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Office of the State Superintendent of Education
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Confidential

Adult Student ¹ , Petitioner, v. District of Columbia Public Schools ("DCPS") ["LEA"] Respondent. Case # 2015-0406 Date Issued: March 6, 2016	HEARING OFFICER'S DETERMINATION Hearing Date: February 5, 2016 <u>Representatives:</u> Counsel for Petitioner: Carolyn Houck, Esq. Steve Nabors, Esq. P.O Box 252 St. Michaels, Md. 21663 & Steve Nabors, Esq. 1220 L Street, N.W. Washington, D.C. 20005 Counsel for Respondent: Steven Rubenstein, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 February 11, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

On December 22, 2015, Petitioner filed this due process complaint that alleged DCPS failed to provide her with a free appropriate public education (“FAPE”) by: (1) failing to evaluate the student; (2) failing to develop an appropriate individualized educational program (“IEP”), and (3) failing to provide a special education placement during school year (“SY”) 2015-2016.

Petitioner seeks as relief that the Hearing Officer find DCPS denied the student a FAPE and order DCPS to immediately place and fund her at a private placement of her choice in order for her to complete a credit recovery program. Petitioner requests that the DCPS fund an independent functional behavioral assessment (“FBA”). Petitioner also seeks an order requiring DCPS to convene a multidisciplinary team (“MDT”) meeting to review the evaluation(s) and develop an IEP. Finally, Petitioner requested an award of compensatory education.

On December 31, 2015, DCPS filed a timely response to Petitioner’s complaint in which it denied that it failed to provide the student with a FAPE. DCPS asserted that the student had been appropriately evaluated, her IEP is appropriate and DCPS has made good faith attempts to provide the student an appropriate placement.

A resolution meeting occurred on January 22, 2016. However, the parties did not reach any agreement on the issues and did not agree to proceed directly to hearing. The 45-day period began on January 22, 2016, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on March 6, 2016.

The Hearing Officer convened a pre-hearing conference (“PHC”) on January 22, 2016, and issued a pre-hearing order (“PHO”) on January 22, 2016, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issue(s) adjudicated are:

1. Whether DCPS denied the adult student a FAPE by failing to evaluate the student in all areas of suspected disabilities by not conducting a FBA within two years prior to the date the complaint was filed.
2. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP by not including a behavior intervention plan (“BIP”), adequate goals, and a meaningful transition plan.³
3. Whether DCPS denied the adult student a FAPE by failing to provide a special education placement during school year (“SY”) 2015-2016.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1 through 10 and Respondent’s Exhibits 1 through 17) that were admitted into the record and are listed in Appendix A).⁴ Witnesses are listed in Appendix B. The record was closed with simultaneous written closing arguments by each party on February 19, 2016.

FINDINGS OF FACT:⁵

1. Petitioner (“the student”) is an adult committed to the D.C. Department of Youth and Rehabilitative Services (“DYRS”) and in the past few years has been both at DYRS’ Youth Services Center (“YSC”), private special education schools, and several different residential treatment centers outside the District of Columbia. (Respondent’s Exhibit 2-1, 3-1, 3-3, 4-2)
2. In January 2015 a psychiatric evaluation conducted while the student was at YSC diagnosed the student with bipolar disorder and noted the student “has a long history of

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the hearing and the parties agreed that these were the issue(s) to be adjudicated. At the outset of the hearing Petitioner withdrew the allegation that DCPS failed to conduct triennial evaluations and comprehensive psychological and psychiatric evaluations. Petitioner is maintaining the claim that DCPS failed to conduct a FBA and is asserting the violation occurred up to two years prior to the date the complaint was filed.

³ Petitioner asserts the IEP’s social emotional goal was inadequate and the transition plan is not meaningful and not based on an age appropriate evaluation.

⁴ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

poor behavioral and emotional control and has not functioned well in the community or in residential treatment centers.” (Respondent’s Exhibit 3-1, 3-3)

3. The student because of the bipolar disorder and has mood swings and can react with physical and/or verbal aggression toward teachers and peers. She has a history of violating the rights of others and not conforming to rules. She has been in a traditional non-public school setting as well as residential school settings and displayed behaviors that have resulted in her being expelled from both types of settings. (Witness 1’s testimony)
4. The student’s most recent residential placement (“School A”) was for four months and ended in May 2015. While at this facility a psychological assessment was conducted and noted the student’s behaviors of violence and aggression. At this last residential placement the student was charged with assaulting a teacher and immediately returned to the District of Columbia and placed at YSC. (Student’s testimony, Respondent’s Exhibit 4-1, 4-2, 4-7)
5. The student has an IEP dated, April 7, 2015, that classifies her as emotionally disturbed (“ED”). The IEP requires that student receive 26.5 hours of specialized instruction outside general education. The special education and relates services page of the IEP states: “[the student] receives services in a residential facility with small group and [sic] instruction to meet her academic and social/emotional needs.” The IEP was developed while the student was at her most recent residential placement. A DCPS representative participated in the IEP meeting by telephone. There were no concerns expressed about the student’s social emotional goals or her transition plan during the meeting. (Witness 4’s testimony, Petitioner’s Exhibit 4-1, 4-7, Respondent’s Exhibit 8)
6. The student’s IEP contains goals in reading, written expression and emotional, social and behavioral development (“ESBD”). The present levels of performance in the ESBD section of the IEP indicate the following: “Teachers report that [the student] can be a self-starter and will advocate for herself and her needs. In contrast, she can present as a victim and can be quite pushy and demanding when she believes that she is being slighted or that she has been treated unfairly. This seems to be the theme for her. She then becomes explosive when, in her mind, her needs have not been met.” (Petitioner’s Exhibit 4-6)
7. The IEP’s description of how the student’s accesses the general education curriculum states: “Due to her disability [the student] needs therapeutic behavioral support services in a small classroom setting in order to improve her anger management skills, coping skills and social skills in order to be more safe and successful in an academic setting and to have access to the general education curriculum.” (Petitioner’s Exhibit 4-6)
8. The IEP’s description of how the student’s disability affects her progress in the general education curriculum states: “Affection education and social skills training will be provided through the day. [The student] has been identified as student with a Serious Emotional Disturbance (Disability). She displays a pattern of explosive behaviors with

peers, moodiness, and difficulty coping with frustrations and anger. When she is distracted by her emotional issues, she is not able to focus on her academic work or make progress towards her goals that she would like to pursue.” (Petitioner’s Exhibit 4-6)

9. The IEP has one ESBD goal: “[The student] will reduce incidents of aggression or emotional shutdown by consistently using positive coping strategies to cope and manage feelings of anger and frustration at least 80% of the time as measured by her daily point cards.” The IEP notes the student was currently performing at 60% relative to this goal. (Petitioner’s Exhibit 4-6)
10. The IEP’s least restrictive environment (“LRE”) page indicates that the student requires specialized instruction in a small structured environment in order to access the general education curriculum and prescribes 26.5 hours of specialized instruction outside general education. The IEP does not prescribed extended school year (“ESY”) services. (Petitioner’s Exhibit 4-8, 4-10)
11. The IEP contains a post-secondary transition plan that indicates the student received a Casey Life Skills Assessment on February 13, 2015, an educational assessment and an employment assessment on April 6, 2015. The IEP notes the student’s academic, functional and employment interests and notes that she is interested in pursuing a career in criminal justice. It also notes her interest in human services and financial services and that she would like to work part time while attending college. (Petitioner’s Exhibit 4-11)
12. The Casey Life Skills Assessment is a reliable questionnaire if the questioner is familiar with the student and able to ask the student clarifying questions. Petitioner presented an expert witness who opined that she would recommend that the student be provided an assessment tool that can determine the student’s current aptitude and skills relative to her vocational interests and opportunities. (Witness 2’s testimony)
13. The IEP contains the following post-secondary goal: “Upon completion of high school [the student] will attend college to earn a degree in criminal justice and then attend law school.” And the IEP has the following measurable annual transition goal: “[The student] will identify and explore at least three career training/educational opportunities that will lead to a career as an attorney, utilizing the internet and attending career trainings fairs/presentations.” The post secondary training indicates: the student will have career skills classes for 4 hours per month. (Petitioner’s Exhibit 4-11, 4-12.
14. The student’s IEP was amended on June 17, 2015, after she returned to YSC to include 1 hour per week of behavior support services.⁵ The amendment form indicates the IEP was amended without an IEP meeting and someone other than the student signed the form. The student did not sign the form or authorize someone to sign on her behalf. (Student’s testimony, Respondent’s Exhibit 9-1)

⁵ The amendment form notes that the new services were to replace consultative behavioral support services on the IEP; however, the Hearing Officer notes that the IEP in the record does not have consultative behavioral support services.

15. The student remained at YSC until July 2015 when she was released and began living with her parent. (Student's testimony)
16. On September 11, 2015, the student's DYRS counselor contacted a DCPS representative by email and indicated: that the student "has been working towards her GED but was considering going back to get her diploma. She was taking high school classes while in residential recently at School A. She said that she previously attended [School A] but was kicked out for fighting a teacher. Can you let me know A) if and where she could attend school at this point B) if she would be able to enroll at his point in the year C) when her expected graduation date would be." (Respondent's Exhibit 10-9, 10-10)
17. Correspondence continued between the DCPS representative and the student's DYRS counselor over the next few weeks regarding identifying a school for the student. In an October 8, 2015, email to the student's YSC counselor the DCPS representative noted the following: "[The student] was stepped down to YSC, without DCPS notification and appropriate discharge planning with the DCPS LEA Representative. Therefore, a school was not identified for her... At this point you have to submit her through OSI location for school identification." (Respondent's Exhibit 10-6)
18. The DCPS representative offered to convene a meeting with the student on October 19, 2015, to identify an appropriate school placement. The student met with DCPS on October 26, 2015. Because of the student's history of behavioral difficulties a number of the schools DCPS approached for the student to attend declined to accept her. (Witness 4's testimony, Respondent's Exhibit 10-1, 10-2, 10-3)
19. The student wants to obtain her high school diploma and attend college. She is familiar with her transcript, and has 16.5 credits of the 24 credits she needs to graduate. (Student's testimony, Respondent's Exhibit 14-1)
20. The student has been accepted at School B and was offered an interview at School C. There are additional schools DCPS is considering for the student and is waiting on word of acceptance and/or for an invitation for the student to interview at the school(s). (Respondent's Exhibit 8-2, Witness 4's testimony)
21. School C is a non-public therapeutic special education school and provides speech and language and occupational therapy and counseling. School C has an OSSE certificate of approval ("COA"). The student was referred to School C in November 2015 by DCPS. In response School C talked with the student's DYRS counselor and was able to coordinate an interview with the student for December 18, 2015. School C got correspondence the night before the interview cancelling the interview. The school is still open to conducting the interview with the student and considering her for acceptance. The school has six high school classes and it is traditional school that cannot offer flexibility to allow the student to stay in her daytime workforce development program. (Witness 5's testimony)

22. The student decided she did not want to attend School C and did not attend the interview because she has acquaintances who attend the school who would have a negative influence on her. (Student's Testimony)
23. DCPS has also proposed the student attend School B a private special education school in the District of Columbia ("D.C.") the student has attended School B in the past. The student does not believe she can be successful at School B. She attended another campus of School B in Maryland for four months at the beginning of 2014. She was put out of the school for assaulting a teacher and was out of school for three months. She was then placed at School B in D.C. She stayed approximately a month and had difficulties getting along with peers and difficulty staying in the classroom. While attending School B the student felt on edge and defensive which affected her ability to learn and do her school work. While at this school the student was suspended twice and was sent home on several occasions due to her behaviors. The student stopped going to School B when she was incarcerated. (Student's testimony)
24. The student continues to live with her parent and is currently attending a job development program she has successfully attended for approximately four months from 10 a.m. to 2:00 p.m. on Mondays through Thursdays. In this program the student learns job readiness and skills. The student is not mandated by DYRS to attend and gets there on her own. The student has displayed no major behavior difficulties at the program that would cause her to be put out of the program. The director of the program noted that the student "can go from zero to 100" when she gets upset but is allowed to walk around to cool down when those instances occur. The vocational program has a flexible schedule so students can come in the morning or the afternoon and students work at their own place. It is not a standard school environment but an adult learning environment. (Student's testimony, Witness 2's testimony)
25. Petitioner presented an expert witness who expressed an opinion about the type of educational setting the student needs. In her opinion the student needs to feel a therapeutic alliance with individuals working with her. In all her prior programs she has been restricted. She wants to learn in an autonomous setting and give her chance to display what she has learned at these previous placements and be in a place to earn the credits she needs to obtain her high school diploma. (Witness 1's testimony)
26. Petitioner's expert witness also provided an opinion regarding the student's IEP - ESD goal in her most recent IEP.⁶ In her opinion the goal is inadequate given the student's severe mood dis-regulation and the IEP is missing a goal around safety. In her opinion the goal is not be sufficient because it is not operationally defined with strategies so anyone is it using the document will know how to implement the goal and do so with fidelity. The student's report from her most recent residential placement expresses that

⁶ Is it noted regarding this witness' testimony, the witness did not talk with anyone at the student's most recent residential facility, had no information of what interventions were used at that facility, spoke to no one who participated in the student's IEP meeting and the first time she spoke with the student was the morning of the hearing.

the student was meeting the IEP goal. (Witness 1's testimony, Petitioner's Exhibits 4-6, 5-2)

27. This expert witness also opined that the student requires a FBA in her new setting to look at the antecedents for her behaviors and to develop a BIP. (Witness 1's testimony)
28. The student's educational advocate who also testified as an expert witness offered her opinion that the student's current transition goal and opined that the goal simply states facts but does not give target actions for the student and the goal is not measurable. The witness opined that the goal is inappropriate because it does not point out the skills that the student needs to develop and the action she needs to take toward her career pursuits. (Witness 2's testimony)
29. The student's educational advocate was familiar with School B and noted that it has small classrooms with no windows and older students with behavior problems. The advocate believes the student should be placed at a credit recovery program the student has visited and wants to attend. The advocate believes the student would be successful in this program she has "buy-in" and may do better in a less formal classroom structure. (Witness 2's testimony, Petitioner's Exhibit 4-11)
30. Petitioner has requested that the Hearing Officer order DCPS to place and fund the student at a credit recovery program ("Program D"). The student interviewed for the program and was offered acceptance. Program D provides tutoring and mentoring, credit recovery and a GED to at risk students. Program D has a contract with DYRS to provide students with tutoring and credit recovery. Program D uses an external vendor to provide credit recover online content and has content certified teacher(s) to assist the student with the online courses. (Witness 3's testimony)
31. Program D serves students with severe emotional disabilities. There are usually no more than four students working in small groups or individually. In the case there is an emotional outburst by a student the school staff either sends the student home or calls external support staff that can assist with the student over the phone. (Witness 3's testimony)
32. Program D has two different funding models (1) a per hour/per class model. The credit recovery courses cost \$375 to \$395 per course and the tutoring associated with the credit recovery is \$65 per hour, and (2) a daily rate of \$225. Program D provides services at YSC and can do so if the student is re-incarcerated. (Witness 3's testimony)
33. Program D does not have an OSSE COA but can provide the student all courses she needs to obtain her high school diploma except D.C. History that hopefully will soon be arranged through a local private school. Program C has contract licensed social workers to provide related services that are billed separately. (Witness 3's testimony)

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. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. 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) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the adult student a FAPE by failing to evaluate the student in all areas of suspected disabilities by not conducting a FBA within two years prior to the date the complaint was filed.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence of on this issue.

A public agency must ensure that a reevaluation of a child with a disability conducted in accordance with 34 C.F.R. §§ 300.304 through 300.311 is completed at least once every three years, or, if the child’s parent or teacher requests one or the public agency determines one is warranted. 34 C.F.R. § 300.303. The IDEA does not mandate any particular assessment, as part of the evaluation or reevaluation process. See, e.g. *EL Haynes Public Charter School v. Frost*, 66 IDELR 287 (D.D.C, Sept, 11, 2015).

IDEA requires that an IEP team, "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); see also 34 C.F.R. § 300.324(a)(2)(i). "The statute requires school districts to conduct an FBA and implement a behavioral plan if there is a disciplinary change in placement of the student." See *Endrew F. by Joseph F. and Jennifer F. v. Douglas County Sch. Dist.* RE-1, 798 F.3d 1329, 1337 (10th Cir. 2015) (citing 20 U.S.C. § 1415(k)(1)(D)(ii)).

The evidence presented by Petitioner to support that the student should have had a FBA and BIP up to two years prior to the filing of the complaint included the expert testimony of Petitioner's witness who stated that the student's behavior in multiple school settings were replete with actions that often resulted in the student's removal from the schools and/or facilities. Although the student's IEP has a behavioral goal the student's recent psychiatric and psychological assessments clearly indicate the student has continued to demonstrate verbal and physical aggression.

As Respondent points out IDEA requires that in the case of student whose behavior impedes his or her learning or that of others an IEP team is to consider the use of positive behavioral interventions and supports and other strategies to address that behavior. At the student's most recent residential placement the student was expelled and returned to YSC for assaulting a staff member. It is clear that although interventions were in place these interventions did not prevent the student from exhibiting behaviors that resulted in her assaulting a staff member and being expelled from the facility. Petitioner's expert witness offered cogent testimony that the development of a FBA and a BIP would be a useful and a preferred tool to address the student's behaviors that have apparently been manifest and caused her to be removed from at least two educational setting in the past few years.

Consequently, despite the fact that there is only one instance outlined in IDEA that mandates that a student be provided and FBA and BIP to wit: in the case of disciplinary proceedings, the Hearing Officer concludes that the student's removal from School B in 2014 and her removal from her residential placement in May 2015, although not apparently treated a disciplinary matters disciplinary removals pursuant to 34 C.F.R. 300.530, nonetheless in the Hearing Officer's opinion, were actions akin to the type that would mandate a FBA being conducted and BIP being developed. Consequently, the Hearing Officer concludes that Petitioner sustained the burden of proof by a preponderance of evidence that the student should have had a FBA and BIP developed at least following her removal from her most recent residential facility and the failure to do so was a denial of a FAPE. The Hearing Officer directs in the order below that DCPS conduct a FBA and develop a BIP for the student within sixty (60) calendar days of the issuance of this order.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP by not including a BIP, adequate goals, and a meaningful transition plan.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence of on this issue.

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Id. at 206-07

The court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation." Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P., 540 F.3d 1143, 1148-49 (10th Cir. 2008); District of Columbia v. Walker, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) (the "adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

Once a student turns 16, the IDEA requires an IEP with a transition plan that includes (1) "appropriate measureable postsecondary goals" and (2) the "transition services needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). The postsecondary goals must be based on "age appropriate assessments related to training, education, employment, and where appropriate, independent living skills."

As previously pointed out, a BIP is only required under the IDEA under 20 U.S.C. § 1415(k)(1) when a student violates a code of student conduct and faces a disciplinary change in placement. In the previous issue the Hearing Officer concluded the student should have been provided a FBA and a BIP developed soon after she returned to YSC from her most recent residential placement. Therefore, the Hearing Officer finds it unnecessary to discuss the BIP in this issue.

The evidence presented by Petitioner included the expert testimony of two witnesses. One who opined that the student's IEP's ESBD goal was inadequate because it was not operationally defined with strategies so anyone using the goal could do so in the same way. The other expert witness averred that the student's IEP transition plan was inadequate because it was not based on an assessment that ascertained the student's current skills and abilities relative to her career pursuits rather than a questionnaire administered to the student that only identified the student's career interests and because the transition goal lacked action steps for the student to take toward her area of career interest. In both instances the expert witnesses attempted Monday morning quarter backing the student's IEP to offer an opinion that the IEP was and is inappropriate. Respondent, on the other hand, did not present any witness who countered this expert testimony, except the one IEP team member who did testify and stated that during the April 2015 IEP meeting there was no concern raised by any team member about these two challenged areas of the IEP.

Despite the fact that the psychologist did not meet with the student until the day of the hearing she provided cogent testimony based on her expertise by reviewing the student's extensive educational record including evaluations focused on the student's academic and social emotional functioning and expressed that given the student's behavior history at the time the IEP was developed the ESBD goal was inappropriate. The other expert witness offered clear testimony that the transition plan when it was developed was based on an insufficient assessment. Absent

specific testimony to refute this expert testimony the Hearing Officer concludes that Petitioner met the burden of proof by a preponderance of the evidence on this issue, albeit it slight, that the student's IEP at least in regard to the student's social emotional goals and the transition plan was not reasonably calculated to provide her education benefit.⁷ Consequently, in the order below the Hearing Officer directs that DCPS review any and all current evaluations including the FBA ordered as result of the decision and review and revise the student's IEP as appropriate including updating her social emotional and behavioral goals and including a BIP.

ISSUE 3: Whether DCPS denied the adult student a FAPE by failing to provide a special education placement during school year (“SY”) 2015-2016.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. Additionally, when determining the Least Restrictive Environment of a student, “in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.” 34 C.F.R. § 300.116(d).

IDEA requires that “consistent with § 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.” 34 C.F.R. §300.327. This requirement is also contained in 34 C.F.R. § 300.501(b) (“the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to – (1) the identification, evaluation, and the educational placement of the child.”). In this case the placement decision should include the student.

The evidence demonstrates that when the student was released from her residential placement in May 2015 and immediately returned to YSC there was no meeting at which another school was determined for the student. The evidence also demonstrates that when the student was released from YSC by DYRS during the summer of 2015 DCPS took no action to identify a school for the student.⁸ Soon after the start of SY 2015-2016 the student's DYRS counselor contacted DCPS in search of school the student could attend.

⁷ Respondent noted in its closing argument that in the District of Columbia courts have held that the absence of an adequate transition plan with adequate transition services is not a FAPE violation where the remainder of the IEP is appropriate. *Patterson v. D.C.*, 965 F.Supp.2d 126, 131 (D.D.C. 2013); see also *Sinan L. v. Sch. Dist. of Philadelphia*, 293 Fed.Appx. 912, 914–15 (3d Cir.2008) (transition plan that was “left largely blank” did not violate IDEA). As the court put it, the absence of an adequate transition plan is “a mere procedural violation.” *Id.* However, the Hearing Officer distinguished the present case from the one Respondent cited. This case, however, demonstrates not only an inappropriate transition plan but also the lack of a BIP and the inadequacy of the ESBD goal. That together rendered the IEP inappropriate.

⁸ The Hearing Officer takes administrative notice that DCPS is the LEA for the school the student attended at YSC upon her return to the District of Columbia in May 2015.

It was not until late October 2015 that a meeting was held to begin the process of identifying a school placement for the student. DCPS at that point made efforts to secure a placement for the student, however, because of her history of behavioral difficulties a number of the schools declined to accept the student. To date, DCPS has secured a single school that will accept the student but it is a school the student has previously attended and is unlikely to attend. Consequently, the Hearing Officer concludes that despite DCPS' efforts to identify a location since October 2015, the student educational placement could have and should have been determined either soon after she left her last residential placement or at latest when she was released from YSC. Consequently, the Hearing Officer concludes that because DCPS did not take immediate action upon the student's release from YSC to identify a school for student, DCPS denied the student a FAPE in that regard. As result, the Hearing Officer in the order below directs DCPS to convene a meeting with the student and determine an appropriate educational placement.

Remedy:

"[C]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." Branham, 427 F.3d at 12

Petitioner has requested as a remedy the student be placed at Program D despite the fact that program D does not have an OSSE COA. The Hearing Officer is unconvinced by the evidence presented as to Program D that the student should be placed there as a prospective placement. First, the evaluations of the student in the record clearly indicate that the student has a severe bipolar disorder and that she has a history of outbursts and physical and verbal aggression that have caused her to be removed and expelled from schools and facilities in the past. The testimony of the witness as to Program D and how it would handle the student's behaviors should such outbursts occur were limited to allowing her time to cool down and calling someone outside the program to assist in addressing such an incident with the student.

Although Program D has contract service providers who are available to provide related services, there was no indication as when those providers are present and available to address the student's behavioral concerns. There was testimony that despite the student's apparent success in and affinity for her current vocational training program she has on occasion displayed outbursts at that location. The evidence demonstrates that Program D is not the student's least restrictive environment and despite the fact that it can provide the student credits toward her high school diploma and appears to be reasonably priced, the Hearing Officer concludes that Program D is not an appropriate prospective placement for the student given the nature and severity of the student's disability.

Although there was testimony from Petitioner's expert witness that the student wants the opportunity to demonstrate what she has learned in her previous more restrictive settings, that expert did not talk with anyone at the student's most recent residential facility, had no information of what interventions were used at that facility, spoke to no one who participated in

the student's IEP meeting and she had just met the student the morning of the hearing. The Hearing Officer is not convinced by that testimony in contrast to the weight of documentary evidence of the student's severe emotional disability and behaviors of verbal and physical aggression that a program that is not a full therapeutic setting with staff and facilities available to address her emotional concerns and that has not been vetted and approved by the OSSE COA process is appropriate for this student particularly given there are other OSSE COA approved schools that are available to the student that DCPS has offered and/or has made referrals to for the student to attend.⁹

Consequently, the Hearing Officer does not conclude that Program D meets the standards espoused in Branham and concludes that DCPS should continue to explore school placement options for the student with dispatch to determine an appropriate long term placement for the student where her IEP can be fully implemented and the full spectrum of her social and emotional needs can be met while she pursues and obtains her high school diploma. The Hearing Officer directs in the order below that DCPS convene a meeting that includes the student where the proposed school placements can be identified and discussed and agreed upon so the student may resume her education as promptly as possible.

In the meantime, however, until such an educational placement is determined the Hearing Officer in the order below grants Petitioner as compensatory education for the denials of FAPE determined herein DCPS funding of credit recovery courses and corresponding independent tutoring hours so that the student can immediately get under way working toward her high school diploma until the longer term educational placement is determined.

Compensatory Education

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

The Hearing Officer concludes that based upon the evidence that the student is seeking to complete her high school diploma and has 16.5 credits of the 24 needed, the Hearing Officer

⁹ Respondent points out in its written closing statement: "A recent decision from the District Court, Dobbins ex rel. A.D. v. District of Columbia, 2016 WL 410995 (D.D.C. Feb. 2, 2016), upholding a Hearing Officer's denial of a petitioner's request for prospective placement at a non-COA residential treatment center based upon the Hearing Officer's application of D.C. Code § 38-2561.03(b)(2), which provides that a Hearing Officer may only make a placement in a nonpublic special education school or program that lacks a valid Certificate of Approval from OSSE if the hearing officer has determined that: (A) There is no public school or program able to provide the student with a free appropriate public education; and (B) There is no nonpublic special education school or program with a valid Certificate of Approval that meets the requirements of D.C. Code § 382561.03(a)(2).2 Id. at *2, 4-5.

concludes that the appropriate compensatory services that will assist toward putting the student in the stead she would had the denials of FAPE not occurred is two credit recovery courses and corresponding tutoring to assist the student in completing those courses.

ORDER: ¹⁰

1. DCPS shall, within sixty (60) calendar days of the issuance of this order, conduct a FBA and a vocational assessment of the student and develop a BIP contingent upon the student's signing an evaluation consent form.
2. DCPS shall within ten (10) school days of issuance of this order, authorize funding for the student to complete two independent online credit recovery courses at a cost not to exceed \$390 per course as compensatory education and to be used by Petitioner with a provider of her choice by December 31, 2016.
3. DCPS shall within ten (10) school days of this issuance of this order provide the student as compensatory education 100 hours of independent tutoring at the DCPS/OSSE prescribed rates to be used by Petitioner by December 31, 2016, to be used to assist her in completing the two online credit recovery classes noted above.
4. DCPS shall, within 20 twenty calendar days of the issuance of this order, convene a MDT meeting with the student in attendance where the proposed school placements are identified and discussed and agreed upon so the student may resume her education as promptly as possible. At this meeting the MDT shall also review the student's evaluations that are available and review and revise the student's IEP to revise the student's transition plan, incorporate the BIP directed to be developed by this order,¹¹ review the student's LRE and determine an appropriate placement and location of services for the student for the remainder of SY 2015-2016 and for 2016-2017 or until the student obtains a high school diploma or otherwise ages out special education eligibility.
5. Petitioner shall make a good faith effort to interview at any potential school placements that require a student interview as a prerequisite to an offer of acceptance that are considered by the MDT in fulfilling the directive in paragraph # 4 above.

¹⁰ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

¹¹ If the evaluations directed to be conducted by this order are not completed by the date of this meeting DCPS shall move forward with the placement discussion and determination and convene a second meeting within ten (10) business days of the completion of the evaluations to carry out the full dictates of this order. The date of this second meeting shall not exceed the time frame in provision number #1 above: 60 calendar days from the date of the issuance of this order.

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 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: March 6, 2016

Copies to:

Petitioner Representative: Carolyn Houck, Esq. & Steve Nabors, Esq.
Respondent Representative: Steven Rubenstein, Esq.
OSSE-SPED (due.process@dc.gov)
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(CHO) Chief Hearing Officer