

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3rd Floor  
Washington, DC 20002

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

Petitioners,

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Date Issued: February 18, 2018

Hearing Officer: Peter B. Vaden

Case No: 2017-0281

Hearing Dates: January 18 and 30, 2018  
February 2 and 7, 2018

Office of Dispute Resolution  
Washington, D.C.  
Rooms 403, 112 and 111

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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 Petitioners (the PARENTS), 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 their due process complaint, Petitioners seek reimbursement from Respondent District of Columbia Public Schools (DCPS) for their unilateral placement of Student at various private day schools in the 2012-2013, 2013-2014, 2014-2015, 2015-2016 and 2017-2018 school years.

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

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on October 13, 2017, named DCPS as respondent. The undersigned hearing officer was appointed on October 16, 2017. The parties met for a resolution session on October 31, 2017 and were unable to reach an agreement. My final decision in this case was originally due by December 27, 2017. On November 29, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. By order entered November 29, 2017, I denied DCPS' motion to dismiss the complaint without prejudice for Petitioners' counsel's being unavailable for hearing dates in December 2017 proposed by DCPS. On December 27, 2017, I granted the Petitioners' request to extend the final decision due date to February 16, 2018. Because the hearing was not completed in three days as scheduled, I set February 7, 2018 as an additional hearing day and granted Petitioners' unopposed request to continue the final decision due date to February 23, 2018.

The due process hearing was held before the undersigned impartial hearing officer on January 18 and 30, 2018 and February 2 and 7, 2018 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 Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by SCHOOL SOCIAL WORKER and by DCPS' COUNSEL.

MOTHER and FATHER both testified and they called as additional witnesses PHYSICIAN 1, PRIVATE COUNSELOR, NEUROPSYCHOLOGIST, DEAN OF STUDENTS, NEUROLOGIST and SOCIAL LEARNING TEACHER. DCPS called as witnesses School Social Worker, SPECIAL EDUCATION COORDINATOR, ASSISTANT PRINCIPAL and SCHOOL PSYCHOLOGIST. Petitioners' Exhibits P-1 through P-100

were admitted into evidence without objection, with the exceptions of Exhibit P-94 admitted over DCPS' objection and Exhibit P-95, to which DCPS' objection was sustained. DCPS' Exhibits R-1 through R-16 were admitted into evidence without objection, except for Exhibit R-13 which was withdrawn.

Counsel for the respective parties made opening statements and closing arguments. I reconvened the hearing on February 7, 2018 to receive oral closing argument in lieu of counsel's filing post-hearing written closings.

### **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 January 10, 2018 Prehearing Order:

- Whether DCPS denied the student a free appropriate public education (FAPE) by developing an IEP in April 2012 that was not appropriate to meet Student's needs and failing to offer placement for school year 2012-2013 in a program that could meet Student's needs;
- Whether DCPS denied the student a FAPE by developing an IEP in June 2013 that was not appropriate to meet Student's needs and failing to offer placement for school year 2013-2014 in a program that could meet Student's needs;
- Whether DCPS denied the student a FAPE by developing an IEP in June 2014 that was not appropriate to meet Student's needs and failing to offer placement for the 2014-2015 school year in a program that could meet Student's needs;
- Whether DCPS denied the student a FAPE by developing an IEP in September 2015 that was not appropriate to meet Student's needs and failing to offer placement for school year 2015-2016 in a program that could meet Student's needs;
- Whether DCPS denied the student a FAPE by developing IEPs in September 2016 and October 2016 that were not appropriate to meet Student's needs and failing to offer placement for school year 2016-2017 in a program that could meet

Student's needs;

- Whether DCPS denied the student a FAPE by failing to timely review/revise the student's June 2014 IEP and to have in place an IEP at the beginning of the 2015-2016 school year;

The above IEPs were allegedly inappropriate to meet the student's needs because,

The IEPs did not contain services appropriate to meet the student's special education needs including appropriate specialized instruction, related services, accommodations, supplemental support services and goals;

The student's IEP team failed to discuss, determine and indicate on the student's IEP the appropriate least restrictive environment for the student and the type of placement the student needed along the continuum of alternative placements.

- Whether DCPS denied the student a FAPE by failing to conduct a comprehensive triennial reevaluation in the winter/spring of 2017;
- Whether DCPS denied the student a FAPE by failing and refusing to convene an IEP meeting to review the results of numerous independent evaluations conducted with the student that were provided to personnel in DCPS, including, *inter alia*, independent evaluations conducted by Neuropsychologist 1, NEUROPSYCHOLOGIST 2, Neurologist, PHYSICIAN 2, INDEPENDENT OT and Physician 1;
- Whether DCPS denied the student a FAPE by failing to issue a prior written notice informing Petitioners of the placement for the student and an appropriate program and describing what options had been considered for school years 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, and 2017-2018. This failure to issue a prior written notice allegedly deprived Petitioners of the ability to meaningfully participate in and make meaningful decisions concerning the student's education;
- Whether DCPS failed and refused to provide FAPE to the student by agreeing to authorize an independent educational evaluation, that is, a neuropsychological evaluation, and then refusing to pay a reasonable market rate for this evaluation.<sup>2</sup>

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<sup>2</sup> At the conclusion of the due process hearing, Petitioners, by counsel, withdrew two additional claims, namely,

- That DCPS' IEPs were not appropriate because the student's IEP teams failed to conduct a functional behavioral assessment and develop a behavior intervention plan or properly address the student's worsening behavior issues and

For relief, the Petitioners request,

1. A finding that DCPS has denied a FAPE to the student and has significantly impeded Petitioners' opportunity to participate in the decision making process regarding the provision of FAPE to the student;
2. A finding that NONPUBLIC SCHOOL 3 can provide and is providing educational benefit to the Student.
3. That the Hearing Officer order DCPS to immediately reimburse Petitioners for the tuition and related costs for the placement of Student at Nonpublic School 3 for school years 2014-2015, 2015-2016, and 2017-2018, including transportation costs, related services costs, application fees and any other costs reasonably related to the placement at Nonpublic School 3;
4. That the Hearing Officer order DCPS to place and fund the student at Nonpublic School 3, with transportation and all related services for the remainder of the 2017-2018 school year;
5. That the Hearing Officer order DCPS to immediately reimburse Petitioners for the tuition and related costs, including transportation, for the placement of Student at NONPUBLIC SCHOOL 1 for the period of September 2012 through February 2013 and for the cost of related services paid for by Petitioners during this period;
6. That the Hearing Officer order DCPS to immediately reimburse Petitioners for the tuition and related costs, including transportation, for the placement of Student at NONPUBLIC SCHOOL 2 for the period of March 2013 through June 2014 and for the cost of related services paid for by Petitioners during this period;
7. That the Hearing Officer order DCPS, within 10 days of the date of the final decision, reimburse Petitioners for the full cost of the independent neuropsychological evaluation conducted by Neuropsychologist 1 in 2016/2017;
8. That the Hearing Officer order DCPS, within 10 days of the date of the final decision, to convene an IEP meeting to review all of the reports/evaluations from independent providers that have been provided to DCPS. Such reviews shall be conducted by personnel who are qualified to interpret the testing, recommendations, and implications of the evaluation results. At this meeting, the student's IEP shall be reviewed and revised in light of the recommendations set forth in these reports.

The Petitioners also seek a compensatory education award to compensate

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– Whether DCPS has failed and refused to provide copies of, or access to, all of the student's education records that are collected, maintain, or used by DCPS.

Student for the denials of FAPE alleged in the due process complaint and seek any other relief that is just and fair.

### **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 child, resides in the District of Columbia with Student's parents. Mother is a litigation attorney with a federal agency. Testimony of Mother. Father holds a Masters degree in English and works as an on-line tutor for a university in Canada. Testimony of Father, Exhibit P-18.

2. Student is eligible for special education under the IDEA disability classification Autism Spectrum Disorder (ASD). Exhibit P-47. Student was initially evaluated by DCPS Early Stages in March 2012 and determined to have a disability due to Developmental Delay. Exhibit P-30.

3. Student has been medically diagnosed with impulse control disorder, episodic dyscontrol syndrome, anxiety, learning disabilities and ASD. Student presents with anxiety, mood swings and unpredictable emotional outbursts. Student has high-functioning autism spectrum disorder. Student exhibits a social-pragmatic language disorder, does not read social cues or relate to peers in a typical way and has difficulty expressing self. Testimony of Neurologist.

4. In April 2017, Student was also identified by NEUROPSYCHOLOGIST 2 as a gender non-conforming (GNC) youth, which increases Student's risk, as Student struggles to understand social situations, has problems discerning teasing/bullying, gets "stuck" on ideas and worries, such as how others will treat Student and struggles to

know how to appropriately respond and self-advocate in teasing/bullying situations.

Exhibit P-4.

5. Student has also been diagnosed with PANDAS (Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections), which is believed by some in the neurologic community to cause a neurological reaction to associated infections. This episodic condition, which may set off Student emotionally for several weeks at a time, has improved in response to antibiotic therapy. Testimony of Neurologist.

6. Student currently receives Occupational Therapy (OT) weekly from Independent OT, a private provider. Previously, Student received OT for about 4 years until 2014. The parents reinstated private OT services in August 2017. Testimony of Mother.

7. For the 2011-2012 school year, the parents enrolled Student in a nonpublic preschool in their neighborhood in Washington, D.C. Testimony of Mother.

8. Student's initial Individualized Education Program (IEP) was developed on April 24, 2012 at CITY SCHOOL 1. The April 24, 2012 IEP identified Adaptive/Daily Living Skills, Communication/Speech and Language and Motor Skills/Physical Development as areas of concern. For Special Education and Related Services, the IEP provided 4 hours per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology outside general education and 4 hours per month of OT in general education. Exhibit P-75. The parents did not think that the IEP services were sufficient. Testimony of Mother.

9. At the beginning of the 2012-2013 school year, the parents enrolled Student, at their expense, in Nonpublic School 1, a nonpublic preschool in Washington,

D.C. The parents were not happy with Student's experience at Nonpublic School 1 and moved Student mid-year to another nonpublic preschool, Nonpublic School 2.

Testimony of Mother.

10. An IEP team meeting for Student was held by DCPS on January 12, 2013. At that meeting, PHYSICIAN 2 reported that Student more clearly demonstrated symptoms of an ASD. It was reported that the parents were pursuing a private evaluation through a local university's autism center and would provide the results to DCPS. DCPS agreed to conduct Autism Diagnostic Observation Schedule (ADOS) and Vineland Adaptive Behavior Scales (Vineland) assessments if not performed by the university, an articulation and social-pragmatic language assessment and an OT reevaluation, and to reconvene the IEP team to review Student's IEP and educational placement. Exhibit P-16. Student was reevaluated in May 2013 and was determined on June 26, 2013 to meet criteria for the ASD disability. Exhibit P-30.

11. Student's IEP team was convened on June 26, 2013 at City School 1. For the meeting, the parents provided a letter from Student's teacher at Nonpublic School 2, who described Student's social-emotional challenges and recommended a classroom with positive role models, where there is more than one adult, as the optimal situation. Exhibit P-11.

12. At the June 26, 2013 IEP meeting, Student's IEP Present Levels of Performance and Goals and Objectives were updated. The revised IEP left Specialized Instruction at 4 hours per week outside general education. Speech-Language Pathology services were increased to 2 hours per month, outside general education, and 2 hours per month in general education. Direct OT services were removed from the IEP in favor of 30 minutes per month of OT consultation services. Exhibit P-71.

13. The parents moved their residence in the District to the City School 2 neighborhood with the intent to enroll Student at City School 2 for the 2013-2014 school year. The parents wanted to hold Student back in preschool because they did not think that Student was emotionally mature enough to be advanced. Because City School 2 staff told the parents that they could not hold Student back, the parents decided to re-enroll Student at Nonpublic School 2 for the 2013-2014 school year. The parents paid Student's tuition costs. Student had a positive experience that school year at Nonpublic School 2. Testimony of Mother.

14. On June 19, 2014, Student's IEP team was convened at City School 1. Both parents and their advisor, Physician 2, attended the meeting. Physician 2, a specialist in Developmental and Behavioral Pediatrics, told the IEP team that Student needed a small classroom in a small school, which would be able to provide immediate feedback and consistency in behavior management. Testimony of Mother. Despite this recommendation, the IEP team decided that Student would receive almost all instruction in the public school general education setting. Exhibit P-61.

Notwithstanding, the parents intended for Student to attend City School 3 for the 2014-2015 school year. However Student had a very difficult summer and, out of concern for Student's safety, the parents unilaterally enrolled Student in Nonpublic School, a nonpublic special education day school in suburban Maryland. The parents paid for Student's enrollment expenses at Nonpublic School 3 and provided Student's transportation. Testimony of Mother. The parents did not give written notice to DCPS of concerns about the June 19, 2014 IEP or of their intent to enroll Student in a private school at public expense. Testimony of Father.

15. For the 2014-2015 school year, overall things went well for Student at

Nonpublic School 3. Testimony of Mother. Student made educational progress at Nonpublic School 3, including learning to read, starting to write and making some improvement in math. Testimony of Dean of Students.

16. In the spring of 2015, the parents re-approached DCPS about enrolling Student in City School 2. Testimony of Mother. In August 2015, the day before the start of school, Special Education Coordinator met Father and Student at the school for an introduction. From the beginning of the school year, Father would walk Student to school, but had to drag Student “kicking and screaming.” Testimony of Mother. On one day, Student sat down in the street and refused to go to school. After about two weeks, the parents decided that Student was not ready to attend City School 2 and they re-enrolled Student at Nonpublic School 3. Testimony of Mother. The parents did not give written notice to DCPS of concerns about Student’s DCPS IEP or of their intent to enroll Student in a private school at public expense. Testimony of Father.

17. On September 21, 2015, Student’s IEP team met to update Student’s DCPS IEP. At that point in time, the parents had already decided that Student would not return that school year to City School 2. The challenge of getting Student into the school building was the primary issue. The parents told school staff that they thought everyone had done their best, but that Student was not yet developmentally ready. Testimony of Mother.

18. The September 21, 2015 IEP team proceeded to develop an IEP for Student’s eventual return to City School 2 for the 2016-2017 school year. The team based its IEP on Student’s report card from Nonpublic School 3. In developing the September 21, 2015 IEP, the team relied on the information provided by the parents and did not decline anything the parents requested. The September 21, 2015 IEP identified

Communication/Speech and Language; Emotional, Social and Behavioral Development; and Motor Skills/Physical Development as areas of concern. For Special Education and Related Services, the IEP provided 45 minutes per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology outside general education and OT, Behavioral Support Services and Specialized Instruction as Consultation Services. All of the team members, including the parents, agreed that the IEP was appropriate for Student. Testimony of Special Education Coordinator, Testimony of School Social Worker, Exhibits P-58, P-59.

19. There were approximately 20 students in the general education classrooms at City School 2. Testimony of Special Education Coordinator.

20. By the time of the September 21, 2015 IEP team meeting, the parents had already decided that Student would not return that year to City School 2. DCPS did not offer any other educational program for Student. Testimony of Mother.

21. Except for the short period at the beginning of the 2015-2016 school year at City School 2, Student attended Nonpublic School 3 for the 2015-2016 school year. The parents paid for tuition and provided transportation for Student to attend Nonpublic School 3 that year. The 2015-2016 school year at Nonpublic School 3 went well for Student. Testimony of Mother. Although Student presented with resistance to change, perseverating, not reading social cues and poor impulse control, Student was a little less rigid in math and started to enjoy writing and telling stories. Testimony of Dean of Students.

22. After the end of the 2015-2016 school year, the parents had exhausted their resources and were committed to Student's returning to City School 2 for the 2016-2017 school year. Student began the school year at City School 2 and Student's IEP

team met on September 19, 2016 to update Student's IEP. The IEP team got input from the parents and considered Student's report card from Nonpublic School 3. For Special Education and Related Services, the IEP team reduced Student's Specialized Instruction Services to 15 minutes per week in general education, because the team felt that based on Student's academic performance at Nonpublic School 3, Student did not need a lot of academic support. The IEP also provided for 2 hours per month of Speech-Language Pathology outside general education which would address social skills, as well as OT, Behavioral Support Services and Specialized Instruction as Consultation Services. Exhibit P-55, Testimony of Special Education Coordinator. The parents did not raise any concerns about this IEP. Testimony of School Social Worker.

23. On October 26, 2016, Student's IEP team met for a 30-day review of the IEP. The parents reported that Student was anxious at home after school and their primary concern was getting Student to the school. Student's regular education teachers reported that in school, Student had been well-behaved and was performing well. At this meeting, Student's Speech-Language Pathology services were reduced to 90 minutes per month and 120 minutes per month of Behavioral Support Services, outside general education, were added to the IEP. The Behavioral Support Services were provided to address Student's resistance to going to school. The parents agreed with the changes made to Student's IEP. Testimony of School Social Worker, Exhibits P-53, P-54.

24. During the 2016-2017 school year, it was a struggle to get Student to school. School staff worked with the parents to encourage Student to attend. They made a home visit, offered rewards for attendance and arranged for School Social Worker to meet Student at the curb when Student arrived by car. The school also

allowed Student to arrive late. Testimony of Mother, Testimony of Special Education Coordinator. Because Student was allowed to arrive late for school, Student missed hours of class time. Testimony of Special Education Coordinator, Testimony of School Social Worker.

25. For the 2016-2017 school year, Student performed at or above grade level in Reading and Math. Student struggled with Writing, but with appropriate instruction, was close to grade level. The teachers enjoyed having Student in their classes.

Testimony of Special Education Coordinator.

26. On February 13, 2017, DCPS granted the parents' request for funding for an Independent Educational Evaluation (IEE) Neuropsychological Evaluation of Student. Exhibit P-85. DCPS' School Support Liaison informed Petitioners' Counsel, by email of February 19, 2017, that there were many providers in the District that "adhere" to the OSSE approved price. Exhibit P-85. Neuropsychologist 1 charged the parents \$4,550.00 for the spring 2017 neuropsychological evaluation. Exhibit P-84.

27. Several incidents occurred in the winter and spring of 2017 when Student lost control emotionally. In early March 2017, Student reacted badly to changes in school routine caused by a snow day and was "corralled" in a washroom by staff until Student calmed down. In an April 2017 incident, Student refused to go to the classroom one day and, displaying rage and anger, cursed and threatened School Social Worker. On another day, Student ran away from Father, who was accompanying the class on a field trip. In May 2017, there was an incident in the school cafeteria where Student allegedly made a threat to another Student and later threatened to do self-harm. This resulted in safety meetings convened by School Social Worker, where the school sought to have Student sign a "safety contract" before resuming classes. Student would not sign

a safety contract and Student never returned to classes at City School 2 after the cafeteria incident. Testimony of Mother, Testimony of School Social Worker, Exhibit P-82.

28. Physician 1 wrote the school by email on May 24, 2017 that, due to Student's extreme anxiety and inability to control Student's behavior, she recommended that Student not return to school pending a reevaluation of Student's progress. Exhibit P-2.

29. At the time of the May 2017 cafeteria incident, School Social Worker recommended that Student be hospitalized for mental health treatment. Neurologist and Physician 1 decided that hospitalization was not required, but that Student should not return to school at that time. Testimony of Physician 1, Testimony of Neurologist. School Social Worker's position at that time was that Student needed to be stabilized and that once Student was stabilized, Student could return to the prior educational setting at City School 2. Testimony of School Social Worker.

30. Prior to 2017, Student's eligibility for special education as a child with ASD was last determined on June 19, 2014. City School 2 convened an eligibility committee meeting on May 8, 2017 and Student's eligibility for special education as a Student with an ASD was confirmed. At the May 8, 2017 eligibility meeting, it was noted that the team would reconvene after the parents submitted the IEE neuropsychological evaluation report authorized by DCPS in February 2017. Exhibit R-2A.

31. In May 2017, Independent OT conducted an IEE OT evaluation of Student. She concluded that Student had mild developmental dyspraxia with postural and visual components and sensory processing differences. She recommended, *inter alia*, that Student be given additional intensive support in the form of weekly 50-minute direct OT

sessions. Exhibit P-3. Independent OT's report was provided to DCPS on June 5, 2017. Exhibit P-93.

32. Neuropsychologist 2 conducted an Autism and Gender Development Consultation for Student on April 6, 2017. Exhibit P-4. His report was provided to DCPS on June 13, 2017. Exhibit P-93.

33. In March 2017, Neuropsychologist 1 conducted an IEE neuropsychological evaluation of Student. Her report was forwarded to DCPS in June 2017. Neuropsychologist 1's assessment results indicated that Student is a very bright, expressive and knowledgeable youngster with very good nonverbal cognitive abilities, excellent conceptual and planning skills, and "fantastic" retention of newly-learned information. Within the context of her evaluation, Student showed moderate difficulties sustaining focus over time, exhibited an inflexible approach to tasks, and had trouble making inferences and deciphering ambiguous linguistic information. Student also displayed tremendous sensitivity to a variety of sensory information. Student demonstrated generally solid academic skills, but became overwhelmed when asked to write a story. Neuropsychologist 1 reported that Student's cognitive and behavioral profiles were quite typical of students with high functioning autism. Neuropsychologist 1 reported that until recently, Student had not shown any significant behavioral challenges at school, while exhibiting considerable challenges – including aggressive behaviors – when Student would get home. Neuropsychologist 1 diagnosed Student with Autistic Disorder, PANDAS and Specific Developmental Disorder of motor function. Neuropsychologist 1 recommended, *inter alia*, that Student needed to attend a full-time special education school, designed specifically to meet the needs of students with social and communication challenges, with services to include a strong social-

emotional curriculum; psychological support to help Student express frustration appropriately and decrease behavioral challenges; Speech-Language therapy to address challenges in inflexibility; support for inferential thinking and pragmatic skills; OT; support in flexible thinking; support in attention and executive functioning; academic support for spelling and communicating in writing; consideration of Extended School Year (ESY) services; support for nonacademic time at school and access to assistive technology such as voice-to-text programs. Exhibit P-5.

34. On June 14, 2017, Student's IEP team at City School 2 met to review Neuropsychologist 1's neuropsychological evaluation report on Student. School Psychologist went over the report for the team, including the report's Cognitive, Academic and Behavioral/Social-Emotional components. School Psychologist stated that the IEE evaluation was incomplete because it lacked a classroom observation and that if a classroom observation were not provided, the requirement for DCPS to conduct its own psychological reevaluation of Student could not be waived. Exhibit R-3.

35. DCPS did not review or update Student's IEP after October 26, 2016. On July 2, 2017, Petitioners' Counsel wrote a DCPS attorney, by email, that the parents disagreed with the decision of DCPS not to revise Student's IEP in light of the recommendations of Neuropsychologist 1 and of Independent OT. Petitioners' Counsel gave notice that the parents had decided to place Student back at Nonpublic School 3 for the 2017-2018 school year and that they would seek reimbursement from DCPS for the cost of this private placement. Exhibit P-92. DCPS responded, by a letter emailed on August 7, 2017, that it had made a FAPE available to Student with an appropriate IEP and placement at City School 2 and that DCPS would not agree to bear the cost of a private placement for Student. Exhibit P-100.

36. Initially, City School 2 offered to the parents to hold an IEP annual review meeting for the 2017-2018 school year. However, after the parents withdrew Student from City School 2, the school representatives informed the parents that Student was no longer “our student” and, in September 2017, informed Petitioners’ Counsel, by email, that because Student had been withdrawn from City School 2, the school would not hold an IEP meeting. Testimony of Assistant Principal.

37. Nonpublic School 3 is a private, for profit, special education day school in suburban Maryland serving some 58 students in grades K through 8. All of the students have some sort of social or communication challenges. Most or all have symptoms of ASD. There are 9-10 children in Student’s classroom taught by two homeroom teachers. The homeroom teachers are not certified to teach special education. There is a full-time occupational therapist on staff who provides group or individual therapy as needed, with a focus on self-regulation. Nonpublic School 3 is accredited by an independent schools association and is on the list of special education schools maintained by the state of Maryland. Nonpublic School 3 has not applied for, or been granted, a certificate of approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE). The annual tuition at Nonpublic School 3 is around \$40,000. Testimony of Dean of Students.

### **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 Petitioners 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 Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

### Analysis

#### Statute of Limitations

The Petitioners' due process complaint in this case was filed on October 13, 2017. DCPS asserts as an affirmative defense that Petitioners' claims, as to alleged violations of the IDEA that occurred more than two years before their due process complaint was filed, are barred by the Act's two-year statute of limitations. *See* 34 CFR § 300.511(e).<sup>3</sup> "The IDEA grants a parent of a disabled child the right to bring a complaint "with respect to *any matter* relating to the . . . provision of a free appropriate public education to such child," 20 U.S.C. § 1415(b)(6)(A). *Somoza v. New York City Dep't of Educ.*, 538 F.3d 106, 115 (2d Cir. 2008) (emphasis in original). The U.S. District Court

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<sup>3</sup> *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

34 CFR § 300.511(e).

for the District of Columbia observed in *Damarcus S. v. District of Columbia*, 190 F.Supp.3d 35 (D.D.C. 2016), that the IDEA establishes a filing deadline, requiring that a due process hearing be requested “within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.” *Id.* at 43. As the Court pronounced in *Damarcus S.*, so long as the complaint is filed within two years of the known or should have known (KOSHK) date, the petitioners are entitled to full relief for that injury. The statute of limitations inquiry requires a “fine-grained analysis” to determine the KOSHK dates for the respective IDEA violations alleged. *See id.*, quoting *K.H. v. New York City Dep’t of Educ.*, 2014 WL 3866430 (E.D.N.Y. Aug. 6, 2014). The statute of limitations inquiry should focus upon the particular deficiency asserted, and the parents’ ability to recognize it. *See Damarcus S.*, 190 F.Supp.3d at 45. With respect to the ability of this student’s parents to recognize IDEA violations, the hearing officer is mindful that the mother is a litigation attorney for a federal agency and the father is a tutor to university students.

Following the guidance from *Damarcus S.*, in order to determine which of the Petitioners’ claims may be time-barred, I turn now to the particular deficiencies asserted by the parents in this case. The parents first claim that DCPS denied Student a FAPE by developing an IEP in April 2012 there was not appropriate to meet Student’s needs and failing to offer placement for the 2012-2013 school year in a program that could meet Student’s needs. DCPS’ April 24, 2012 IEP provided for Student to receive 4 hours per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology outside general education and 4 hours per month of OT in general education. Mother testified that the parents did not think that these IEP services were sufficient and they unilaterally enrolled Student in private schools for the 2012-2013

school year – first at Nonpublic School 1 and, at midyear, at Nonpublic School 2. I find that the parents did recognize the alleged deficiencies with the April 24, 2012 IEP and with DCPS' proposed educational placement, at least by the beginning of the 2012-2013 school year. Hence, they would have had to file a complaint asserting that claim by the fall of 2014. Because the parents did not file their due process complaint until October 13, 2017, their claims as to the inappropriateness of the April 2012 IEP and Student's proposed placement for the 2012-2013 school year are barred by the IDEA's 2-year statute of limitations.

The parents next allege that DCPS denied Student a FAPE by developing an IEP in June 2013 that was not appropriate and by failing to offer an educational placement for the 2013-2014 school year that could meet Student's needs. Mother testified that at the time of the June 26, 2013 IEP meeting, the parents decided to keep Student at Nonpublic School 2 because DCPS staff denied their request to hold Student back in preschool and they did not think that Student was emotionally mature enough to be advanced to the next grade. I find that by the beginning of the 2013-2014 school, the parents knew that the educational placement proposed by DCPS for that school year was, in their view, deficient. Therefore the parents' October 13, 2017 due process complaint claims as to the inappropriateness of the June 2013 IEP and of Student's proposed placement for the 2013-2014 school year are also barred by the IDEA's 2-year statute of limitations.

The parents next allege that DCPS' June 2014 IEP for Student was not appropriate to meet Student's needs and DCPS failed to offer Student placement for the 2014-2015 school year in a program that could meet Student's needs. At the behest of the parents, Physician 2 participated in the June 19, 2014 IEP team at City School 2.

Mother testified that at the meeting, Physician 2 emphasized Student's need for a small classroom in a small school, with the opportunity for Student to receive immediate feedback and consistency in behavior management. Notwithstanding, the IEP team decided that Student would receive almost all instruction in the public school general education setting. Mother testified that out of concern for Student's safety, the parents decided to enroll Student in Nonpublic School 3 for the 2014-2015 school year. I find that the parents knew, or should have known, at least by the start of the 2014-2015 school year, that the June 19, 2014 IEP was allegedly deficient because the IEP team had overridden Physician 2's recommendation for a small school/small classroom for Student. Therefore, the parents' October 13, 2017 due process complaint claims as to the inappropriateness of the June 2014 IEP and Student's proposed placement for the 2014-2015 school year are also barred by the IDEA's 2-year statute of limitations.

Moving chronologically, the parents next claim that DCPS denied Student a FAPE by failing to timely review the June 19, 2014 IEP and not ensuring that an updated IEP was in place for Student by the beginning of the 2015-2016 school year. The IDEA requires that a child's IEP must be reviewed at least annually. *See* 34 CFR § 300.324(b)(1). The parents' untimely review claim is also barred by the statute of limitations. A layperson should have known whether Student's IEP team met, within one year, to review the June 19, 2014 IEP. Moreover, the parents attended a September 21, 2015 IEP team meeting where the June 2014 IEP was reviewed and revised. On the first page of the September 21, 2015 IEP form, it is stated that Student's "Last IEP Annual Review Meeting Date" was "06/19/2014." *See* Exhibit P-58. I find that by September 21, 2015, if not before, the parents knew, or should have known, that DCPS had not ensured that the June 19, 2014 IEP was reviewed within one year. Therefore,

the parents' October 13, 2017 due process complaint claim that DCPS failed to timely review the June 19, 2014 IEP is also barred by the IDEA's two year statute of limitations.

Next, the parents allege that DCPS' September 21, 2015 IEP was not appropriate for Student and DCPS failed to offer Student placement for the 2015-2016 school year in a program that could meet Student's needs. The September 21, 2015 IEP meeting was held after the parents had decided to place Student back at Nonpublic School 3, a decision the parents had made because of the extreme difficulty they were having getting Student to go to City School 2 in the first two weeks of the school year. Mother testified that by the time of the September 21, 2015 IEP team meeting, the parents had already decided that Student would not return that year to City School 2 and that DCPS did not offer any other educational program for Student. I find that as of the September 21, 2015 IEP meeting date, the parents knew that DCPS' proposed IEP and educational placement of Student at City School 2 were, to their minds, inappropriate. I conclude that the parents' October 13, 2017 due process complaint claims as to the inappropriateness of the September 21, 2015 IEP and Student's proposed placement for the 2015-2016 school year are also barred by the IDEA's 2-year statute of limitations.

The parents' remaining claims, alleging inappropriate IEPs and educational placements for Student, pertain to City School 2 IEPs developed in September and October 2016. The parents' October 13, 2017 due process complaint was filed within the 2-year statute of limitations period as to the fall 2016 IEPs and these claims are not time-barred.

The parents also allege in their October 13, 2017 due process complaint that DCPS denied the student a FAPE by failing to provide the parents prior written notices (PWNs) regarding Student's placement and programming, describing what options had

been considered, for school years 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, and 2017-2018. The IDEA requires the District to give the parents written notice before the District proposes to, or refuses to, initiate or change the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. *See* 34 CFR § 300.503(a). The hearing record in this case shows that the parents were given multiple prior written notices and procedural safeguard notices concerning identification, evaluations, eligibility and development of IEPs for Student beginning not later than June 2013. *See, e.g.,* Exhibits P-59, P-60, P-63, P-64, P-65, P-66 (acknowledgment of receipt of procedural safeguards and PWN signed by Father on April 28, 2014), P-68, P-70, P-72, and P-73. Assuming that there were other required PWNs, which DCPS failed to give the parents in school years 2012-2013, 2013-2014, 2014-2015 or 2015-2016, the parents knew, or should have known, that they did not receive those notices. To the extent that the parents did not bring their complaint about DCPS' failure to provide PWNs within two years of the dates when the respective notices were due, I find that these procedural claims are time-barred.

#### Remaining Claims

Petitioners' October 13, 2017 due process complaint claims, which survive DCPS' statute of limitations defense, are the following:

- Whether DCPS denied Student a FAPE by developing IEPs in September 2016 and October 2016 that were not appropriate to meet Student's needs and by failing to offer placement for school year 2016-2017 in a program that could meet Student's needs;
- Whether DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment and develop a behavior intervention plan as part of Student's initial evaluation by DCPS in 2011-2012 and subsequent evaluations to the present as recommended by DCPS and while the student's behavior continued to change and deteriorate;

- Whether DCPS denied Student a FAPE by failing to conduct a comprehensive triennial reevaluation in the winter/spring of 2017;
- Whether DCPS denied Student a FAPE by failing and refusing to convene an IEP meeting and review the results of numerous independent evaluations conducted with Student that were provided to personnel in DCPS, including, *inter alia*, independent evaluations conducted by Neuropsychologist 1, Neuropsychologist 2, Neurologist, Physician 2, Independent OT and Physician 1;
- Whether DCPS denied Student a FAPE by failing to issue a prior written notice informing Petitioners of the placement for Student and an appropriate program and describing what options had been considered for school years 2015-2016, 2016-2017, and 2017-2018 and
- Whether DCPS failed and refused to provide FAPE to Student by agreeing to authorize an independent educational evaluation, that is, a neuropsychological evaluation, and then refusing to pay a reasonable market rate for this evaluation.

A.

The Fall 2016 IEPs

The parents seek reimbursement from DCPS for their unilateral private placement of Student at Nonpublic School 3 for the 2017-2018 school year and compensatory education for denials of FAPE in the 2016-2017 school year. As justification for their claim, the parents allege that DCPS denied Student a FAPE because its September 19, 2016 and October 26, 2016 IEPs did not provide appropriate specialized instruction, related services, accommodations, supplemental support services and goals, and because the IEP teams failed to discuss and indicate on Student's IEP the appropriate least restrictive environment and the type of placement Student needed along the continuum of alternative placements.

The parents enrolled Student in City School 2 at the beginning of the 2016-2017 school year, after Student had attended Nonpublic School 3 for the 2014-2015 school year and for most of the 2015-2016 school year. Student had started at City School 2 at the beginning of the 2015-2016 school year, but after about two weeks, the parents

moved Student back to Nonpublic School 3 because of Student's extreme resistance to going to the public school.

DCPS' September 19, 2016 IEP provided for Student's full-time placement in the general education setting with 15 minutes per week of Specialized Instruction and pull-out Speech-Language services for 2 hours per month. Student was placed in the regular classroom with some 20 Other students. From the beginning of the 2016-2017 school year, it was very difficult for the parents to get Student to go to school. At the October 26, 2016 IEP review meeting, the IEP team added 120 minutes per month of Behavioral Support Services to address this concern (and reduced Student's Speech-Language services to 90 minutes per month). The parents contend that these IEP services and Student's educational placement were inappropriate. DCPS responds that for most of the school year, Student's behavior at City School 2 was not a problem – once Student got into the school building, and that Student was at or near grade level academically. DCPS maintains that its fall 2016 IEPs were appropriate for Student. DCPS has the burden of persuasion as to the appropriateness of the fall 2016 IEPs.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 LED.2d 690 (1982), for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out

a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be “*pecially designed*” to meet a child’s “*unique needs*” through an “*individualized education program.*” An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

*Andrew F., supra.* “The adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.” *District of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (citing *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008)).

DCPS’ expert, Special Education Coordinator, explained that in the fall 2016 IEPs, the City School 2 IEP team placed Student in the general education classroom, and provided only 15 minutes per week of Specialized Instruction because Student had done well the year before at Nonpublic School 3. Petitioners’ expert, Dean of Students, opined that DCPS’ October 26, 2016 IEP was not adequate because Student needed a lot more support and instruction focused around Student’s behavior, impulsiveness and perseverating. She added that Student’s lack of impulse control was a safety issue and Student could become very angry and run off.

I did not find persuasive Special Education Coordinator’s justification for

Student's full-time general education placement at City School 2, with minimal special education services, in the fall 2016 IEPs. Nonpublic School 3 is a small special education day school serving students with social or communication challenges associated with ASD symptoms. At the private school, Student was in a classroom with approximately 10 other students, taught by 2 adults. That environment undoubtedly contributed to Student's undisputed progress there. Under the fall 2016 IEPs at City School 2, Student was placed in a completely different educational setting - the general education classroom with some 20 students. Although Student was able to make academic progress at City School 2, Student missed a great deal of class time because it was so difficult to get Student to go to school. Moreover, as the school year progressed, there were several occasions at school when Student's behavior was out of control, culminating with incidents in May 2017 when Student allegedly talked of committing suicide and threatened to harm another Student. The latter incidents led School Social Worker to strongly recommend that Student be hospitalized in a psychiatric facility. Although Student was not hospitalized, Student did not return to school after the May 2017 incidents.

As noted above, the U.S. Supreme Court pronounced in the *Endrew F.* decision that school authorities must "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.*, 137 S.Ct. at 1002. I find that DCPS has not met this burden. At the time of the fall 2016 IEP team meetings, Student was transitioning to public school after spending most of the preceding two school years in the full-time Nonpublic School 3 program for children with ASD symptoms. The severity of Student's ASD-related emotional and behavior issues was known to school

staff and to the IEP team. The prior school year, the parents had returned Student to Nonpublic School 3, because despite the best efforts of the school team, the parents had not been able to overcome Student's school refusal as far as going to City School 2. Given this history, I find that DCPS has failed to provide "a cogent and responsive explanation" for how placing Student in a full-time general education program at City School 2 for the 2016-2017 school year was reasonably calculated to enable Student to make progress appropriate in light of this child's circumstances. This was a denial of FAPE.

B.  
The 2017-2018 School Year

On June 14, 2017, DCPS convened a meeting of Student's IEP team to review Neuropsychologist 1's IEE neuropsychological evaluation. In her report, Neuropsychologist 1 recommended, *inter alia*, that Student needed to attend a full-time special education school designed specifically to meet the needs of students with social and communication challenges. School Psychologist told the IEP team that Neuropsychologist 1's evaluation was not complete because it did not include a classroom observation of Student. The IEP team did not review or update Student's last DCPS IEP, developed on October 26, 2016, at the June meeting or at any time before the start of the 2017-2018 school year. After giving notice to DCPS in July 2017 that they disagreed with the decision not to revise Student's IEP, the parents re-enrolled Student in Nonpublic School 3 for the 2017-2018 school year. The parents now seek reimbursement from DCPS for their private school expenses.

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own

financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter, supra*, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The indispensable condition for private school reimbursement from the *Leggett* decision is that the District failed to offer the child a FAPE. In the present case, I have determined that at the time it was developed, DCPS’ October 26, 2016 IEP was not appropriate for Student. In her spring 2017 IEE neuropsychological report, Neuropsychologist 1 recommended that Student needed a host of in-school supports, including a change in academic placement to “a full-time, special education school designed specifically to meet the needs of students with social and communication challenges.” School Social Worker conceded in her testimony that she agreed that, as of spring 2017, Student could not return to City School 2, under the October 26, 2016 IEP, until Student was “stabilized.” DCPS’ witnesses testified that DCPS was able to provide all of the supports recommended by Neuropsychologist 1, except for the full-time special education school placement. However, DCPS did not reconvene Student’s IEP team to revise Student’s IEP, with or without incorporating Neuropsychologist 1’s recommendations, before the start of the 2017-2018 school year. I find that by not

offering Student an appropriately revised IEP before the start of the 2017-2018 school year, DCPS failed to provide Student a FAPE. *Cf. Leggett, supra*, 793 F.3d at 67 (Officials must have an IEP in place for each student with a disability at the beginning of each school year.)

As explained above, the D.C. Circuit held in its *Leggett* decision that a school district must reimburse parents for private-school expenses if the LEA failed to offer the child a FAPE, the private school chosen by the parent was proper under the IDEA and the equities weigh in favor of reimbursement. Having found that DCPS failed to offer Student a FAPE with a revised IEP before the start of the 2017-2018 school year, I turn next to the other requirements for reimbursement pronounced in the *Leggett* decision. In *Leggett*, the Court held that for the private school chosen by the parents to be “proper,” it need only be “reasonably calculated to enable the child to receive educational benefits.” *Leggett, supra*, at 71. That standard, based on the U.S. Supreme Court’s decision in *Rowley, supra*, must be updated to reflect the Supreme Court’s more recent holding in *Endrew F.*, that is, the private school chosen by the parents must be reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances. *See Endrew F.*, 137 S.Ct. at 999.

Nonpublic School 3's focus is to serve children, like Student, who have social or communication challenges associated with ASD symptoms. It is undisputed that Student made educational progress at Nonpublic School 3 in the 2014-2015 and 2015-2016 school years. I find that the parents’ decision to return Student to Nonpublic School 3 for the 2017-2018 school year was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances and was therefore proper under the *Leggett* standard.

Turning to the equities inquiry, DCPS has not alleged that the parents acted unreasonably in placing Student at Nonpublic School 3 or in their request for public funding from DCPS. Notably, Petitioners' Counsel gave timely written notice to DCPS in July 2017 that the parents disagreed with the decision of DCPS not to revise Student's IEP in light of the recommendations of Neuropsychologist 1 and of Independent OT, that the parents intended to place Student back at Nonpublic School 3 for the 2017-2018 school year and that the parents would seek reimbursement from DCPS for their costs. There was no evidence that the tuition cost at Nonpublic School 3 is out of line with tuition charged by OSSE-approved special education day schools. Therefore, I find that the parents have met the criteria for private school reimbursement set forth in the D.C. Circuit's *Leggett* decision. I will order DCPS to reimburse the parents for their expenses, through the due process hearing date, for Student to attend Nonpublic School 3 in the 2017-2018 school year.

#### C.

#### Functional Behavioral Assessments

Petitioners alleged that DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIP) as part of Student's initial evaluation by DCPS in 2011-2012 and subsequent evaluations to the present. However, Petitioners' expert, Neuropsychologist 1, opined in her testimony that Student did not need an FBA or a BIP because Student does not have behavior problems *per se*. She testified that Student was instead "overwhelmed" by the large classroom/large school setting at City School 2. I find that Petitioners have not met their burden of persuasion on this issue.

#### D.

#### Triennial Reevaluation/Independent Evaluations

The Petitioners allege that DCPS denied Student a FAPE by not conducting a comprehensive triennial reevaluation in the winter or spring of 2017. The IDEA requires that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. The failure to timely complete a required reevaluation is a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia*, 924 F. Supp. 2d 273, 280.

Prior to 2017, Student's eligibility for special education as a child with ASD was last determined on June 19, 2014. City School 2 convened an eligibility committee meeting on May 8, 2017 and Student's eligibility for special education as a Student with an ASD was confirmed. On February 13, 2017, DCPS had granted the parents' request for funding for an IEE neuropsychological evaluation. At the May 8, 2017 eligibility meeting, it was noted that the team would reconvene after the parents submitted the IEE neuropsychological evaluation report. On June 14, 2017, Student's IEP team convened to review Neuropsychologist 1's IEE evaluation. The DCPS representatives determined that the IEE neuropsychological evaluation was not complete because it did not include a classroom observation. It does not appear that the team met again to consider Student's eligibility or educational needs, prior to the parents' filing their due process complaint in October 2017.

Assuming, that DCPS' failure to either accept the IEE neuropsychological evaluation or to conduct its own psychological reevaluation of Student constituted a failure to timely reevaluate Student, I do not see that Student was denied a FAPE by this omission. Procedural violations may only be deemed a 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). By May 2017, Student's eligibility team had determined that Student remained eligible for special education. At the June 14, 2017 IEP team meeting, Student's IEP team, including the parents, did review Neuropsychologist 1's IEE neuropsychological evaluation report and discussed her recommendations. Petitioners have not shown that DCPS' unwillingness to accept the IEE neuropsychological report, without a classroom observation, impeded their opportunity to participate in the decision making progress or impeded Student's right to a FAPE. Notwithstanding, Student's spring 2017 reevaluation is not complete without a valid psychological reevaluation. *See James v. District of Columbia*, 194 F. Supp. 3d 131, 144 (D.D.C. 2016) (Failure to conduct a new comprehensive psychological evaluation means that IEP might not be sufficiently tailored to the student's special and evolving needs.) I will order DCPS to correct this omission.

Petitioners also complain that DCPS failed to convene an IEP team meeting to review the results of numerous independent evaluations of Student, including, *inter alia*, independent evaluations conducted by Neuropsychologist 1, Neuropsychologist 2, Neurologist, Physician 2, Independent OT and Physician 1. Most of these assessments were provided to DCPS in June 2017. The IDEA requires the District to ensure that a child's IEP team reviews and revises the IEP to address, *inter alia*, the results of any reevaluation and information about the child provided by the parents. *See* 34 CFR § 300.324(b). As noted previously, Student's IEP team reviewed Neuropsychologist 1's report on June 14, 2017. The parents have not shown that the failure of an IEP team to

review the other IEE reports has impeded their opportunity to participate in the development of Student's IEP or impeded Student's right to a FAPE. However, it remains DCPS' obligation to have an IEP team review all of the recent IEE evaluations of Student in order to update Student's DCPS IEP as appropriate. I will order DCPS to ensure that this review is made.

Petitioners also complain that DCPS paid Neuropsychologist 1 the OSSE approved rate of \$2,406.72, instead of the "market rate" for her IEE neuropsychological evaluation of Student. DCPS' School Support Liaison informed Petitioners' Counsel, by email of February 19, 2017, that there were many providers in the District that "adhere" to the OSSE approved price. In her hearing testimony, Neuropsychologist 1 testified that she charged the parents \$4,550.00, which she stated approximated market rates in the District of Columbia. Without more data on the rate for school system financed neuropsychological evaluations in the District, I find that the parents failed to establish that they were not able to obtain an IEE neuropsychological evaluation of Student at the cost approved by DCPS. Moreover, Neuropsychologist 1's evaluation did not include an "observation of the student in his or her educational environment," which is a DCPS requirement for neuropsychological evaluations. Therefore, I decline to require DCPS to pay the difference between the amount charged by Neuropsychologist 1 for her evaluation of Student and the total cost authorized by DCPS' IEE funding authorization.

#### E.

#### Prior Written Notices

Lastly, Petitioners contend that DCPS denied Student a FAPE by failing to issue Prior Written Notices (PWNs) informing Petitioners of the placement for Student and an appropriate program and describing what options had been considered for school

years 2015-2016, 2016-2017, and 2017-2018. The IDEA requires that the LEA must give prior written notice before the LEA proposes to, or refuses to, initiate or change the identification, evaluation, or educational placement of child with a disability or the provision of FAPE to the child. *See* 34 CFR § 300.503(a). The notice must include (1) A description of the action proposed or refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action and (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action. *See* 34 CFR § 300.503(b). The purpose of the prior written notice requirement “is to ensure that parents are aware of the decision so that they may pursue procedural remedies.” *M.B. ex rel. Berns v. Hamilton Southeastern Schools*, 668 F.3d 851, 861-862 (7<sup>th</sup> Cir.2011).

DCPS did issue PWNs to the parents at the time of the development of Student’s June 19, 2014 IEP and September 21, 2015 IEP. In addition, Father acknowledged receipt on April 28, 2014 of DCPS’ procedural safeguards notice. I find that Petitioners have not established that Student was denied a FAPE by DCPS’ not providing Prior Written Notices (PWNs) concerning Student’s program and placement for the 2015-2016 school year. In light of my determinations in this decision that Student was denied a FAPE as a result of DCPS’ inappropriate IEPs for the 2016-2017 school year and the District’s failure to provide Student an appropriate revised IEP for the 2017-2018 school year, it is unnecessary for me to reach the issue of whether DCPS also failed to issue required PWNs for the 2016-2017 or 2017-2018 school years. *See Adams v. District of Columbia*, No. CV 17-1816, 2018 WL 587124 (D.D.C. Jan. 29, 2018) (When an HOD finds an IDEA violation, “[w]hether the Hearing Officer based such a finding on one, or two, or three alleged violations is irrelevant—the result would be the same.” *Id.*, quoting

*Green v. District of Columbia*, 2006 WL 1193866 (D.D.C. May 2, 2006).)

F.  
Compensatory Education

The parents seek a compensatory education award to compensate Student for the denials of FAPE in this case. “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 decision, I have determined that Student was denied a FAPE by DCPS’ failure to offer an appropriate revised IEP prior to the start of the 2017-2018 school year. The parents unilaterally enrolled Student in Nonpublic School 3 for the 2017-2018 school year, and I have determined that DCPS must reimburse the parents for these private school expenses. Therefore, no additional compensatory education is warranted for the denial of a FAPE for the 2017-2018 school year.

I have also determined that DCPS failed to show that Student’s IEPs were appropriate for the 2016-2017 school year when Student attended City School 2. Petitioners offered no competent evidence on what different position Student would have been in, had Student been provided an appropriate IEP and educational placement for the 2016-2017 school year. Academically, Student made progress throughout the year at City School 2 and was at or above grade level in Reading and Mathematics. Behaviorally, Student was usually able to function satisfactorily at school, but was

unable to maintain that out of school. On this record, the hearing officer has no way of determining how much more progress this student might have made, had the student been provided an appropriate IEP and educational placement for the 2016-2017 school year. *Cf. Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275, 276 n. 2 (D.D.C.2011) (Court found it had no way of knowing how much more progress the student might have shown if provided transportation to Extended School Year program.)

In the D.C. Circuit's *B.D.* decision, *supra*, in the context of compensatory education awards, the Court encouraged hearing officers to order further assessments if needed to discern a student's needs. ("Assessments sufficient to discern B.D.'s needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them . . ." *Id.* at 800.) However, at this point in time, Student has already been subjected to numerous evaluations and assessments, including the comprehensive neuropsychological evaluation in spring 2017, and the value of a further assessment to discern Student's compensatory education needs is doubtful.

As an alternative to ordering a compensatory education assessment, I will grant, as compensatory education, the parents' request that DCPS be ordered to fund Student's continued placement at Nonpublic School 3 for the remainder of the 2017-2018 school year. I do this, in my discretion, recognizing, as DCPS objected, that it is problematical whether Nonpublic School 3 would meet all of the criteria for a prospective placement enunciated in the D.C. Circuit's decision in *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005). Nonpublic School 3 is not approved by OSSE and Student's teachers are not certified in special education. Moreover, Nonpublic

School 3 only enrolls children with ASD-related issues and the parents agree that Student benefits from interactions with typically developing peers. These concerns are offset by the undisputed fact that Student is receiving educational benefit at Nonpublic School 3. Therefore, as compensatory education for DCPS' failure to provide Student an appropriate IEP and educational placement for the 2016-2017 school year at City School 2, I will order DCPS to continue to fund Student's enrollment at Nonpublic School 3 through the end of the private school's 2017-2018 regular school year.

### **ORDER**

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

ORDERED:

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, DCPS shall, without undue delay, reimburse the parents their costs for tuition and related covered expenses, including transportation, for Student's enrollment at Nonpublic School 3 from the beginning of the 2017-2018 school year through the date of this decision;
2. As compensatory education for DCPS' denial of FAPE to Student in the 2016-2017 school year, DCPS is ordered to fund Student's continued enrollment and related covered expenses, including transportation, at Nonpublic School 3 for the remainder of the private school's 2017-2018 school year;
3. Subject to obtaining a parent's written consent, DCPS shall supplement its 2017 special education reevaluation of Student to include a comprehensive neuropsychological evaluation. DCPS may, at its discretion, conduct a new evaluation or accept the IEE neuropsychological evaluation conducted by Neuropsychologist 1, supplemented as needed. Upon receipt of the neuropsychological evaluation report, DCPS shall convene Student's IEP team, including the parents, to review the evaluation, all independent assessments provided by the parents conducted since January 1, 2017, and all additional data identified in 34 CFR § 300.305(a)(1) in order to review and revise Student's IEP, as appropriate and
4. All other relief requested by the Petitioners herein is denied.

Date: February 18, 2018

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