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Confidential

<p>Parent on Behalf of Student, Petitioner, v. School A Public Charter School (“School A”) Local Educational Agency (“LEA”), Respondent. Case # 2018-0199 Date Issued: November 4, 2018</p>	<p>HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: October 16, 2018 October 24, 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, November 4, 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 16, 2018, and October 24, 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 IDEA with a disability classification of specific learning disability (“SLD”). Student attends a District of Columbia Public Charter School (“School A”), and School A is Student's local educational agency (“LEA”).

School A found Student eligible for special education services with the SLD disability classification and drafted Student’s initial individualized education program (“IEP”) during school year (“SY”) 2016-2017. Student’s most recent IEP, dated March 23, 2018, prescribes 12.5 hours per week of specialized instruction outside general education, 3.75 hours per week of specialized instruction inside general education, and 120 minutes per month of behavioral support services.

On July 31, 2018, Petitioner filed her due process complaint against School A alleging, inter alia, that Student’s IEPs dated April 5, 2017, and March 23, 2018, was/is inappropriate; School A did not provide Student with extended school year (“ESY”) services in summer 2018; and School A did not sufficiently evaluate Student.

RELIEF SOUGHT:

Petitioner seeks as relief that School A be ordered to, among other things, place Student at, and provide transportation to, a non-public school; alternatively, make a referral to OSSE for a placement and convene a meeting with the multidisciplinary team (“MDT”) and OSSE to ensure an appropriate placement going forward; devise and implement an appropriate IEP with appropriate programming, a more inclusive and comprehensive disability classification, an appropriate least restrictive environment (“LRE”), appropriate behavioral goals, supports and counseling services; update and/or modify Student’s functional behavioral assessment (“FBA”) and behavior intervention plan (“BIP”); fund any and all testing including occupational therapy (“OT”) and review the results with the parent, her counsel, and the MDT to make all necessary changes to the Student’s IEP and placement; and fund a compensatory education award.

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

LEA Response to Petitioner's Complaint:

School A ("LEA" and "Respondent") filed a response to the complaint on August 16, 2018. Respondent asserts that it has not denied Student a free appropriate public education ("FAPE"). In its response, Respondent stated, inter alia, that Student's IEPs developed on April 5, 2017, or March 23, 2018, were/are reasonably calculated to enable the student to make appropriate progress in light of Student's circumstances, and Student has in fact made appropriate progress with the services in place.

Student's services were increased on March 23, 2018, in light of the Student's needs, resulting in continued progress. Student did not and does not require more out of general education services than are prescribed by Student's IEPs. Student did not and does not require a more restrictive, therapeutic setting. Student did not and does not require a dedicated aide or more behavior support services. Student did not and does not require an FBA or BIP. The positive behavior interventions and supports prescribed by the IEP address Student's behavior needs as required by IDEA.

Respondent denies that Student's disability classification is inappropriate. Student has been comprehensively evaluated and the team, including the parent, agreed with the disability classification.

Respondent denies that the student has not been comprehensively evaluated. The student does not require an OT evaluation or an FBA. Student has made appropriate progress without these evaluations and therefore has received a FAPE. Student does not have occupational therapy needs, and Student's behavior needs have been met through the use of positive behavior interventions and supports as required by IDEA.

Student did not require ESY for the 2017 summer. Respondent admits that ESY should have been provided for the 2018 summer and was not. Respondent is prepared to provide compensatory education for these missed services but does not admit, at this time, that Student suffered regression over the 2018 summer or was otherwise denied FAPE as a result of these missed services. With the school year just starting, the actual impact that these missed services had on Student has yet to be determined. Had the parent's attorney brought this issue to the Respondent's attention, it could have been resolved without a complaint.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on August 16, 2018. The parties did not resolve the complaint and did not mutually agree to proceed directly hearing in this matter. The 45-day period began on August 30, 2018, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on October 14, 2018.

The parties agreed to an extension of the HOD due date corresponding to the change in the hearing date from the initial date proposed. Respondent filed a motion to extend the HOD due date by twenty-one (21) calendar days. The motion was granted. The HOD due date was extended to November 4, 2018.

The undersigned Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on August 30, 2018, and issued a pre-hearing order (“PHO”) on September 5, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES: ³

The issues adjudicated are:

1. Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate IEP on April 5, 2017, because the IEP did not prescribe at least 15 hours of specialized instruction per week outside general education, and/or a consult behavior support services, and/or ESY services. ⁴
2. Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate IEP on March 23, 2018, because the IEP did not (a) have a disability classification that includes emotional disability (“ED”) and/or other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”), (b) and/or prescribe at least 20 hours of specialized instruction per week outside general education and/or an LRE and placement in a full-time out of general education therapeutic day school, (c) and/or prescribe additional behavioral support services to include either consultative services or an additional 30 minutes per month of behavior supports services, (d) and/or prescribe a dedicated aide or behavior technician.
3. Whether the LEA denied Student a FAPE by failing to timely and appropriately evaluate Student at earliest by the fall of SY 2016-2017 by not conducting an OT evaluation and/or conducting an FBA and developing a BIP.
4. Whether the LEA denied Student a FAPE by failing to implement Student’s IEP by failing to provide Student ESY services during summer 2018.

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 67 and Respondent’s Exhibits 1 through

³ The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated. At the outset of the hearing, Petitioner withdrew one of the five issues outlined in the PHO (the original issue #3) related to educational records.

⁴ Petitioner alleged in the paragraph #15 of the due process complaint that Student’s IEP April 5, 2018, IEP was inappropriate because it lacked a dedicated aide, behavior supports services, ESY services. However, during the PHC Petitioner counsel also asserted that at the resolution meeting Petitioner’s counsel informed the LEA that Student should have also had more hours of specialized instruction in the April 5, 2017, IEP, at minimum 15 hours per week outside general education. During the PHC Petitioner’s counsel stated that the dedicated aide should have been in the March 23, 2018, IEP, and not the April 5, 2017, IEP.

36) that were admitted into the record and are listed in Appendix 2.⁵ The witnesses testifying on behalf of each party are listed in Appendix B.⁶

SUMMARY OF DECISION:

In this case, Petitioner held the burden of production on all issues to be adjudicated and held the burden of persuasion on issues #3, and #4. Respondent held the burden of persuasion on issues #1 and #2 after Petitioner established a prima facie case on those issues.

The Hearing Officer concluded that Respondent sustained the burden of persuasion by a preponderance of the evidence on issues #1, and #2. Petitioner sustained the burden of persuasion on issue #4 but did not sustain the burden of persuasion by a preponderance of the evidence on issue #3. As a result of the finding of a denial of FAPE as to the provision of ESY services to Student for summer 2018, the Hearing Officer granted Petitioner compensatory education in the amount of 40 hours of independent tutoring.

FINDINGS OF FACT:⁷

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 SLD. Student attends School A, a public charter school, and School A is Student's LEA. (Respondent's Exhibit 15-1)
2. In April 2016, School A referred Student for a comprehensive psychological evaluation. The evaluation report is dated April 26, 2016. The psychologist assessed Student's cognitive, academic, social-emotional and adaptive functioning. Student's Full-Scale IQ was Extremely Low with a score of 66, at the first percentile. Student's academic functioning was varied. In Listening Comprehension, Alphabet Writing Fluency, and Sentence Composition, Student tested above grade level. In Reading Comprehension and Word Reading, Oral Expression, and Oral Reading Fluency, Student tested on grade level. However, in Early Reading Skills and Pseudoword Decoding, Student tested one grade level below Student's grade at the time of testing. Student's math skills also were one grade level below Student's grade at the time of testing. The evaluator concluded

⁵ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁶ Petitioner presented three witnesses: (1) Student's parent ("Petitioner"), (2) the admissions coordinator of the non-public school Petitioner is seeking, and (3) Petitioner's educational advocate employed by the law firm that represents Petitioner. Respondent presented five witnesses: (1) a School A psychologist (2) a School A counselor, (3) a School A special education teacher, (4) a School A occupational therapist (5) the School A director of student support services.

⁷ 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.

Students written expression, reading comprehension, and math were all within the Below Average ranges and below that of Student's same-age peers. (Respondent's Exhibit 4-1, 4-2, 4-3, 4-7, 4-8, 4-16, 4-17)

3. The evaluation revealed that based on ratings from Student's mother and teacher that Student had significant difficulties with, among other things, conduct problems, depression, attention problems, learning problems, and social skills. The adaptive assessment was conducted due to Student's low IQ score and based on responses from Student's mother and teacher the psychologist concluded Student was underdeveloped compared to same-aged peers in communication, activities of daily living and socialization skills. The psychologist concluded Student met the criteria for SLD with moderate impairment in reading, math, and written expression and recommended Student receive special education services. (Respondent's Exhibit 4-16, 4-17, 4-18)
4. School A found Student eligible with the SLD disability classification and developed Student's initial IEP on May 11, 2016. The IEP included goals in the areas of math, reading, and written expression. The IEP prescribed 5 hours per week of specialized instruction in reading outside general education, 5 hours per week of specialized instruction in math outside general education, and 2.5 hours per week of specialized instruction in written expression inside general education. The IEP prescribed no related services and did not prescribe ESY services. (Respondent's Exhibit 7-1, 7-4, 7-5, 7-6, 7-7, 7-8, 7-9, 7-10, 7-13)
5. During SY 2016-2017, Student demonstrated progress on IEP goals, earned passing grades in each trimester, and was promoted to the next grade for SY 2017-2018. (Respondent's Exhibits 13)
6. School A updated Student's IEP on April 5, 2017. The updated IEP prescribed 10 hours per week of specialized instruction outside general education, and 2.5 hours per week of specialized instruction inside general education. The IEP prescribed no related services and did not prescribe ESY services. (Respondent's Exhibit 11-1, 11-9, 11-12)
7. During SY 2016-2017 Student was tardy to school thirteen (13) times and absent from school eleven (11) days of which five (5) absences were excused. (Petitioner's Exhibit 37-1)
8. During SY 2016-2017, from March 22, 2017, through May 17, 2017, Student had five behavioral incidents that included disruptive behavior in class, arguing with and hitting another student, leaving class without permission and ignoring the teacher's directions. (Petitioner's Exhibit 23-17, 23-18, 23-19)
9. School A maintained Student's level of specialized instruction because Student was making progress and Student was not displaying significant behavioral problems and did not demonstrate the need for a FBA or BIP. At that time, Student did not appear to have any retention issues that would require ESY services. Student's academic achievement

improved, and Student progressed on all IEP goals after Student's April 5, 2017, IEP was developed. (Witness 3's testimony, Witness 7's testimony, Respondent's Exhibit 31)

10. Student has been progressing on all of Student's reading, writing, and math goals. Student made progress in reading as demonstrated by the four (4) level increase in Student's Fountas & Pinnell scores. A three (3) level increase in Fountas & Pinnell scores is equivalent to one (1) year of educational development. Student's Measures of Academic Progress ("MAP") reading score has increased by eleven (11) points when the typical growth is eight (8) points. Student has also increased Student's MAP math score by twenty (20) points. (Witness 5's testimony, Respondent's Exhibit 31-1)
11. During SY 2017-2018 from August 7, 2017, through December 18, 2017, Student had twenty-one (21) behavioral incidents, including but not limited to disruptive behavior in class, physical altercations with other students, leaving class without permission and ignoring or refusing to follow the teacher's directions. (Petitioner's Exhibit 23-12, through 23-17)
12. On February 28, 2018, School A sent Petitioner a Notice of Disciplinary Action that stated Student was receiving one (1) day of out of school suspension for a behavioral incident that occurred on February 28, 2018, in which Student walked away from adults, attempted to stomp on a teacher's hand and engaged in a fight in a restroom. (Petitioner's Exhibit 26-1)
13. From January 2, 2018, through March 23, 2018, Student had twenty-five (25) behavioral incidents, including but not limited to disruptive behavior in class, physical altercations with other students, leaving class without permission and ignoring or refusing to follow the teacher's directions. (Petitioner's Exhibit 23-3 through 23-12)
14. On March 12, 2018, School A sent Petitioner a Notice of Disciplinary Action that stated Student was receiving one day of out of school suspension for a behavioral incident that occurred on March 12, 2018, in which Student pushed Student's teacher from behind when upset by the consequences of Student's behavior. (Petitioner's Exhibit 26-2)
15. On March 23, 2018, School A convened Student's annual IEP meeting. Petitioner participated in the meeting and expressed concerns that Student was struggling with concentration and behavior, but learning more in class. Petitioner stated that Student had been diagnosed with ADHD, slight schizophrenia, emotional disorder, and bipolar disorder. The team reviewed Student's grades and attendance. The team agreed to 16.25 hours of specialized instruction, that Students' math instruction would be in a small pullout group and that Student would receive small group reading and reading services inside general education. In addition, the team agreed to add behavioral support services ("BSS") outside general education. (Respondent's Exhibit 14-1, 14-2, 14-3)
16. Student did not require a FBA or BIP during Student's first year with an IEP at School A. Student began having more behavioral incidents during Student's second year with an IEP, and Student's March 2018, IEP team provided Student with 120 minutes per month

of behavior support services to address Student's behaviors. (Witness 4's testimony, Respondent's Exhibit 15-10)

17. Student's March 23, 2018, IEP prescribed 12.5 hours per week of specialized instruction outside general education, 3.75 hours per week of specialized instruction inside general education, and 120 minutes per month of BSS. The IEP did not prescribe ESY services. (Respondent's Exhibit 15-1, 15-10, 15-13, Petitioner's Exhibit 25-1)
18. Due to a dip in Student's grades, and an increase in behavioral incidents, Student's March 2018 IEP team increased Student's instructional hours inside and outside of the general education setting, added BSS, and updated Student's present levels of performance ("PLOPs"). The IEP team added positive behavior interventions to Student's IEP. Respondent's special education expert opined that Student should not have an IEP with 20 hours of services because the IEP would place Student within an environment that is too restrictive based upon Student's academic and behavioral performance. (Witness 7's testimony)
19. During SY 2017-2018 from April 9, 2018, through June 8, 2018, Student had nine (9) behavioral incidents, including but not limited to disruption of learning and skipping class, leaving class without permission and ignoring or refusing to follow the teacher's directions. (Petitioner's Exhibit 23-1, 23-2)
20. During SY 2017-2018 Student was tardy to school sixteen (16) times, two (2) of which were excused and Student was absent from school thirteen (13) days of which six (6) absences were excused. Student was dismissed early on one occasion for disciplinary reasons. (Petitioner's Exhibit 35-1)
21. During the first trimester of SY 2017-2018 Student had a failing grade in math, and in the second trimester had failing grades in both math and literacy. Student demonstrated progress on IEP goals, earned passing grades in the third trimester of SY 2017-2018 and was promoted to the next grade for SY 2018-2019. (Respondent's Exhibits 17, 19-1)
22. Student's behaviors are improving with the interventions contained in Student's current IEP. The School A counselor provides Student with behavior support services. Although the counselor is just getting to know Student, Student is working on self-advocacy, self-regulation and expressing feelings. Student has experienced a few behavioral incidents, but the incidents do not appear to negatively impact Student's ability to make academic progress. (Witness 3's testimony, Witness 4's testimony)
23. The school counselor sees Student once per week and makes sure Student remains in the classroom. The counselor wants to provide Student's services and then review Student's performance before making additional changes to Student's IEP, such as removing Student to a more restrictive environment. The school counselor has interviewed Student's science and reading teachers and is aware that Student exhibits behaviors such as talking out of turn. However, Student has not been out of Student's seat since preferential seating, and other interventions have been in place. Student is being

appropriately served at Student's current IEP levels and does not require a dedicated aide or a more restrictive non-public placement. (Witness 4's testimony)

24. Petitioner requested ESY services for Student because Student is not recalling concepts Student has been taught and does not want to perform class assignments. Petitioner recalls that during an IEP meeting she was advised that Student would receive ESY. However, Petitioner forgot about it and enrolled Student in the summer 2018 program too late. (Petitioner's testimony)
25. Petitioner often receives telephone calls from School A staff shortly after Student is dropped off to school to assist with Student's behavior. Most mornings Student does not want to walk into Student's classroom. Petitioner believes that School A is unable to maintain Student. Petitioner believes Student was allowed to move to the next grade without achieving the necessary academic goals. (Petitioner's testimony)
26. On August 17, 2018, after Petitioner had filed her due process complaint, School A issued a prior written notice ("PWN") of intention to conduct evaluations of Student including a psychological, occupational therapy ("OT") and FBA. On August 21, 2018, Petitioner granted School A's written consent to conduct the evaluations. (Respondent's Exhibits 21, 22)
27. During the resolution meeting, Petitioner's advocate was not prepared to request an award of compensatory education and agreed to submit a written request by September 4, 2018. The advocate did not provide the compensatory education plan until September 18, 2018. The advocate requested sixty (60) hours of tutoring and sixty (60) hours of mentoring.
28. After receiving the advocate's compensatory education plan, counsel for School A forwarded emails to Petitioner's advocate requesting clarification concerning what amount of the compensatory education plan was designated to address Student's missed 2018 ESY. Counsel for School A also needed information on any deficits Student may have suffered between Petitioner's first ESY request and the present, Student's functioning during the period of harm, and any notable differences or declines in Student's cognitive and/or psychological functioning. (Witness 2's testimony, Petitioner's Exhibit 57)
29. The advocate explained the request for an award of compensatory education in an email to counsel for School A, in which the advocate advised that twenty (20) hours of tutoring was for Student's missed ESY, forty (40) hours tutoring related to the gap in special instructional hours, and forty (40) hours of mentoring was to address Student's behavioral issues. (Witness 2's testimony, Petitioner's Exhibit 58-2)
30. The advocate's compensatory education plan does not reference or consider Student's MAP testing, Fountas & Pinnell Benchmark Assessment, or Student's achievement of IEP goals. The advocate's compensatory education plan also does not provide

information on the impact of absences and tardy arrivals on Student's overall academic achievement. (Witness 2's testimony)

31. On September 20, 2018, School A, through its attorney, informed Petitioner, through her attorney, that School A was submitting a placement review referral to OSSE so that the IEP team could address Petitioner's change in placement request. The placement meeting with OSSE has not yet taken place. (Respondent's Exhibit 29-8)
32. In August and September 2018 School A conducted the psychological and OT evaluations and an FBA. On October 1, 2018, School A provided the evaluation reports to Petitioner through her attorney and proposed a meeting to review the evaluations on October 5, 2018. However, the parties have not convened the IEP meeting to review the evaluations. (Respondent's Exhibits 23, 24, 25, 29-6)
33. Student's primary disability classification is SLD; however, Student's scores on the Behavior Assessment System for Children, Second Edition ("BASC-2") revealed that Student was at-risk for ADHD. Student's home ratings were significantly elevated, and the IEP team agreed to monitor Student for the necessity of a FBA and BIP. (Witness 3's testimony, Respondent's Exhibit 25)
34. Respondent's expert in OT asserts that Student did not require OT services during SY 2017-2018. Student is sometimes visually distracted which is the rationale for Student receiving preferential seating. Noise canceling headphones is another tool that may assist Student in achieving greater academic success as well as testing accommodations and frequent breaks. (Witness 6's testimony)
35. Student was accepted into School B, a private therapeutic day school for special education students on September 12, 2018. School B renders special education and related services to approximately 121 students in grades K through 12 with a variety of disabilities, including, but not limited to, ED, multiple disabilities, OHI, and Autism. The daily cost of School B is \$299.27. This cost does not include transportation or ESY services. School B has a certificate of approval ("C of A") from OSSE. The classroom selected for Student by School B has a student to teacher ratio of 9 to 1. The classroom also has a teacher's assistant. The teacher is a licensed special education teacher. Because School B is a therapeutic day school, therapists are in the classroom throughout the day to provide services to students assigned to them. School B also has additional staff that deals with students in crisis. Student's IEP can be reviewed on a 30-day, 60-day, or 90-day cycle depending upon Student's needs. (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. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner carried the burden of production on the first six issues adjudicated.

Respondent held the burden of persuasion on issues #1 and #2 after Petitioner established a prima facie case on those issues. Petitioner held the burden of production on all issues to be adjudicated and held the burden of persuasion on issues #3, and #4.⁸ 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 the LEA denied Student a FAPE by failing to provide Student with an appropriate IEP on April 5, 2017, because the IEP did not prescribe at least 15 hours of specialized instruction per week outside general education, and/or a consult on behavior support services, and/or ESY services.

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.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student’s April 5, 2017, IEP was reasonably calculated to provide Student educational benefit and to enable Student to make reasonable progress 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).

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 the child 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 alleges that Student's April 5, 2017, is inappropriate because the IEP did not prescribe at least 15 hours of specialized instruction per week outside general education, and/or a consult behavior support services, and/or ESY services.

The evidence demonstrates that during Student's first year with an IEP Student made progress in IEP goals, made passing grades, and prior to the IEP being updated did not have significant behavioral problems. Respondent offered credible and convincing testimony, from Student's special education teacher and the School A director of student support services, both who testified as expert witnesses, that Student's level of specialized instruction was appropriately maintained in the April 5, 2017, IEP because of Student's academic progress. There was no apparent need for Student's specialized instruction to have been increased to 15 hours per week.

At the point at which Student's IEP was updated on April 5, 2017, Student had only a handful of behavioral incidents. There was no apparent need at that point for School A to have added BSS, either consult or direct, to Student's IEP. Finally, based on the credible testimony of the School A staff, including Student's special education teacher and the director of student support services, there was no basis for Student to have had ESY services during summer 2017. There was no indication that Student was having difficulty with retention after absences from school such that ESY services were warranted.

Consequently, based on the evidence adduced, the Hearing Officer concludes that Student's April 5, 2017, IEP was reasonably calculated to provide Student educational benefit and to enable Student to make reasonable progress in light of Student's circumstances. Respondent sustained the burden of persuasion on this issue by the preponderance of the evidence.

ISSUE 2: Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate IEP on March 23, 2018, because the IEP did not (a) have a disability classification

that includes ED and/or OHI for ADHD, (b) and/or prescribe at least 20 hours of specialized instruction per week outside general education and/or an LRE and placement in a full-time out of general education therapeutic day school, (c) and/or prescribe additional behavioral support services to include either consultative services or an additional 30 minutes per month of behavior supports services, (d) and/or prescribe a dedicated aide or behavior technician.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's March 23, 2018, IEP was reasonably calculated to provide Student educational benefit and to enable Student to make reasonable progress in light of Student's circumstances.

There was insufficient evidence presented that Student's current SLD disability classification is inappropriate or that Student yet qualifies for a different or additional classification. Although Student was displaying behavioral difficulties, there was insufficient evidence that based on Student's behavior School A should have initiated, absent a request, any evaluation to determine if Student met the criteria for a different disability classification. There was no evidence presented by Petitioner to support a finding that Student qualified for any other disability classification than SLD. School A has now conducted a psychological evaluation that an IEP team will review. The team can consider whether Student qualifies for a different or additional disability classification. At this juncture, Respondent's presented sufficient evidence that as of Student's March 23, 2018, IEP Student did not require a different disability classification other than SLD.

The evidence demonstrates that during Student's second year with an IEP Student made progress in IEP goals, had some failing grades in the beginning and middle of the year and began to have significant behavioral problems. At the time School A reviewed and updated Student's IEP, it increased Student's specialized instruction and added BSS services. Respondent offered credible and convincing testimony from Student's special education teacher and the School A director of student support services, both who testified as expert witnesses, that Student's level of specialized instruction was appropriate in the March 23, 2018, IEP. This is borne out by Student's continued progress on IEP goals, grades and behavior after School A added the additional services to Student's IEP. The evidence does not support a finding that Student's specialized instruction needed to have been increased to 20 hours per week.

The evidence demonstrates that after Student's IEP was updated to include BSS services Student's behavioral incidents declined. School A's counselor credibly testified that Student is engaging in counseling that is being provided, benefits from it and does not need any additional supervision regarding behaviors. There is no evidence that at the time Student's March 23, 2018, IEP was developed Student was in need of, or that School A should have prescribed, more than 120 minutes of BSS per month or that Student was in need of a dedicated aide or a behavioral technician to assist in either Student's academics or to address Student's behaviors.

Although Petitioner testified that she believes School A promoted Student to the next grade without Student making requisite progress and she continues to receive calls from School A regarding Student's behavior, the documentary evidence demonstrates that Student's made academic progress and Student's behavioral incidents declined during the months after Student's March 23, 2018, IEP was developed and after Student began receiving weekly counseling

services. Although Student has not made the level of academic and behavioral progress that Petitioner desires, the evidence demonstrates that Student has nonetheless made reasonable progress. The evidence does not support a finding that Student was in need of a higher level of services or a more restrictive LRE than School A prescribed for Student in the March 23, 2018, IEP.

Consequently, based on the evidence adduced, the Hearing Officer concludes that Student's March 23, 2018, IEP was reasonably calculated to provide Student educational benefit and to enable Student to progress in light of Student's circumstances. Respondent sustained the burden of persuasion on this issue by the preponderance of the evidence.

ISSUE 3: Whether the LEA denied Student a FAPE by failing to timely and appropriately evaluate Student at earliest by the fall of SY 2016-2017 by not conducting an OT evaluation and/or conducting an FBA and developing a BIP.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

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 reevaluation of each child with a disability is conducted in accordance with 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 reevaluation 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]."). See 34 C.F.R. § 300.303(a)(2).

IDEA does not explicitly 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 the evidence demonstrates that Student had significant behavioral incidents during SY 2017-2018 and had out of school suspensions on two occasions, the disciplinary actions by School A did not rise to the level that would have required School A to conduct an FBA or develop a BIP as mandated by IDEA. There was insufficient evidence that School A should have conducted an FBA or BIP during SY 2016-2017 or thereafter.

The evidence demonstrates that when Student's IEP was reviewed and updated in March 23, 2018, the team took Student's behavioral difficulties into account and prescribed BSS outside general education and included behavioral interventions in Student's IEP.

There was no indication that Student displayed any OT deficits during SY 2016-2017 or thereafter. Petitioner presented no evidence that Student was in need of OT services or that School A should have conducted an OT evaluation prior to Petitioner filing her due process complaint. School A has now conducted an OT evaluation that will soon be reviewed by an IEP team. Respondent presented sufficient evidence to sustain a finding that School A did not deny Student a FAPE by not conducting an OT evaluation prior to Petitioner filing her due process complaint. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 4: Whether the LEA denied Student a FAPE by failing to implement Student's IEP by failing to provide Student ESY services during summer 2018.

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

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 although Student's March 23, 2018, IEP did not prescribe ESY services, prior to the end of SY 2017-2018, Petitioner requested and School A agreed that Student would be provided ESY services during summer 2018. School A admitted that it should have provided these services to Student and did not. Although there was insufficient evidence that Student suffered any harm from ESY services not being provided, a showing of harm is not necessary with regard to a failure to implement an IEP. Because Student missed all ESY services during summer 2018 and School A has acknowledged it should have provided the services, the Hearing Officer concludes that Petitioner sustained the burden of persuasion by a preponderance of the evidence that Student was denied a FAPE by School A failing to provide ESY services during summer 2018.

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.

The compensatory education proposal provided by Petitioner drastically overstated the amount of compensatory education that Student is due for the denial of FAPE found by the Hearing Officer. There was, however, sufficient evidence based on Student's academic functioning that Student would benefit from tutoring services. Therefore, the Hearing Officer has directed in the order below that School A provide Student with the amount of independent tutoring the Hearing Officer considers reasonable based on the evidence presented.

ORDER: ⁹

1. The LEA shall, within twenty (20) business days of the issuance of this order, provide Petitioner authorization to obtain 40 hours of independent tutoring at the OSSE prescribed rate.
2. The LEA shall, within fifteen (15) school days of the issuance of this order, convene an IEP team meeting to review the evaluations School A has conducted 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: November 4, 2018

Copies to: Counsel for Petitioner
Counsel for LEA
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⁹ 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.