and 12/1/17, and was open to the public. Petitioner was represented by *Petitioner’s counsel*. Public Charter School was represented by *Respondent’s counsel*. Petitioner was present for most of the hearing.

Petitioner’s Disclosures, submitted on 11/22/17, contained documents P1 through P51, which were admitted into evidence over a variety of objections. Respondent’s Disclosures, submitted on 11/22/17, contained documents R1 through R29, which were admitted into evidence without objection. Joint Disclosures were submitted by the parties on 11/22/17, containing documents J1 through J10, which were admitted into evidence (without objection).

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

1. *Educational Advocate* (qualified over objection as an expert in Special Education Eligibility and Programming)
2. *Clinical Psychologist* (based on objection, qualified as an expert in Psychology and Psychological and Psychoeducational Evaluations)
3. *Petitioner’s Compensatory Education Expert* (qualified over objection as an expert in Compensatory Education)
4. Parent

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

1. *Respondent’s Compensatory Education Expert* (qualified without objection as an expert in Compensatory Education)
2. *School Psychologist* (qualified without objection as an expert in School Psychology)
3. *Director of Compliance* (qualified without objection as an expert in IEP Development and Programming)

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

Issue 1: Whether Respondent denied Student a FAPE by failing to comply with its affirmative Child Find obligations on a timely basis and/or to comprehensively evaluate Student and determine eligibility by 6/1/16 or thereafter, where (a) Parent requested evaluation; (b) Student had deficits in Working Memory and Communication and Social Skills; (c) Student had severe behavioral problems, with multiple crises, including a referral to ChAMPS; (d) Student had a medical diagnosis of ADHD and a 504 plan identifying disabilities related to ADHD; (e) Respondent’s evaluations in May 2016 were not

Hearing Officer Determination

Case No. 2017-0256

comprehensive; and (f) Respondent failed to test for autism in June 2017 despite Parent's request.² *Petitioner has the burden of persuasion on this issue.*

Issue 2: Whether Respondent denied Student a FAPE by failing to provide an appropriate IEP and placement on 5/20/17, where (a) Respondent acknowledged that Student needed a full-time therapeutic placement outside general education in a small classroom with a low student-to-teacher ratio, but refused to update Student's IEP; (b) the IEP did not include an adequate level of services, was deficient in annual goals, present levels of performance, a description of how Student's disability affected Student's education, and a description of Student's least-restrictive environment ("LRE"); (c) Respondent abruptly withdrew its request for a change of placement for Student during a July 2017 meeting with OSSE; and/or (d) there is no indication that Respondent has created an appropriate program and setting for Student in 2017/18. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 20 school days, Respondent shall convene an IEP team meeting to revise Student's IEP to include (a) a full-time, self-contained setting with a low student-teacher ratio, small group setting, and therapeutic interventions for behavior; and (b) updated annual goals, present levels of performance, description of how Student's disability affects Student's education, and a specific description of Student's least-restrictive environment.
3. Beginning within 15 school days, Respondent shall conduct testing to rule out autism.³
4. Respondent shall fund or provide compensatory education for any denial of FAPE.⁴
5. Any other just and appropriate relief.

² Issue 1 combines issues A and C from pages 8 and 12 of the due process complaint.

³ At the prehearing conference, Petitioner expressly withdrew her request for a speech and language evaluation. At the beginning of the due process hearing, Petitioner expressly withdrew her request for an occupational therapy evaluation.

⁴ Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial 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 denial of FAPE. Respondent should be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

Hearing Officer Determination

Case No. 2017-0256

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and in *Grade* at Public Charter School, where Student has attended since 2015/16.⁷

2. Student was first found eligible for special education and related services based on the classification of Other Health Impairment ("OHI") due to Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder ("ADHD").⁸ An initial IEP for Student dated 5/15/17 provided for 20 hours/week of specialized instruction inside general education, 1 hour/week of Behavioral Support Services ("BSS") and a dedicated aide 30 hours/week who started on 5/15/17.⁹

3. School Psychologist conducted a Psychological Evaluation of Student dated 5/26/16 because of Mother's concerns about Student's behavior: Student was aggressive, yelling for no reason, punching, spitting on teachers, throwing things without provocation, and falling on the ground when not getting Student's way.¹⁰ Mother was not concerned about Student's learning or academic abilities.¹¹ Student's cognitive and academic skills were within range of where they were expected to be for Student's age, with scores in the Average range for overall Full Scale IQ ("FSIQ") and every index on the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V"), except for Working Memory Index which was in the Very Low range, possibly due to Student's distractibility.¹² Student scored in the Low Average range for Written Expression skills and overall Total Achievement score on the Wechsler Individual Achievement Test - Second Edition ("WIAT-II"), while Student's Mathematics and Oral Language skills were in the Average range.¹³ On Student's report card prior to the Psychological Evaluation, Student received either a Mastery or Progressing

⁵ 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.

⁶ Parent.

⁷ Parent; R6-1.

⁸ J4-1.

⁹ J4-1,10; R25-11.

¹⁰ J1-1,2.

¹¹ J1-1,3.

¹² J1-5,7,16.

¹³ J1-16.

Hearing Officer Determination

Case No. 2017-0256

grade for all academic areas.¹⁴ Student's reading and math skills were where they were expected to be based on a standardized test.¹⁵

4. The Psychological Evaluation considered the classifications of Specific Learning Disability ("SLD") and Emotional Disturbance ("ED") and determined that Student appeared to be achieving adequately and making sufficient progress, so did not meet the criteria for SLD; Student's problematic behaviors did not appear to have an adverse impact on Student's educational performance at that time, so Student did not meet the first criteria for ED.¹⁶ ED is a strong diagnosis for a child as young as Student.¹⁷ Clinical Psychologist reviewed the Psychological Evaluation and found the conclusion that Student did not meet the definition of ED to be "curious."¹⁸ Clinical Psychologist testified that there were "incipient signs" of ED that got worse over the year after School Psychologist evaluated Student.¹⁹

5. On the Behavior Assessment System for Children, Second Edition ("BASC-2"), Student scored in the Clinically Significant range on the Aggression and Depression scales in a teacher's responses, but lacked academic impact.²⁰ The Psychological Evaluation referenced Student's "tiredness, headache, distractibility, impatience, hyperactivity and difficulty remaining seated" and Student's "increased energy level" and "difficulty focusing" attention, which may have resulted in the evaluation not reflecting Student's true potential in some areas.²¹ School Psychologist did not seriously consider ADHD as an issue at that time, as all of the symptoms could result from simply being tired.²² Mother did not observe ADHD symptoms at home; ADHD symptoms must be observed in two different environments, such as home and school, to be diagnosed.²³ School Psychologist was more concerned with Student's emotional issues; mood disorders are to be ruled out first, prior to diagnosing ADHD.²⁴ School Psychologist's notes from 2/18/16 stated that Student's pediatrician was going to evaluate for ADHD.²⁵

6. At the eligibility meeting on 6/1/16, Student's teacher stated that Student needed a smaller setting and one-to-one support to be successful; both teachers emphasized that Student's issue is behavior, not academics.²⁶ Based on the evaluation and other information, School Psychologist stated that Student didn't qualify for an IEP, but could receive a 504

¹⁴ J1-13.

¹⁵ *Id.*

¹⁶ J1-1,15,16.

¹⁷ School Psychologist.

¹⁸ Clinical Psychologist.

¹⁹ *Id.*

²⁰ School Psychologist; J1-12,16.

²¹ J1-6,7.

²² School Psychologist.

²³ *Id.*

²⁴ *Id.*

²⁵ R25-4.

²⁶ J2-2,3.

Hearing Officer Determination

Case No. 2017-0256

Plan to provide breaks and therapy.²⁷ Respondent's Compensatory Education Expert concurred that a 504 Plan was appropriate in the circumstances on 6/1/16.²⁸ School Psychologist suggested that Mother have Student evaluated to rule out ADHD.²⁹ School Psychologist's calendar noted that he referred Student to other service providers for ADHD on 2/18/16, 6/1/16 and 6/8/16.³⁰ Mother and Parent, who did not have legal representation at the 6/1/16 meeting, agreed with the conclusions.³¹

7. Student was diagnosed on 4/11/17 with ADHD, Combined Type and prescribed medication which Student has not taken consistently over the months.³² Significant behavior problems continued; Public Charter School noted that when Student was taking medication consistently, Student's behavior and academic performance were successful.³³

8. Student was found eligible for special education and an initial IEP was finalized on 5/15/17, along with a Functional Behavioral Assessment ("FBA") and a Behavioral Intervention Plan ("BIP"); all parties agreed with the IEP and signed off, including Parent, although Educational Advocate followed up with concerns about the IEP.³⁴ In Student's 5/15/17 IEP, the present levels of performance stated that Student had "a basic understanding" of each math, reading and writing, without providing data or any further detail or specificity.³⁵ Some of Student's IEP's goals were baseless, such as reading goals for Student emphasizing phonics which were not a concern.³⁶ The IEP baselines for each academic goal stated that Student "will show one year's growth in the subject matter," while the baselines for Emotional, Social, and Behavioral Development were "improve on inappropriate behavior in 5 of 5 trials."³⁷ The IEP's consideration of special factors included typos in the statement that Student acts to "pain" power and control and may act "our" or shut down; that paragraph, including typos, was repeated verbatim 3 other places in the IEP.³⁸

9. Amended IEPs were proposed by Public Charter School on 7/28/17 and 10/04/17, but not finalized as Parent did not agree, which would have changed specialized instruction to 10 hours inside general education and 10 hours outside general education, but did not address concerns with present levels and baselines (or correct the typos).³⁹ An improved amended IEP was proposed by Public Charter School on 11/20/17 to provide 28.75

²⁷ J2-3; R2; School Psychologist.

²⁸ Respondent's Compensatory Education Expert.

²⁹ J2-3; R2-1.

³⁰ R25-1,2,3,4.

³¹ J2-3; Parent.

³² P25-10; J8-4; R4-1; R25-13,16,17.

³³ P33-1; R6-1.

³⁴ R5-1; Parent; P28-4; J5; J6.

³⁵ J4-3,5,7.

³⁶ Petitioner's Compensatory Education Expert; J4-5,6; P28-4.

³⁷ J4-3,4,5,6,7,8,9.

³⁸ J4-2,8,11.

³⁹ R9-1; R16-1.

Hearing Officer Determination

Case No. 2017-0256

hours/week of specialized instruction outside general education, along with 4 hours/month of BSS and 30 minutes/week of Speech-Language Pathology.⁴⁰ The 11/20/17 IEP included data in the present levels and included baselines in a more useful format, although every baseline in each subject was uniform (every baseline for math and reading was “60%”; every baseline for writing was “50%”; and every social-emotional baseline was “2 out of 5”).⁴¹

10. In response to a 6/29/17 change in placement request from Public Charter School, on 7/28/17 OSSE concluded after a thorough review that a change in placement to a more restrictive environment was not warranted for Student at that time; OSSE recommended training and technical assistance be provided to Public Charter School.⁴² After the Public Charter School members conferred privately, Student’s IEP team did not move forward with the change in placement.⁴³ Public Charter School determined that it would create a program that would meet Student’s needs, even though school was beginning in about 2 weeks.⁴⁴

11. Petitioner’s counsel requested on 6/23/17 that Student be evaluated with an FBA, Speech-Language Evaluation, Occupational Therapy (“OT”) Evaluation, and an autism assessment, as well as be authorized for an independent Comprehensive Psychological Evaluation.⁴⁵ A Speech-Language Evaluation was completed by Public Charter School and given to Parent and her counsel on 10/3/17.⁴⁶ An OT Evaluation dated 11/21/17 concluded that Student was not a candidate for OT services at that time.⁴⁷

12. Educational Advocate testified that autism testing is still being sought just to be cautious.⁴⁸ Clinical Psychologist didn’t find that Student had autism or suggest any additional evaluations in his 10/10/17 Comprehensive Psychological Evaluation.⁴⁹ School Psychologist credibly testified that he did not see any symptoms of autism in his 5/26/16 Psychological Evaluation.⁵⁰

13. An independent Comprehensive Psychological Evaluation was authorized by Public Charter School on 7/12/17.⁵¹ The independent Comprehensive Psychological Evaluation dated 10/10/17 found that Student had average intellectual functioning across various cognitive domains based on the WISC-V, with the exception of visual spatial abilities, which was in the Extremely Low range and likely the result of situational factors as it was

⁴⁰ R24-1,11,12.

⁴¹ R24-1,3,4,5,6,7,8,9,10.

⁴² J7-1.

⁴³ P44-2; J7-4.

⁴⁴ R11-4; P44-2.

⁴⁵ P31-1.

⁴⁶ R17-2.

⁴⁷ J10-7.

⁴⁸ Educational Advocate.

⁴⁹ Educational Advocate; J8; Clinical Psychologist; School Psychologist.

⁵⁰ School Psychologist.

⁵¹ R7-1; Educational Advocate.

Hearing Officer Determination

Case No. 2017-0256

notably lower than in the 2016 Psychological Evaluation.⁵² Student's Working Memory Index was in the Average range, confirming School Psychologist's sense that the low memory score on his 5/26/16 Psychological Evaluation was merely an aberration.⁵³ Student's academic assessment in the Comprehensive Psychological Evaluation revealed mild to moderate deficits, with overall academic skills and math skills both in the Low Average range, while spelling and reading skills both had severe deficits.⁵⁴ The evaluation diagnosed Student with ADHD-Combined Type, Disruptive Mood Dysregulation Disorder, ruled out SLD, and concluded that Student's Multi-disciplinary Team ("MDT") should add ED to the OHI (ADHD) classification and modify Student's educational services.⁵⁵

14. The Comprehensive Psychological Evaluation emphasized Student's family history of mental illness, including bipolar disorder on Student's paternal side and history of drug abuse on the maternal side, combined with other aggravating factors including Student's possible neglect/inconsistent emotional nurturance by Mother, familial instability, and exposure to unstable/unhealthy living conditions (Mother allowed men and women to frequent their home who engaged in drugs (crack cocaine) and various sexual activities).⁵⁶

15. On 10/11/17, Public Charter School re-opened its change of placement request with OSSE to obtain a more therapeutic placement for Student.⁵⁷ OSSE stated at the 11/2/17 change in placement meeting that it needed more data to move forward and formally stated in a 11/3/17 letter that change in placement was not warranted; placement is an IEP team decision and Student's team agreed on a change.⁵⁸ On 11/17/17, OSSE assigned Student to Nonpublic School.⁵⁹

16. Behavior. In 2015/16, Student had explosive behavior issues.⁶⁰ Public Charter School completed an SST on Student and Public Charter School prepared a Behavior Management Plan dated 2/19/16 to address Student being disruptive, noncompliant, defiant and disrespectful to peers and adults.⁶¹ Public Charter School tried pullouts, one-to-one instruction, behavioral modifications, and social-emotional counseling; Student continued to go into crisis with screaming, kicking, hitting peers and staff, and destroying school property.⁶²

⁵² J8-6,7,8,12.

⁵³ J8-7,8,9; School Psychologist.

⁵⁴ J8-12.

⁵⁵ J8-13.

⁵⁶ J8-2,3,13.

⁵⁷ R17-1,2.

⁵⁸ R20-1; R19-2.

⁵⁹ J9-2,4; Educational Advocate.

⁶⁰ Parent.

⁶¹ R6-1; R1-1.

⁶² R6-1; R17-3.

Hearing Officer Determination

Case No. 2017-0256

17. In 2016/17, Student initially was doing well with the teacher.⁶³ By 11/18/16, Student was acting out more, and in an incident with School Psychologist, Student was banging arms on the desk very hard, and saying Student wanted to kill Student, cut Student's throat, and poke Student's eyes out; School Psychologist recommended that Student be taken to the hospital.⁶⁴ School Psychologist met with Student as needed to deal with crises and thought Student was improving and doing well from November 2016 to March 2017.⁶⁵ Student then got worse and had several crises when Student had to be removed from class for aggressive behavior towards students and staff; ChAMPS did a screening following a 3/22/17 crisis in which Student assaulted a teacher by forcefully punching her in the back; police were involved.⁶⁶

18. Student's behavior further worsened with an incident on 6/12/17 when Student physically attacked peers and staff and destroyed school property; Student was so out of control that Student was confined by Parent in the bathroom to prevent harm and "looked like another person"; Parent felt school personnel could not manage Student, so pulled Student from school and did not allow Student to return.⁶⁷ After that incident, School Psychologist and Director of Compliance discussed with Public Charter School's executive director on 6/12/17 changing Student's placement to a different school.⁶⁸ On 6/13/17, Director of Compliance emailed Parent that on 6/12/17 he worked on amending Student's IEP to a "separate small setting full-time day placement"; Director of Compliance also offered to send Student's dedicated aide to provide lessons for Student at home for the rest of the school year.⁶⁹ A Public Charter School special education teacher provided services for Student at home, including ESY.⁷⁰

19. In 2017/18, Student continued to have behavioral issues, including emotional outbursts with screaming and kicking the classroom door and voicing ideations of self-harm.⁷¹ School Psychologist believed Student was making social-emotional progress and was less aggressive and leaving class less in 2017/18.⁷²

20. Role of Parent. Parent was frequently summoned to school in 2015/16 and 2016/17.⁷³ The 2 observations of Student for the FBA on 4/28/17 and 5/2/17 both ended with Parent having to go to school to address Student's physically aggressive behavior.⁷⁴ Parent spent half days at Public Charter School for a few months, taking Student home when

⁶³ Parent.

⁶⁴ R25-6.

⁶⁵ School Psychologist; R25-7,8.

⁶⁶ Parent; P24-1; J5-1; P22-1; J8-3; R25-9.

⁶⁷ J8-4; R6-1; R8-2; R11-3; R25-15.

⁶⁸ R25-15.

⁶⁹ P32-1.

⁷⁰ R8-2.

⁷¹ P21; P29-1; R11-2; P27-1; R25-18.

⁷² School Psychologist.

⁷³ P22; J8-4; R8-1; R25-5,11,19.

⁷⁴ J5-5.

Hearing Officer Determination

Case No. 2017-0256

Student was not able to de-escalate and taking copies of assignments as homework.⁷⁵ On 2/23/16, Parent visited Student's classroom from 9:00 - 11:30 a.m.; on 2/24/16, Mother observed Student's class; on 2/25/16, Parent sat with the class for an hour around Noon and took Student home because of disruptive behavior.⁷⁶ On 1/24/17, Parent stated at an MDT meeting that she may consider homeschooling Student or seek another school for a fresh start.⁷⁷ Parent stated on 6/13/17 that she had spent many days at Public Charter School and enjoyed assisting other children along with Student.⁷⁸

21. Compensatory Education. A thorough and detailed compensatory education plan prepared by Petitioner's Compensatory Education Expert concluded that in addition to a psychiatric evaluation, Student needed (a) 60 weekly 1-hour sessions of group, play or art-related therapy, (b) 120 twice-a-week speech-language sessions of 30-minutes each, (c) 60 weekly 1-hour tutoring sessions, and (d) 60 weekly 1-hour mentoring sessions.⁷⁹ Tutoring by a qualified tutor would be desirable for Student to the extent tutoring can be tolerated without causing anxiety.⁸⁰ Art or play therapy is helpful for Student's emotional problems or traumas and would be needed for a while.⁸¹ Nonpublic School is a good choice for Student and good for Student's behavior, but not sufficient to remediate Student's academic deficits.⁸² Student's achievement scores are remarkable for being as high as they are given Student's behavior problems.⁸³ The tutoring and other compensatory education elements should "pretty well" put Student in the place Student should be academically but for the denial of FAPE.⁸⁴

22. Respondent's Compensatory Education Expert suggested a much narrower period of no more than half a year of possible missed services, which could be remedied with some 25-30 hours of academic tutoring and about 10 hours of play therapy.⁸⁵ Respondent's Compensatory Education Expert credibly testified that child-centered play therapy would likely be preferable to art therapy or group therapy given Student's age, and that play therapy overlapped and would be preferable to mentoring.⁸⁶ Clinical Psychologist noted that Student could benefit from intensive remediation in reading and writing, including spelling.⁸⁷ Tutoring would be helpful as compensatory education.⁸⁸

⁷⁵ Parent; P44-1; R11-3; Educational Advocate.

⁷⁶ P23-2,3.

⁷⁷ J3-1.

⁷⁸ P33-2.

⁷⁹ P48-1; P47; Petitioner's Compensatory Education Expert.

⁸⁰ Petitioner's Compensatory Education Expert.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Respondent's Compensatory Education Expert.

⁸⁶ *Id.*

⁸⁷ Clinical Psychologist; J8-14.

⁸⁸ Clinical Psychologist.

Hearing Officer Determination

Case No. 2017-0256

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, the LEA 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 recent 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.

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

Hearing Officer Determination

Case No. 2017-0256

achieved satisfactorily. 34 C.F.R. 300.114; *Endrew 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); *Schaffer ex rel. Schaffer v. West*, 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.

Issue 1: *Whether Respondent denied Student a FAPE by failing to comply with its affirmative Child Find obligations on a timely basis and/or to comprehensively evaluate Student and determine eligibility by 6/1/16 or thereafter, where (a) Parent requested evaluation; (b) Student had deficits in Working Memory and Communication and Social Skills; (c) Student had severe behavioral problems, with multiple crises, including a referral to ChAMPS; (d) Student had a medical diagnosis of ADHD and a 504 plan identifying disabilities related to ADHD; (e) Respondent's evaluations in May 2016 were not comprehensive; and (f) Respondent failed to test for autism in June 2017 despite Parent's request. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of demonstrating that Public Charter School did not conduct appropriate evaluations and find Student eligible around 6/1/16 and that any alleged failure resulted in substantive harm to Student and a denial of FAPE.

Appropriate Evaluations. Considering first whether there were appropriate evaluations of Student, there is no dispute that evaluations of children by experts are central to the determination of eligibility and what special education and related services are needed. See *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *18 (D.D.C. 2016) quoting *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60 (D.D.C. 2011). As the public agency, Public Charter School must ensure that a child is "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. 300.304(c)(4). Decisions on the areas to be assessed are to be made based on the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg.

Hearing Officer Determination

Case No. 2017-0256

46643 (2006). However, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Cf. James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016).

In this case, Petitioner asserted that the 5/26/16 Psychological Evaluation was not sufficiently comprehensive, due to not thoroughly pursuing the possibility of ADHD or autism. While Student had symptoms that may suggest ADHD to a lay person (including distractibility, hyperactivity, difficulty remaining seated and focusing attention), School Psychologist explained that as an expert psychologist he did not seriously consider ADHD as an issue at that time, as all of the symptoms could result from Student simply being tired.⁸⁹ More conclusively, School Psychologist testified that Mother did not observe ADHD symptoms at home and several symptoms of ADHD must be observed in two different environments – such as home and school – for ADHD to be diagnosed.

As for testing to determine whether Student was on the autism spectrum, School Psychologist credibly testified that he did not see any symptoms of autism in his 5/26/16 Psychological Evaluation. Further, Clinical Psychologist – the independent evaluator that Petitioner’s counsel selected, did not find that Student was on the autism spectrum or suggest the need for any additional evaluations in his 10/10/17 Comprehensive Psychological Evaluation. Indeed, Petitioner did not assert any factual basis for conducting an autism assessment and Educational Advocate forthrightly testified that autism testing was being sought just to be cautious.

Beyond that, Petitioner’s counsel requested on 6/23/17 that Student be evaluated with an FBA, Speech-Language Evaluation and OT Evaluation, as well as be authorized for an independent Comprehensive Psychological Evaluation. While not agreeing that the evaluations were necessary, Public Charter School sought to be responsive. An FBA had already been completed on 5/15/17, which Petitioner did not meaningfully criticize. A Speech-Language Evaluation was completed by Public Charter School and given to Parent and her counsel on 10/3/17 (although not included in the record or asserted in this case). An OT Evaluation dated 11/21/17 concluded that Student was not a candidate for OT services. An independent Comprehensive Psychological Evaluation was authorized by Public Charter School on 7/12/17 and completed on 10/10/17, as discussed above. Moreover, Petitioner failed to demonstrate that any delays in evaluations were harmful to Student.

Timely Eligibility. Turning to the process for determining eligibility for special education, 34 C.F.R. 300.306 requires a group of qualified professionals and 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

⁸⁹ ADHD may be considered an OHI disability classification under the IDEA, 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).

Hearing Officer Determination

Case No. 2017-0256

child with a disability under the IDEA, Student must have both a listed concern, such as SLD or ED, 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, the key question was whether Student should have been found eligible at the 6/1/16 meeting, when a group of qualified professionals and both Mother and Parent came together to determine eligibility based on the recent evaluation and other information. The 5/26/16 Psychological Evaluation primarily considered the classifications of Specific Learning Disability⁹⁰ and Emotional Disturbance.⁹¹ School Psychologist determined in the evaluation that Student appeared to be achieving adequately and making sufficient progress, so Student did not meet the criteria for SLD. Similarly, Student's negative behaviors did not appear to have an adverse impact on Student's educational performance at that time, so Student did not meet the first criteria for ED which requires an adverse academic impact. Based on this, the MDT team, including Mother and Parent, concluded that Student was not eligible for special education and related services at that time, but that it would be appropriate to develop a 504 Plan to provide breaks and therapy for Student.⁹²

⁹⁰ SLD is defined in 34 C.F.R. 300.8(c)(10) as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." An SLD may be found if a student "does not achieve adequately for the child's age" in written expression (which was Student's lowest score) among other areas, or if the child fails "to meet State-approved grade-level standards" in such skills, with various exclusions. 34 C.F.R. 300.309(a),(b). *See also* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46656 (August 14, 2006).

⁹¹ The IDEA regulations define ED to mean a condition exhibiting one or more of the following characteristics, over a long period of time and to a marked degree, that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. 300.8(c)(4).

⁹² *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*

Hearing Officer Determination

Case No. 2017-0256

Much was made at the hearing of Student's alleged memory issues, based on a finding that Student's Working Memory Index was in the Very Low range in the 5/26/16 evaluation. School Psychologist believed that low memory index was likely an aberration, which was confirmed by the 10/10/17 Comprehensive Psychological Evaluation which found Student's Working Memory Index to be in the Average range. Petitioner's remaining assertions in Issue 1 were no more persuasive to the undersigned: No deficits in Communication and Social Skills were shown to require either testing or a finding of eligibility. Student did have behavior problems which Public Charter School sought to address but which worsened over time until the ChAMPS screening on 3/22/17, which contributed to the IEP developed less than 2 months later. The 504 Plan was put in place after the MDT team found no eligibility for special education and provides no evidence that an IEP was needed. Similarly, the ADHD diagnosis of Student was not until April 2017 and contributed to the IEP a month later.

In sum, the undersigned concludes that Petitioner did not meet her burden on Issue 1 and finds no denial of FAPE due to a lack of comprehensive evaluation of Student or a failure to find Student eligible for special education by 6/1/16 or thereafter.

Issue 2: *Whether Respondent denied Student a FAPE by failing to provide an appropriate IEP and placement on 5/20/17, where (a) Respondent acknowledged that Student needed a full-time therapeutic placement outside general education in a small classroom with a low student-to-teacher ratio, but refused to update Student's IEP; (b) the IEP did not include an adequate level of services, was deficient in annual goals, present levels of performance, a description of how Student's disability affected Student's education, and a description of Student's least-restrictive environment; (c) Respondent abruptly withdrew its request for a change of placement for Student during a July 2017 meeting with OSSE; and/or (d) there is no indication that Respondent has created an appropriate program and setting for Student in 2017/18. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on the issue of lack of an appropriate IEP and placement on 5/15/17 based on the evidence presented, shifting the burden of persuasion to Respondent which has failed to meet its burden of demonstrating that it did provide an appropriate IEP for Student in all respects.

The applicable legal standard for analyzing the appropriateness of an IEP has recently been articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. The undersigned views this new standard as building on and buttressing prior articulations of whether the challenged IEPs were "reasonably calculated to produce meaningful educational benefit" and to permit Student to access the educational curriculum to the extent possible. *See Damarcus S. v.*

Columbia, 202 F. Supp. 3d 64, 65 (D.D.C. 2016), quoting *Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 149 (D.D.C. 2016).

Hearing Officer Determination

Case No. 2017-0256

Dist. of Columbia, 190 F. Supp. 3d 35, 51 (D.D.C. 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07.

The measure and adequacy of an IEP is to be determined as of the time it was provided to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEP is analyzed by considering each specific concern raised by Petitioner in turn.⁹³ *See* 34 C.F.R. 300.320(a)(1),(2),(3); *Honig*, 484 U.S. at 311.

IEP Inadequacies. Considering first the IEP issues on which Petitioner prevails, Student's 5/15/17 IEP did not contain the necessary statement of present levels of performance as required by 34 C.F.R. 300.320(a)(1). Student's present levels of performance simply stated that Student had a "basic understanding" of math, a "basic understanding" of reading and a "basic understanding" of writing, without providing data or any further detail or specificity, which on its face is not sufficient to develop an appropriate program for Student. As a result, Student's IEP goals lacked a proper foundation and some were inappropriate, such as reading goals for Student emphasizing phonics which were not a concern, in violation of 34 C.F.R. 300.320(a)(2).

Further, the 5/15/17 IEP baselines were insufficient in violation of 34 C.F.R. 300.320(a)(2),(3), for the baselines for each academic goal merely stated that Student "will show one year's growth in the subject matter," which is not a baseline (and more like a goal), while the baselines for Emotional, Social, and Behavioral Development were "improve on inappropriate behavior in 5 of 5 trials," which again is not a baseline. The IEP's consideration of special factors included typos in the statement that Student acts to "pain" power and control and may act "our" or shut down, which shows a lack of attention to the IEP as that paragraph, including typos, was repeated verbatim 3 other places in the IEP.⁹⁴

While these concerns may be considered merely procedural violations of 34 C.F.R. 300.320(a), a proper IEP is vital under the IDEA and this Hearing Officer concludes that these IDEA violations amount to a denial of FAPE pursuant to 34 C.F.R. 300.513(a)(2) by significantly impeding Parent's ability to participate in decision-making relating to the IEP and provision of a FAPE to Student. *See Andrew F.*, 137 S. Ct. at 994 (IEP requires "careful consideration of the child's individual circumstances"). Thus, Student's IEP team shall revise Student's IEP to include appropriate present levels of performance, accurate

⁹³ As an initial matter, a Hearing Officer must determine whether "the State complied with the procedures" set forth in the IDEA. *A.M.*, 933 F. Supp. 2d at 204, *quoting Rowley*, 458 U.S. at 206-07. No such procedural violations were alleged in this case.

⁹⁴ An improved amended IEP was proposed by Public Charter School on 11/20/17, which included data in the present levels and baselines in a more useful format, although every baseline in each subject was uniform, as every baseline for math and reading was "60%"; every baseline for writing was "50%"; and every social-emotional baseline was "2 out of 5." This suggests to the undersigned that further specificity and attention to Student's IEP may be necessary.

Hearing Officer Determination

Case No. 2017-0256

baselines and updated annual goals as ordered below. In addition, these violations result in an award of compensatory education below.

Other IEP Issues. Petitioner's remaining allegations in Issue 2 do not rise to the level of IDEA violations or a denial of FAPE in the view of the undersigned. Public Charter School did seek a change in placement for Student to a more restrictive environment at a full-time day school and proposed to update Student's IEP on 11/20/17 to provide 28.75 hours/week of specialized instruction outside general education, along with 4 hours/month of BSS and 30 minutes/week of Speech-Language Pathology. Public Charter School previously proposed IEP amendments on 7/28/17 and 10/04/17, which would have made Student's 5/15/17 IEP more restrictive by shifting specialized instruction to 10 hours inside general education and 10 hours outside general education, but Petitioner refused the amendments.

Petitioner alleged that Student's initial IEP did not include an adequate level of services, even though it provided for 20 hours/week of specialized instruction inside general education, 1 hour/week of BSS, and a dedicated aide 30 hours/week who started immediately. Notwithstanding the significant behavioral issues of Student, the undersigned considers this an appropriate level of support for an initial IEP given the facts and circumstances of this case, particularly given the full-time dedicated aide. The undersigned also found the description of how Student's disability affected Student's education, and a description of Student's least-restrictive environment in Student's IEP to be sufficient.

Petitioner complained that Public Charter School abruptly withdrew its request for a change of placement for Student during a July 2017 meeting with OSSE, which Public Charter School did do after OSSE concluded that a change in placement to a more restrictive environment was not warranted for Student at that time and recommended training and technical assistance be provided to Public Charter School. Public Charter School members conferred privately and determined that the school would seek to create a program to meet Student's needs at Public Charter School, so Student's IEP team, including Parent, did not move forward with the change in placement on 7/28/17. Petitioner also alleged that Public Charter School failed to create an appropriate program and setting for Student in 2017/18, but this was rebutted in part by School Psychologist's testimony that Student was making social-emotional progress and was less aggressive and leaving class less in 2017/18, notwithstanding ongoing behavioral incidents. In any case, on 10/11/17 Public Charter School re-opened its change of placement request with OSSE to obtain a more therapeutic placement for Student. OSSE remained unconvinced that a change in placement was warranted, but Student's IEP team overrode OSSE and agreed on a change to a full-time therapeutic day school, which OSSE determined on 11/17/17, selecting Nonpublic School.

Placement. In determining the appropriateness of Student's educational placement, the standard under the IDEA is that Public Charter School "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfil the student's IEP requirements). Here, Public Charter School was an appropriate placement that was

Hearing Officer Determination

Case No. 2017-0256

capable of carrying out Student's 5/15/17 IEP and proposed amended IEPs prior to the change in placement moving Student from Public Charter School to a full-time day school. In short, Public Charter School did not "commit a material failure, or leave 'more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP.'" *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), quoting *James*, 194 F. Supp. 3d at 139.

Thus, apart from the violations due to the IEP present levels, goals and baselines discussed above, this Hearing Officer concludes that, viewed as of the time it was developed, the remainder of Student's 5/15/17 IEP was reasonably calculated to enable Student to make appropriate progress in the circumstances, and placement was appropriate, so there was no denial of a FAPE on the remaining aspects of Issue 2.

Remedy

The IDEA gives Hearing Officers broad discretion to provide an "equitable remedy" for students who have been denied a FAPE. See *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *25 (D.D.C. 2016) (IDEA prescribes broad discretion in fashioning relief for educational deprivation).

While there is "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.*, 817 F.3d at 799, 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.

As remedy for the denial of FAPE in Issue 2 found above, Petitioner is awarded compensatory education based on this Hearing Officer's determination of what would be most beneficial to put Student in the position Student should have been in at this point had there been no violations. The testimony of the 2 compensatory education experts, along with the compensatory education plan from Petitioner's Compensatory Education Expert, are given due consideration by the undersigned, recognizing that only a portion of the claims were found to be a denial of FAPE, so the proposals have been weighted accordingly. The undersigned is persuaded of the importance of therapy given Student's behavioral issues, and found credible Respondent's Compensatory Education Expert's explanation of the value of play therapy given Student's age, compared to other types of therapy. In addition the undersigned recognizes the importance of academic tutoring to make up for the problem with Student's IEP discussed above. Taking all these factors into account, the undersigned concludes that 30 hours of compensatory education is appropriate to restore Student through play therapy and/or academic tutoring, but considers Parent (in

Hearing Officer Determination

Case No. 2017-0256

consultation with her counsel) to be in the best position to know the impact of Nonpublic School and what other services Student is currently receiving and whether Student could most benefit from therapy or tutoring.

Accordingly, compensatory education for the denial of FAPE found herein shall consist of Public Charter School funding, at customary rates for independent providers, a total of 30 hours of play therapy and/or academic tutoring, as determined by Parent in consultation with her counsel. All hours are to be used within 12 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Public Charter School which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner has prevailed on Issue 2 in part, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Public Charter School shall fund an independent provider or independent providers chosen by Petitioner, and provide a letter of authorization within 10 business days of Petitioner’s request(s), for a total of 30 hours of play therapy and/or academic tutoring, at Petitioner’s option. All hours are to be used within 12 months; any unused hours will be forfeited.
- (2) Within 20 school days, Public Charter School shall convene Student’s IEP team to revise Student’s IEP to include (a) appropriate present levels of performance, (b) accurate baselines, and (c) updated annual goals, consistent with this decision.

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:

Hearing Officer Determination

Case No. 2017-0256

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