

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

PARENT,
on behalf of STUDENT,¹

Date Issued: May 5, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0048

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: April 23 and 26, 2019

Respondent.

Office of Dispute Resolution, Room 423
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by not comprehensively reevaluating Student for special education since 2012 and by failing to provide Student appropriate Individual Education Programs (IEPs) and behavioral supports in the 2017-2018 and 2018-2019 school years.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on February 15, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on February 19, 2019. On March 7, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On March 8, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

On April 15, 2019, DCPS, by its counsel, filed a motion to dismiss, as time-barred, Petitioner's claims which accrued more than two years before the filing of her due process complaint. On April 16, 2019, Petitioner's counsel responded by email that Petitioner was not seeking relief for alleged harm outside the IDEA two-year statute of limitations. On April 23, 2019, at the start of the due process hearing, DCPS' counsel withdrew DCPS' motion to dismiss.

The due process hearing was convened before the undersigned impartial hearing officer on April 23 and 26, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by COMPLIANCE CASE MANAGER (Day 1), by CASE MANAGER 2 (Day 2) and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified at the hearing and called as additional witnesses EDUCATIONAL ADVOCATE 1, EDUCATIONAL ADVOCATE 2, CLINICAL PSYCHOLOGIST and OPHTHALMOLOGIST. DCPS called as witnesses MOBILITY SPECIALIST, VISION TEACHER, Case Manager 2, CASE MANAGER 1, SCHOOL SOCIAL WORKER, and LEA REPRESENTATIVE. Mother was recalled to testify in rebuttal.

Petitioner's Exhibits P-1 through P-54 and DCPS' Exhibits R-1 through R-32 were all admitted into evidence without objection. Counsel for the parties made oral closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination, as certified in the March 13, 2019 Prehearing Order, are:

- a. Whether District of Columbia Public Schools (DCPS) failed to timely and comprehensively reevaluate the student since 2012, with a triennial evaluation, and in response to the parent's request for evaluations and in response to the student's needs;
- b. Whether DCPS failed to implement the student's IEP, including hours of specialized instruction and related services, during the 2017-2018 and 2018-2019 school years by failing to provide Student's IEPs to Student's teachers;
- c. Whether DCPS failed to provide appropriate behavioral supports when it failed to perform a Functional Behavioral Assessment and put a Behavior Intervention Plan in place, beginning during the 2017-2018 school year, while the student exhibited inappropriate behaviors and
- d. Whether DCPS failed to develop and/or provide the student with an appropriate IEP or placement and/or Location of Services for the 2017-2018 and 2018-2019 school years in that the IEPs provided inadequate hours of specialized instruction for the 2017-2018 school year and the hours were decreased for the 2018-2019 school year; the IEPs provided for insufficient Behavioral Support Services; the inclusion setting was not appropriate for Student; placement in a large school with three floors, with many areas accessible only by steps, was unsuitable and the IEP did not address Student's need for a small therapeutic day school.

Petitioner, by counsel, withdrew the second issue, Failure to Implement, prior to the start of the hearing.

For relief, the parent originally requested that the hearing officer award Student compensatory education for denials of FAPE alleged in the complaint and order Student's IEP team to meet and provide Student a full time IEP in a self-contained setting to be implemented at a school for the visually-impaired and blind or other small, therapeutic, day school; order DCPS to conduct a Functional Vision Assessment, Assistive Technology Evaluation, Comprehensive Psychological Evaluation, functional behavioral assessment (FBA), OT Evaluation, Speech and Language Evaluation with Braille Assessment, Comprehensive Vocational Evaluation for students with visual impairments and blindness, and an evaluation for functional orientation and mobility. At the beginning of the due process hearing, counsel agreed that DCPS has now assessed Student with a speech-language evaluation, a functional vision assessment, a functional orientation/mobility assessment and an FBA. These assessments have all been reviewed by Student's multidisciplinary team. An occupational therapy assessment is in progress. Petitioner also withdrew her request for a comprehensive psychological evaluation of Student.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother. Testimony of Mother.
2. Student is eligible for special education under the IDEA disability classification Multiple Disabilities, based upon underlying impairments Visual Impairment including Blindness and Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD). Exhibit R-2.

3. Student has received ophthalmic care for over 14 years at HOSPITAL. Student has congenital glaucoma, resulting in near blindness in the left eye and diminished vision in the right eye. Student has had multiple surgeries for this condition and is on medications to control intraocular pressure caused by the glaucoma. Exhibit P-6. Student's vision is currently stable with medication treatment. Testimony of Ophthalmologist.

4. In a 2012 DCPS psychological evaluation of Student, Mother and a teacher completed Conners Third Edition (Conners 3) rating scales. The teacher rated Student's attention and hyperactivity within the Clinically Significant/Highly Elevated ranges. Mother rated Student's attention and hyperactivity within the Average ranges. Due to the discrepancy between school and home ratings, it was concluded that Student's symptoms of hyperactivity and inattention at school could not best be accounted for by ADHD. Exhibit R-10.

5. In spring 2018, Clinical Psychologist assessed Student's cognitive abilities using the Wechsler Intelligence Scale for Children, 5th Edition (WISC-V). Student's WISC-V scores were generally in the Average range. Student's full-scale IQ and General Ability Index (GAI) scores, both 100, fell in the Average range. Exhibit P-16.

6. Student's January 14, 2015 IEP provided for Student to receive 5 hours per week of Specialized Instruction and 30 minutes per month of Behavioral Support Services in general education, and 4 hours per month of Specialized Instruction and 1 hour per month of Orientation and Mobility Services outside general education. The IEP also provided for numerous classroom accommodations to address Student's low vision and focus and attention challenges. Exhibit R-13.

7. In November 2015, when Student attended PRIOR SCHOOL, Student's

case manager made an Analysis of Existing Data (AED) instead of obtaining a comprehensive psychological reevaluation of Student. The data collected, included standardized test scores, a classroom observation and teacher reports. The data showed that Student had trouble attending to work, was distracted in whole group instruction, and was constantly up and down, out of the seat and moving around the classroom. In mathematics and written expression, Student performed below grade level. Exhibit R-13.

8. In December 2015, Student was administered the Woodcock Johnson IV Tests of Academic Achievement (WJ-IV ACH). Student had difficulty with reading fluency, difficulty with words that are harder to pronounce, difficulty with fractions and decimals and money, and difficulty with more advanced math requiring Student to reduce and divide fractions, and Student struggled to write for an extended length of time. Exhibit R-14.

9. DCPS conducted a Functional Vision Assessment (FVA) of Student in 2015. Testimony of Vision Teacher.

10. On December 15, 2015, Student's eligibility for special education was confirmed under the Visual Impairment disability classification. Exhibit R-1.

11. Student has attended CITY SCHOOL since the 2017-2018 school year. At the end of Term 1 for that year, Student received F's in Biology and Spanish and passing grades in other courses. By the end of Term 2, Student's grades had declined. Student received F's in all core courses. For the 2017-2018 school year, Student failed all core classes except for attaining a "D" in English. Exhibit P-23. Student was able to obtain credit for two failed classes in the summer school credit recovery program. Testimony

of Mother. In the 2018-2019 school year, as of December 27, 2018, Student was failing all core courses, except for World History/Geography. Exhibit P-26.

12. Student's December 4, 2017 IEP identified Mathematics, Reading, Written Expression and Vision as areas of concern. The IEP provided for Student to receive 8 hours per week of Specialized Instruction in the general education setting. The IEP also provided for 3 hours per year of Specialized Instruction consultation services and 30 minutes per month of Behavioral Support consultation services. The IEP also provided for preferential seating, untimed assessments, enlarged print materials and other classroom accommodations. Exhibit R-1.

13. In the 2017-2018 school year, City School attempted to set Student up with a social worker out of concerns for Student's emotional challenges. Student was not receptive to working with a social worker. Testimony of Case Manager 1.

14. In March 2018, Mother requested Case Manager 1 to have Student evaluated for ADHD. After speaking to LEA Representative and the City School school psychologist, Case Manager 2 recommended to Mother that to expedite the process, she obtain a diagnosis for Student from an outside psychiatrist. Testimony of Case Manager 1. On July 2, 2018, Clinical Psychologist diagnosed Student with Attention Deficit-Hyperactivity Disorder (ADHD), Combined Type. Exhibit P-16.

15. At the beginning of the 2018-2019 school year, City School proposed self-contained classes for Student. Mother and Student both objected. Testimony of Case Manager 2.

16. In October 2018, SCHOOL PSYCHOLOGIST reviewed Clinical Psychologist's evaluation of Student and conducted additional assessments, including the Behavior Rating Inventory of Executive Function - Second Edition (BRIEF 2) and

the Conners Rating Scale - Third Edition (Conners 3). Both rating scales were completed by Student and a Teacher. School Psychologist also interviewed the teacher and Student and conducted a classroom observation. On the Conners 3 rating scales, the teacher's responses indicated Very Elevated/Clinically Significant scores for most areas, including Inattention, Hyperactivity/Impulsivity, Executive Functioning and Defiance/Aggression. In her November 2018 report, School Psychologist endorsed that Student displayed behaviors "similar to ADHD" through difficulty focusing, inattention and hyperactivity within the general education and special education settings, and that Student's current classroom grades did not reflect Student's ability to perform. Exhibit R-7.

17. On November 26, 2018, City School convened an eligibility team meeting for Student. At this meeting, Student's disability classification was changed to Multiple Disabilities, based on the underlying disabilities Vision Impairment including Blindness and OHI-ADHD. Exhibit P-33.

18. Student's City School IEP team was convened on December 3, 2018 to revise Student's IEP. The December 3, 2018 IEP identified Mathematics, Reading, Written Expression, Vision and Emotional, Social and Behavioral Development as areas of concern. The IEP provided for Student to receive 16 hours per week of Specialized Instruction in the general education setting, 30 minutes per month of Behavioral Support Services, and 60 minutes per month of Consultation Specialized Instruction Services. Exhibit R-2. This was an increase in services over the December 4, 2017 IEP. The December 3, 2018 IEP states 16 hours "per mon", instead of per week, of Specialized Instruction. This was a typographical error. Testimony of Case Manager 2.

19. At the December 3, 2018 IEP meeting, School Social Worker told the IEP

team that she had been working with Student since the start of the school year to work on attendance, motivation, higher grades and scheduling. At the meeting, Case Manager 2 recommended self-contained classes. Exhibit P-37. Student continued to object to being placed in self-contained classes, but was willing to go to the self-contained classroom for English. As of the due process hearing date, Student was attending self-contained classes for English for 4 hours per week and receiving the remainder of the IEP Specialized Instruction, 12 hours per week, in the general education setting. Testimony of Case Manager 2.

20. School Social Worker completed a Functional Behavior Assessment (FBA) of Student in March 2019. Exhibit P-19. The FBA was discussed at the March 18, 2019 resolution session meeting for this case. School Social Worker has also developed a Behavior Intervention Plan (BIP) for Student, but as of the due process hearing date, the BIP had likely not been considered by Student's IEP team. Testimony of School Social Worker.

21. Student has a long-standing negative perception of self-contained classes and therapeutic day schools because of a belief that the children in those settings are much more severely impaired. Due to Student's objection and Student's threat not to attend classes at all, the City School team has "compromised" and limited Student's removal from the general education setting. At the March 9, 2019 resolution session meeting in this case, there was agreement that Student's IEP would be amended to provide for Specialized Instruction to be provided 8 hours per week in general education and 8 hours per week in the self-contained setting. It was also agreed at this meeting that Student's Behavioral Support Services would be increased to 120 minutes per month. Exhibit P-40. Mother now supports placing Student in the self-contained

setting for all 16 hours per week of Specialized Instruction. Testimony of Mother.

22. Mobility Specialist conducted an Orientation and Mobility Assessment of Student in March 2019. She accompanied and observed Student walking outside of school. Student did fine walking, could read street signs, bus numbers and house numbers, sent emails by mobile phone while walking, had good depth perception, was able to run down steps to the metro entrance and ride the escalator back up to the street. Mobility Specialist also observed Student at City School. She saw that Student was able to transition around the hallways and walk up and down the stairways and generally was fine navigating within the school. Student told Mobility Specialist about having fallen once this year in the school stairway. Student explained that Student was just skipping up the stairs and tripped. Testimony of Mobility Specialist.

23. Vision Teacher conducted a Functional Vision Assessment of Student in February 2019, which included a school observation. Vision Teacher observed Student in the classroom and hallway. Student moved very quickly. Student told Vision Teacher about playing sports with friends outside of school and using the Uber ride service independently for transportation. Despite Student's impaired vision, Student did not demonstrate any issues navigating independently within the school building. Testimony of Vision Teacher.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of

production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

- a. Has DCPS failed to timely and comprehensively evaluate Student since 2012, with a triennial evaluation and in response to the parent's request for evaluations and to Student's needs?

Petitioner alleges that DCPS denied Student a FAPE by not timely conducting special education reevaluations after 2012, as required by the IDEA. DCPS responds that Student was timely reevaluated in fall 2015 and in fall 2018. Petitioner has the burden of persuasion on this claim.

The IDEA requires that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. See 34 CFR § 300.303. Generally, when a child has been evaluated for special education eligibility and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. § 300.304(b)(1-3), (c)(4, 6). IDEA evaluations depend upon the exercise of professional

judgment by the child's educators, which is entitled to a reasonable degree of deference. *Perrin on behalf of J.P. v. Warrior Run Sch. Dist.*, No. 4:13-CV-2946, 2015 WL 6746306 (M.D.Pa. Sept. 16, 2015), report and recommendation adopted *sub nom. Perrin v. The Warrior Run Sch. Dist.*, No. 13-CV-02946, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015), *citing County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005).

The evidence in this case establishes that Student was reevaluated for special education eligibility and Student's eligibility was confirmed at Prior School in November and December 2015. Petitioner does not challenge the adequacy of those reevaluations, which occurred outside the IDEA statute of limitations period for this case.

In the spring of 2018, Mother requested that Student be evaluated for Attention Deficit-Hyperactivity Disorder. Student's City School case manager suggested that Mother obtain a psychiatric diagnosis, outside of DCPS, to expedite the process. Mother did obtain an assessment by Clinical Psychologist, who by July 2018, diagnosed Student with ADHD. In November 2018, DCPS' School Psychologist confirmed the ADHD diagnosis and on November 26, 2018, the City School eligibility team determined that Student had an IDEA OHI-ADHD impairment, in addition to the previously determined Vision Impairment.

Student had long shown signs of having ADHD. When Student was evaluated in 2012 by a DCPS school psychologist, the responses by Student's teacher to the Conners 3 rating scales, used to assess for ADHD, indicated that Student's attention deficits and hyperactivity were within the Clinically Significant/Highly Elevated ranges. At that time, Student was not found to have an IDEA OHI-ADHD impairment, because Mother's responses to the Conners 3 questionnaire did not indicate that Student showed

ADHD type behaviors at home. After 2012 DCPS had continuing cause to suspect that Student had an ADHD disability. For example, DCPS' December 2015 Analysis of Existing Data (AED) reported that Student had trouble attending to work, was distracted in whole group instruction and was constantly up and down and in and out of the seat, moving around the classroom. Because ADHD remained an area of suspected disability for Student, the District had a duty to regularly assess Student for attention and hyperactivity impairments in order to ensure that the DCPS IEPs met Student's needs. DCPS violated this duty by not reevaluating Student for ADHD until November 2018.

DCPS' failure to reevaluate Student for ADHD, prior to November 2018, was a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia*, 924 F. Supp. 2d 273, 280 (D.D.C. 2013) (District's failure to adequately evaluate student was a procedural error.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2).

Student was determined to have a qualifying OHI-ADHD disability only after the independent ADHD assessment of Student in spring 2018 and DCPS' reevaluation in November 2018. Student's IEP was updated in November 2018 to address this impairment. I find it more likely than not that, had Student been periodically reevaluated for ADHD after 2012, Student's OHI-ADHD disability would have been

recognized much sooner and Student's IEP would have been revised to address Student's ADHD related needs.

Petitioner in this case limits her claims to violations by DCPS that occurred within the IDEA's two-year statute of limitations period, that is, in the two years before the due process complaint was filed on February 15, 2019. *See* 34 CFR § 300.511(e).² I conclude that DCPS' failure to comprehensively reevaluate Student, specifically for ADHD, from February 15, 2017 until November 2018, caused a deprivation of educational benefit. This procedural violation was a denial of FAPE.

- b. Did DCPS fail to develop and/or to provide Student with an appropriate IEP or placement and/or Location of Services for the 2017-2018 and 2018-2019 school years in that the IEPs provided inadequate hours of specialized instruction for the 2017-2018 school year and the hours were decreased for the 2018-2019 school year; the IEPs provided for insufficient Behavioral Support Services; the inclusion setting was not appropriate for Student; placement in a large school with three floors, with many areas accessible only by steps, was unsuitable and the IEP did not address Student's need for a small therapeutic day school?

Petitioner alleges that the City School IEPs for the 2017-2018 and 2018-2019 school years were inappropriate for Student because the IEPs provided insufficient hours of Specialized Instruction and Behavioral Support services and the educational placement, primarily in the general education setting, at City School was not appropriate. Although Student has attended City School since the start of the 2017-2018 school year, only Student's December 4, 2017 and December 3, 2018 IEPs were offered into evidence. Therefore, I consider the appropriateness of only these two IEPs for

² *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

34 CFR § 300.511(e).

Student.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures 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.

Moradnejad at 274-75. Here, the Parent does not allege that DCPS failed to comply with the IDEA's procedural requirements in developing Student's IEPs. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry, were DCPS' December 4, 2017 and December 3, 2018 IEPs appropriate for Student?

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an

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

See also Z. B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018) (In *Andrew F.*, Supreme Court held that the IDEA requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard markedly more demanding than requiring merely some educational benefits. *Z. B.* at 517.)

Through the testimony of her expert witnesses, Educational Advocate 2 and Clinical Psychologist, Petitioner established a *prima facie* case that the City School IEPs were inappropriate for Student. Therefore, under the Special Education Student Rights Act, the burden of persuasion as to the appropriateness of the respective December 4, 2017 and December 3, 2018 IEPs falls on DCPS.

I consider first the suitability of City School as the school location for Student. The IDEA requires that students with disabilities be educated in the least restrictive environment (LRE) appropriate for that Student. In selecting the LRE, consideration must be given to any potential harmful effect on the Student or on the quality of services that he or she needs. *See* 34 CFR §§ 300.114(a)9, 300.116(d). Petitioner alleges that due to Student’s vision impairment resulting from congenital glaucoma, City School is not

suitable for Student, because it is a large school with three floors, with many areas accessible only by steps. However, the hearing evidence was overwhelming that despite having a serious vision impairment, Student is able to safely navigate within the City School building, including using the stairways and transitioning the hallways between classes. Student did fall one time in a school stairway, but by Student's account, Student tripped when skipping up the steps, not on account of the stairway's dangerousness for Student. Moreover, Student is able to regularly use the public stairways to access the Metro train platform. Also, City School has provided Student a pass for school elevators, which Student declines to use. I find that DCPS has met its burden of persuasion that the physical layout of the City School building does not have a "harmful effect" on Student and that City School, as a site location, is not otherwise unsuitable for Student.

With regard to the appropriateness of the Specialized Instruction Services and the educational setting for Student within City School, at the start of the 2017-2018 school year, Student was placed for a short time in a self-contained classroom for one class and in the general education classroom for the rest of the day. Student did not like being in the self-contained classroom. After obtaining Mother's agreement, City School provided for Student to receive all services in the general education setting.

In the term preceding the City School December 4, 2017 IEP team meeting, Student received passing grades in all classes except Spanish and Biology, including a C- in Algebra and a C+ in English. In the December 4, 2017 IEP, the IEP team provided for Student to receive 8 hours per week of Specialized Instruction, all in the general education setting. I find that based on Student's educational progress up to December 2017, DCPS has met its burden of persuasion that these special education services and the general education setting were reasonably calculated to enable Student to continue

to make appropriate progress. *See Z. B., supra*, 888 F.3d at 524 (Inquiry calls for evaluating an IEP as of the time it was created rather than with the benefit of hindsight.)

Because an “IEP must be ‘tailored to the unique needs’ of each child, *Rowley, supra* at 181, 102 S.Ct. 3034, it must be revised regularly in response to new information regarding the child’s performance, behavior, and disabilities. *See* 20 U.S.C. § 1414(d)(4).” *Pinto v. District of Columbia*, 938 F. Supp. 2d 25, 30 (D.D.C. 2013). By the end of the second advisory period, in mid-January 2018, Student’s grades had dropped dramatically and Student was failing all core classes. Student’s special education case manager recognized by mid-year that Student should be placed in the self-contained classroom for core academic classes. However, Mother said not to change the placement because Student would refuse to go to the self-contained classroom. Student’s IEP was not revised.

To “meet its substantive obligation under the IDEA,” the District “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S.Ct. at 999. Therefore, when Student’s performance declined in the middle of the 2017-2018 school year, DCPS was required to timely convene Student’s IEP team, to include the parent, to review and revise, as appropriate, Student’s December 4, 2017 IEP. *See* 34 CFR § 300.324(b). While the D.C. Regs. require informed, written parental consent before making any change in a student’s educational placement, *see* 5-E DCMR § 3026.1(b), the District may not fail to ensure that a student’s IEP is revised appropriately when warranted, even in the face of opposition from the parent and the student. *See* 5-E DCMR § 3026.1(b). (A dissatisfied parent may then file for due process or even revoke consent for the provision of special education services. *See* 34 CFR § 300.300(b)(4).)

I conclude that the hearing evidence establishes that from the end of the second advisory period of the 2017-2018 school year, DCPS' IEPs for Student which provided for all Specialized Instruction in the general education setting, were not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Andrew F.*, 137 S.Ct. at 1001. This was a denial of FAPE.

Petitioner alleges also that the December 4, 2017 and December 3, 2018 City School IEPs did not provide adequate Behavioral Support Services to meet Student's needs. The IDEA requires that Behavioral Support Services, as IEP related services, be provided to a student as required to assist the student to benefit from special education. *See 34 CFR § 300.34(a)*. Student's December 4, 2017 IEP provided no direct Behavioral Support Services. The December 3, 2018 IEP provided for Student to receive 30 minutes per month of Behavioral Support Services.

Case Manager 1 testified that beginning in the 2017-2018 school year, he tried to get Student set up with the school social worker, but Student was not receptive. However, School Social Worker testified that she had been meeting with Student 1-2 times per week since around February 2018. She testified that Student was pretty stable emotionally, very social and quite popular with peers. At the resolution meeting in this case, DCPS agreed to increase Student Behavioral Support counseling services to 120 minutes per month, although School Social Worker opined in her testimony that this level of services was not typical for a student like Student, for whom social-emotional concerns were not a significant issue.

Based on School Social Worker's testimony that social-emotional concerns were not a significant issue for Student, I conclude that DCPS has met its burden of persuasion, that with respect to Behavioral Support Services, the December 4, 2017 and

December 3, 2018 IEPs, were appropriate.

- c. Did DCPS fail to provide appropriate behavioral supports when it failed to perform a Functional Behavior Assessment and put a Behavior Intervention Plan in place beginning during the 2017-2018 school year while Student exhibited inappropriate behaviors?

Lastly, Petitioner alleges that DCPS denied Student a FAPE by not conducting a Functional Behavior Assessment (FBA) and not developing a Behavior Intervention Plan (BIP) in the 2017-2018 school year. Petitioner has the burden of persuasion on this claim. The IDEA requires that, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). *See, also*, Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.) Functional Behavior Assessment or "FBA" refers to a systematic set of strategies that are used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. *See Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017) An LEA's failure to complete an FBA and develop a Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

Student's City School Case Manager for the 2017-2018 school year, Case Manager 1, testified that Student was very resistant to using vision supports in the general education classroom, such as large-font documents, magnifiers and an i-Pad, because

Student did not want to stand out as different from non-disabled peers. Student also strongly resisted being placed in the self-contained classroom and was not receptive to working with the school social worker. Educational Advocate 2 testified that in the 2017-2018 school year, besides refusing services, Student was sitting in with a “bad crowd” to avoid being teased and bullied. Educational Advocate 2 hypothesized that if Student had been provided a BIP, Student would now know how to accept, and would benefit from, the low vision accommodations in the City School IEP.

As discussed above in this decision, since the middle of the 2017-2018 school year, Student has failed most academic classes, despite having average cognitive abilities. Student’s behaviors very likely impeded Student’s learning and warranted the IEP team’s consideration of the use of positive behavioral interventions, such as an FBA and a BIP. I find that DCPS’ failure to conduct an FBA and develop a behavior intervention plan for Student, by the middle of the 2017-2018 school year, was a denial of a FAPE. *See Long, supra.*

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by failing to comprehensively reevaluate Student, specifically for ADHD, from February 15, 2017 until November 2018; by failing to ensure that Student’s IEP was revised, by the end of the 2017-2018 second advisory period, to provide for delivery of Student’s Specialized Instruction Services outside of the general education setting and by DCPS’ failure to conduct an FBA and develop a BIP for Student by the middle of the 2017-2018 school year.

For relief, Petitioner originally requested that DCPS be ordered to conduct a host of special education assessments, which have now been completed or are underway.

Petitioner continues to request that DCPS be ordered to fund Student's placement at a full-time school for the visually-impaired or another small, therapeutic day school. However, the IDEA requires that children with disabilities be placed in the "least restrictive environment" "so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate." *K.S. v. District of Columbia*, 2013 WL 4506969, 3 (D.D.C. Aug. 26, 2013) (citations omitted); *Z. B., supra*, 888 F.3d at 528 (To "the maximum extent appropriate," public schools provide students with disabilities an education in the "least restrictive environment" possible. *Id.*, citing 20 U.S.C. § 1412(a)(5)(A).)

To order Student's placement in a full-time special education school, would require a finding that the severity of Student's disability is such that Student's education in the self-contained classroom at City School could not be achieved satisfactorily. The hearing evidence does not support such a finding. Prior to the due process hearing, Student had been placed in a self-contained setting for only a few hours per week. In his hearing testimony, Case Manager 2 opined that Student should receive all Specialized Instruction Services, 16 hours per week, in the City School self-contained setting. The parent's expert, Educational Advocate 2, opined that Student needed a full-time special school placement for students with vision impairments. However, the evidence was overwhelming that despite having a severe vision impairment, Student is able to self-navigate around City School and gets along well with peers there. I found more persuasive Case Manager 2's opinion that Student should receive core academic classes in the self-contained setting at City School. I find that DCPS has met its burden of persuasion that at this point in time, Student's least restrictive environment is not a special school placement, apart from typically developing peers. *See, DeVries by*

DeBlaay v. Fairfax County Sch. Bd., 882 F.2d 876, 878 (4th Cir.1989) (“Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act.”) Student’s City School IEP must be revised to provide for all Specialized Instruction Services to be provided in the self-contained classroom setting. Due to the short period of time left in the 2018-2019 school year, if the parent agrees, DCPS may defer changing Student’s setting until the 2019-2020 school year. *Cf. Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (Asking whether setting aside placement order might disrupt child’s education.)

Petitioner also requests that Student be awarded compensatory education for the denials of FAPE in this case. The compensatory education remedy has been discussed in numerous judicial decisions in the District of Columbia. As U.S. District Judge Rudolph Contreras explained in *Lopez-Young v. District of Columbia*, 211 F.Supp.3d 42 (D.D.C. 2016),

When a school district denies a child a FAPE, [hearing officers] have “broad discretion” to fashion a remedy. *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (citation omitted); *accord Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015). “That equitable authority ... must include the power to order compensatory education.” *Boose*, 786 F.3d at 1056 (citing *Reid*, 401 F.3d at 522–23). Compensatory education is a remedy in the form of educational programs that “make up for prior deficiencies.” *Reid*, 401 F.3d at 522. An award of compensatory education must follow a “fact-specific” inquiry and 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.” *Id.* at 524. “To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.” *B.D. ex rel. Davis v. District of Columbia*, 817 F.3d 792, 798 (D.C.Cir.2016). (D.D.C. 2016)

Lopez-Young at 55. The compensatory education inquiry requires “figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.” *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017), citing *B.D.* at 799.

In her compensatory education proposal, Exhibit P-50, Educational Advocate 2 recommends that Student be awarded 50 hours of counseling and 200 hours of tutoring, as well as credit recovery through ACADEMY for failed classes not available through DCPS. She recommended the counseling because, she opined that with appropriate counseling and behavioral interventions since December 2017, Student would have developed the confidence to accept the classroom accommodations for vision impairment offered at City School, in order to better participate in the general curriculum and to be successful in school. She recommended the compensatory tutoring services, because Student has the capability to perform academically, but has failed most courses over the last two school years. I find Educational Advocate 2’s proposal for compensatory counseling and tutoring services to be appropriate and reasonably calculated to get Student back to the position where Student would have been, had DCPS timely comprehensively reevaluated Student for ADHD and ensured that Student’s IEP provided sufficient services, a suitable outside of general education placement and behavior interventions, as discussed in this decision.

Academy is apparently an internet school that provides on-line credit recovery courses. I decline to order DCPS to fund credit recovery classes from Academy for want of information on the Academy program, including whether it is approved by the D.C. Office of the State Superintendent of Education (OSSE) for students in the District or whether Academy classes are appropriate and needed to get the Student back to the

position where Student would likely be, absent the denials of FAPE found in this decision.

ORDER

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

ORDERED:

1. As compensatory education for the denials of FAPE in this case, not later than 15 business days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain for Student 200 hours of individual academic tutoring from a qualified instructor and 50 hours of counseling services from a qualified social worker or other mental health professional;
2. DCPS shall ensure that Student's IEP is revised, within 10 school days, to provide for all of Student's Specialized Instruction Services (currently 16 hours per week) to be provided in a self-contained classroom setting. If the parent agrees, DCPS may defer changing Student's classroom setting until the start of the 2019-2020 school year and
3. All other relief requested by the Petitioner herein is denied.

Date: May 5, 2019

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team