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Confidential

<p>Parent on Behalf of Student, Petitioner, v. District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”), Respondent. Case #s 2018-0188 & 2018-0191 Date Issued: October 30, 2018</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: October 9, 2018 October 11, 2018</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, October 30, 2018, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on October 9, 2018, and October 11, 2018, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112.

BACKGROUND AND PROCEDURAL HISTORY:

The student or ("Student") is age _____ and in grade _____.² Student resides with Student's parent ("Petitioner") in the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of other health impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). District of Columbia Public Schools ("DCPS") is Student's local educational agency ("LEA"). Student attends a DCPS school ("School A").

On July 24, 2018, Petitioner filed her due process complaint against DCPS. Petitioner alleges that Student's individual educational program ("IEP") developed on April 11, 2017, and/or the IEP developed on January 20, 2018, and/or the IEP developed on June 11, 2018, was inappropriate because the IEP did not: (1) prescribe speech and language and/or (2) include adaptive goals, and/or (3) include a multiple disability ("MD") classification to also include specific learning disability ("SLD"), and (4) prescribe a least restrictive environment ("LRE") in a therapeutic separate day school.

Petitioner also alleges that the April 11, 2017, IEP was inappropriate because it did not include any behavior support services ("BSS") and that the June 11, 2018, IEP was inappropriate because it did not prescribe more than 120 minutes per month of BSS in a general education setting and did not include a dedicated aide; that DCPS failed to implement Student's IEP during school year ("SY") 2017-2018 by failing to provide Student occupational therapy ("OT") services, and failed to provide Student appropriate BSS by failing to conduct a functional behavioral assessment ("FBA") and failing to develop a behavior intervention program ("BIP") during SY 2017-2018.

Finally, Petitioner alleges DCPS failed to comprehensively evaluate Student by not conducting a sufficiently comprehensive psychological evaluation and by not conducting a speech language evaluation. Petitioner alleges that Student's last psychological evaluation did not include social-emotional measures and/or academic achievement testing.

² The student's current age and grade are indicated in Appendix B.

DCPS' Complaint:

On July 25, 2018, DCPS filed a due process complaint against Petitioner. DCPS asserts that on October 16, 2017, DCPS conducted a comprehensive psychological evaluation of Student that was reviewed at a meeting on January 30, 2018, and neither Petitioner nor her attorney disagreed with the evaluation. DCPS asserts that at a meeting on June 11, 2018, Petitioner, through counsel, requested that DCPS fund an independent psychological evaluation ("IEE"). DCPS acknowledged the request and replied that it would respond without unnecessary delay. On July 5, 2018, DCPS informed Petitioner that it intended to file a due process complaint to defend its October 16, 2017, psychological evaluation.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer find that DCPS has denied Student a FAPE and order DCPS to revise Student's IEP to include counseling services, adaptive goals, BSS and a dedicated aide. Petitioner also seeks that an order directing DCPS to conduct a speech language evaluation, authorize an independent comprehensive psychological evaluation, and place Student a therapeutic special education day school. Lastly, Petitioner seeks an award of compensatory education.

DCPS seeks as relief that the Hearing Officer determine that DCPS' October 16, 2017, psychological evaluation is appropriate, and find that Petitioner is not entitled to an IEE at DCPS expense.

LEA Response to Petitioner's Complaint:

The LEA filed a response to Petitioner's complaint on August 2, 2018, and denied all claims asserted by Petitioner in her complaint. In its response DCPS stated, inter alia, the following:

Student was enrolled at a DCPS elementary school during SY 2015-2016. On May 24, 2016, DCPS convened a meeting to reevaluate Student and determine eligibility for special education and related services. The team reviewed a speech language reevaluation completed on May 13, 2016, and determined Student no longer required speech language services. The team, which included parent, agreed to dismiss Student from speech and language therapy.

Student enrolled at another DCPS school for SY 2016-2017. Student was placed in the Specific Learning Supports ("SLS") self-contained classroom. On April 11, 2017, the IEP team convened for an annual IEP review meeting. The team appropriately determined Student required 26 hours per week of specialized instruction and 120 minutes per month of OT outside general education. On August 29, 2017, the multi-disciplinary team ("MDT") convened at Parent's request. During the meeting, the MDT agreed to perform an occupational therapy ("OT") evaluation and to conduct a comprehensive psychological evaluation to determine if Student should be classified as a Student with Autism Spectrum Disorder. The team determined a speech language evaluation was not necessary.

On January 30, 2018, the MDT convened to discuss the results of the comprehensive

psychological evaluation. Petitioner, through her advocate, requested that DCPS conduct a speech language evaluation. The speech language pathologist was not present at the meeting. The team agreed to reconvene with the speech language pathologist present to determine if Student required the evaluation. The team reviewed and revised Student's IEP to include 30 minutes per month of behavioral support consultation services.

On March 1, 2018, the MDT reconvened to determine if Student required a speech language evaluation. Petitioner was not available to participate in the meeting and the team agreed to reschedule. On June 11, 2018, the MDT reconvened to discuss the request for a speech language evaluation.

The speech language pathologist reviewed the previous speech language evaluation and provided feedback from her informal observations of Student. The MDT determined Student did not require a speech language evaluation. Petitioner through her advocate requested Student receive direct BSS. Despite the social worker's recommendation that Student did not require direct BSS to access education, the social worker agreed to provide the services. Student's IEP was amended to include 120 minutes per month of direct BSS. The behavior support consultation services were removed.

At the January 30, 2018, and June 11, 2018 meetings, the team discussed and determined that Student does not require a FBA or BIP. DCPS did not fail to implement Student's IEP by failing to provide OT services throughout SY 2017-2018.

Petitioner's Response to DCPS' Complaint:

On August 27, 2018, Petitioner filed a response to DCPS' due process complaint. In the response Petitioner stated, inter alia, the following:

There were several reasons the advocate requested an independent evaluation. While a comprehensive psychological evaluation and an OT evaluation were requested, there was an additional evaluation requested at the meeting. Parent requested a FBA and School A agreed to perform a short form FBA. The FBA was never completed. At the time of the meeting, Petitioner's advocate opined that the drop in Student's full-scale intelligence quotient ("FSIQ") was a cause for concern as Student's FSIQ had dropped from an 81 to a 69 although Student had no head injuries and only one-year and four-months had passed between evaluations. Petitioner also told the team that socio-emotional and academic functioning testing was not completed, and should have been performed. The evaluator did not even address the drop in IQ points, or conduct further testing to address the discrepancy between the two scores.

Another concern the advocate shared was that the adaptive assessment and autism scales were both on the borderline and needed to be further addressed. Student consistently displayed academic under-performance, impulsivity, inattention, hyperactivity, inappropriate adaptive functioning, and socio-emotional problems. Although no new ADHD testing was conducted, the evaluator said that Student still should be classified as having an OHI. The parent reiterates her contention that the psychological reevaluation conducted by DCPS is not appropriate under the IDEA pursuant to 34 CFR Sections 300.304 – 300.306. Although the public agency may not

require the parent to provide an explanation, the parent outlined the basis of her disagreement with School A's evaluations of the student in a June 16, 2018, email to DCPS.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on September 19, 2018, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing after the complaint was filed. The 45-day period began on August 24, 2018, and ends [and the Hearing Officer's Determination ("HOD") was due] on October 7, 2018.

The original hearing date was September 19, 2018. DCPS filed a motion to: (1) extend the HOD due date for Petitioner's complaint by twenty-three (23) calendar days to allow for the requested hearing dates and (2) to extend the HOD due date for the complaint filed DCPS by fifty-three (53) days to track on the same timeline as the complaint filed by Petitioner. The motion was granted. The HOD due date for both complaints were extended to October 30, 2018.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on August 24, 2018, and issued a pre-hearing order ("PHO") on August 30, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied Student a free and appropriate public education ("FAPE") by failing to provide Student with an appropriate IEP on April 11, 2017, because the IEP did not: (1) prescribe speech and language services, and/or (2) adaptive goals, and/or (3) include an MD disability classification to include SLD, and/or (4) include an LRE in a therapeutic separate day school and/or (5) include any BSS services.
2. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on January 30, 2018⁴, because the IEP did not: (1) prescribe speech and language services and/or (2) adaptive goals, and/or (3) include an MD disability classification to also include SLD, and/or (4) include an LRE in a therapeutic separate day school.
3. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on June 11, 2018, because the IEP did not: (1) prescribe speech and language services and/or (2) adaptive goals, and/or (3) include an MD disability classification to also include SLD, and/or (4) include an LRE in a therapeutic separate day school, and/or

³ The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

⁴ The PHO stated that Student's IEP was dated January 20, 2018; however, the record reflects that Student's IEP is actually dated January 30, 2018.

(5) prescribe more than 120 minutes per month of behavior support services in a general education setting and/or (6) include a dedicated aide.

4. Whether DCPS denied Student a FAPE by failing to implement Student's IEP during SY 2017-2018 by failing to provide Student OT services Student was due.
5. Whether DCPS denied Student a FAPE by failing to provide Student appropriate behavioral support by failing to conduct an FBA, and failing to develop a BIP during SY 2017-2018.
6. Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by not conducting a sufficiently comprehensive psychological evaluation and not conducting a speech language evaluation.⁵
7. Is DCPS' October 16, 2017, psychological evaluation appropriate, such that DCPS is not required to comply with Petitioner's request for DCPS to fund an independent comprehensive psychological evaluation ("IEE") pursuant to 34 C.F.R 300.502. (Issue from complaint filed by DCPS: Case # 2019-0191)

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 41 and Respondent's Exhibits 1 through 23) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

SUMMARY OF DECISION:

In this case, Petitioner carried the burden of production on the first six issues adjudicated. Petitioner had both the burden of production and persuasion on the following issues: # 4, #5 and #6. Respondent held the burden of persuasion on the following issues after Petitioner established a prima facie case on these issues: #1, #2, and #3. Respondent held the burden of production and

⁵ Petitioner alleges that Student's last psychological evaluation did not include social-emotional measures and/or achievement testing.

⁶ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁷ Petitioner presented seven witnesses: (1) Student's parent ("Petitioner"), (2) the principal of the non-public school Petitioner is seeking, (3) an independent psychologist about compensatory education, (4) Student's independent therapist (5) Petitioner's educational advocate employed by the law firm representing Petitioner, (6) an independent speech language pathologist, and (7) another independent psychologist. Respondent presented six witnesses: (1) a DCPS contract occupational therapist, (2) Student's current DCPS occupational therapist, (3) a DCPS speech language pathologist, (4) a DCPS special education teacher (5) a DCPS social worker, and (6) a DCPS psychologist who evaluated Student.

persuasion on issue # 7. The burden of persuasion shall be met by a preponderance of the evidence.⁸

Based upon the evidence adduced, the Hearing Officer concluded Respondent sustained the burden of persuasion by a preponderance of the evidence on issues #1, #2, #3, and #7. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #6 with regard to the speech language evaluation only, and did not sustain the burden of persuasion by a preponderance of the evidence as to the psychological evaluation and did not sustain the burden of persuasion by a preponderance of the evidence on issues #4 and #5. As result of the denial of FAPE determined the Hearing Officer directs DCPS in the order below to conduct a speech language evaluation of Student and to also conduct an updated comprehensive psychological evaluation including cognitive, academic and social emotional testing to gather a full perspective of Student's current functioning and for a team to review those evaluations and review and revise Student's IEP as appropriate.

FINDINGS OF FACT:⁹

1. Student resides with Petitioner in the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of OHI due to ADHD. DCPS is Student's LEA. Student attends School A, a DCPS school. (LEA Exhibit 19-1)
2. Student was enrolled at a DCPS elementary school ("School B") in an Early Learning Support ("ELS") program during SY 2015-2016. Student's IEP developed on April 19, 2016, prescribed 26 hours of specialized instruction outside general education, 120 minutes of speech language services per month, and 120 minutes of OT services per

⁸ DC Code § 38-2571.03 (6) provides:

(A) In special education, due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

⁹ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

month. At that time, Student's disability classification was Developmental Delay ("DD"). In May 2016, DCPS conducted a comprehensive psychological reevaluation of Student to determine if Student met the eligibility criteria for SLD classification. (LEA Exhibit 12-1)

3. The evaluation assessed, among other things, Student's cognitive and academic functioning using the Weschler Intelligence Scale for Children-Fifth Edition ("WISC-V") and the Woodcock Johnson Test of Achievement -Fourth Edition ("WJ-IV"). Student's cognitive scores were in the Low Average range with a FSIQ composite score of 81 at the 10th percentile. Student's academic performance displayed significant academic deficits ranging from Very Low to Low Average in reading, math and written expression. The DCPS psychologist concluded Student met the criteria for SLD classification. (LEA Exhibit 12-1, 12-2, 12-5, 12-7, 12-9 12-11, 12-12)
4. DCPS conducted a speech language reevaluation in April 2016, with an evaluation report dated May 13, 2016. The evaluator assessed Student with the following: Peabody Picture Vocabulary Test - 4 ("PPCT-4"), the Expressive Vocabulary Test - 2 ("EVT-2"), Clinical Evaluation of Language Fundamentals -5 ("CELF-5") and Goldman Fristoe Test of Articulation - 2 ("GFTA-2"). Student's receptive vocabulary assessed using the PPVT-4 was Below Average; Student's expressive vocabulary assessed using the EVT-2 was Average; Student's auditory comprehension assessed using the CELF-5 was Average; Student's expressive language assessed using the CELF-5 was Average and Student's total language score assessed using the CELF-5 was Average. The evaluator concluded Student's fluency, voice and resonance were within normal limits. Student's receptive vocabulary was within the Below Average range, but expressive vocabulary was in the Average range. (LEA Exhibit 2-1, 2-5)
5. The IEP team met on May 24, 2016, and determined Student met the disability classification of OHI. Petitioner and her educational advocate participated in the meeting by telephone. The DCPS speech language pathologist and OT therapist were present. The speech language pathologist reviewed her evaluation report and recommended that Student be exited from speech language services. The OT therapist also reviewed her evaluation report. The team agreed Student would continue in the ELS program and continue to receive OT services. (LEA Exhibits 3-1, 10-1, 10-2)
6. Student began attending School A during SY 2016-2017. On April 11, 2017, School A conducted an annual review of Student's IEP. Petitioner participated in the meeting by telephone. During the meeting, Petitioner advised the team that Student's physician mentioned that Student may be within the autism spectrum and would be tested. The team determined Student would continue to receive full-time specialized instruction at School A in the SLS program along with OT services. (LEA Exhibits 8-2, 18-1 18-10, 18-11)
7. Despite the fact that Student's parent agreed to exit Student from speech and language services, parent believes Student continues to struggle with speech and language, math, and remaining focused in the classroom. Student has issues with remaining seated within

the classroom and playing during class, for which parent has occasionally received telephone calls from School A. Student can also become aggressive within the home environment. Student's IEP team discussed with parent the possibility that Student may have autism, and two (2) physicians also told parent that Student may have autism. Parent is happy with Student's teacher at School A and believes Student is making progress. Parent advised School A that she does not believe Student is autistic. (Parent's testimony)

8. On August 29, 2017, School A convened an IEP meeting. Petitioner's advocate requested a psychological reevaluation of Student to rule out Autism Spectrum Disorder ("ASD"). During the meeting, the team agreed to conduct a comprehensive psychological evaluation to determine if Student should be classified as a Student with ASD and an OT evaluation. DCPS noted that based on Student's most recent speech language evaluation, speech language services were no longer necessary. (LEA Exhibit 1-1, Petitioner's Exhibit 27-1, 27-3, 27-4)
9. On September 20, 2017, DCPS conducted a comprehensive psychological reevaluation with a report dated October 16, 2017. The DCPS psychologist conducted the following assessments: WISC-V, Gilliam Autism Rating Scale- Third Edition ("GARS-III"), Adaptive Behavior Assessment System Third Edition ("ABAS"), conducted a review of prior evaluations and data, performed a parent, teacher and student interview as well as a classroom observation. Student's cognitive testing yielded scores in the Very Low to Extremely Low ranges. Student's FSIQ score was 69 at the 2nd percentile. Student's overall Autism Index was in the "Unlikely" range. Student's rating on the ABAS scores for adaptive skills based on the parent and teacher rating was in the Average range. The psychologist concluded Student continued to meet the eligibility criteria for OHI. The psychologist noted that Student's teacher would assess Student's academic achievement using the WJ-IV. (LEA Exhibit 1-1, 1-2, 1-4, 1-5, 1-9, 1-10, 1-12)
10. Student's School A teacher conducted the WJ-IV on October 16, 2017. Student's academic achievement scores revealed Student was operating approximately two grade levels below Student's grade at the time in reading and math, and one grade level below in written expression. (LEA Exhibit 1-14, 1-15)
11. In September 2017, DCPS conducted an OT evaluation of Student at Petitioner's request for additional testing in the area of sensory processing. The evaluation report is dated October 10, 2017. The evaluator conducted interviews of Student and Student's classroom teacher, reviewed records, and observed and assessed Student. On the Beery Developmental Tests of Visual Motor Integration ("VMI-6th") Student's visual perception scored at the 39th percentile. Student's visual motor integration was at the 9th percentile and Student's motor coordination was at the 5th percentile. Student's sensory processing was typical except in the area of touch. Student frequently touched classmates and showed distress when touching certain textures. The evaluator concluded Student presented with no difficulties in the ability to receive, process, and effectively respond to sensory information in the classroom. (LEA Exhibit 13-1, 13-2, 13-5, 13-6, 13-7)

12. On December 19, 2017, DCPS provided Petitioner's attorney with the evaluation reports and proposed a meeting to review the evaluations on January 11, 2018. (Petitioner's Exhibit 32-1)
13. On January 11, 2018, the IEP team convened to discuss the results of the comprehensive psychological evaluation and the OT evaluation. Petitioner, through her advocate, requested that DCPS conduct a speech language evaluation. The speech language pathologist was not present at the meeting. The team agreed to reconvene with the speech language pathologist present to determine if Student required the evaluation. The team reviewed and revised Student's IEP to include 30 minutes per month of behavioral support consultation services. At the January 30, 2018, meeting the team discussed the issue and determined that Student does not require a FBA or BIP. (Petitioner's Exhibit 29, LEA Exhibits 9, 19-1)
14. As a result of the January 2018 meeting, DCPS developed an IEP for Student dated January 30, 2018. Student's disability classification remained OHI. The IEP prescribed 26 hours of specialized instruction outside general education, 120 minutes of speech language services per month and 120 minutes of OT services per month and 30 minutes per month of consultative behavioral support services. Student's disability classification was OHI due to ADHD. (LEA Exhibit 19-1, 19-10)
15. On February 8, 2018, DCPS issued a prior written notice ("PWN") that stated the team's decision regarding Student's disability classification and services including the previous decision to exit Student from speech language services. The PWN stated that DCPS would arrange for the speech language pathologist to meet with Petitioner's advocate to review that decision. (LEA Exhibit 16-1)
16. On February 22, 2018, DCPS provided Petitioner a "Make-Up Missed Services Plan" for the OT service that Student had not been provided from August 2017 through November 2017. The total amount of OT services missed was 360 minutes, and was to be made up between February 2018 and June 2018. (LEA Exhibit 4-1)
17. From December 2017 through June 2018, Student was due to receive 120 minutes per month of OT services or 840 minutes of services plus 360 minutes of make-up OT services, for a total of 1,200 minutes. Student was provided 1,035 minutes of OT services during this period. Student was unavailable for 225 minutes of services that were offered. Thus, DCPS made available to Student all the OT services Student was due to receive during SY 2017-2018 including the make-up services. (LEA Exhibit 4)
18. DCPS' OT contractor provided all of Student's make-up OT services. The DCPS occupational therapist later began seeing Student, and provided services in accordance with Student's IEP goals and objectives. The DCPS therapist noticed that Student was engaged in sessions, works well with peers, and was meeting and surpassing some IEP goals for OT. Student still experiences intermittent issues with attention seeking and inattention. (Witness 7's testimony, Witness 8's testimony)

19. DCPS scheduled another IEP meeting for March 1, 2018. Petitioner was not available to participate in the meeting, and the team agreed to reschedule. On June 11, 2018, the MDT reconvened to discuss the request for a speech and language evaluation. The speech and language pathologist reviewed the previous speech and language evaluation and provided feedback from her informal observations of Student. The MDT determined Student did not require a speech language evaluation. Petitioner, through her advocate, requested Student receive direct BSS. Despite the social worker's recommendation that Student did not require BSS to access education, the social worker agreed to provide the services. Student's IEP was amended to include 120 minutes per month of direct BSS. The behavior support consultation services were removed from Student's IEP. (Petitioner's Exhibit 29, LEA Exhibit 7)
20. During the June 11, 2018, meeting, the team discussed parent's concerns about adaptive goals. In response to the DCPS's psychologist's inquiry, Petitioner stated she had no concerns regarding Student's life-skills such as toileting, chores, and Student's ability to state wants and needs. The DCPS team members, including Student's classroom teacher, stated that the major concern was Student's inattentiveness and there were no concerns regarding Student's behaviors. The team determined Student did not require a FBA or BIP. The DCPS psychologist noted that there was no ADHD testing in the DCPS psychological evaluation because the evaluation was conducted for the purpose of determining whether Student was on the autism spectrum. Petitioner, nonetheless, requested an IEE authorization from DCPS for a psychological evaluation. DCPS indicated that it would file a due process complaint to defend its psychological evaluation. (Petitioner's Exhibit 29, LEA Exhibit 7)
21. Student's IEP progress reports for SY 2017-2018 indicate that Student made progress and mastered some of Student's IEP goals during the school year. (LEA Exhibit 11, Petitioner's Exhibit 9, 10, 11, 12)
22. On June 15, 2018, DCPS issued a PWN that stated that the DCPS speech language pathologist and MDT determined that an additional speech language evaluation was not warranted based upon Student's previous evaluation, current academic performance, and the fact that Student was properly exited from speech language services in May of 2016. (LEA Exhibit 14-1)
23. On June 16, 2018, Petitioner's advocate sent DCPS a dissent letter outlining Petitioner's concerns about DCPS's May 26, 2016, psychological evaluation and requesting DCPS's authorization for an independent psychological evaluation, an independent speech language evaluation and an independent Applied Behavior Analysis ("ABA") evaluation. The advocate recommended a change in Student's disability classification, advised that Student's goals were repeating, not at Student's level and inappropriate, and requested 240 minutes per month of OT outside of the classroom. She also requested adaptive goals, as well as a dedicated aide. (Petitioner's Exhibit 33)

24. Petitioner's expert in Speech Language evaluation and services reviewed Student's psychological evaluation, most recent speech language evaluation, and TRC scores. The expert opined that Student is far below grade level in reading and requires extensive support. In support of her opinion, the expert cited Student's Below Average score on the Peabody Picture Vocabulary assessment that measures receptive language skills. The Below Average score means that Student may have difficulty with understanding language and processing oral communication. Student's CELF-V core language score was Average, but Student's performance on subtests in word structure, pronouns, grammar, and changing words to plurals changes were all in the Below Average range. Petitioner's speech expert opined that Student's performance on linguistic concepts demonstrated that Student has difficulty remaining on-topic and that Student did not master all of Student's speech and language goals before being exited from services. Student's written expression and broad written language performance was in the Low Average range prior to Student's psychological evaluation. Student's WISC score for verbal comprehension, which measures the ability to access word knowledge, express one's self, and formulate and express ideas was a 73, placing Student's performance in the Very Low range. This means Student may not have the vocabulary necessary for self-expression and may have problems with defining and understanding words. (Witness 3's testimony, Petitioner's Exhibits 8, 21, 25)
25. Petitioner's Speech and Language expert recommended that Student receive speech and language intervention with word knowledge, phonics, sounding out prefixes, decoding, and oral comprehension. However, Petitioner's expert has never met or spoken to Student or Student's Parent, and is not familiar with DCPS's policy on eligibility for Speech and Language services. The expert was unaware of the type of educational program Student is currently receiving. (Witness 3's testimony)
26. The DCPS speech and language pathologist was qualified as an expert in speech and language pathology. The Student's May 2016 speech and language evaluation was valid and reliable based upon the tools used to perform the evaluation and the explanation provided by the evaluator. Due to the evaluation results, there is no basis for Student's IEPs to include speech and language goals or services beyond the date on which Student was exited from the services. (Witness 9's testimony)
27. Although Student continues to experience problems with speech language issues, there are supports built into Student's special education classroom curriculum that respond to Student's issues with verbal comprehension, and difficulties with vocabulary and reading. Teachers also provide continuing checks regarding Student's comprehension. (Witness 9's testimony)
28. Student's family therapist provides guidance to Petitioner to assist with the management of Student's behaviors as well as individual therapy to Student. The therapist uses cognitive behavioral therapy (CBT), a type of psychosocial intervention that focuses on changing cognitive distortions and behaviors to improve emotional regulation and coping strategies. There must be a basic level of communication in order to deliver CBT because the child needs to listen, understand and articulate the child's understanding as

well as be able to utilize the tools they are provided to navigate the community outside of the clinic. Student has demonstrated difficulties following along and it has been difficult to ascertain whether Student understands what the therapist is attempting to convey. Student's responses to questions are often brief, vague, or off-topic. Due to Student's language skills, Student is not fully benefitting from CBT. (Witness 4's testimony)

29. The family therapist's practice generally involves children who are developing in the typical manner, and Student stands out within the clinical environment. Student requires behavioral supports in school and some of Student's concerns are directly related to Student's peer interactions. Student feels threatened by peers and is without clear options as to how to address these issues. Student requires direct problem-solving skills, problem-solving feedback, and teacher guidance to successfully navigate problematic social situations. Student's family therapist has serious concerns about whether Student has autism and recommends that a Gilliam Autism Rating Scale (GARS) and other assessments be performed to rule out autism. However, he never communicated his concern to Student's school. (Witness 4's testimony)
30. Petitioner's educational advocate was qualified as an expert in the areas of special education and IEP programming. Petitioner's advocate attended two (2) IEP meetings and claims that during one of the meetings, she was advised about Student's classroom behaviors, impulsivity, problems with comprehension and writing. Petitioner's advocate stated that she shared parent's and Student's concerns related to Student being "bullied" and feeling uncomfortable within the school setting. Petitioner's advocate stated that DCPS has been consistent in its view that Student's behavior is not a problem. Student's teachers did not think BSS outside of the classroom would be beneficial to Student. (Witness 5's testimony)
31. Petitioner's independent psychologist recommended that Student's disability classification be reconsidered with focus on SLD and/or autism and that Student might require additional assessments to definitely rule in or out ASD. However, the psychologist opined that autism does not necessary preclude an SLD classification, and that it is possible for a child to have both disabilities. Although the independent psychologist had never talked with School A staff or participated in any meetings at School A on behalf of Student, he nonetheless recommended Student be provided a more restrictive setting. (Witness 6's testimony)
32. Student is in a self-contained SLS classroom at School A where the social worker provides push-in services for Student's entire class. The social worker implements positive behavioral intervention services ("PBIS") and assists with behavior and classroom engagement. School A provides a unique design that allows Student to interact with non-disabled peers in specials, lunch, and recess. Student has demonstrated a solid network of friends with whom Student interacts, and is able to successfully navigate the school environment. (Witness 10's testimony)
33. Student makes good eye contact during conversation, is able to listen, and appears to be thriving and developing socially at School A. Student does not require a FBA or a BIP,

and does not require adaptive goals because Student is able to adequately perform life skills. Student does not display behavior problems and has not had behavioral incident referrals at School A. Although Student was not in need of direct BSS, Student currently receives 120 minutes of direct counseling per month. (Witness 10's testimony)

34. Student's special education teacher has a class that is capped at 12 students. The classroom has one special education teacher, a co-teacher or teacher's aide. Student presents within the classroom with no social needs beyond those of Student's classmates. Student is one of the higher performing students in the class, and when Student completes Student's work, Student will often assist other students. Student is able to read with fluency and minimal comprehension issues and can accurately solve division and multiplication problems. Student is able to repeat information and asks questions when there is a lack of understanding. Student has made academic progress. Student periodically experiences issues with impulsivity such as wandering within the classroom or foot/pencil tapping. Although Student's DIBEL score is well below Student's grade level, Student is actually able to read at, or near, grade level text. Student has no need for a dedicated aide and is able to escort others to places within the school building and return to the classroom. Student has no need for adaptive goals. (Witness 11's testimony)
35. The DCPS School A psychologist conducts a workshop for students at School A on Bullying in which Student participates. Student enjoys working with the other students and Student requests assistance when necessary. The Bullying class includes non-disabled peers and Student easily interacts with all students. At the beginning of the school year, the psychologist was asked to rule out a diagnosis of autism for Student. The school psychologist interviewed Student's parent and teacher, performed an observation of the student, conducted a WISC and the Gilliam Autism Rating Scale ("GARS-2"). The GARS-2 was administered in the psychologist's office and through conducting interviews with Student's parent and teacher. The psychologist selected the GARS-2 because it is aligned with the Diagnostic Statistical Manual ("DSM"). The psychologist also interviewed Student's parent and teacher regarding adaptive scales for Student. The student scored in the "Unlikely" range for autism and in the Average range as to adaptive functioning. Student does not require adaptive goals. (Witness 12's testimony)
36. Although the DCPS psychologist noted Student's 12-point drop in Full-Scale IQ score, the drop is not a standard deviation. She spoke with the Student's IEP team concerning the matter when she reviewed her evaluation and did not believe that further testing was necessary concerning the issue. The DCPS psychologist believes that Student has met the criteria for OHI due to ADHD and Student's classification is appropriate. Student's academic problems stem from Student's attention issues. (Witness 12's testimony)
37. Petitioner's Clinical Psychologist testified as an expert in the area of compensatory education. The psychologist claims that Student's IEP did not address Student's deficits in math and reading, and did not address the possibility that Student's classification may be MD. The psychologist points to Student's escalating behaviors that were interfering

with Student's progress. Petitioner's psychologist establishes Student's period of harm from Student's April 2017 IEP to the present. Petitioner's expert relied upon Student's baseline IEP data, Student's psychological evaluation, particularly the results of the WISC-V, and claims that if Student had been provided appropriate services Student would be operating on grade level or performing close to Student's peers. The Psychologist recommends a program that promotes school engagement and self-esteem as well as remediation in reading, math and written language. The psychologist also recommends Student receive a new FBA, BIP, speech and language evaluation and a different school. In order to compensate Student, the psychologist recommends an award of 250 hours of tutoring services and 40 hours of direct counseling. (Witness 2's testimony, Petitioner's Exhibit 37)

38. Student has been admitted into School C, a private special education school. School C has classes that are only 40-minutes long and offers tactile, multi-sensory activities in the classroom. School C's staff receives training on providing services to students with ADHD as well as providing non-violent crisis intervention, control position, and therapeutic holds training. The classroom picked for Student is the Purple group where there five (5) students and three (3) teachers [two (2) teachers and one (1) paraprofessional]. School C can implement Student's IEP and has an OSSE Certificate of Approval. (Witness 1'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. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner carried the burden of production on the first six issues adjudicated. Petitioner had both the burden of production and persuasion on the following issues: # 4, #5 and #6. Respondent held the burden

of persuasion on the following issues after Petitioner established a prima facie case on these issues: #1, #2, and #3. Respondent held the burden of persuasion on issue # 7. The burden of persuasion shall be met by a preponderance of the evidence.¹⁰ The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on April 11, 2017, because the IEP did not: (1) prescribe speech and language services, and/or (2) adaptive goals, and/or (3) include an MD disability classification to include SLD, and/or (4) include an LRE in a therapeutic separate day school and/or (5) include any BSS services.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student’s April 11, 2017, IEP was reasonably calculated to provide Student educational benefit in light of Student’s circumstances.

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

¹⁰ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student’s individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*. 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. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . 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. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But 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. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, what the IEP offered was reasonably calculated to enable the specific student’s progress....“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Before moving a child to a special school, where would be segregated from students who are not disabled, a school district must consider intermediate steps wherever appropriate. See, e.g., *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1218 (3d Cir. 1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir.1989).

Petitioner asserts Student's April 11, 2017, IEP is inappropriate because the IEP did not (1) prescribe speech and language services, and/or (2) adaptive goals, and/or (3) include an MD disability classification to include SLD, and/or (4) include an LRE in a therapeutic separate day school and/or (5) include any BSS services.

Student's April 11, 2017 IEP, was appropriate for Student at the time it was created, and it was reasonably calculated for Student to receive educational benefits. Since Student had been exited from speech and language services based upon Student's May 2016 speech and language evaluation, Student did not require speech and language services. Student had no problems with toileting, bathing, dressing or other daily life skills and did not require adaptive goals.

The facts of this case are dispositive of the issue of Student's disability category. The evidence demonstrates that in May 2016 when DCPS conducted a psychological evaluation the evaluator recommended that Student's disability classification be changed from DD to SLD. However, when the MDT met to determine Student's disability, it determined Student's disability classification was OHI due to Student's ADHD. The evidence, including testimony from DCPS witnesses who actually work with Student, supports the conclusion that Student's most significant challenge is inattention and distractibility consistent with Student's ADHD diagnosis and OHI disability classification.

Petitioner put forth an expert witness who suggested that based upon the first DCPS evaluation, Student might be considered for the SLD disability classification. However, that same witness testified that in his opinion Student might require additional assessments to definitely rule in or out Autism spectrum disorder. That same witness could not definitely say whether an SLD and Autism classification were mutually exclusive and concluded that further testing would be necessary to determine any disability classification beyond Student's current disability of OHI. Absent any more conclusive evidence than Petitioner has offered, the Hearing Officer credits and gives greater weight to the DCPS witnesses testimony who actually work with and assessed the Student to conclude that Student's current OHI disability classification most accurately identifies the condition that most affects Student's educational performance. Consequently, the Hearing Officer does not conclude that any of Student's IEPs at issue here are inappropriate because they lack the MD disability classification.

The testimony in this matter reveals that Student is doing well in Student's current educational program and setting. DCPS witnesses credibly testified that Student is making academic progress. Although Student still displays academic deficits, Student had progress and even mastered some IEP goals. Although Student has some attention issues in the classroom and Petitioner has been occasionally called by the school about Student's behaviors, Student has had no behavioral referrals and the School A staff have repeatedly indicated Student displays no behavioral problems other than inattentiveness. The evidence demonstrates that Student's current placement in the School A self-contained special education classroom has provided Student with sufficient supports to make academic progress. The evidence does not support a conclusion that Student was in need of a more restrictive placement, and does not support a conclusion that Student requires a therapeutic separate day school where Student would have no contact with non-disabled peers. Student's classroom behaviors did not rise to the level of BSS

services. Therefore, the Hearing Officer concludes Student's April 11, 2017 IEP was reasonably calculated to provide Student educational benefit in light of Student's circumstances.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on January 30, 2018¹¹, because the IEP did not: (1) prescribe speech and language services and/or (2) adaptive goals, and/or (3) include an MD disability classification to also include SLD, and/or (4) include an LRE in a therapeutic separate day school.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's January 30, 2018, IEP was reasonably calculated to provide Student educational benefit in light of Student's circumstances.

The evidence reflects that at the January 11, 2018, meeting School A agreed to add consultative BSS services and continue Student's placement in the School A self-contained classroom. As discussed in the issue above, the evidence demonstrates that during SY 2017-2018, Student was making academic progress. There is no additional evidence that indicates that as of this date, Student was in need of speech language services, adaptive goals, a different disability classification other than OHI for ADHD, or a more restrictive placement or a placement in a therapeutic separate day school.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on June 11, 2018, because the IEP did not: (1) prescribe speech and language services and/or (2) adaptive goals, and/or (3) include an MD disability classification to also include SLD, and/or (4) include an LRE in a therapeutic separate day school, and/or (5) prescribe more than 120 minutes per month of behavior support services in a general education setting and/or (6) include a dedicated aide.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's June 11, 2018, IEP was reasonably calculated to provide Student educational benefit in light of Student's circumstances.

The evidence reflects that at the June 11, 2018, IEP meeting DCPS added direct BSS services and continued Student in the School A self-contained special education program.

Since Student had been exited from Speech and language services based upon Student's May 2016 speech and language evaluation, Student did not require speech and language services. Student had no problems with toileting, bathing, dressing or other daily life skills and did not require adaptive goals. The facts of this case are dispositive of the issue of Student's disability category. Student's current disability classification is appropriate. There has been no evidence presented in this case which would indicate that Student requires more than 120 minutes of behavior supports per month, and evidence directly contradicts Student needing a dedicated aide.

¹¹ The PHO stated that Student's IEP was dated January 20, 2018; however, the record reflects that Student's IEP is actually dated January 30, 2018.

The testimony in this matter reveals that Student is doing well in Student's current educational program and setting. Student does not require a therapeutic separate day school and requires contact with non-disabled peers. Student's classroom behaviors do not rise to the level of BSS services and Student had no need for a dedicated aide.

As discussed in issue # 1 above, the evidence demonstrates that during SY 2017-2018, Student was making academic progress. There is no additional evidence that indicate that as of June 11, 2018, Student was in need of speech language services, adaptive goals, a different disability classification other than OHI for ADHD, additional BSS services than DCPS prescribed, that Student was in need of a dedicated aide, or a more restrictive placement or a placement in a therapeutic separate day school. Student's June 11, 2018, IEP was appropriate for Student at the time it was created, and it was reasonably calculated for Student to receive educational benefits in light of Student's circumstances.

ISSUE 4: Whether DCPS denied Student a FAPE by failing to implement Student's IEP during SY 2017-2018 by failing to provide Student OT services Student was due.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by not providing Student all the OT services Student was due during SY 2017-2018.

In reviewing a failure-to-implement claim, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

The evidence demonstrates that DCPS provided Student with all the OT services Student was due during SY 2017-2018. The related services tracking as well as the credible testimony of both DCPS OT providers support a conclusion that DCPS did not fail to implement Student's IEP. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 5: Whether DCPS denied Student a FAPE by failing to provide Student appropriate behavioral support by failing to conduct an FBA and failing to develop a BIP during SY 2017-2018.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct an FBA and failing to develop a BIP during SY 2017-2018.

IDEA does not specifically mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions are not applicable to this case. Although Student displayed some behavioral concerns that were related to Student's inattention, there was insufficient evidence that Student's behavior rose to the level of concern that would have warranted specific action by School A to address Student's behavior with a FBA and/or BIP. Student's IEP first prescribed consultative behavior support services and then direct services. The services were designed to address Student's attention and occasional behavioral issues that were related to that concern. There was insufficient evidence presented that Student was in need of a FBA or BIP. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 6: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by not conducting a sufficiently comprehensive psychological evaluation and not conducting a speech language evaluation.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct a sufficiently comprehensive psychological evaluation. However, Petitioner sustained the burden of persuasion that DCPS denied Student a FAPE by failing to conduct a speech language evaluation.

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

34 C.F.R. § 300.303 provides:

- (a) General. A public agency must ensure that a re-evaluation of each child with a

disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section--

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.303(a) makes it clear that, “A local education agency (“LEA”) *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. (*Emphasis added*)

Pursuant to 34 C.F.R. § 300.324 Development, review, and revision of IEP. (a) Development of IEP—(1) General. In developing each child’s IEP, the IEP Team must consider— (i) The strengths of the child; (ii) The concerns of the parents for enhancing the education of their child; (iii) The results of the initial or most recent evaluation of the child; and (iv) The academic, developmental, and functional needs of the child. (2) Consideration of special factors. The IEP Team must— (i) 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.

Students are also entitled to a re-evaluation of their disability upon a parental request, provided that no re-evaluation occurs "more frequently than once a year," though a requested re-evaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303]."). According to the record, R.H.'s last speech-language evaluation occurred over twelve years ago, on March 9, 2004. AR 60. Therefore, DCPS had an obligation to administer a speech-language reevaluation at Ms. Hill's request in August 2013. See 34 C.F.R. § 300.303(a)(2).

The evidence demonstrates that at the June 11, 2018, IEP Petitioner inquired about and objected to Student having been previously exited from speech language services. Petitioner’s advocate in her June 16, 2016, dissent letter cited concerns about DCPS’ October 16, 2016, psychological evaluation and asked that DCPS authorize an IEE for a psychological evaluation, a speech language evaluation and an Applied Behavioral Analysis (“ABA”) evaluation. The letter later stated that the observation that DCPS conducted in response to Petitioner’s request for a speech and language evaluation was insufficient. However, there was no evidence that Petitioner sought an independent speech language evaluation or an independent ABA evaluation because Petitioner disagreed with the speech and language evaluation or that an ABA evaluation had ever been conducted. Therefore, as to the evaluations other than the psychological evaluation, there is no indication Petitioner was requesting an IEE for those other two evaluations pursuant to 34 CFR 300.502.

Nonetheless, Petitioner has asserted that in response to her request for a speech language evaluation DCPS failed to conduct one. The evidence demonstrates that DCPS issued Petitioner a PWN stating its reasons for not conducting a speech language evaluation. Petitioner has sought to prove that the speech language evaluation should have been conducted following Petitioner's request.

The evidence demonstrates that when Student was evaluated in May 2016, Student did not at the time qualify for speech language services. However, there was sufficient evidence presented that Student's vocabulary and comprehension and other language deficits presented legitimate basis for Petitioner's request for DCPS to conduct an updated speech language evaluation. Because the prior speech language evaluation had been conducted more than a year prior to Petitioner's request for the evaluation at the June 11, 2018, meeting, the Hearing Officer concludes that DCPS was obligated, despite the reasons given in the PWN, to conduct the speech language evaluation. DCPS' failure to conduct the evaluation impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE.

Petitioner also asserts that DCPS denied Student a FAPE by failing to conduct a sufficiently comprehensive psychological evaluation. The evidence reflects that Petitioner requested that DCPS conduct a psychological evaluation to specifically rule out autism. Although the evaluation assessed Student in a number of areas, the evidence demonstrates that the evaluation DCPS conducted squarely answered the evaluation question. The evaluation concluded Student did not meet the criteria for autism.

DCPS's psychological evaluation was conducted within a year prior to Petitioner's June 16, 2018, request for an IEE psychological evaluation. There was no basis for DCPS to have conducted another psychological evaluation of Student at the time of Petitioner's request. Consequently, the Hearing Officer does not conclude there was a denial of FAPE to Student for DCPS not conducting another psychological evaluation. Petitioner's request for the IEE for a psychological evaluation and the appropriateness of DCPS' evaluation are fully addressed in the discussion of issue # 7 below.

ISSUE 7: Is DCPS' October 16, 2017, psychological evaluation appropriate such that DCPS is not required to comply with Petitioner's request for DCPS to fund an independent comprehensive psychological evaluation ("IEE") pursuant to 34 C.F.R 300.502. (Issue from complaint filed by DCPS: Case # 2019-0191)

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that DCPS' October 16, 2017, psychological evaluation was appropriate and DCPS is not required to grant Petitioner's request for an IEE.

The IDEA regulations provide parents with a limited right to obtain an independent educational evaluation at public expense. An independent evaluation is one "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i).

The IDEA regulations provide parents with a limited right to obtain an independent educational evaluation at public expense. An independent evaluation is one “conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” The limited right arises only after the agency has procured an evaluation with which the parent “disagrees.” 34 C.F.R. § 300.502(b).

The regulations limit the parent to one independent evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. *Id.* Once the parent expresses her disagreement, she may request an independent reevaluation at public expense, which the agency must either provide or, as DCPS has done in this case, file a due process complaint to establish that its evaluation is “appropriate.” See 34 CFR § 300.502(b)(2). If the agency’s evaluation is found to be appropriate, the parent may still obtain an independent evaluation at her own expense. 34 C.F.R. § 300.502(b)(3). See *South Kingstown School Committee v. Joanna S.*, 2014 WL 197859 (D.R.I. 2014).

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).

Petitioner, in response to DCPS’ October 16, 2017, psychological evaluation, requested that DCPS fund an independent psychological evaluation. At the June 11, 2016, meeting DCPS indicated that it would file a due process complaint to defend its psychological evaluation.

In her complaint Petitioner asserted that the DCPS psychological evaluation was inappropriate because it did not include academic achievement testing, did not sufficiently explain or conduct further testing regarding the apparent drop in Student’s cognitive scores from prior testing and did not assess Student’s social emotional and behavior functioning.

The evidence demonstrates that the stated purpose of Petitioner’s initial request that Student be evaluated that led to DCPS’ October 16, 2017, psychological evaluation was to determine if Student qualified as a Student on the autism spectrum. As a result, the DCPS psychologist focused her assessments of Student and the evaluation in total on answering that evaluation question. Respondent put forth the credible testimony of the evaluating DCPS psychologist, who cogently relayed her reasons and rationale for choosing the assessments tool she chose to determine if Student met the criteria of autism. Based upon her assessment and the feedback provided from Student’s teacher and Petitioner, the DCPS psychologist concluded Student did not meet the criteria for autism. Petitioner’s expert witness testified that although he might have chosen a different assessment tool to assess Student for autism, the assessment tool the DCPS psychologist chose, the Gilliam, was a reliable instrument for assessing for autism.

The DCPS psychologist credibly testified that because the drop in scores was not a full standard deviation and because there was a discussion and explanation of the drop in scores during the IEP meeting, there was no need for further cognitive testing. The Hearing Officer found the

DCPS psychologist's testimony more convincing than that of Petitioner's expert witness given that she had actually evaluated Student and because there was no evidence that a drop in Student's cognitive scores from a previous evaluation at all impacted the primary purpose of the evaluation to assess Student for autism.

Although the DCPS psychologist did not herself assess Student's academic functioning in that evaluation, she noted that Student's teacher would assess Student's academic functioning. The teacher conducted the academic assessment that was reviewed by Student's IEP team at a same meeting when the psychological evaluation was reviewed.

Petitioner also asserted that DCPS's psychological evaluation was inappropriate because it included no social emotional and behavioral assessments. However, Petitioner offered no legal support for her claim that the psychological evaluation that DCPS conducted to assess Student for autism needed to include social emotional and behavioral testing. See *Damarcus S.*, 2016 U.S. Dist. LEXIS 67178, 2016 WL 2993158 ("Plaintiffs have not identified any requirement that the evaluation offer a particular analysis of the information").

In fact, the IDEA lacks specific parameters regarding the content of psychological evaluations, or for that matter, of other evaluations. It merely requires that such evaluations "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(2)(C). Its implementing regulations provide only that students be "assessed in all areas related to the suspected disability" and that such evaluations use "[a] variety of assessment tools and strategies ... to gather relevant functional and developmental information about the child [...] that may assist in determining -- [t]he content of the child's IEP." 34 C.F.R. § 300.304(b)(1), (c)(4). *Sylvia HILL et al., v. District of Columbia*, August 26, 2016 68 IDELR 133 citing *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012) (finding that evaluations "should be tailored to the specific problems a potentially disabled student is having" but not "designed to identify and diagnose every possible disability").

Based on the evidence adduced, the Hearing Officer concludes that DCPS' October 2017 psychological evaluation meets the threshold for a valid and appropriate evaluation for the purpose for which it was conducted and that the DCPS school psychologist followed the requirements of the IDEA Regulations, 34 CFR § 300.304. Therefore, the Petitioner is not entitled to an IEE at DCPS's expense. See 34 CFR §300.502(b)(2).

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. See 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

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.

Although Petitioner requested as relief that Student be placed in a non-public special education day school, the Hearing Officer did not conclude that Student was in need of such a restrictive placement so as to be totally removed from non-disabled peers. Although Student continues to have academic deficits, the evidence demonstrates that Student has made progress academically and in the areas Student has been provided related services at School A. Therefore, the Hearing Officer does not grant Petitioner the requested relief of Student's placement at School C. In addition, because the speech language evaluation that was the basis of the denial of FAPE found and that the Hearing Officer has ordered below has not yet been conducted, there is currently no basis for an award of compensatory education.

ORDER: ¹²

1. DCPS shall, within twenty (20) business days of the issuance of this order, conduct a speech language evaluation and an updated comprehensive psychological evaluation including cognitive, academic and social emotional testing to gather a full perspective of Student's current functioning.
2. DCPS shall, within fifteen (15) school days of the completion of the two evaluations mentioned above, convene an IEP team meeting to review those evaluations and review and revise Student's IEP as appropriate.
3. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer

Date: October 30, 2018

¹² Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.

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