

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Review and Compliance  
Office of Dispute Resolution  
1050 First Street, NE  
Washington, DC 20002  
Tel: 202-698-3819  
Fax: 202-478-2956

OSSE  
Office of Dispute Resolution  
June 29, 2019

**Confidential**

<p>Parent on Behalf of Student, <sup>1</sup> Petitioner,</p> <p>v.</p> <p>Public Charter School (“School A”) Local Educational Agency (“LEA”),</p> <p>Respondent.</p> <p>Case # 2019-0056</p> <p>Date Issued: June 29, 2019</p>	<p><b>FINAL HEARING OFFICER’S DETERMINATION</b></p> <p>Hearing Dates: May 24, 2019 June 17, 2019</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---	---

---

<sup>1</sup> Personally identifiable information is in the attached Appendices A & B.

## **JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on the following days: May 24, 2019, and June 17, 2019 at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20002, in Hearing Room 112.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student (“Student”) is age \_\_\_ and during school year (“SY”) 2018-2019 was in \_\_\_\_ grade, attending a public charter school located in the District of Columbia (“School A”).<sup>2</sup> School A was Student’s local educational agency (“LEA”) during SY 2018-2019. School A closed permanently at the end SY 2018-2019 and Student will be attending a different LEA for SY 2019-2020.

On February 28, 2019, Student’s parent (“Petitioner”) filed a due process complaint against School A (“Respondent”). Petitioner asserted in the complaint that she sent a written request to School A dated December 17, 2018, that Student be evaluated for special education eligibility. Petitioner asserted that this written request came after an oral request made at the beginning of SY 2018-2019. Petitioner alleged that despite her requests that School A evaluate Student, Student’s grades, test scores and behavior should have put School A on notice by early in SY 2018-2019 that Student should have been evaluated pursuant to School A’s child find obligation. Petitioner asserted that Student was thus denied a free appropriate public education (“FAPE”).

Petitioner provided School A written consent to evaluate Student. After Petitioner filed the due process complaint, School A completed evaluations of Student. However, when an initial hearing on Petitioner’s due process complaint was held on May 24, 2019, School A had not held an eligibility meeting to review the evaluations and to determine Student’s eligibility or ineligibility for special education.

The parties had scheduled an eligibility meeting to be held sometime after the May 24, 2019, hearing date. As a result, the Hearing Officer bifurcated the hearing and on May 24, 2019, heard and considered evidence to determine whether there was a violation of IDEA with regard to whether School A had failed to timely evaluate Student pursuant to its child find obligation and/or pursuant to Petitioner’s alleged oral and/or written requests to School A that School A evaluate Student. The Hearing Officer and the parties scheduled a second hearing date on June 17, 2019, to consider evidence following the scheduled eligibility meeting. The Hearing Officer was not aware of the outcome of the eligibility meeting prior to the June 17, 2019, hearing, and on June 17, 2019, prior to commencing the second hearing, issued an interim Hearing Officer’s Determination (“HOD”).

---

<sup>2</sup> Student’s age and grade are noted in Appendix B.

In the interim HOD the Hearing Officer concluded that School A had violated IDEA by failing to timely evaluate Student following Petitioner's September 2018 oral request that Student be evaluated. The Hearing Officer did not conclude that School A had violated its child find obligation regarding Student or that there was any violation of IDEA by School A failing to act on Petitioner's written request of December 2018.

After the Hearing Officer provided the interim HOD to the parties on June 17, 2019, the parties then informed the Hearing Officer that School A had found Student eligible for special education when the School A staff, Petitioner and her representatives met on May 29, 2019.

Given Student's eligibility for special education, the Hearing Officer took additional testimony on June 17, 2019, and admitted the parties' supplemental disclosures, in order to make a determination whether School A had denied Student a FAPE based on the violation found in the interim HOD and what a remedy, if any, was warranted.

### **RELIEF SOUGHT:**

When Petitioner filed her complaint, as relief she sought a finding that School A had denied Student a FAPE and an order directing School A to evaluate Student with the following evaluations: comprehensive psychological, speech and language, auditory processing, occupational therapy evaluations and a functional behavioral assessment ("FBA"), convene a meeting to review the evaluations and determine eligibility, and if Student was found eligible, develop an appropriate individualized education program ("IEP") and provide Student compensatory education for the alleged denial(s) of a FAPE.

As noted, School A conducted evaluations of Student and on May 29, 2019, found Student eligible for special education. During the meeting School A discussed services to be included in Student's IEP and later provided Petitioner a draft an IEP. At the June 17, 2019, hearing, Petitioner sought as relief that the Hearing Officer conclude School A had denied Student a FAPE, award Student compensatory education and order School A to conduct additional evaluations.

### **LEA Response to the Complaint:**

School A, the LEA, filed a response to the complaint on March 8, 2019. The LEA denied that there was any failure to provide Student with a FAPE. In its response to the due process complaint the LEA asserted, inter alia, the following:

Petitioner was a part of the Student Support Team ("SST") process and Student responded well to tier 1 and 2 interventions and was exited out of SST. Student has received passing grades except one "F" in math in one quarter of the 2<sup>nd</sup> grade. Student started to demonstrate work refusal behavior in November 2018. In response, the LEA provided additional supports and scheduled an SST meeting with Parent. Parent, however, cancelled due to a funeral. The first request for evaluations that the LEA is aware of was the request from Parent's legal team on February 15, 2019. The LEA is moving forward with evaluation(s) but wanted to gather more information about

Petitioner's concerns and attempted to schedule a meeting. The LEA received no response to its repeated requests for a meeting. Instead, Petitioner's legal team filed the due process complaint.

**Resolution Meeting, Pre-Hearing Conference and Bifurcation of Hearing:**

The parties participated in a resolution meeting on March 11, 2019, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on March 28, 2019, and ended and the final HOD was originally due on May 14, 2019.

The parties were not available on the hearing dates offered: May 1, 2019, and May 2, 2019, and agreed to the May 24, 2019, hearing date and an extension of the HOD due date to accommodate the requested hearing date. Respondent filed an unopposed a motion to extend the HOD due date from May 14, 2019, to June 5, 2019.

A pre-hearing conference was held on April 1, 2019. Additional pre-hearing conferences were held on April 11, 2019, and May 1, 2019, to update on settlement discussions. The Hearing Officer issued a pre-hearing order on May 1, 2019, outlining the issue to be adjudicated.

By the initial date of the hearing on the May 24, 2019, an eligibility meeting still had not been held. The Hearing Officer and the parties agreed that because there had yet been no finding of eligibility or ineligibility, the Hearing Officer would render an interim HOD to determine if there was a violation of IDEA regarding Petitioner's alleged claim that School A failed to timely evaluate Student either based on her oral and/or written request or based on the alleged child find violation. The parties set the hearing date of June 17, 2019, to conduct a hearing on relief if a denial of FAPE was found. On May 29, 2019, Respondent filed an unopposed motion to extend the HOD due date from June 5, 2019, to June 29, 2019, to allow for the additional day of hearing. The motion was granted and the final HOD is now due on June 29, 2019. As noted, an interim HOD was issued on June 17, 2019. As result of the findings and conclusions of the interim HOD, the issue adjudicated at the June 17, 2019, hearing is as stated below:

**ISSUE:**<sup>3</sup>

The issue adjudicated is:

Whether the School A denied Student a FAPE by failing to timely evaluate Student based on the oral request for evaluation made by Petitioner early in SY 2018-2019; and if there was a denial of FAPE, whether a remedy is warranted and if so, what remedy.

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in

---

<sup>3</sup> The Hearing Officer restated the issue at the hearing, and the parties agreed that this was the issue to be adjudicated.

each party's disclosures and supplemental disclosures (Petitioner's Exhibits 1 through 29 and Respondent's Exhibits 1 through 20) that were admitted into the record and are listed in Appendix 2.<sup>4</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>5</sup>

### **SUMMARY OF DECISION:**

This Final HOD includes the findings of fact and conclusions of law from the June 17, 2019, interim HOD and additional findings of fact regarding Student's evaluation and May 29, 2019, eligibility and conclusions regarding the denial of FAPE and the appropriate remedy.

In the June 17, 2019, interim HOD the Hearing Officer concluded, based upon the evidence adduced, there was insufficient evidence based on Student's academic records, academic performance and behavior during first semester of SY 2018-2019, that School A should have evaluated Student and acted to determine Student's eligibility for special education pursuant to its child find obligation. School A acted appropriately in light of Student's academic performance and behavior to begin its SST process and attempt interventions of Student prior to moving forward with evaluating Student.

Although Petitioner made a written request to School A by email in December 2018 that School A evaluate Student for special education, that request was not received by School A because it was sent to an invalid email address. However, there was sufficient evidence presented, based on Petitioner's testimony and that of Student's math teacher that Petitioner made an oral request to Student's teacher sometime in late September 2018 that Student be evaluated for special education.

The Hearing Officer concluded that based on Petitioner's oral request to Student's teacher in late September 2018 that Student be evaluated, School A should have promptly acted on that request and that School A should have evaluated Student and determined Student's eligibility or ineligibility for special education within the required 120 calendar days of the oral request. Thus, that determination should have been made by early January 2019.

Because School A did not evaluate Student and make an eligibility determination by early January 2019, the Hearing Officer concluded there was a violation of IDEA. However, because there had been no determination of Student's eligibility for special education by the time of the hearing on May 24, 2019, the Hearing Officer did not and could not conclusively determine that School A's violation resulted in a denial of FAPE to Student.

Following the June 17, 2019, hearing, the Hearing Officer now concludes, based upon the evidence adduced, that Student was denied a FAPE due School A's failure to timely evaluate Student and

---

<sup>4</sup> Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

<sup>5</sup> Petitioner presented three witnesses: (1) Student's parent ("Petitioner"), (2) Independent Clinical Psychologist, testifying as an expert witness, and (3) Petitioner's Educational Advocate, testifying as an expert witness. Respondent presented three witnesses: (1) School A's Assistant Principal, (2) Student's School A Math Teacher, and (3) School A's Director of Strategic Initiatives.

determine Student's eligibility for special education within the required 120 calendar days of Petitioner's oral request, to wit: by early January 2019. The Hearing Officer directs in the order below that School A provide Student the following as compensatory education: 60 hours of independent tutoring and 10 hours of independent counseling

**FINDINGS OF FACT:**<sup>6</sup>

1. During SY 2018-2019 Student attended School A. Student attended School A starting in first grade. Before that, Student resided outside of the District of Columbia. (Petitioner's testimony)
2. During SY 2016-2017, Student earned the following final grades: [D] – Writing, [C-] - Visual Arts, [A] – Theater, [C] - Science and Social Studies, [D] – Mathematics, [C] ELA [A] Dance and Movement, and [A] - Band. During SY 2017-2018, Student earned the following final grades: [C+] – Social Studies, [A-] - Science, [C+] – Mathematics, [C] – ELA. Student received [A+] in Dance and Movement during the 2<sup>nd</sup> Quarter and [A] in Band for the 3<sup>rd</sup> Quarter. (Petitioner's Exhibit 11-1)
3. Petitioner advised School A staff of her concerns for Student's academic well-being for two (2) years. Petitioner requested that School A monitor Student's academic progress and she often forwarded text messages to school staff regarding her concerns. (Petitioner's testimony)
4. Petitioner recalls attending Back-to-School night at School A, shortly after the start of SY 2018-2019, and meeting with Student's teacher. During that meeting, Petitioner verbally requested that Student be evaluated for special education. (Petitioner's testimony)
5. During SY 2018-2019, Student missed a few school days for which Petitioner provided notes for excused absences. On occasion, Petitioner received written documentation of instances where Student had behavioral incidents. Petitioner is also aware that Student has had other school incidents which have resulted in telephone calls to Petitioner, in-school detention and suspensions. Petitioner often communicates with school staff via text messages and one-on-one interactions with Student's teachers about Student's behavior and academic performance. (Petitioner's testimony)
6. During early SY 2018-2019, Petitioner observed Student at School A sitting in a classroom with other students whom she termed "uncontrollable", and who were not paying attention to what was going on in the classroom. Student remained seated, but had difficulty completing class work in the English and Language Arts ("ELA") and Social Studies classes. Petitioner recalls that Student would request to go to the bathroom to get out of

---

<sup>6</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

the Student's chair and then did not complete the class assignment that Student had been given. (Petitioner's testimony)

7. Student has been struggling with academics and Petitioner wants Student to have the appropriate resources. Student does not have confidence in Student's academic abilities, appears unsure, speaks in soft tones when reading, and Student voices fears that Student cannot succeed academically. (Petitioner's testimony)
8. Petitioner believes Student is afraid because Student cannot keep up with peers and, due to embarrassment, will not say that Student does not understand. Petitioner placed Student in outside counseling in October 2018 to address emotional concerns. Petitioner also forwarded an email to the School A school counselor requesting that the counselor speak with Student has had been agreed. (Petitioner's testimony)
9. After Student's homeroom was changed, Student's behavior improved for a short time, then the telephone calls to Petitioner from School A staff resumed. Petitioner saw a video of how Student's behavior was declining. The video showed of Student continuing to get out of Student's seat and being sent to detention. (Petitioner's testimony)
10. On December 17, 2018, Petitioner forwarded an email to School A to request that Student be "tested for an IEP or 504 [p]lan." In the email, Petitioner requested a social worker meet with Student and referenced a meeting that had occurred in October 2018, which she believed would have resulted in Student receiving a counselor. Petitioner voiced her concerns and frustrations with the process of providing assistance to Student. However, that email was sent to an invalid email address at School A that does not receive return emails. (Petitioner's Exhibits 16-5, 17)
11. On March 11, 2019, School A conducted a multi-disciplinary team ("MDT") meeting to discuss the Analysis of Existing Data ("AED") with respect to Student. The purpose of the meeting was to "address concerns outlined in Petitioner's due process complaint and collect additional information for the purpose of evaluations." (Petitioner's Exhibit 6-1)
12. The MDT/AED meeting notes state that one of the Student's teachers, who worked with Student the previous school year, noticed an up-tic in Student's inability to remain seated. According to the teacher, "[t]he behaviors were noticed in November and it is becoming an everyday thing." Another of Student's teachers also saw the behaviors exhibited by Student, and recommendations were made to have Student work alone, encourage Student to ask for breaks instead of eloping from class, provide assistance with assignments and positive reinforcement. Student had begun the Achieve 3000 reading program, completed an entire lesson, and scored a 75. Student also read at the level of 770 without problem on another assignment, with grade level performance being between 700 – 900. Student was reported to be "playful and silly" but was able to complete the assignment. (Petitioner's Exhibits 6-2, 6-3)
13. During the MDT/AED meeting, there was commentary concerning Student's statements that Student had not been able to spend enough time with Student's mother, due to her

hospitalization as well as a night work schedule. Student was spending a lot of time with Student's grandmother. (Petitioner's Exhibits 6-3, 6-4)

14. The MDT determined that Student would receive a Comprehensive Evaluation [IQ Academic (reading, writing, math) and Clinical], an assessment for Attention Deficit Hyperactivity Disorder ("ADHD") and a Functional Behavior Assessment ("FBA")/Behavior Intervention Plan ("BIP"). The team determined that Student did not require an occupational therapy ("OT") or speech assessment. However, School A was willing to perform the speech and OT evaluations, if recommended by the psychologist as a result of other assessments. Petitioner specifically requested IQ, academic, audiological and OT assessments. Petitioner was advised that due to the closure of School A on June 14, 2019, the proposed evaluations and eligibility meeting would have to occur as soon as possible. (Petitioner's Exhibits 6-4, 6-5)
15. Student was assessed using the Partnership for Assessment of Readiness for College and Careers ("PARCC") in Mathematics in spring 2018. At that time, Student's score was 742 which meant that Student "Approached Expectations" for the applicable grade level learning standards. In the major content of multiplication/division, area/measurement, fractions, Student's achievement category was "Meets or Exceeds". In additional and supporting content of perimeter, place value, geometric shapes, graphing, Student's achievement category was "Nearly Meets". In the area of expressing mathematical reasoning and the ability to justify solutions and analyze/correct others' reasoning, Student's achievement category was "Below", and in modeling and application and the ability to represent and solve problems using symbols and tools, Student's achievement category was "Nearly Meets". Student scored better than 47% of the students taking the test at School A and 51% of all DC students who took the test. (Petitioner's Exhibits 7-1, 7-3)
16. Student was assessed using the PARCC in English Language Arts/Literacy ("ELA") in spring 2018. At that time, Student's score was 691 which meant that Student "Did Not Meet Expectations" for grade level learning standards. Student's achievement scores for Literary Text, Informational Text, Vocabulary and Knowledge and Use of Language Conventions were all listed as "Below". Student's Written Expression was rated as "Nearly Meets" expectations. Student scored better than 25% of the students taking the test at School A and better than 21% of students in DC who took the test. (Petitioner's Exhibits 8-1, 8-2)
17. As a result of a behavioral incident, School A forwarded an After-School Detention Letter to Petitioner on January 31, 2019, for detention on February 4, 2019. (Petitioner's Exhibit 9-1)
18. Petitioner's clinical psychologist was qualified as an expert in clinical psychology and special education programming. The expert had reviewed the documents contained within Petitioner's disclosure and formed her opinion of the issues she believes are problematic for Student. The clinical psychologist advised that Student's AED and PARCC demonstrate that Student was approaching grade level performance. However, Student's

MAP testing shows Student's regression in academic performance from fall to winter. The expert opined that had she been a member of Student's MDT, she would have recommended a psychological evaluation, FBA and BIP and a speech and language evaluation, based upon the escalation of Student's behaviors since November 2018. (Witness 1's testimony, Petitioner's Exhibit 14 and 15)

19. Petitioner's educational advocate was qualified as an expert in special education eligibility and programming. She has reviewed the Student's documents and spoke to the parent regarding her concerns. In her opinion Student performed well on the spring 2018 math PARCC testing. Student approached expectations, met, or nearly met all expectations. However, Student did not meet expectations in mathematical reasoning, which are the written explanations for the solutions to math problems. The cause of Student's inability to provide the written explanations for the math solutions may be Student's reading skills, which are well below grade level. (Witness 2's testimony, Petitioner's Exhibits 7-1, 7-3, 8-1, 8-2)
20. Student's reading PARCC testing shows that Student's performance was below expectations for all subtests. Student's reading abilities were far below level at around the 15<sup>th</sup> percentile. Student's Achievement Network ("ANET) scores show the same pattern of Student achieving at half the level of peers in ELA, but in math, Student met or exceeded the performance of Student's peers. Student's reading level fell from 15% to 1%, which places Student at the kindergarten level in reading. On review of Student's work samples for writing, Petitioner's expert found the samples to be "poor". Since Student attends school regularly, and does not have vision or hearing deficits, Student's performance is not due to these issues. (Witness 2's testimony, Petitioner's Exhibits 13-1, 13-2)
21. Although Petitioner's expert in special education did not attend Student's meeting on March 11, 2019, she has reviewed the meeting notes and AED. The expert opined that Student should receive a full evaluation which would consist of psychological and auditory processing evaluations as well as a FBA and BIP. The expert believes Student also requires a significant amount of remediation to deal with reading deficits. (Witness 2's testimony, Petitioner's Exhibits 5 and 15)
22. The assistant principal at School A is a part of the behavioral management staff. She works with the SST, counselors, teachers and social workers to review student data and determine the best way to manage student behaviors. The assistant principal has known Student since the beginning of the current school year. (Witness 3's testimony)
23. School A used Response to Interventions ("RIT") which is a process initiated by the SST. The SST determines how a student will move through the RIT process. The role of the assistant principal is to oversee the process because she manages the school counselor. The role of the school counselor is to facilitate the process, schedule meetings, ensure the required documentation is in place, review the data, and ensure the intervention is taking place. Trackers are used to monitor student progression through RIT. Although the SST process is different from the special education process, the SST process may result in the

initiation of the special education evaluation process and some of the SST members are also a part of the special education process. (Witness 3's testimony)

24. School A uses Tier level identifications to process students determine whether to initiate the SST. The tiers are also used by the SST. Tier 1 level is the implementation of teacher intervention. Teacher interventions must be implemented with fidelity for four (4) to six (6) weeks. If the teacher interventions fail to demonstrate a positive result, a student is referred to SST. Tier 2 is having a counselor or interventionist review interventions for the student for four (4) to six (6) weeks. These interventions are implemented by someone other than Student's teacher. If the student does not demonstrate a positive change, the student is referred for the special education process. Most students move through the process in approximately 2.5 months. If a parent requests evaluation prior to the completion of SST, that request stops the SST process. However, the interventions that were working would remain in place during the special education process. (Witness 3's testimony)
25. The School A Assistant Principal met with Petitioner in January 2019 as part of the SST process. However, the two teachers who had referred Student to SST were both absent on the day of the meeting. Student's SST was initiated in December 2018, based upon data provided by the two teachers with respect to Student's behaviors and incomplete work samples. (Witness 3's testimony)
26. The Assistant Principal spoke with Petitioner about Student's academic and behavioral referral data as well as Student's assessments for math and ELA. They also discussed Student's receiving vision and hearing testing. The Assistant Principal understood that Petitioner wanted to move forward with special education evaluation. (Witness 3's testimony)
27. The Assistant Principal never received an e-mail or other notification from Petitioner that she was requesting the School A initiate the special education process. Parents have direct email addresses for teachers. However, School A does have a "no-reply" email address which does not relay emails which may be mistakenly sent to it. (Witness 3's testimony)
28. Student's math and science teacher did not know Student until the current school year. At the "Back to School" night Petitioner mentioned to Student's teacher that she wanted Student evaluated and the teacher gave Petitioner the email address for the special education coordinator. At the beginning of the year, Student was on task, had good grades and was a model for good behavior. The teacher began to notice changes in Student's behavior in late October and early November. Student began displaying disruptive classroom behaviors, such as name-calling peers. Student also stopped turning in assignments and handed in partially completed work. Student's homeroom assignment was changed in November 2018. (Witness 4's testimony)
29. As part of Student's Tier 1 interventions, Student's teacher offered behavior charts and treats. Student advised the teacher that Student no longer wanted to participate in the interventions; however, the teacher still utilizes rewards without tracking. The teacher

checked with Student's other teachers to determine whether they experienced behavioral issues with Student. Student's behaviors were reportedly worse in the Art and ELA classes. She and another teacher referred Student to SST. The teacher advised that Student has mastered grade level classroom performance. (Witness 4's testimony).

30. The Director of Student Support Services at School A was qualified as an expert in special education, IEP development and IEP implementation. The expert supervises the special education department at School A and the EL teachers. The expert has known Student since Student was in 1<sup>st</sup> grade. During 1<sup>st</sup> grade Student's teacher referred Student to SST concerning Student's reading, writing and self-esteem. At that time, the expert oversaw the SST. The expert invited Petitioner to a SST meeting where they devised a SST plan to be implemented at home and at school. When the meeting was reconvened, Student had made growth, and by the end of the school year, Student was on grade level. (Witness 5's testimony)
31. Typically, when anyone makes a request for testing or referral related to special education, the person goes to the special education coordinator. School A had a special education coordinator in early SY 2018-2019 who is no longer employed by School A. On Mondays the team holds "wellness" meetings and they discuss referrals made to any of the participants. In January 2019, students who were experiencing behavioral were brought to her attention. Student was identified as one of those children, and the team discussed strategies that could be used in the classroom. However, the expert did not follow up to see if the strategies were helpful. The expert did speak to two of Student's teachers about Student's behaviors and made suggestions to them. Neither of the teachers mentioned any academic concerns. (Witness 5's testimony)
32. School A enters behavioral referrals as infractions at a level of 1 to 4. The expert has reviewed Student's ANET, PARCC and MAP scores and in her expert opinion, Student should have been referred to SST after receiving Student's winter 2018-2019 MAP scores. (Witness 5's testimony, Petitioner's Exhibit 14-1)
33. According to Student's behavioral incidents reporting, Student received 18 documented incidents, which resulted in an office referral, from four teachers. The referrals begin on October 4, 2018, with one incident of Student being "continuously disruptive and EXTREMELY disrespectful during small group activity" resulting in a Level 2 Formal Warning and Restorative Conversation. (Respondent's Exhibits 4-5)
34. On November 13, 2018, Student has two incidents; one for being "unfocused and disrupting class," resulting in a Level 1 Verbal Warning, and one for disrupting the class, which resulted in a Level 2 Formal Warning and Restorative Conversation. (Respondent's Exhibits 4-5)
35. On November 14, 2018, Student was cited for running through the halls, resulting in a Level 2 Formal Warning and Restorative Conversation. On November 16, 2018, Student "was repeatedly asked to remain in [Student's] seat", resulting in a Level 1 Verbal Warning. (Respondent's Exhibit 4-4)

36. On December 13, 2018, Student was cited for “running around the hallways continuously after dismissal”, resulting in a Level 4 Detention. Student received two citations on January 31, 2019, from the same teacher for “continuously being disruptive”, which resulted in Level 3 Plan for Success and for walking around the classroom during an assessment, resulting in a Level 4 Detention. (Respondent’s Exhibit 4-4)
37. Student’s behavioral incidents continued during the month of February 2019, with five (5) if the incidents resulting in Level 4 Detention. (Respondent’s Exhibits 4-3, 4-4)
38. School A conducted a comprehensive psychological and Attention Deficit Hyperactivity Disorder (“ADHD”) evaluation of Student on May 1, 2019, and May 15, 2019, and completed the psychological evaluation report on May 20, 2019. The evaluator assessed Student’s cognitive, academic and social-emotional functioning. Student’s cognitive functioning was in the Average range. However, Student’s academic standard scores were as follows: Broad Reading: 78, Broad Math: 86 and Broad Written Language: 78. The evaluator concluded based on the assessments that the School A team should consider qualifying Student for special education with a disability classification of multiple disability (“MD”) to include specific learning disability (“SLD”) in reading, written expression and math and other health impairment (“OHI”) due to ADHD. Based on the assessments the evaluator did not identify, or recommend a rule-out of, any speech language concerns. (Witness 5’s testimony, Petitioner’s Exhibit 25-1, 25-16, 25-17, 25-19, 25-20, 25-25)
39. On May 29, 2019, School A convened an eligibility meeting. Petitioner and her representatives participated. The team reviewed evaluation results and determined Student eligible for special education with an MD disability classification to include SLD and OHI for ADHD. The team also discussed proposed special education services to be included in an IEP and agreed that School A would provide a draft IEP following the meeting. Petitioner’s advocate requested that School A conduct a speech language evaluation, but the School A team did not believe that the evaluation was warranted. (Witness 2’s testimony, Petitioner’s Exhibit 26)
40. School A created a draft IEP for Student on May 30, 2019, and provided the draft IEP to Petitioner and her representatives. The IEP includes goals in the areas of math, reading, written expression, emotional/social/behavioral development and prescribed the following services: 3 hours per week of specialized instruction in general education, 1 hour per week of specialized instruction outside general education, 1 additional hour of specialized instruction per week outside general education in reading, 120 minutes of behavioral support per month outside general and 60 minutes per month of behavior support inside general education. The draft IEP also included classroom and testing accommodations. (Petitioner’s Exhibit 27)
41. On June 11, 2019, Petitioner’s educational advocate, who participated in the May 29, 2019, meeting sent a dissent letter to School A addressing Petitioner’s and her representatives concerns about the meeting and the draft IEP. (Petitioner’s Exhibit 28)

42. School A closed permanently at the end of SY 2018-2019. School A engaged a contractor to complete an FBA of Student but the FBA was not completed in time for the May 29, 2019, meeting. The data for the FBA has been compiled and the contractor will provide the FBA and a draft BIP that can be reviewed by a team at Student's new school in SY 2019-2020. (Witness 5's testimony)
43. Petitioner's educational advocate presented a compensatory education proposal that suggested that as result of Student being without special education services Student allegedly missed 8 hours of specialized instruction per week for 28 weeks from October 31, 2018, to the end of SY 2018-2019, for a loss of 224 hours of specialized instruction and 8 months or 16 hours of behavioral support services. She requested that an FBA and BIP be completed and a speech and language evaluation be conducted and that Student be provided 115 hours of tutoring and 25 hours of behavior support services. (Witness 2's testimony, Petitioner's Exhibit 29)
44. Had School A timely evaluated Student following Petitioner's oral request in late September 2018, based on Student now having been evaluated and determined eligible, School A should have determined Student eligible by January 2019, and had an IEP in place for Student by February 1, 2019. Had the IEP that School A drafted for Student following the May 29, 2019, eligibility meeting been in place by February 1, 2019, Student would have been provided the following services from February 1, 2019, until the end of SY 2018-2019: 5 hours per week of specialized instruction and 180 minutes per month of behavior support services. Therefore, based on School A's calendar for SY 2018-2019, Student missed the following services during that period: 18 weeks of specialized instruction for a total of 90 hours missed, and 4.5 months of behavioral support services for a total of 810 minutes or 13.5 hours missed. (Petitioner's Exhibit 27, Respondent's Exhibit 20)

## **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a Hearing Officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an

appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE:** Whether the School A denied Student a FAPE by failing to timely evaluate Student based on the oral request for evaluation made by Petitioner early in SY 2018-2019; and if there was a denial of FAPE, whether a remedy is warranted and if so, what remedy.

**Conclusion:** In the June 17, 2019, interim HOD the Hearing Officer determined there was sufficient evidence to support a finding that based on Petitioner's oral request to School A in late September 2018 that School A should have evaluated Student and determined Student's eligibility or ineligibility within 120 days of that request. School A having found Student eligible for special education on May 29, 2019, the Hearing Officer now concludes that Student was denied a FAPE a result of School A not timely evaluating Student and determining Student's eligibility.

In the June 17, 2019, interim HOD, the Hearing Officer determined that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that based on Student's academic record, academic performance and behavior in first semester of SY 2018-2019 that School A should have evaluated Student and determined Student's eligibility for special education based on School A's child find obligations. The Hearing Officer also found that School A never received Petitioner's December 2018 written request. Thus, the Hearing Officer determined there was no denial of FAPE either as to child find or based on a written request by Petitioner.

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

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Petitioner alleged that Respondent did not comply with IDEA by timely evaluating Student for special education following her requests and/or pursuant to its child find obligations.

"DCPS child-find obligations [to evaluate the student] are triggered 'as soon as a child is identified as a potential candidate for services,'" *Long*, 780 F. Supp. 2d at 57 (citing *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2011)). *Integrated Design and Elec. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 34 (D.D.C. 2008) (a school is obligated to evaluate a student once that student is "suspected of having a disability").

DCPS must conduct initial evaluations to determine a child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code § 38-2561.02(a).

Because an evaluation and eligibility determination are a prerequisite to preparing an IEP, ordinarily an LEA's failure to evaluate the student and determine ■ eligibility strictly within the deadline would be considered a denial of a FAPE. See G.G. ex rel. *Gersten v. District of Columbia*, 924 F.Supp.2d 273, 280 (D.D.C. Feb. 20, 2013) and cases cited therein; *Latynski-Rossiter v. District of Columbia*, 928 F.Supp.2d 57, 60 (D.D.C.2013) (An IDEA violation occurs at the moment that the District fails to provide an appropriate placement for the child.)

Petitioner asserted that School A was put on notice by early in SY 2018-2019 that Student was perhaps a child with a disability due to Student's academic performance and behavioral difficulties and the repeated telephone calls from School A to Petitioner about Student's behaviors and that School A should have evaluated Student pursuant to its child find obligations. The Hearing Officer did not conclude there was sufficient evidence presented that this was the case.

The evidence demonstrated that during Student's first years at School A, Student's academics and behavior were not problematic. Although Petitioner had concerns and wanted Student monitored, Student displayed no outstanding academic or behavioral deficits. At the start of SY 2018-2019, Student's teacher credibly testified, despite Petitioner's concerns, that Student was performing well academically and had no behavioral concerns.

In October 2018 Student began to display behavioral concerns and fail to turn in assignments. Student's teacher then confirmed with Student's other teachers that Student had begun to display similar behaviors in other classes. Based on that information, Student's teachers referred Student to School A's SST process and School A began to implement interventions to address the concerns. This was a legitimate course of action by School A to introduce interventions and begin the SST process for Student. The SST referral process first attempts interventions, as it should, prior to initiating a referral for a student to be evaluated for special education eligibility.

Based upon the evidence adduced, the Hearing Officer concluded there was insufficient evidence based on Student's academic records, academic performance and behavior during first semester of SY 2018-2019, to find that School A should have evaluated Student and acted to determine Student's eligibility for special education pursuant to its child find obligation. School A acted appropriately in light of Student's academic performance and behavior to begin its SST process and attempt interventions of Student prior to moving forward with evaluating Student.

Although Petitioner made a written request to School A, by email in December 2018, that School A evaluate Student for special education, the evidence demonstrates that the request was not received by School A because it was sent to an invalid email address. Consequently, the Hearing Officer did not conclude that School A should have or could have taken action to evaluate Student based on Petitioner's December 2018 email request.

However, there was sufficient evidence presented, based on Petitioner's testimony and that of

Student's math teacher that Petitioner made an oral request to Student's teacher sometime by late September 2018 that Student be evaluated for special education. The teacher testified that she gave Petitioner the email address for the School A's special education coordinator based on that request from Petitioner.

Although there does not appear from the evidence that Petitioner emailed the coordinator in late September, and the coordinator was no longer employed at School A, the oral request to Student's teacher in late September 2018, was in the Hearing Officer's opinion sufficient to constitute a request from Petitioner to School A that Student be evaluated for special education. School A should have acted immediately based upon that oral request to evaluate Student. As Respondent's witness testified, despite School A's normal course of instituting its SST process, when a parent specifically requests that a student be evaluated for special education, that request is acted upon irrespective of the SST process. That did not happen in the case at hand.

The Hearing Officer concluded that based on Petitioner's oral request to Student's teacher in late September 2018 that Student be evaluated, School A should have promptly acted on that request and that School A should have evaluated Student and determined Student's eligibility or ineligibility for special education within the required 120 calendar days of the oral request. Thus, that determination should have been made by early January 2019.

Because School A did not evaluate Student and make an eligibility determination by early January 2019, the Hearing Officer concluded there was a violation of IDEA.

Had School A timely evaluated Student following Petitioner's oral request in late September 2018, based on Student now having been evaluated and determined eligible, School A should have determined Student eligible by January 2019, and had an IEP in place for Student by February 1, 2019.

The evidence demonstrates, based upon the May 29, 2019, meeting in which the team found Student eligible and in need of specialized instruction and related services, that the failure by School A to have timely evaluated Student, found Student eligible and had an IEP in place by February 1, 2019, to provide Student specialized instruction and related services through the remainder of SY 2018-2019, was denial of a FAPE.

### **Remedy:**

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

Under the theory of compensatory education, "courts and hearing officers may award educational services, to be provided prospectively, to compensate for a past deficient program. The inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties

must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Had the IEP that School A drafted for Student following the May 29, 2019, eligibility meeting been in place by February 1, 2019, it is presumed that Student would have been provided the following services from February 1, 2019, until the end of SY 2018-2019: 5 hours per week of specialized instruction and 180 minutes per month of behavior support services. Based on School A's calendar for SY 2018-2019, Student missed 90 hours of specialized instruction and 13.5 hours of behavioral support services.

The Hearing Officer considered the evidence regarding Student's academic performance and social-emotional functioning, and evidence presented by both Petitioner and Respondent regarding compensatory education. The evidence supports a finding that Student would benefit from tutoring and independent counseling that Petitioner's plan proposes. However, the amount of tutoring Petitioner requested was unreasonable because it was not accurate as to the number of hours Student missed had an IEP been in place for Student by February 1, 2019. Given that Student missed a total of 90 hours of specialized instruction and 13.5 hours of behavioral support, and based on the draft IEP and the fact that majority of specialized instruction would have been provided in general education, the Hearing Officer grants in the order below an amount of independent tutoring and counseling hours that seems reasonable and likely based upon evidence to put Student in the place Student would have been had the denial of a FAPE not occurred.

Although Petitioner requested additional evaluations, the Hearing Officer was not convinced by the evidence that a speech language evaluation was warranted as a part of School A's initial evaluation. The Hearing Officer did not find a sufficient evidentiary basis for Petitioner's request that School A to conduct the additional evaluation or that an independent evaluation be granted. In light of the fact that Student will be attending a different LEA in SY 2019-2020, the Hearing Officer does, however, direct School A to provide Petitioner the outstanding FBA and draft BIP so that they can be reviewed by Student's next school.

**ORDER:**<sup>7</sup>

1. Respondent LEA, School A, shall, within 20 calendar days of the issuance of this order, provide Petitioner authorization for 60 hours of independent tutoring and 10 hours of independent counseling at the OSSE prescribed rates.
2. Respondent LEA, School A, shall, within 10 calendar days of the issuance of this order, if it has not already done so, provide Petitioner the FBA that was completed and a draft BIP.
3. All other relief requested by Petitioner is denied.

---

<sup>7</sup> Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

---

**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: June 29, 2019**

Copies to: Counsel for Petitioner  
Counsel for LEA  
OSSE-SPED {due.process@dc.gov}  
ODR [hearing.office@dc.gov](mailto:hearing.office@dc.gov)  
contact.resolution@dc.gov