

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: December 18, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2017-0276

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: December 5 and 13, 2017

Office of Dispute Resolution, Room 2006  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by determining in May 2017 that Student was no longer eligible for special education and related services.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on October 5, 2017, named DCPS as respondent. The

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<sup>1</sup> Personal identification information is provided in Appendix A.

undersigned hearing officer was appointed on October 6, 2017. The parties met for a resolution session on November 20, 2017 and were unable to reach an agreement. My final decision in this case is due by December 19, 2017. On November 2, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned impartial hearing officer on December 5 and 13, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

The Petitioner testified and called as additional witnesses INDEPENDENT PSYCHOLOGIST and EDUCATIONAL ADVOCATE. DCPS called as witnesses SPECIAL EDUCATION TEACHER and SCHOOL PSYCHOLOGIST. Petitioner's Exhibits P-3 through P-16 and P-18 through P-65 were admitted into evidence, including Exhibits P-27 and P-44 admitted over DCPS' objections. Exhibit P-17 was withdrawn. I sustained DCPS' objections to Exhibits P-1 and P-2. DCPS' Exhibits R-1 through R-26, R-28, R-29, R-31, R-32 and R-34 were admitted into evidence, including Exhibit R-1 admitted over Petitioner's objection. Exhibits R-27 and R-33 were withdrawn. I sustained Petitioner's objection to Exhibit R-30. Counsel for Petitioner made an opening argument. Due to the early due date for my final decision, I requested that counsel make closing arguments in lieu of filing post-hearing briefs. Counsel for both parties made closing arguments.

**JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

**ISSUES AND RELIEF SOUGHT**

The following issues for determination were certified in the November 2, 2017

Prehearing Order:

A. Whether on or about early May 2017, DCPS inappropriately exited Student from special education;

B. Whether DCPS failed to comprehensively evaluate Student prior to exiting Student from special education in May 2017, as Student’s processing issues warranted an Occupational Therapy assessment and Student’s Independent Educational Evaluation psychological evaluation had not been completed, and a formal social history and any other evaluations deemed needed had not been done.

For relief, the parent requests the hearing officer to order DCPS to ensure that Student is comprehensively reevaluated, including with an Occupational Therapy (OT) and social assessment. In addition, the parent seeks an award of compensatory education.

**FINDINGS OF FACT**

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia.

**Testimony of Mother.**

2. Student has a history of conduct problems at school that go back at least to the 2010-2011 school year. Student was initially referred for evaluation for special education eligibility in May 2013. Exhibit P-45. Prior to that, Student had a Section 504

Plan (Section 504 of the Rehabilitation Act of 1973) to address behavioral concerns.

Exhibit P-16. In an August 2013 psychological report, a DCPS school psychologist reported, *inter alia*, that when information was presented verbally to Student, Student showed some difficulties in comprehension. Student was unable to comprehend lectures or verbal readings, and experienced confusion from time to time. With regard to information presented visually, Student could attend to and think about the information in order to complete tasks. However, novel or problem-solving tasks utilizing mainly visual information could be tricky for Student. Whether the information was presented verbally or visually, Student had trouble with concentration or attention to the information. Deficits in attention and processing abilities delayed the reading process by tying up the mental resources that could be used for comprehension. Student also experienced difficulty when a time element was involved in the problem. Student demonstrated elevated levels of hyperactivity, aggression, and conduct problems. This meant that in the classroom, Student would often display poor self-control and be unable to take turns and follow the rules. In addition, Student displayed disruptive behavior or acted aggressively, which impaired Student's ability to maintain healthy adult and peer relationships. The DCPS school psychologist recommended that Student would benefit from additional support in the form of special education services. These services would address Student's concerns in the academic, as well as emotional, areas of functioning. Exhibit P-16.

3. Student was initially determined eligible for special education services on October 2, 2013 at CITY SCHOOL. Exhibit P-45.

4. Student's IEP, in effect on September 1, 2015, provided for 5 hours per

week of Specialized Instruction in Reading outside general education and 180 minutes per month of Behavioral Support Services. Exhibit P-45.

5. PSYCHIATRIST assessed Student's behavior in a July 2015 psychiatric evaluation. Psychiatrist diagnosed Student with ADHD and Adjustment disorder with mixed disturbance of emotions and conduct. Exhibit P-13.

6. Student's special education eligibility was confirmed at an eligibility meeting on September 2, 2015 at City School. Student's IDEA disability was identified as Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). Exhibit P-7.

7. Student's April 21, 2016 City School IEP identified Reading and Emotional, Social and Behavioral Development as areas of concern. The IEP stated that Student appeared to have a high level of problem behavior according to the assessments performed. Overall problem behavior combined Student's performance on measures of hyperactivity, aggression, depression, attention problems, atypicality and withdrawal. On another assessment, Student demonstrated below average internalizing and externalizing maladaptive behaviors as compared to other children of Student's age. Assessments involving Student's drawings indicated maladaptive behavior tendencies and disturbances in functioning or pathology. Those scores implied that Student displayed a higher level of problem or maladaptive behaviors and that Student's behaviors had depressed Student's ability to function in the school environment and negatively impacted Student's academic progress. Student was to receive behavioral support in an attempt to address Student's concerns in the areas of attending and remaining on task. Student was to also receive assistance as it related to dealing with

feelings of depression and anxiety. Student also had a behavior intervention plan to support behavioral concerns. A box on the IEP was checked to affirm that Student's behavior impeded the child's learning or that of other children. Exhibit P-7.

8. The April 21, 2016 IEP provided two annual goals for Reading including goals for increased reading accuracy and improved decoding. Student was reported to be reading grade-level passages with 91% accuracy, at an average rate of 74 correct words/minute. Behavioral goals included improved management of peer conflicts, cooperatively following adults' directions and improved management of emotions. The IEP continued Student's Specialized Instruction at 5 hours per week outside general education and Behavioral Support Services at 180 minutes per month. Exhibit P-7.

9. On March 22, 2017, Student's IEP team met at City School to consider a request by Mother for Student to be reevaluated. School staff reported that Student was making excellent progress, had mastered the IEP academic annual goals and was then reading above grade level. The school representatives recommended that Student's Specialized Instruction Services be reduced from 5 hours per week to 1 hour per week of push-in instruction. The school offered to conduct a psychological evaluation and to have an Occupational Therapist conduct an OT screening to determine if an OT assessment of Student was needed. The team agreed. The team deferred revising Student's IEP and agreed to reconvene on April 12, 2017 to conduct the annual review of Student's IEP. Exhibit R-4.

10. At the March 22, 2017 meeting, Student's City School MDT team updated Student's Behavior Intervention Plan - Level II. The updated BIP reports that Student has a history of physical aggression toward others, distracting others from learning

when talking, yelling or out of seat, crying and throwing self on the floor, and engaging in attention-seeking behavior. Student's noncompliance, walking out and physical/verbal aggression were reported as demonstrated daily. The team reported that contributing factors to Student's undesirable behaviors may have stemmed from sensory processing concerns, visual motor, handwriting, motor planning and self regulation. Current targeted behaviors of noncompliance and verbal and physical aggression with peers were reported to negatively impact Student's ability to consistently and successfully access the general education curriculum. Exhibit R-14. (All of this wording was repeated verbatim from Student's September 21, 2016 BIP. Exhibit R-15.)

11. By the end of the third reporting period, March 31, 2017, Student had mastered both of the April 22, 2016 IEP annual goals for Reading. Student had made no progress on the IEP behavioral goal to manage peer relations. Student was reported to be progressing on behavioral goals to follow directions from adults and to manage emotions such as anger, sadness and frustration. Exhibit P-32.

12. On April 2, 2017, a DCPS Occupational Therapist conducted an OT screening of Student. The Occupational Therapist had one of Student's teachers complete the Sensory Profile School Companion 2 (SPSC-2) questionnaire to measure Student's sensory processing ability. Results indicated that Student's ability to effectively process sensory input may lead to difficulty achieving an optimal arousal level, depending on the threshold of Student's nervous system. Behaviors of concern identified by the teacher on the SPSC-2 included Student's missing written, verbal or demonstrated directions more than other students; Student's struggles to complete

tasks in a noisy setting, keeping materials and supplies organized, and leaving items blank on a busy worksheet, despite knowing the answers; Student's watching people as they moved around the room, touching people or objects to the point of annoying others and displaying the need to touch objects, surfaces or textures; Student's having difficulty participating in group activities when there was a lot of talking, looking away from tasks to notice all actions in the room and being fidgety/disruptive when standing in line or close to other people; Student's becoming distressed during assemblies, lunch or other large gatherings, flinching or recoiling when Student's body is touched or when others get too close, and what was described as inflexibility compared to same aged students. It appeared to the Occupational Therapist that Student had the most difficulty processing sensory input from the auditory, visual, and tactile hand movement sensory tracts. The Occupational Therapist concluded that based on the teacher's responses to the SPSC-2, it appeared that Student was having difficulty achieving and maintaining the optimal arousal/alertness level needed to consistently attend to classroom instruction. Exhibit R-13.

13. On April 12, 2017, an annual review of Student's IEP was conducted at City School. For the Reading area of concern, the IEP reported that Student's academics were not being affected by Student's disability and that Student was performing on and above grade level. For the behavioral area of concern, the IEP reported that Student exhibited attention-seeking behaviors and poor self regulation. On a Strengths and Difficulties Questionnaire completed by Student's teacher, scores of Very High were noted for overall stress, behavior difficulties, hyperactivity and concentration problems. Student was reported to have had numerous discipline referrals, which were increasing

in frequency, for refusing to comply with staff and for physical altercations. The IEP reported that Student's attention-seeking behaviors and deficits in self-regulation impacted Student's ability to access the general education curriculum and that Student needed accommodations to access the curriculum. The April 12, 2017 IEP continued Student's Specialized Instruction at 5 hours per week outside general education and Behavioral Support Services at 180 minutes per month. Exhibit P-5.

14. Beginning in March 2017, School Psychologist conducted a comprehensive psychological reevaluation of Student on the referral of Student's multidisciplinary team (MDT), as requested by Mother. Mother had requested updated information and expressed concerns regarding Student's prior evaluation and Student's behavior in school. School Psychologist interviewed Student, Mother, two teachers and Student's social worker and conducted a classroom observation. School Psychologist administered cognitive, academic and behavioral assessments to determine if Student continued to meet OHI criteria and to assess Student's academic skills. On the Reynolds Intellectual Assessment Scale, Second Edition (RIAS-2), Student's scores were in the Average range, except for the Speeded Processing Index (SPI) which was within the Significantly Below Average range. School Psychologist noted that the SPI test was the last component of the RIAS-2 administered and the score may have reflected a decline in Student's testing motivation. On the Woodcock-Johnson Tests of Academic Achievement, Fourth Edition (WJ-IV ACH), Student's scores for Mathematics, Reading and Written Language ranged from Low Average to Average, except for a Low score on Passage Comprehension. School Psychologist had Mother and Student's math teacher complete the Conners' Rating Scale, Third Edition (Conners 3) to assess for ADHD. The

responses reflected elevated concerns in the areas of the inattention, hyperactivity/impulsivity, executive functioning, defiance/aggression, and peer relationships. Teacher and Mother both had elevated concerns about Student in the area of learning problems. Additionally, the Conners 3 results indicated that Student may be experiencing anxiety and depression. Exhibit P-10.

15. In her May 6, 2017 report, School Psychologist reviewed the eligibility criteria for Other Health Impairment. She concluded that diagnostic impressions, based on informant data and observations, indicated that Student has ADHD, Combined Type. However, she further concluded that the ADHD condition did not adversely affect Student's educational performance. School Psychologist reported that Student was currently performing above grade level in Reading, that Student's Scholastic Reading Inventory (SRI) score was 928 which was above grade level. Student's Dynamic Indicators of Basic Early Literacy Skills (DIBELS) reading fluency performance reflected that Student was at Level Y which was above grade level. Student was also reported to be at grade level in math and to be very strong in geometry. Student's i-Ready middle-of-the-year math score was 487, which was also at grade level. School psychologist concluded that these results indicated that Student's ADHD impairment did not adversely affect Student's educational performance. Exhibit R-12.

16. Student's MDT team met at City School on May 16, 2017 to review School Psychologist's comprehensive psychological evaluation of Student. The school members of the team reported that Student was on grade level in reading comprehension and was on track to master grade level in reading fluency by the end of the school year. The school team members determined that although Student has ADHD, the disability does

not adversely impact Student's educational performance. The MDT team determined that Student was no longer eligible for special education and related services. Mother disagreed with the determination. Exhibits R-2, R-10.

17. The May 16, 2017 MDT team recommended that Student be provided a Section 504 Plan to address behavior concerns. Mother did not want Student to have a Section 504 Plan until a Independent Educational Evaluation (IEE) psychological evaluation of Student could be completed. Mother declined for Student to continue to receive offered counseling services from the City School social worker as part of a Section 504 Plan. Testimony of Mother. On May 16, 2017, DCPS issued funding authorization for Mother to obtain an Independent Educational Evaluation (IEE) comprehensive psychological evaluation of Student. Exhibit P-29.

18. Student's grades for the last two terms of the 2016-2017 school year at City School were all Proficient or Advanced. Exhibit R-17.

19. For the 2017-2018 school year, Mother enrolled Student in Public Charter School (PCS), a college preparatory boarding school in the District. Testimony of Mother.

20. In August 2017, Independent Psychologist conducted an Independent Educational Evaluation (IEE) comprehensive psychological evaluation of Student. Independent Psychologist observed Student in a classroom at PCS. In her September 12, 2017 Comprehensive Psychological Evaluation report, Clinical Psychologist reported that Student was not disruptive in class and that Student complied when redirected by the teacher (that Student needed to sit up in class – not lay Student's head on the desk). Student's scores on the Woodcock-Johnson IV Tests of Cognitive Abilities were in the

Average to High Average range. Student's scores on the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) were in the Low Average range for Reading and Written Language and in the Average range in the Math domain. To assess Student's behavioral functioning, Independent Psychologist had Student, Mother and two teachers from City School respond to Behavioral Assessment System for Children, Third Edition (BASC-3) rating scales. The teachers' and Mother's responses supported concerns for Student's Adaptive Skills, Hyperactivity, Adaptability, Aggression, Conduct Problems, Study Skills and Externalizing Problems. Independent Psychologist diagnosed Student with ADHD and Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. She recommended that Student was eligible for special education as a student with Multiple Disabilities. Exhibit P-8.

21. On September 27, 2017, an MDT team met at PCS to review Independent Psychologist's IEE psychological evaluation of Student and to determine Student's eligibility for an IEP or a Section 504 Plan. Mother and Educational Advocate attended the meeting. Independent Psychologist participated by telephone. Independent Psychologist reported that during her classroom observation, Student responded to redirection and was on-task for the duration of the class, that Student's cognitive abilities were average and that on the WJ-IV ACH, Student earned scores in the Average to Low Average range in all areas. The PCS science teacher reported that Student's behavior was not interfering with Student's ability to access instruction and make progress in class. She reported that Student was making progress daily and that Student appeared to be like other students of the same gender in her class. The PCS school psychologist reported that she observed Student in three classes and that Student was

on task over 90% of the time in English class and over 80% of the time in math class. The PCS team proposed that Student be determined eligible for special education as a Student with OHI-ADHD. The PCS team did not agree that Student was eligible based upon an adjustment disorder. The PCS team members proposed IEP special education and related services of 50 minutes per day of Specialized Instruction Services in general education and 180 minutes per month of Behavior Support Services. In addition, the PCS MDT team members proposed 30 minutes per month of consultation Behavior Support Services. Exhibit P-25.

22. The PCS IEP team met on October 2, 2017. Mother attended the meeting. The October 2, 2017 IEP states that Student's behavior impedes Student's learning or that of other students. The narrative reports that Student has some difficulties with peer interactions and following instructions given by adults, that Student struggles with consistently remaining focused and has required redirection, that Student's behaviors fluctuate and that Student is not consistent with showing positive behaviors. Exhibit P-3.

23. The October 2, 2017 PCS IEP identifies Written Expression and Emotional, Social and Behavioral Development as areas of concern. The IEP states that in the area of Written Expression, Student is performing below grade level and often makes spelling and usage errors, and that Student requires specialized instruction and advance organizers in the area of written expression to minimize those deficits. For Special Education and Related Services, the PCS IEP provides 100 minutes per day of Specialized Instruction in general education, of which 50 minutes is designated for Written Expression. The PCS IEP provides for 180 minutes per month of Behavioral

Support Services (BSS) outside general education, 60 minutes per week of BSS in general education and 30 minutes per month of BSS consultation services. Exhibit P-3.

24. On October 11, 2017, PCS issued a Prior Written Notice to Mother that it proposed to complete a clinical psychological and an OT evaluation of Student. Exhibit P-19. Mother provided consent for the evaluations. Exhibit P-21.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. *See* D.C. Code § 38-2571.03(6). In this case, there is no dispute about the appropriateness of Student's existing or proposed program of placement. Therefore, the Petitioner must bear the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence.

#### **Analysis**

– Did DCPS inappropriately exit Student from special education in May 2017?

- Did DCPS fail to comprehensively evaluate Student prior to exiting Student from special education in May 2017, as Student’s processing issues warranted an Occupational Therapy assessment, Student’s Independent Educational Evaluation psychological evaluation had not been completed, and a formal social history and any other evaluations deemed needed had not been done.

This case arises from the May 16, 2017 decision of Student’s City School multidisciplinary team (MDT) team to exit Student from special education services. The decision was driven by a recommendation of School Psychologist, with which the school members of the eligibility team agreed, that although Student has ADHD, the disability does not adversely affect Student’s educational performance. At the beginning of the 2017-2018 school year, Student transferred to PCS, which acts as its own local education agency (LEA). On September 27, 2017, a PCS MDT team, after considering an IEE psychological evaluation of Student completed on July 30, 2017, determined that Student was eligible for special education and related services as a student with an Other Health Impairment, based on Student’s diagnosis of ADHD. In the present proceeding, Petitioner contends that City School’s May 16, 2017 eligibility determination was erroneous, resulting in denial of FAPE to Student. Petitioner seeks a compensatory education award to compensate Student for the period Student was without special education and related services.

In *Davis v. District of Columbia*, 244 F. Supp. 3d 27 (D.D.C. 2017), U.S. District Judge Boasberg explained the IDEA’s requirements for eligibility reevaluations:

[S]chool districts must reevaluate students’ eligibility for special education at least once every three years and not more frequently than once a year (unless parents and district agree to a different timespan). *See* 20 U.S.C. § 1414(a)(2)(B). In considering eligibility, multidisciplinary teams convene to review specialists’ assessments and other data, including parental input, classroom or other local or state assessments, and observations by

teachers and specialists. *Id.* § 1414(c)(1); 34 C.F.R. §§ 300.305(a), 300.306(c) (pointing to “aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior”). The team must “[u]se a variety of assessment tools and strategies,” “[n]ot use any single measure or assessment as the sole criterion,” and otherwise “[u]se technically sound instruments.” 34 C.F.R. § 300.304(b). To qualify as a “child with a disability,” the student must have a listed disorder and, “by reason thereof, need[ ] special education and related services.” 20 U.S.C. § 1401(3)(A); see *Hawkins ex rel. D.C. v. District of Columbia*, 539 F.Supp.2d 108, 109 (D.D.C. 2008).

*Davis*, 244 F. Supp. 3d at 42.

Prior to City School’s May 16, 2017 decision exiting Student from special education, Student had been eligible for special education under the Other Health Impairment classification. A student has an other health impairment (OHI) “when he has ‘limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment,’ (1) ‘due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder,’ that (2) “[a]dversely affects [his] educational performance.’ 34 C.F.R. § 300.8(c)(9).” See *McLean v. District of Columbia*, 2017 WL 3891669 (D.D.C. Sept. 5, 2017). It is undisputed in this case that in May 2017, Student met the first OHI criterion. Student has limited strength, vitality, or alertness due to ADHD. What is disputed is whether at the time of the May 16, 2017 eligibility review, Student’s ADHD adversely affected Student’s educational performance, and, more broadly, whether Student needed special education and related services by reason of the ADHD impairment.

In finding Student ineligible, the May 16, 2017 eligibility team focused on Student’s level of achievement in Reading, the only academic area of concern addressed

in Student's last IEP. The team noted that based on the DIBELS periodic formal reading assessment, Student's reading comprehension was above grade level and Student was on track to master reading fluency by the end of the school year. Student had also mastered the annual goals in Reading from Student's April 21, 2016 IEP. On Woodcock-Johnson academic achievement tests administered in spring and summer 2017, Student's Broad Reading score was in the Low Average to Average range. Based on these data, DCPS has shown that it is likely that by May 2017, Student no longer needed Specialized Instruction in Reading. However, the inquiry does not end there.

The IDEA requires that before making a change in eligibility, the student be "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 CFR §§ 300.304(b)(4), 300.305(e). The hearing record in this case shows that notwithstanding Student's improved academic performance in Reading, as well as in Math, the City School eligibility team understated other areas related to Student's ADHD, including Student's social and emotional status and OT concerns – or relegated those concerns to be addressed with a Section 504 Plan.

Student's behavior concerns were most documented. At a March 22, 2017 meeting, Student's City School MDT team reported in an updated Behavior Intervention Plan (BIP) that Student has a history of physical aggression toward others, distracting others from learning when talking, yelling or out of seat, crying and throwing self on the floor, and engaging in attention seeking behavior. Student's noncompliance, walking out and physical/verbal aggression were reported as occurring daily. It was reported

that Student's undesirable behaviors may stem from sensory processing concerns, visual motor, handwriting, motor planning and self regulation issues and that Student's behaviors of noncompliance and verbal and physical aggression with peers were negatively affecting Student's ability to consistently and successfully access the general education curriculum. In the April 12, 2017 IEP, which was the last IEP developed for Student before the eligibility meeting, Student's IEP team reported that Student's attention-seeking behavior and deficits in self-regulation impacted Student's ability to access the general education curriculum and that Student needed accommodations to access the curriculum.

Besides Student's behavioral challenges, there was evidence that Student had Occupational Therapy (OT) deficits which may have been related to Student's ADHD disability. In response to a questionnaire for a spring 2017 OT screening, one of Student's teachers reported, *inter alia*, that Student missed directions more than other students, that Student struggled to complete tasks in a noisy setting, that Student touched people or objects to the point of annoying others and that Student had difficulty participating in group activities when there was a lot of talking. The OT evaluator concluded that Student's limited ability to effectively process sensory input contributed to Student's having difficulty achieving and maintaining the optimal arousal/alertness level needed to consistently attend to classroom instruction.

Student also continued to have deficits in academics. In September 2017, the eligibility team at PCS determined that in the area of Written Expression, Student was performing below grade level and often made spelling and usage errors. The PCS eligibility team found Student required Specialized Instruction to address those Written

Expression deficits. Student's special education teacher at City School testified that she had not looked at Student's writing, which was not identified as a concern on the City School IEPs.

I find that at the May 16, 2017 eligibility team meeting at City School, the MDT team failed adequately to assess how Student's social and emotional and OT deficits related to Student's ADHD disability and to consider how those deficits affected Student's educational performance. *See* 34 CFR § 300.8(c)(9)(ii).<sup>2</sup> The eligibility team should also have considered whether Student's ADHD contributed to Student's weaknesses in Written Expression. I conclude, therefore, that DCPS failed to ensure that Student was assessed in all areas related to the ADHD disability before exiting Student from special education.

DCPS' failure to ensure that Student was comprehensively assessed prior to terminating special education eligibility in May 2017 was a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (District's failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) Procedural violations may only be deemed a

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<sup>2</sup> Whether Student would have been able to make academic progress with a Section 504 Plan has no bearing on Student's special education eligibility. Providing a Section 504 Plan does not suffice for a Student who is entitled to an IEP. "[T]he requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a broad anti-discrimination statute." *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 696 n. 5 (6th Cir.2003) (citing *Muller v. Comm. on Special Educ.*, 145 F.3d 95, 100 n. 2 (2d Cir.1998)). *Cf. N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 29 (D.D.C. 2008) (rejecting argument that because parent's expert also recommended "educational accommodations" under Section 504, District had no obligation under the IDEA to conduct its own evaluation of child's needs.)

denial of FAPE 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 CFR § 300.513(a)(2). In this case, I find that Petitioner has met her burden of persuasion that DCPS' failure to ensure that Student was appropriately assessed, before the City School MDT team determined that Student was no longer a child with a disability, significantly impeded the parent's opportunity to participate in the decision-making process. I also find it is likely that if the eligibility team had given appropriate weight to how the ADHD disorder affects Student's educational performance, the team should have determined that Student continued to be a child with a disability. I conclude City School's exiting Student from special education in these circumstances was a denial of FAPE.

#### Remedy

Since Student has already transferred to PCS, a separate LEA in the District, the only remedy available in this case is an award of compensatory education. "If a hearing officer concludes that the school district denied a student a FAPE, he has 'broad discretion to fashion an appropriate remedy,' which may include compensatory education. *See B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). The compensatory education inquiry requires 'figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.' *Id.* at 799." *Butler v. District of Columbia*, Case No. 16-cv-01033 (D.D.C. Aug. 14, 2017).

In this case, there was limited harm from inappropriately exiting Student from special education in May 2017. Student's last DCPS IEP, revised on April 12, 2017, had provided for 5 hours per week of Specialized Instruction outside general education and 180 minutes per month (approximately 42 minutes per week) of Behavioral Support Services. Student was exited out of special education following the May 16, 2017 eligibility meeting at City School. The DCPS school year ended on June 14, 2017. Therefore, Student missed, at most, some three weeks of special education services at City School. Student was found eligible for special education early in the 2017-2018 school year at PCS and the new IEP was completed on October 2, 2017, some six weeks after the start of the school year. Taken together, Student was deprived of some 9 weeks of special education and related services – 45 hours total of Specialized Instruction and 6 hours of Behavioral Support Services – which Student should have been provided, if Student had not been inappropriately exited from special education in May 2017.

Petitioner's expert, Independent Psychologist, recommended 40 hours of academic tutoring to compensate Student for the missed services. I find that this proposal is "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," *see Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir.2005), *supra*, and I will order DCPS to provide those services as compensatory education.

Independent Psychologist also recommended that Student be provided mentoring services to compensate for the Behavioral Support Services Student missed. However, City School offered to continue Student's Behavioral Support Services as part

of a Section 504 Plan after Student was exited from Special Education. Mother refused those services. Therefore, I do not hold DCPS responsible for any harm which resulted from Students' missing Behavioral Support Services after Student was exited from special education. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005) (Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting appropriate relief.)

**ORDER**

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

ORDERED:

1. Within 10 business days of the date of this decision, DCPS shall provide funding authorization for the parent to obtain 40 hours of individual academic tutoring for Student and
2. All other relief requested by the Petitioner herein is denied.

Date: December 18, 2017

s/ Peter B. Vaden  
Peter B. Vaden, 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).

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE Division of Specialized Education  
DCPS Resolution Team