

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: October 25, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2016-0184

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: October 13-14, 2016

Respondent.

Office of Dispute Resolution, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Student was denied a free appropriate public education (FAPE) by the failure of District of Columbia Public Schools (DCPS) to conduct timely special education reevaluations and to provide him with appropriate Individualized Education Programs (IEPs) and educational placements.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 5, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on August 8, 2016. The parties met for a resolution session on August 18, 2016 and were unable to reach an agreement. My final decision in this case was originally due by October 19, 2016. In order to accommodate scheduling for the October 13-14, 2016 due process hearing, by order issued August 29, 2016, I granted DCPS' unopposed request for a 10-day extension of the final decision due date to October 29, 2016. On August 24, 2016, I convened a prehearing conference with counsel to discuss the hearing date, issues to be determined and other procedural matters.

On September 1, 2016, I issued an order clarifying that the burden shifting provision of the D.C. Special Education Students' Rights Act of 2014, D.C. Code § 38-2571.03(6), mandates that DCPS holds the burden of persuasion on the appropriateness of Student's IEPs and placements, including the March 2015 IEP which was developed prior to the July 1, 2016 effective date of the Act's burden shifting provision.

The due process hearing was held before the undersigned Impartial Hearing Officer on October 13-14, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner participated in person, and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Student's stepfather also attended the first day of the hearing. Respondent DCPS was represented by SCHOOL SUPPORT LIAISON and by DCPS' COUNSEL.

The Petitioner testified and called as witnesses EDUCATIONAL CONSULTANT, and NONPUBLIC SCHOOL ADMINISTRATOR. DCPS called as witnesses SPECIAL EDUCATION TEACHER, ACADEMIC SUPPORT TEACHER, SCHOOL SOCIAL WORKER and STUDENT SUPPORT DIRECTOR. Petitioner's Exhibits P-1 through P-46 and DCPS' Exhibits R-1 through R-21, were all admitted into evidence without objection. Counsel for the respective parties made opening arguments. At the conclusion of Petitioner's case-in-chief, counsel for DCPS made an oral motion to strike, which I denied after finding that Petitioner had established a *prima facie* case that the IEPs and educational placements at issue were not appropriate for Student. Counsel for both parties made closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the August 24, 2016

Prehearing Order:

- A. Whether DCPS denied Student a FAPE by failing to conduct a triennial reevaluation by January 2015;
- B. Whether DCPS denied Student a FAPE by failing to reevaluate him after he returned to school from cancer treatment in late spring 2014;
- C. Whether DCPS denied Student a FAPE by failing to provide him with an appropriate IEP in March 2015 in that DCPS failed to gather necessary informal data on Student's behavior or consider his behavior or academic functioning, inappropriately identified Student as a student with Other Health Impairment (OHI), and provided only 2.5 hours per week of pullout instruction for reading, 2.5 hours per week of pull-out instruction for math, and 15 minutes per week of behavior support services and no behavior intervention plan;
- D. Whether DCPS denied Student a FAPE by failing to provide him with an

appropriate IEP in March 2016 in that the IEP lacked sufficient academic and behavioral support services;

E. Whether DCPS denied Student a FAPE when if failed to ensure that Student was provided suitable educational placements for the 2015-2016 school year and for the 2016-2017 school year and

F. Whether DCPS denied Student a FAPE by failing to ensure that Student's IEPs were reviewed and revised appropriately upon receipt of new information about Student's academic and social-emotional functioning in the 2014-2015 and 2015-2016 school years.²

For relief, Petitioner requests that DCPS be ordered to ensure that an appropriate revised IEP is developed for Student and that DCPS be ordered to fund Student's prospective placement at Nonpublic School. The Petitioner also seeks a compensatory education award to compensate Student for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student an AGE youth resides in the District of Columbia with FATHER. Testimony of Mother. Student is eligible for special education and related services as a child with an Other Health Impairment (OHI). Exhibit P-21.

2. Until the 2015-2016 school year, Student was enrolled in CITY SCHOOL. Student was first determined eligible for special education at City School when he was in ELIGIBILITY GRADE. Testimony of Mother. In May 2011 INDEPENDENT PSYCHOLOGIST conducted a comprehensive psychoeducational and clinical evaluation of Student. The psychologist diagnosed Student with Reading Disorder, Disorder of

² An additional issue, whether DCPS denied Student a FAPE by failing to provide transportation services in his March 2016 IEP, was withdrawn by the Petitioner before the hearing.

Written Expression, Attention Deficit-Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Exhibit P-2. Student was determined eligible for special education and also enrolled in a school behavioral support program designed to modify antisocial behavior. Exhibit P-3.

3. In November 2012, a DCPS speech-language pathologist conducted a speech-language evaluation of Student. Student did not exhibit speech-language deficits that warranted IEP services. Exhibit P-3.

4. On February 8, 2013, Student's special education eligibility was confirmed under the OHI-ADHI disability classification. Student was determined not to meet all of the required criteria for Speech or Language Impairment. Exhibit R-1.

5. On February 21, 2013, Student's case manager at City School completed an Evaluation Summary Report on Student compiled from data collected from 2010 to November 2012. As of November 2012, Student was reported to be reading on a Fountas & Pinnell Level G (Grade 1.5) reading level. Exhibit R-1.

6. In September 2013, Student was diagnosed with Nasopharyngeal Carcinoma. Following surgery in September 2013, Student underwent chemotherapy and radiation treatment until January 2014. He did not return to school full-time until April or May 2014. Student received home and hospital services from DCPS during the period of his treatment and recovery. Student is currently in full remission from the cancer. Testimony of Mother.

7. On March 12, 2014, DCPS developed a modified schedule for Student "to respond to medical circumstance that may prevent the student from receiving appropriate education facilitation SY 2013-2014." Exhibit R-2.

8. Student's IEP was reviewed and revised at an IEP meeting on March 12,

2014. Student was provided annual goals for Reading, Written Expression and Emotional, Social and Behavioral Development. The IEP team noted that Student's medical absences had impacted his progress in the 2013-2014 school year. Exhibit P-12. The IEP team reported that as of June 2013 Student was reading on a Fountas & Pinnell Level K (Grade 2.5) reading level. He had not been tested more recently because of his medical issues. The IEP team reported that Student's below grade-level reading and writing impacted his abilities in those subjects as well as his problem solving in math. For the emotional, social and behavioral development area of concern, the IEP team noted that Student's ADHD was well managed, but he was isolated from other children due to his medical absences. The IEP provided for Student to receive 5 hours per week of Special Education Services, all outside general education, and 60 minutes per month of Behavioral Support Services. Exhibit P-12.

9. At the end of the 2013-2014 school year, Student was reported to be progressing on all of his IEP goals, except for one of his writing goals which had not yet been introduced. He was reported to be reading independently at the Fountas & Pinnell Level L reading level. Exhibit R-3.

10. As of November 12, 2014, Student's reading level was reported to have regressed over the summer and he was again reading at the Fountas & Pinnell Level K (Grade 2.5) reading level. For several of the Reading and Written Expression annual goals, on which Student had been reported to be "Progressing" on the June 19, 2014 Progress Report, the November 14, 2014 Progress Report stated that these same goals had either not been introduced, or just been introduced. Exhibits R-3, R-5. This discrepancy was not explained at the due process hearing.

11. In February 2015, DCPS amended Student's IEP without an IEP meeting,

recognizing that the IEP team and Student's family had identified academic and social-emotional areas impacted by Student's illness. The IEP was amended to provide transportation services and to add one hour per week of Special Education services. The IEP amendment form stated that at times, Student could be very fragile and that he required additional support to reinforce skills lost during his illness. Exhibit R-6.

12. On March 9, 2015, Student's IEP team at City School convened for Student's annual IEP review. Student was then reported to be reading independently at the Fountas & Pinnell Level L (middle of second grade) reading level. The IEP provided for Student to receive 6 hours per week of Special Education services, including 1 hour inside general education. The IEP continued 60 minutes per month of Behavioral Support Services. Exhibit P-14.

13. Student was hospitalized four times during the spring and early summer of 2015 for mental health concerns. He was admitted to CITY HOSPITAL on March 3, 2015 and April 29, 2015. He remained at City Hospital for two weeks for each admission. Testimony of Mother, Exhibit P-5. Student was admitted to PSYCHIATRIC HOSPITAL on May 27, 2015 for two weeks and again on July 6, 2015 got two weeks. Three of the four hospitalizations followed episodes of anger outbursts at home. Student's discharge diagnoses following the July 6, 2015 hospitalization were Depressive Disorder Not Otherwise Specified, Post-Traumatic Stress Disorder, Anxiety Disorder Not Otherwise Specified, Oppositional Defiant Disorder (presenting with increased aggression toward family) and ADHD - combined type. When admitted on July 6, 2015, Student stated that he wanted to live with his biological father. Exhibits P-4, P-5. After the July 6, 2015 hospitalization, Student was released to Father, with whom he has resided ever since. Since his July 2016 discharge from Psychiatric

Hospital, Student has not been hospitalized again. Testimony of Mother.

14. On August 18, 2015, DCPS issued funding authorization for Mother to obtain an Independent Educational Evaluation (IEE) Psychological Assessment and Functional Behavioral Assessment (FBA) of Student. Exhibit R-10.

15. At the beginning of the 2015-2016 school year, Mother enrolled Student in PUBLIC CHARTER SCHOOL (PCS). DCPS is the local education agency (LEA) for PCS. Mother provided Student's City School IEP to PCS. Mother informed the PCS Special Education Coordinator about Student's psychiatric hospitalizations and how he had struggled in class at City School. The PCS Special Education Coordinator told Mother that they would do what they could, but if it did not work out, they would have to find somewhere else for Student. Testimony of Mother.

16. For the first month or two of the 2015-2016 school year at PCS, Student's behavior was okay. After a month or two, he started walking out of class and disrupting class. In response to Student's acting out at school, Mother would receive calls from the school staff to come up to the school or to talk with Student by telephone. Testimony of Mother.

17. In December 2015, IEE PSYCHOLOGIST conducted an IEE Psychological Reevaluation of Student. He reported that cognitive measures indicated low average skills, with significant weaknesses in processing speed, which seemed to be mostly impacted by social-emotional issues (depression and anxiety). Student's academic achievement showed extreme variability, with relative strength in mathematics and especially weak skills in Reading. Student demonstrated a relative strength in writing, but significantly weaker skills in sentence writing fluency and spelling. Independent Psychologist reported that Student's social-emotional profile appeared to be the most

predominate area that creates barriers to learning, although characteristics of ADHD and Learning Disabilities were also apparent. Independent Psychologist diagnosed Student with Unspecified Depressive Disorder, Generalized Anxiety Disorder, Post Traumatic Stress Disorder (PTSD), ADHD-Combined Type, and Specific Learning Disorder with Impairments in Reading Mathematics and Written Expression. Exhibit P-7.

18. IEE Psychologist recommended, *inter alia*, that Student's primary disability classification be changed to Emotional Disability (ED), and that his IEP goals should address social-emotional issues as primary, and that secondary issues of OHI-ADHD and Learning Disabilities in Reading, Mathematics and Written Expression should also be addressed. Exhibit P-7.

19. Educational Consultant conducted an FBA of Student in January 2016. He observed Student in class and interviewed Student's teachers. Educational Consultant concluded that the function of Student's problem behaviors was to escape from demands from peers and school staff. For interventions, Educational Consultant recommended consistency in providing consequences for positive and negative behavior, diligent use of a behavioral contract, proximate seating to teachers, limiting choices or options and avoiding multi-step directions, redirection to visual presentation of tasks and having regular movement breaks. Educational Consultant also recommended, *inter alia*, that Student needed someone to talk with him at least twice a day about his behavior. Exhibit P-8.

20. Student's IEP team at PCS convened for his annual IEP review on March 24, 2016. The IEP team reviewed, *inter alia*, the IEE psychological assessment and FBA. The IEP team decided to defer a decision on changing Students' disability

classification for OHI to ED pending a psychological reevaluation by DCPS' school psychologist. The PCS IEP team increased Student's IEP Specialized Instruction from six hours per week to 16 hours per week, including 10 hours outside general education. Student's Behavioral Support Services were increased from 60 minutes per month to 60 minutes per week. Exhibits P-14, R-14, R-15.

21. At the March 24, 2016 IEP meeting, the IEP team also adopted a Behavior Intervention Plan (BIP) for Student based upon the recommendations of Educational Consultant in his IEE FBA. Exhibit R-12, Testimony of Educational Consultant.

22. On May 7, 2016, DCPS SCHOOL PSYCHOLOGIST made a Comprehensive Psychological Reevaluation of Student to assess whether his disability classification should be changed from OHI-ADHD to ED. For the reevaluation, DCPS School Psychologist reviewed prior evaluation reports and records, obtained updates from Student's teachers on his current functioning in school, and had a teacher and Student's father complete a behavior rating scale. She also conducted a classroom observation. Student's teachers reported that his vocabulary was below grade level and he had difficulty expressing himself, he had difficulties when reading silently, his reading comprehension was weak, he had difficulty making predictions, his fluency was poor, his reading was slow and deliberate and below grade level, he could not retell details in a story and he had difficulties with written expression. His math teacher reported that Student had a great deal of difficulty staying focused and displayed an unwillingness to complete work in and out of class. Overall Student had gaps in his learning, lacked understanding of word problems and did not follow written directions. DCPS School Psychologist reported that Student had received an F and D's in ELA for the school year and 2 F's and a D in Math. Her review of Student's written work confirmed weakness in

reading comprehension, use of end marks, writing paragraphs and, especially, in spelling. Exhibit P-9.

23. To assess Student's eligibility for the ED disability classification, DCPS School Psychologist had Student's ELA teacher and Father complete the Devereux Behavior Rating Scale. While the teacher's responses indicated very significant challenges for Student, with a general pervasive mood of unhappiness or depression and a tendency to develop physical symptoms or fears associated with personal or school problems, Father's responses indicated "normal functioning." Because the DCPS criteria for ED require that the characteristics appear across settings, *i.e.* not only at school, DCPS School Psychologist concluded that the evaluation data did not support an ED disability classification for Student. Exhibit P-9.

24. Student is seen by a therapist and a psychologist at the Washington D.C. Department of Behavioral Health (DBH). In the spring of 2016, Student was assigned a community support worker by DBH. Student's behavior at school improved for the last couple of months of the 2015-2016 school year. Testimony of Mother.

25. At a PCS eligibility team meeting on June 8, 2016, the eligibility team confirmed Student's eligibility for special education under the OHI-ADHD classification and determined that Student did not meet criteria for a Multiple Disability (MD) classification based upon also having an ED disability. Mother and her representatives disagreed with the decision not to find that Student eligible base upon ED. Exhibit P-20.

26. Student returned to PCS for the 2016-2017 school year. This school year, Student has been doing a great job with his behavior. He is engaged, has friends, and any discipline issues are at a very low level. Student raises his hand all the time in ELA

and Social Studies. Student recently tested at Level N on the Fountas and Pinnell scale. His spelling has improved. He is able to break words down and write them. His reading comprehension has improved. Student is very confident in multi-step math problems and has mastered that IEP goal. Student seems to really enjoy his PCS music class which is very calming for him. Testimony of Academic Support Teacher.

27. Nonpublic School is a private special education day school, for children with disabilities, grades kindergarten through 12, in the District of Columbia. School staff has reviewed Student's education records and Student visited the private school for two days in October 2016. Nonpublic School offers a highly structured clinically-based approach to reading and math. School staff felt that Student would really benefit from its program. Student has been offered immediate admission. The Nonpublic School classroom proposed for Student has six students, who have Specific Learning Disability (SLD) and/or OHI disabilities. The teachers are certified in special education and in subject content. Nonpublic School is not a therapeutic day school. Related services, including Behavioral Support Services, are available as needed. Nonpublic School holds a Certificate of Approval of the D.C. Office of the State Superintendent of Education (OSSE). Nonpublic School charges the OSSE approved tuition rate of approximately \$44,000 per year. Testimony of Nonpublic School Administrator.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

I. Reevaluation of Student

A. Did DCPS deny Student a FAPE by failing to conduct triennial reevaluations by January 2015?

B. Did DCPS deny Student a FAPE by failing to reevaluate him after he returned to school from cancer treatment in late spring 2014?

I address first the issue of whether DCPS denied Student a FAPE by not conducting timely reevaluations as required by the IDEA. The parent alleges (1) that Student was not reevaluated within three years after his July 2011 reevaluation and (2) that Student should have been additionally reevaluated following his return to school near the end of the 2013-2014 school year, after surgery and lengthy therapy for cancer. DCPS responds that its reevaluations of Student were timely. Petitioner holds the burden of persuasion on this claim.

The IDEA provides that a special education reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and

the public agency agree otherwise. *See* 34 CFR § 300.303. Student was reevaluated at City School in February 2013 and his special education eligibility was confirmed. This was within three years of his prior July 2011 reevaluation. At a PCS IEP team meeting on March 24, 2016, Student's eligibility as a student with an OHI disability was again confirmed, based upon current data including the IEE Psychologist's January 2016 psychological reevaluation. I conclude that Petitioner has not shown that DCPS failed to ensure that Student's regular triennial reevaluations were timely completed. *Cf. Cooper v. District of Columbia*, 77 F. Supp. 3d 32, 37 (D.D.C. 2014) (The IDEA plainly requires that a reevaluation be conducted every three years. As a matter of practical construction, this requirement premises the time for a new evaluation on the date of the student's previous assessment.)

The parent also contends that DCPS should have reevaluated Student after he returned to school late in the 2013-2014 school year, following his recovery from lengthy treatment for cancer. In addition to conducting triennial reevaluations, the District must also reevaluate a child with a disability if the District determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parents or teacher requests a reevaluation. *See District of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 93–94 (D.D.C. 2014). *See, also*, 34 CFR § 300.303(a); U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46648 (August 14, 2006); *West-Linn Wilsonville Sch. Dist. v. Student*, 2014 WL 3778571 (D. Or. July 30, 2014).

Here, the record does not show that the parent or a teacher requested that Student be reevaluated after he returned to school following his lengthy illness. Special Education Teacher, who taught Student for several years at City School, testified that

Student's behavior issues were manageable with City School's crisis plan and that Student was making slow, but adequate, academic progress in the 2014-2015 school year. However, Educational Consultant opined in his testimony that Student should have been reevaluated in the 2014-2015 school year because there was no evidence that Student had made academic or social-emotional progress since 2011.

The hearing record shows that based on the Fountas and Pinnell scales, after May 2012, Student had made minimal, if any, progress in Reading which was his area of greatest academic concern. In her June 11, 2011 psychological evaluation report, Independent Psychologist reported that although Student's cognitive assessment results indicated solidly Average skills, assessment of his academic skills revealed significant deficits in the areas of Reading and Written Expression. Student's IEPs, including the March 12, 2014 IEP were intended to address these deficits. Student's records show that in May 2012, has was reading at Fountas and Pinnell Level M (End Grade 2); in June 2013 at Level K (Beginning Grade 2) and at the end of the 2013-2014 school year, at Level L (Middle Grade 2). In November 2014, Student's reading level was reported to have regressed to Level K. By March 2015, Student was reported to be reading at Level L. Thus, from May 2012 to March 2015, Student's Reading level actually declined. Based on these Fountas & Pinnell measures, I find credible Educational Consultant's opinion that Student's educational needs warranted a reevaluation to enable his IEP team to make an informed determination of his services requirement.

The IDEA does not set a timeline for completing reevaluations outside of the triennial reevaluation requirement. *Cf. Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, the *Herbin* decision concluded that "[r]evaluations should be conducted in a 'reasonable

period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 IDELR 1127, 1129 (1995)).

The parent contends that Student's reevaluation should have been conducted after Student returned to school in late spring 2014 following his cancer treatment. However, reevaluating Student so soon after his return to school may not have been appropriate. Special Education Teacher testified that Student's transition back to school, after missing most of the 2013-2014 school year, was difficult for him and he was provided more support in the 2014-2015 school year to try to get him caught up from the time he had missed. A February 2015 IEP amendment form stated that at times, Student could be very fragile and that he required additional support to reinforce skills lost during his illness. I find that under these circumstances, DCPS' not reevaluating Student immediately after he returned from his medical absences was reasonable. Notwithstanding, considering Student's very weak academic progress since his 2013 reevaluation, DCPS should have ensured that he was reevaluated before his March 19, 2015 IEP annual review meeting in order for the IEP team to be fully informed as to his current educational needs. I conclude that DCPS' not reevaluating Student prior to the IEP review constituted unreasonable delay.

The failure to timely conduct an IDEA reevaluation is a procedural violation of the Act. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district's failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

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

34 CFR § 300.513(a)(2). *See also, e.g., Brown v. District of Columbia*, No. 15-0043, 2016 WL 1452330 (D.D.C. Apr. 13, 2016).

At the March 19, 2015 IEP meeting, the City School IEP team increased Student's special education services by only one hour per week over the March 12, 2014 IEP. I find that DCPS' failure to ensure that Student was reevaluated prior to the March 19, 2015 IEP meeting did impede the parent's opportunity to meaningfully participate in the meeting and impeded Student's right to a FAPE because without an updated evaluation, the IEP team and the parent lacked sufficient data to appropriately revise Student's IEP to address his inadequate educational progress, especially in Reading. *Compare N.K. v. N.Y. City Dep't of Educ.*, 961 F.Supp.2d 577, 586 (S.D.N.Y.2013) (holding that the IEP team had sufficient evaluative data despite the failure to conduct an evaluation). This was a denial of FAPE.

II. Appropriateness of IEPs and Placements

C. Did DCPS deny Student a FAPE by failing to provide him with an appropriate IEP in March 2015 in that DCPS failed to gather necessary informal data on Student's behavior or consider his behavior or academic functioning, inappropriately identified Student as a student with Other Health Impairment (OHI), and provided only 2.5 hours per week of pullout instruction for reading, 2.5 hours per week of pull-out instruction for math, and 15 minutes per week of behavior support services and no behavior intervention plan?

D. Did DCPS deny Student a FAPE by failing to provide him with an appropriate IEP in March 2016 in that the IEP lacked sufficient academic and behavioral support services?

E. Did DCPS deny Student a FAPE when it failed to ensure that Student was

provided a suitable educational placements for the 2015-2016 school year and for the 2016-2017 school year?

F. Did DCPS deny Student a FAPE by failing to ensure that Student's IEPs were reviewed and revised appropriately upon receipt of new information about Student's academic and social-emotional functioning in the 2014-2015 and 2015-2016 school years?

I turn next to Petitioner's allegations that DCPS failed to ensure that Student was offered appropriate IEPs and placements for the 2014-2015 and 2015-2016 school years.

DCPS holds the burden of persuasion on these issues.

In *Moradnejad v. District of Columbia*, No. 14–1159, 2016 WL 1275577 (D.D.C. Mar. 31, 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

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

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, 458 U.S. at 206–07, 102 S.Ct. 3034. Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so.” *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)); *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034 (finding that the IDEA does not require that IEPs “maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children,” only that they be “reasonably calculated to enable the child to receive educational benefits”); *N.T. v. Dist. of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012) (“While the District of Columbia is required to provide students with a public education, it does not guarantee any particular outcome or any particular level of education.”).

Moradnejad, supra.

1. March 9, 2015 IEP

Student's March 9, 2015 IEP, developed at City School, provided Student 6 hours per week of Specialized Instruction, including 1 hour inside general education, and 1 hour per month of Behavioral Support Services. This was an increase of one hour per week of Specialized Instruction over the March 12, 2014 IEP. Petitioner's Expert, Educational Consultant, opined that this IEP was not appropriate because without reevaluating Student, the IEP team did not have sufficient data on where Student was performing academically and because the IEP services were not calculated to remedy Student's alleged failure to progress in Reading and Written Expression under his prior IEPs. DCPS responds that the IEP was appropriate because Special Education Teacher's testimony showed that Student had made progress under the prior IEP.

I agree with Petitioner's expert, Educational Consultant, that DCPS violated the IDEA's procedural requirements by allowing the March 2015 IEP team to revise Student's IEP without first having Student reevaluated. The IDEA regulations require that in developing a child's IEP, the IEP Team must consider, *inter alia*, the academic, developmental, and functional needs of the child. As discussed above, Student had failed to make expected educational progress for three school years, especially in Reading where he was stuck on a 2nd grade level. DCPS' failure to reevaluate Student to assess the reasons for this lack of growth resulted in the March 9, 2015 IEP team's lacking sufficient data to informedly consider Student's academic needs.

Turning to the second prong of the *Rowley* inquiry, I similarly conclude that DCPS has not met its burden of persuasion that the March 9, 2015 IEP was reasonably calculated to enable Student to receive educational benefits. Petitioner's expert,

Educational Consultant, testified that the baselines for Reading and Written Expression in Student's respective 2014 and 2015 IEPs did not show that Student was making educational progress. In fact, the baselines for Written Expression in the 2015 IEP do indicate progress. *See Exhibit P-14 (Student is improving a lot in his writing structure and responses)* However, the 2015 IEP reports that Student was then reading at Fountas & Pinnell Level L, which was below his Reading level measured in May 2012. Despite the lack of expected progress, *see 34 CFR § 300.324(b)*, the March 9, 2015 IEP team added only one additional hour, for a total of 3.5 hours per week, of Specialized Instruction to address Student's Reading needs. I found persuasive Educational Consultant's opinion that this minor change was not the type of systematic IEP revision reasonably calculated to address Student's extreme deficit in Reading. The City School IEP team's failure to revise Student's IEP appropriately to address his lack of academic progress was a denial of FAPE.

Petitioner also alleges that the March 9, 2015 IEP inappropriately identified Student as a student with an Other Health Impairment (OHI), and provided only 2.5 hours per week of pull-out instruction for math [*sic*], 15 minutes per week of behavior support services and no behavior intervention plan (BIP). I find that DCPS met its burden of persuasion as to the appropriateness of these aspects of the March 9, 2015 IEP. Petitioner's expert, Educational Consultant, did not identify math as an area of concern that should have been addressed in the 2015 IEP. (The City School IEP team identified Reading and Written Expression, but not math, as academic areas of concern.) With regard to behavior support, I found persuasive the testimony of Special Education Teacher that prior to the March 2015 IEP meeting, Student did not have day-to-day behavior problems which would have warranted an increase in Behavioral

Support Services or incorporation of a BIP in the IEP. Student's anger episodes, which resulted in mental health hospitalizations, did not occur until later in the school year.

I also find that DCPS established that OHI-ADHD was an appropriate disability classification for Student. An OHI classification is given to a student who has "limited strength, vitality, or alertness, including a heightened alertness with respect to environmental stimuli . . . that . . . [is] due to chronic or acute health problems," which in turn, "results in a limited alertness with respect to the educational environment[] that . . . adversely affects a child's educational performance." *Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 243 (D.D.C. 2010), citing 34 C.F.R. § 300.8(c)(9)-(9)(ii) (2007). Since 2011, Student's psychological evaluations have consistently identified ADHD as one of Student's chronic health problems. Assuming, without deciding, that Student could also have been eligible under another impairment, such as Emotional Disturbance (ED), that does not show that the IEP was inadequate. The IDEA does not require that the disability classification be identified in the IEP. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE.)

2. March 24, 2016 IEP

Student transferred to PCS at the beginning of the 2015-2016 school year. In January 2016, he was reevaluated by Independent Psychologist and in February 2016 he received an IEE. Student's PCS IEP team met on March 24, 2016 to review the IEE assessments and other data in order to revise Student's IEP. The IEP team incorporated data in the IEP from the IEE psychological evaluation and FBA and increased Student's

Specialized Instruction from 6 hours to 16 hours per week and quadrupled his Behavioral Support Services from 60 minutes per month to 60 minutes per week.

Petitioner's expert, Educational Consultant, opined that the March 24, 2016 revised IEP was still inappropriate because the IEP does not identify changed strategies to target Student's Reading and Written Expression deficits. DCPS' expert, Student Support Director, opined to the contrary that the March 24, 2016 IEP was appropriate when developed. I found the DCPS witness' opinion more persuasive than that of Educational Consultant, because she and Academic Support Teacher work with Student on a daily basis. They testified that this school year, Student is a "different child" from last year. Academic Support Teacher reported that Student has recently attained level N on the Fountas & Pinnell reading scale. She noted that Student's spelling, writing and math have all improved also. Academic Support Teacher testified that behaviorally, Student is doing a "great job" this year, that he is attentive and engaged in class and that any discipline issues have been at a very low level. Student Support Director related that Father says that Student now "loves" school and is particularly excited about the PCS performing arts program. I conclude that DCPS has met its burden of persuasion that the March 24, 2016 IEP, which incorporated the findings from the IEE psychological and FBA, more than doubled Student's Specialized Instruction Services and quadrupled his Behavioral Support Services, was reasonably calculated to enable Student to receive educational benefits. *See K.S. v. District of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C. 2013) (An IEP must be likely to produce progress, not regression or trivial educational advancement.)

3. Educational Placements

Petitioner alleges that DCPS denied Student a FAPE by not ensuring that he was

provided suitable educational placements for the 2015-2016 and 2016-2017 school years. DCPS maintains that Student's placement at PCS is appropriate. The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of his disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. See 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA requires that students with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. See, e.g., *Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). "Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act." *J.N. v. District of Columbia*, 677 F. Supp. 2d 314, 324 (D.D.C. 2010) (quoting *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989).)

Petitioner's expert, Educational Consultant, opined that Student needs a full time special education placement with small classes and teaching staff trained in counseling, behavior protocols and behavior tracking. However, the fact that Student is succeeding this school year at PCS, where he is being provided a combination of pull-out and push-in special education services, casts doubt on Educational Consultant's placement opinion. DCPS' behavioral expert, School Social Worker, testified that socially, Student is able to maintain appropriate friendships in the general education setting and to work individually and in small groups with the classroom teacher. As noted above, Student's father reported to Student Support Director that Student loves school at PCS and is

excited about the performing arts program there. I conclude that DCPS has met its burden of persuasion that Student does not require a more restrictive educational placement.

4. Revision of IEPs Due to New Information

Lastly, Petitioner alleges that DCPS denied Student a FAPE by failing to ensure that his IEPs were reviewed and revised appropriately upon receipt of new information about his academic and social-emotional functioning in the 2014-2015 and 2015-2016 school years. At the end of the 2014-2015 school year, Student was hospitalized multiple times for emotional-behavioral issues. Most of these hospitalizations stemmed from episodes of anger or violence occurring away from the school environment. These episodes did not recur in the 2015-2016 school year after Student was permitted to reside with his father. In this decision, I have already addressed DCPS denial of a FAPE to Student by its failure to timely reevaluate Student in the 2014-2015 school year and the failure of the March 9, 2015 IEP team to make appropriate revisions to Student's IEP. Petitioner's allegations concerning DCPS' alleged failure to revise and review Student's IEP based upon "new information" received in the 2014-2015 and 2015-2016 school years are not a basis for a finding of an additional or separate denial of FAPE.

Remedy

In this decision, I have determined that Petitioner established that Student was denied a FAPE by the failure of DCPS to reevaluate Student prior to the March 9, 2015 IEP meeting and that DCPS did not carry its burden of persuasion that the March 9, 2015 IEP was reasonably calculated to enable Student to receive educational benefits. For relief, Petitioner requests, *inter alia*, that DCPS be ordered to fund Student's prospective placement at Nonpublic School and that Student be awarded compensatory

education. The D.C. Circuit Court of Appeals recently explained the compensatory education remedy in its decision in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016):

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has “broad discretion to fashion an appropriate remedy,” which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an award of compensatory education “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.” 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial.⁶⁷ An appropriate compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child’s needs.” *Id.* In some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in others the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.

B.D., 817 F.3d at 797–98.

Petitioner’s expert, Educational Consultant, recommended that Student be provided compensatory education in the form of 90 hours of tutoring, including 60 hours in English Language Arts (ELA) and 30 hours in Math, in the hope that Student would be able to advance two grade levels toward his actual school grade. That Student is progressing under his current PCS IEP, which has increased in Specialized Instruction from 6 to 16 hours per week, demonstrates the harm Student suffered from the inadequate services in the prior City School IEP. I find Educational Consultant’s recommendation of 90 hours of compensatory education tutoring to be appropriate and

certainly no more than would be reasonably calculated to put Student in the position that he would be in, absent DCPS' denial of FAPE.

Petitioner also seeks an order for DCPS to fund Student's immediate placement at Nonpublic School for the remainder of the 2016-2017 school year. Prospective private school placement, or other removal of students with disabilities from the regular educational environment, may occur only if the nature or severity of the disability is such that education in a regular public school, cannot be achieved satisfactorily. *See* 34 CFR § 300.118(a)(2)(ii). In *Jenkins v. Squillacote*, 935 F.2d 303 (D.C.Cir.1991), the D.C. Circuit explained that "if there is an "appropriate" public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Id.* at 305 (internal citations and quotations omitted).

In this case, the evidence established that in the current school year, Student's education is being achieved satisfactorily at PCS. Based upon the unrebutted testimony of Academic Support Teacher, Student is doing well in the general education setting, with special education support and accommodations. He is engaged, likes to participate and is doing a really good job behaviorally. Student is also progressing on all of his IEP academic goals. Father reports that Student now loves his school. On these facts, I find that Student's prospective placement at Nonpublic School is not warranted.

ORDER

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

ORDERED:

1. As compensatory education for the denials of FAPE in this case, within 10 business days of this date, DCPS shall arrange funding authorization for Student to be provided 90 hours of individual academic tutoring by a qualified DCPS, PCS or independent tutor, to be used for ELA, math or other academic instruction as may be determined needed by the parents and the tutor, in collaboration with PCS staff.
2. All other relief requested by the Petitioner herein is denied.

Date: October 25, 2016

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

NOTICE OF RIGHT TO APPEAL

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

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team