

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
October 11, 2016

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STUDENT, <sup>1</sup>	)	
through the PARENT,	)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>	)	
	)	Case No: 2016-0177
v.	)	
	)	<b>Date Issued:</b> October 11, 2016
District of Columbia Public Schools,	)	
<i>Respondent.</i>	)	

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**Hearing Officer Determination**

**SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

**PROCEDURAL BACKGROUND**

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on July 28, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On August 3, 2016, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on August 17, 2016. The parties did not reach agreement during the RSM, but they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on August 27, 2016, and 45-day period concludes on October 11, 2016.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on August 16, 2016, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day

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<sup>1</sup> Personal identification information is provided in Appendix A.

disclosures would be filed by August 23, 2016 and that the DPH would be held on August 30, 2016. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the "PHO") issued on August 16, 2016.

The DPH was held on August 30, 2016, September 16, 2016 and September 23, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Rooms 2006 and 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER'S COUNSEL], Esq. and DCPS was represented by [RESPONDENT'S COUNSEL], Esq.

Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-17 were admitted without objection. Respondent's exhibits R-1 through R-30 were admitted without objection.

Petitioner called the following witnesses at the DPH:

- (a) Student
- (b) Parent
- (c) Parent's Psychologist
- (d) Educational Advocate

Respondent called the following witness at the DPH:

- (a) DCPS Social Worker
- (b) Special Education Teacher
- (c) Special Education Coordinator
- (d) Local Education Agency ("LEA") Representative

Petitioner and Respondent gave oral closing arguments.

### ISSUES

As discussed at the PHC, reflected in the PHO and narrowed at the start of the DPH,<sup>2</sup> the following issues were presented for determination at the DPH:

- (a) Whether DCPS denied the student a FAPE by failing to adequately evaluate the student, including failing to perform triennial evaluations, and/or to evaluate in all areas of suspected disability (by conducting a comprehensive psychological and a functional behavioral assessment) during the 2014-2015 and 2015-2016 school years.
- (b) Whether DCPS denied the student a FAPE by failing to develop appropriate IEPs in May 2015 (in that: (1) it erroneously states that the student's behavior does not impede her learning or that of other students; and (2) it is not based on adequate evaluations or current data and March 2016 (in that: (1) it provides the student specialized instruction in the general education setting only; (2) it lists the incorrect disability classification; (3) it was created without the parent's participation; (4) it is not based on current data; (5) it fails to discuss the student's

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<sup>2</sup> At the start of the DPH, Petitioner withdrew certain portions of what had been included in the PHO as issues (b) and (d).

specific LRE as well as appropriate placement along the continuum of alternative placements).

- (c) Whether DCPS denied the student a FAPE by failing to include the parent in IEP meetings in May 2015 and in March 2016.
- (d) Whether DCPS denied the student a FAPE in failing to provide the student appropriate placements during the 2015-2016 school years, in that the student requires a full-time therapeutic placement.

### **RELIEF REQUESTED**

Petitioner requested the following relief:

- (a) a finding in Petitioner's favor, that the student has been denied a FAPE;;
- (b) an Order that DCPS select an appropriate placement;
- (c) an Order that DCPS fund an independent comprehensive psychological evaluation and an independent functional behavioral assessment at market rate, and not limited to the amount described at 5-A DCMR §§ 2852 & 2853;
- (d) an Order that DCPS fund at market rate any other evaluations recommended in the independent evaluations, including a neuropsychological evaluation, if recommended by the comprehensive psychological evaluation.
- (e) an Order that DCPS convene an MDT meeting to review all evaluations and develop an IEP, to include the placement/location of services;
- (f) an Order reserving compensatory education until Student is in an appropriate placement.

### **FINDINGS OF FACT**

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parent.
2. Prior to December 2014, Student and Parent resided in a jurisdiction outside the District of Columbia ("State A").
3. Student was determined eligible for special education services while in State A. She had an IEP that provided a significant level of services. Student was not in a full-time outside the general education setting in State A; however she had a significantly more restrictive IEP than five hours of specialized instruction outside the general education setting.<sup>3</sup>
4. From approximately June 26, 2014 through July 9, 2014, while still residing and attending school in State A, Student was hospitalized in a psychiatric hospital.<sup>4</sup>
5. In December 2014, Parent and Student relocated to the District of Columbia. Prior to moving, Parent spoke with the principal and social worker at Area School to let them know that Student would be enrolled there, that she had a disability, that she had an extensive

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<sup>3</sup> An IEP from State A is not included in the record. The Hearing Officer draws inferences regarding what the State A IEP included based on the testimony of Parent and the testimony of SEC.

<sup>4</sup> P-3.

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IEP in State A, and that she had recently had a psychiatric hospitalization in the summer of 2014.<sup>5</sup>

6. On approximately December 18, 2014, Student's IEP team at Area School met to conduct a 30-day review of Student's IEP from State A. The team determined that Student needed a re-evaluation, and that an eligibility meeting needed to be convened for her by February 16, 2015.<sup>6</sup>

7. Student was suspended several times during the second half of the 2014-2015 school year, while at Area School.<sup>7</sup> She had conflict with other students, and the school social worker would see her to provide her support. Overall, Area School felt it was able to manage Student's behavior, including her problematic behavior.<sup>8</sup>

8. On May 7, 2015, Student's IEP team convened for the first time since December 2014. Area School notified Parent about the meeting by phone on April 16, 2015, and Parent indicated that she worked and was self-employed, but that she would attend.<sup>9</sup> One week later, Area School sent Parent a formal Letter of Invitation ("LOI") to the meeting by placing the letter in Student's backpack.<sup>10</sup> According to entries on the school's contact log, Parent was informed by phone that the meeting was to begin at 1:45 p.m. However, according to the actual letter of invitation, the meeting was scheduled to begin at 2:00 p.m.<sup>11</sup>

9. Parent was not present at the May 7, 2015 meeting, and the meeting went forward in Parent's absence.<sup>12</sup>

10. At the May 7, 2015 IEP meeting, Student's team determined her eligible for special education services as a student with Other Health Impairment ("OHI").<sup>13</sup> In making this determination, the team relied on psychological evaluation conducted some time prior to December 2014, in State A.<sup>14</sup>

11. Student's May 7, 2015 IEP indicated that her behavior did not impede her learning or that of other students.<sup>15</sup>

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<sup>5</sup> Testimony of Parent.

<sup>6</sup> R-2.

<sup>7</sup> Testimony of Parent.

<sup>8</sup> Testimony of SEC.

<sup>9</sup> Testimony of SEC.

<sup>10</sup> R-13-1 and R-13-2.

<sup>11</sup> R-24; R-13.

<sup>12</sup> Testimony of Parent; testimony of SEC.

<sup>13</sup> R-3.

<sup>14</sup> The date of the psychological evaluation is not specified on the eligibility worksheet that references the evaluation; however, the psychological evaluation had been conducted in State A while Student attended school in State A. P-4-15 and P-14-16; R-6; testimony of SEC.

<sup>15</sup> P-5-6.

12. To the extent that the State A psychological evaluation included information about Student's cognitive abilities and/or behavioral/social emotional needs, Student's May 7, 2015 IEP team ("May IEP team") did not cite to it. However, the May IEP team cited to achievement testing from State A showing that Student was performing below average range in reading and math.<sup>16</sup>

13. Student's May 2015 IEP team also considered two assessments administered by Area School at some point during the second semester of the 2014-2015 school year showed Student on grade level in reading; however, the undersigned determines those results to have been anomalous, in that they were so sharply inconsistent with the data from State A over a relatively short period of time without any readily apparent rationale, and because by the first term of the 2015-2016 school year, Student was again testing significantly below grade level in reading as had been the case in State A.<sup>17</sup>

14. Generally, a student's present levels of performance in her IEP would derive from formal assessments and anecdotal information about how the student is performing in school. For example, if a student were formally assessed in January 2015 and had her annual IEP review in May 2015, the student's team would generally use data from formal assessments as well as anecdotal information in preparing the present levels of performance section of the student's IEP.<sup>18</sup>

15. At the May 7, 2015 IEP team meeting, Student's team determined that would receive 5 hours per week of specialized instruction inside the general education setting. The IEP included goals in mathematics, reading and written expression, but no social emotional goals.<sup>19</sup>

16. The May 7, 2015 IEP describes Student's LRE by saying "[S]tudent has no services prescribed in a setting outside of general education."<sup>20</sup>

17. By the end of the 2014-2015 school year, Student had completed the highest grade offered at Area School, and Student transitioned to and attended City School for the 2015-2016 school year.

18. From approximately June 20, 2015 through July 2, 2015, Student was hospitalized in a psychiatric hospital.<sup>21</sup>

19. During the first term of the 2015-2016 school year, Student earned all "Fs," except for a "D" in science. Student missed four school days during the first term. Generally, her teachers reported that Student had poor behavior, did not complete class assignments, and

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<sup>16</sup> R-4-2; R-4-3; P-4-7; P-4-8.

<sup>17</sup> P-12-3.

<sup>18</sup> Testimony of Educational Advocate.

<sup>19</sup> P-4-5 through P-4-11.

<sup>20</sup> P-4-12.

<sup>21</sup> P-5; P-6.

she needed to study more, but that she had good class participation. At least four of her teachers requested a conference with Student's parents.<sup>22</sup>

20. Student made no progress on her IEP goals during the first term of the 2015-2016 school year, due to her difficulty staying on task and completing assignments.<sup>23</sup>

21. As of March 2016, Student's "lack of focus and attention to detail greatly impact[ed] her ability to access grade level expectations."<sup>24</sup> She was generally earning poor grades; due to her difficulty completing assignments; lack of concentration; difficulty staying on task; inability to self-regulate; impulsiveness; and her tendencies to cause disruptive behaviors, become agitated very quickly, and to walk out of class.<sup>25</sup>

22. City School's social worker had been providing behavioral support services to Student on an informal, sporadic basis throughout the 2015-2016 school year, prior to those services being added to her IEP.<sup>26</sup> Social Worker was often the only person who could effectively de-escalate Student.<sup>27</sup>

23. As of March 2016, Student was failing two classes (Language Art 6 and World Geography & Culture) and had a "D" in at least two classes (Math and Language Arts).<sup>28</sup>

24. Student's IEP team was initially scheduled to meet on March 8, 2016. City School had attempted to confirm the meeting date and time with Parent via letter and phone call; however, was unable to reach Parent and/or confirm the meeting date.<sup>29</sup>

25. Parent went to City School for Student's IEP meeting on March 8, 2016 at the designated time; however, the meeting had not yet begun one hour after the scheduled start time. After waiting one hour past the scheduled start time Parent had to leave City School to go to work. The IEP team meeting did not go forward on that date.<sup>30</sup>

26. Student's IEP team meeting was rescheduled for, and convened on March 24, 2016. Parent arrived for the meeting shortly before the designed time; however, the team had convened early (prior to Parent's arrival), because some team members would be attending a field trip that day.<sup>31</sup>

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<sup>22</sup> P-12-1 or P-12-2.

<sup>23</sup> P-12-5 through P-12-8.

<sup>24</sup> P-7-8 through P-7-9.

<sup>25</sup> P-7-3; P-7-8 through P-7-9.

<sup>26</sup> Testimony of Social Worker.

<sup>27</sup> Testimony of Parent.

<sup>28</sup> P-7-8 and

<sup>29</sup> P-13.

<sup>30</sup> Testimony of Parent.

<sup>31</sup> Testimony of Parent; testimony of Social Worker.

27. Student's disability classification on her March 24, 2016 IEP was determined to be "Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder)."<sup>32</sup>

28. Student's March 24, 2016 IEP indicates that Student's behavior impeded her learning or that of other students, in that it impacted her ability to stay on task, complete assignments and refrain from disruptive behaviors.<sup>33</sup> A new functional behavior assessment ("FBA") and a behavior intervention plan ("BIP") was reviewed for Student at the March 24, 2016 IEP team meeting, because the assistant principal wanted something to help the teacher manage Student.<sup>34</sup>

29. Student's March 24, 2016 IEP indicated that Student received verbal prompts, positive behavior points, cool down periods, breaks, and buddy rooms to address her inappropriate behaviors.<sup>35</sup>

30. As of March 2016, Student had missed 22 days of school (10 excused days and 12 unexcused days).<sup>36</sup> Throughout the school year, Student was frequently placed in in-school suspension, was frequently sent out of class to take a break when she was unable to control her emotions, and frequently given a "passport" (sent home for misbehavior, without being formally suspended).<sup>37</sup>

31. Student's March 24, 2016 IEP included social emotional goals, as well as goals in mathematics, reading and written expression, and provided 5 hours per week of specialized instruction outside the general education setting, and 120 minutes of behavioral support outside the general education setting.<sup>38</sup>

32. The March 24, 2016 IEP describes Student's LRE by saying "[S]tudent requires support to address academic deficits . . . [and] to access the general education setting."<sup>39</sup>

33. From April 11, 2016 through June 16, 2016 – approximately the final reporting period of the 2015-2016 school year – Student was hospitalized three times in a psychiatric hospital. Due to these three hospitalizations, Student missed a significant amount of school during this reporting period, and City School was aware of the hospitalizations.<sup>40</sup>

34. When Student was in school during the reporting period from April 11, 2016 through June 16, 2016, Student required consistent emotional/behavioral stabilization through

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<sup>32</sup> P-7-6.

<sup>33</sup> R-9-2; P-7-7.

<sup>34</sup> Testimony of Social Worker.

<sup>35</sup> P-7-7; P-7-10.

<sup>36</sup> P-7-10.

<sup>37</sup> Testimony of Student.

<sup>38</sup> P-7.

<sup>39</sup> P-7-12.

<sup>40</sup> Testimony of Social Worker.

medication management and therapeutic services. “The constant interruption in Student’s school based behavioral services hindered her overall ability to make progress on her behavior support goals.”<sup>41</sup>

35. Student refused to return to City School for the 2016-2017 school year. Through Educational Advocate’s efforts, she was able to be enrolled in District School, which is a general education school similar to City School. Student promptly began having significant emotional problems at District School, and Parent was called to pick her up and take her home. Ultimately, on instruction from DCPS Central Office personnel, District School was not permitted to send Student home.<sup>42</sup>

36. On May 24, 2016, as a part of a Resolution Session Meeting, DCPS offered to settle the case, in part, by funding an independent comprehensive psychological evaluation for Student at its standard rate, rather than market rate.<sup>43</sup>

37. DCPS maintains a guide for parents it has authorized to receive an independent evaluation at public expense. The guide lists vendors who have agreed to conduct evaluations at pre-determined rate. The rate designed for comprehensive psychological evaluations is approximately \$1,360. A provider may submit to DCPS a request for a variance from the pre-determined rate, if the provider would like to bill higher than \$1,360. In considering whether to approve the variance request, DCPS will consider the provider’s arguments regarding why what they are doing is different from what other providers do to provide similar types of evaluations, such as conducting additional evaluations.<sup>44</sup>

38. Parent’s Psychologist at one time accepted a significant number of evaluations at the DCPS rate; however, now only does so sparingly, due to the \$1,360 payment limit.<sup>45</sup>

39. Parent’s Psychologist at one time was include in the guide DCPS produces for parents; however, is no longer (as was not as of the time the guide was provided to Parent in May 2016) included in the guide, as DCPS has determined it to be a conflict of interest to list Parent’s Psychologist, as she frequently testifies for parents in DPHs.<sup>46</sup>

40. Educational Advocate contacted several of the providers on the parents’ guide during the summer of 2016 in an effort to obtain an independent psychological evaluation for Student. Generally, the providers were no longer in business or no longer accepted the DCPS rate. On average, the providers charged \$300 per hour or \$3000 for a full evaluation.<sup>47</sup>

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<sup>41</sup> R-14-3.

<sup>42</sup> Testimony of Educational Advocate.

<sup>43</sup> R-10.

<sup>44</sup> Testimony of Compliance Case Manager.

<sup>45</sup> Testimony of Parent’s Psychologist.

<sup>46</sup> Testimony of Compliance Case Manager.

<sup>47</sup> Testimony of Educational Advocate.

41. On August 19, 2016, Parent's Psychologist completed an independent comprehensive psychological evaluation for Student.<sup>48</sup> Parent's Psychologist's rate is \$200 per hour. She invoiced Parent \$2,500 for spending 12.5 hours on Student's evaluation. Parent's Psychologist entered into an agreement with Parent that Parent would pay the balance remaining between the DCPS rate and the invoiced amount.<sup>49</sup>

### CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief, except that, once Petitioner has established a prima facie case, Respondent shall carry the burden of persuasion on issues regarding the appropriateness of an IEP or placement. *Schaffer v. Weast*, 546 U.S. 49 (2005); D.C. Code § 38-2571.03(6)(A)(i). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

- (a) Whether DCPS denied the student a FAPE by failing to adequately evaluate the student, including failing to perform triennial evaluations, and/or to evaluate in all areas of suspected disability (by conducting a comprehensive psychological and a functional behavioral assessment) during the 2014-2015 and 2015-2016 school years.**

An LEA must ensure that students eligible for special education and related services are assessed in “all areas related to the suspected disability.” 34 CFR § 300.304(c)(4). In determining the content of a student's IEP, the LEA must conduct an evaluation that uses a “variety of assessment tools and strategies to gather relevant functional developmental and academic information about the child.” 34 C.F.R. 300.304(b)(1). Here, Student had apparently been evaluated when she lived in State A, and City School apparently had access to that evaluation data. However, if State A evaluations included any data such as regarding the underlying causes of Student's academic struggles, learning styles, and/or any social emotional triggers for Student in the learning environment, such data was not summarized in Student's May 2015 or March 2016 IEPs. In fact, City School indicated when Student came to DCPS in December 2014 that she required a re-evaluation. Respondent now argues that City School did

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<sup>48</sup> P-11.

<sup>49</sup> Testimony of Parent; testimony of Parent's Psychologist.

conduct a re-evaluation, in that it reviewed that data from State A. However, the data was not formally/sufficiently reviewed, such as through a review of evaluation report and an IEP meeting that included Parent where the State A data could be discussed and mined for insights regarding Student's learning needs.

DCPS also had the option of conducting its own assessments to understand Student's needs. Assessments such as a comprehensive psychological evaluation would have been particularly important in Student's case, as DCPS was aware from December 2014 that she had a history of psychiatric hospitalization, as she demonstrated social emotional struggles, and as her inability to control her impulses and regulate her emotions consistently interfered with her ability to make academic progress. While DCPS collected achievement testing data for Student, it did not probe into the underlying causes or the specifics of her educational needs, such as through a comprehensive psychological evaluation. Additionally, Student's behavior has been consistently evidenced a need a functional behavioral assessment, as even when the school has felt it could tolerate her behavior, it has impeded her ability to learn, including because she is easily triggered into strong and uncontrollable emotions, and because she has had to miss so much school for disciplinary reasons and for psychiatric hospitalizations.

The failure to appropriately assess a student is a procedural violation of the IDEA. In this instance, it rises to the level of a substantive violation, because it impeded Parent's ability to fully participate in the decision-making process regarding the provision of FAPE to Student in that Parent did not have the information she needed to meaningfully participate in IEP team meetings (had they happened in her presences). It also impeded Student's right to a FAPE and caused Student a deprivation of educational benefit, because had she been appropriately assessed and her needs properly determined and addressed, she would have been better able to better grasp the academic material and have made more progress over the past two years. Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to adequately evaluate her in all areas of suspected disability during the 2014-2015 and 2015-2016 school years. Though the IEP included a section titled "LRE," it provided no information about the type of setting Student needed to make educational progress – such, for example, as how many students should be in the class, whether distractions needed to be minimized. *Brown v. District of Columbia*, 67 IDELR 169 (D.D.C. 2016)

- (b) Whether DCPS denied the student a FAPE by failing to develop appropriate IEPs in May 2015 (in that: (1) it erroneously states that the student's behavior does not impede her learning or that of other students; and (2) it is not based on adequate evaluations or current data and March 2016 (in that: (1) it provides the student specialized instruction in the general education setting only; (2) it lists the incorrect disability classification; (3) it was created without the parent's participation; (4) it is not based on current data; (5) it fails to discuss the student's specific LRE as well as appropriate placement along the continuum of alternative placements).**

At a minimum, an IEP must “provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick*

*Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). While an LEA is not required to maximize a student's educational potential, it also cannot "discharge its duty under the by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985). As stated above, Student's behavior impeded her learning in the 2014-2015 school year, even if City School found her behavior to be tolerable. Student was suspended several times during the second half of the 2014-2015 school year, while at Area School. She had conflict with other students, and the school social worker would see her to provide her support. Notwithstanding these facts, her IEP erroneously indicated that her behavior did not impede her learning (and by extension, she did not have social emotional goals on her IEP). A couple of assessments showed Student on grade level; however, those were so entirely discordant from the State A data in such a short period of time that the team should have explained why they were not anomalous if they were going to rely on them for the proposition that Student had made such significant progress in her few months at City School (notwithstanding her disciplinary problems and suspensions) that she needed minimal services, including no behavioral support and no specialized instruction outside the general education setting. The LEA would have needed to have explicitly relied on sufficient evaluative data, including a comprehensive psychological evaluation and an FBA, in order to adequately determine Student's educational needs and how to address them, and in order to develop an appropriate IEP for Student.

Likewise, no psychological evaluation had been conducted by the time of the March 2016 IEP, though she was earning poor grades; had difficulty completing assignments; lacked concentration; had difficulty staying on task; had an inability to self-regulate; exhibited impulsiveness; and had tendencies to cause disruptive behaviors, become agitated very quickly, and to walk out of class. The OHI disability classification listed on the March 2016 IEP may have been accurate; however, given the magnitude of her emotional problems, it is more likely than not that "Emotional Disability" ("ED") was her primary disability classification, and that classifying her as ED would have altered the services and/placement DCPS provided her.

Further, an LEA must ensure that a student's IEP team include, among other people, "the parents of the child." Parent would have had important insights into Student's IEP process. Respondent argues that it contacted Parent in advance of the IEP meeting consistent with 34 C.F.R. §300.322(d), which details the steps and LEA must take before proceeding with an IEP team meeting without a Parent's participation. However, §300.322(d) only applies when an LEA has not been able to convince a parent to participate, even by alternative means such as through a telephone conference. §300.322(a)-(c). The record in this case in no way indicates that Parent did not want to and was not willing to participate in the March 2016 IEP team meeting. Rather, the record is clear that Parent had a lot of difficulty missing work because she was self-employed, yet she came to the school for the scheduled March 8, 2016 meeting and waited an hour for it to start. She came to the school again for the March 24, 2016 meeting, only to find that it had started earlier than the scheduled time. Parent, by all accounts, was engaged and interested in Student's education. DCPS did not demonstrate that it was unable to convince her to participate. Rather, it chose to proceed without her presence, rather than sufficiently working toward a mutually agreeable time, including by teleconference if necessary. Parent's lack of access to the meeting significantly impeded Parents' opportunity to participate in the decision-

making process regarding the provision of a FAPE to Student. Respondent did not meet the burden of proving that it did not deny Student a FAPE by failing to develop an appropriate IEP on in May 2015 or March 2016.

**(c) Whether DCPS denied the student a FAPE by failing to include the parent in IEP meetings in May 2015 and in March 2016.**

As stated above, an LEA must ensure that a student's IEP team include, among other people, "the parents of the child." On May 7, 2015, Student's IEP team convened for the first time since December 2014. Area School notified Parent about the meeting by phone on April 16, 2015, and Parent indicated that she worked and was self-employed, but that she would attend. One week later, Area School sent Parent a formal Letter of Invitation ("LOI") to the meeting by placing the letter in Student's backpack. According to entries on the school's contact log, Parent was informed by phone that the meeting was to begin at 1:45 p.m. However, according to the actual letter of invitation, the meeting was scheduled to begin at 2:00 p.m. Crediting the testimony that Respondent spoke to Parent and she said she would attend the meeting, even though she was self-employed, it does not then follow that the team would simply proceed as scheduled when Parent did not arrive for the meeting, particularly without offering a teleconference option or offering to reschedule the meeting to another time for Parent's benefit. The fact that Parent was told different start times for the meeting bolsters this conclusion. As was the case for the March 2016 IEP as discussed above, and for the same reasons, proceeding without Parent at the May 2015 IEP meeting was not reasonable, rises to the level of a substantive denial of FAPE, and Petitioner meets the burden of proof on this issue.

**(d) Whether DCPS denied the student a FAPE in failing to provide the student appropriate placements during the 2015-2016 school year, in that the student requires a full-time therapeutic placement.**

The appropriateness of a student's IEP and placement must be assessed as of the time the IEP was developed. "Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008).) By the time Student's team met in March 2016, she had not only a history of psychiatric hospitalizations, but she had severe behavioral problems marked by constant distractions, off-task behavior, regular in-school suspensions, and inability to regulate her emotions. She was regularly sent out of class, or away from school, to compose herself. The school social worker was generally the only person who could effectively deescalate her. She was largely failing or earning "Ds" and making no progress on her IEP goals. The limited IEP services she was offered in her March 2016 IEP, representing only an incremental increase from her previous IEP, which had already shown to be insufficient, was not appropriate. Student needed more significant therapeutic supports in order to be in a position to learn. Respondent does not meet the burden of proof on this issue.

**Request for Independent Evaluation at Market Rate**

One of the forms of relief Petitioner seeks is an independent evaluation at market rate, rather than the rate authorized by DCPS/Office of State Superintendent of Education. Given

that: the LEA did not conduct a psychological evaluation for Student since she arrived at DCPS in December 2014, the LEA did not include specific data from a presumably current psychological evaluation that was apparently conducted in State A, Parent was not able to identify a provider from the parents' guide who would evaluate Student at the DCPS rate, Parent's Psychologist was removed from the parents' guide by DCPS, and that Parent's Psychologist invoice is reasonable, the Hearing Officer will grant this request. Under the facts of this case, to do otherwise would mean that Parent would bear the cost of an evaluation that is vital to the FAPE to which Student is entitled, and which had not been conducted by the LEA.

**ORDER**

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. DCPS shall pay the invoiced amount for Student's comprehensive psychological evaluation;
- B. Within 15 school days, DCPS shall convene an IEP team meeting with Parent present,<sup>50</sup> including to review and consider the independent comprehensive psychological evaluation and other relevant data, to review and revise Student's IEP as appropriate, and to determine an appropriate placement and location of services for Student.<sup>51</sup>

All other relief Petitioner requested in the complaint is **DENIED**.

**IT IS SO ORDERED.**

Date: October 11, 2016

**/s/ NaKeisha Sylver Blount**  
Impartial Hearing Officer

Copies to:  
Petitioner (by U.S. mail)  
Petitioner's Attorney (electronically)  
DCPS' Attorney (electronically)  
Chief Hearing Officer Virginia Dietrich, Esq. (electronically)  
OSSE-SPED (electronically)  
ODR (electronically)

**NOTICE OF RIGHT TO APPEAL**

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

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<sup>50</sup> Days of delay caused solely by Parent, her counsel or her advocates shall not be attributable to DCPS.  
<sup>51</sup> Compensatory education is not ripe in this action, as Student is not yet in an appropriate placement and does not yet have an appropriate IEP; therefore, it is not yet possible to determine the scope of harm.