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OSSE
Office of Dispute Resolution
October 30, 2017

Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”) Respondent.</p> <p>Case # 2017-0211</p> <p>Date Issued: October 15, 2017</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: October 4, 2017 October 5, 2017</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, October 15, 2017, 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 4, 2017, and October 5, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution, 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003. The parties submitted written closing arguments on October 6, 2017.

BACKGROUND AND PROCEDURAL HISTORY:

The student or “Student” is age _____ and in grade _____.² The student resides with the student’s parent in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of Autism. The student attends a District of Columbia Public Schools (“DCPS”) middle school (“School A”). DCPS is the student’s local educational agency (“LEA”).

Student’s mother (“Petitioner”) filed the current due process complaint on August 1, 2017, alleging, inter alia, that DCPS denied Student a free appropriate public education (“FAPE”) by failing to propose an appropriate individualized educational program (“IEP”).

The parties participated in a resolution meeting on August 14, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on August 31, 2017, and ended [and the Hearing Officer’s Determination (“HOD”) is due] on October 15, 2017. Petitioner filed an unopposed motion to continue and extend the HOD due date to allow for the requested hearing dates, because of the unavailability of the parties for the original hearing date(s). The motion was granted and the HOD due date was extended by thirty-three (33) calendar days to October 15, 2017.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on August 30, 2017, and issued a pre-hearing order (“PHO”) on September 5, 2017, and a revised PHO on September 21, 2017, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer order DCPS to immediately place, fund, and provide transportation for the student to attend a non-public special education separate school (“School C”).³

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

³ Although the PHO stated Petitioner was seeking compensatory education, that request for relief was not in the complaint and Petitioner presented no evidence on compensatory education beyond the requested placement at School C.

DCPS Response:

The LEA filed a response to the complaint on August 11, 2017. The LEA denies that there has been any failure to provide the student with a FAPE. The LEA asserts that it has appropriately evaluated and programmed for the student during the relevant time period. The LEA contends it has conducted numerous meetings to review the student's evaluations, formal assessments and IEPs. The LEA asserts the student has had both formal and informal assessments, including psychological, speech and language, as well as evaluations to determine educational performance levels. The LEA contends it has conducted an eligibility review and assessment, a behavior support review, revision and provision.

The LEA asserts the student's strengths and deficits were considered to determine programming and least restrictive environment ("LRE"). The LEA contends the student did not present with a need for behavioral assessment until the spring of 2017, when elopement and proper intervention were issues. The LEA asserts that a dedicated aide is not an appropriate service to address elopement. The LEA contends that Petitioner and her counsel agreed to the student's last IEP that was developed before the end of SY 2016-2017, and that Petitioner decided to reject the provision of ESY on the student's IEP for the summer of 2017.

ISSUES:⁴

The issues adjudicated are:

1. Whether the LEA denied Student FAPE by failing to develop appropriate IEPs for Student on June 2, 2017 (the current IEP), January 5, 2017,⁵ March 30, 2016, and because the IEP(s) lacked: (a) sufficient of hours specialized instruction, (b) appropriate mathematics and writing goals, (c) behavior support services and social skills instruction (d) appropriate social emotional goals, (e) a BIP with appropriate intervention strategies and positive behavioral supports (f) appropriate accommodations and modifications, (g) extended school year ("ESY") services, (h) a dedicated aide, and (i) appropriate assistive technology (beyond an iPad).
2. Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate special education placement, to wit: an appropriate least restrictive environment ("LRE") - a small teacher to student ratio and a self-contained environment as of March 27, 2017.
3. Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate assistive technology assessment as early as August 8, 2016.

⁴ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

⁵ The PHO stated a different date for this IEP; but the hearing record indicates that the IEPs being challenged are dated as indicated in this HOD.

4. Whether the LEA denied Student a FAPE by failing to timely provide Student with FBAs requested on August 8, 2016, and September 2, 2016.

5. Whether the LEA denied Student a FAPE by delegating authority to central office staff that were not members of the MDT to make the decision regarding a dedicated aide on October 18, 2016, and November 4, 2016.

6. Whether the LEA denied Student a FAPE by failing to review and revise the student's IEP to reflect declining grades, a smaller class ratio, and self-contained environment on March 27, 2017, and June 2, 2017.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 104 and Respondent's Exhibits 1 through 61) that were admitted into the record and are listed in Appendix A.⁶ Witnesses' identifying information is listed in Appendix B.⁷

SUMMARY OF DECISION:

Petitioner had both the burden of production and persuasion on the following issues above: #3, #4, #5, #6. Respondent had the burden of persuasion on the following issues: #1, #2. The Hearing Officer concludes that Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issues #1, and #2 and that Petitioner did not sustain the burden of persuasion on the remaining issues. As a result of the finding of denial of FAPE, the Hearing Officer directs DCPS to place and fund the student at School C for the remainder of school year ("SY") 2017-2018 and convene an IEP meeting to review the student's recent evaluations and review and revise Student's IEP as appropriate.

FINDINGS OF FACT:⁸

1. Student resides with Petitioner in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of Autism. (Petitioner's Exhibit 10-1).

⁶ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁷ Petitioner presented four witnesses: Petitioner, an educational consultant, a representative from School B and a assistive technology consultant. Respondent presented five witnesses: two DCPS special education teachers, a DCPS social worker, a DCPS psychologist and a DCPS compliance case manager.

⁸ 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 (or the page number of the entire disclosure document) 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.

2. Student attends School A, a DCPS school where Student began attending at the start of SY 2016-2017. Prior to attending School A, Student attended a different DCPS school ("School B") during SY 2015-2016. While at School B, Student had an IEP that was developed on January 11, 2016, and amended on March 30, 2016. Student attended ESY while at School B. (Petitioner's Exhibit 3-1)
3. While at School B Student consistently attended ESY where Student had small group instruction and displayed little, if any, behavioral difficulties. During ESY, Student was able to have academics reinforced and build skills that made transition to the regular school year less problematic. While Student attended School B, Petitioner requested an FBA, but School B but did not conduct one, and tracked Student's behavior until the last year Student attended School B. Student had no BIP at School B. Petitioner also requested an AT evaluation per Student's pediatrician, and requested a dedicated aide, but School A did not provide either. (Petitioner's testimony)
4. The School B IEP team believed the Student's hours of specialized instruction, and the setting for the instruction, were appropriate based on Student's progress, observation, and what the team thought appropriate. The team considered the goals to be appropriate, and with the amount of supports in place, the team did not deem that a BIP was warranted. The IEP team considered a dedicated aide for the student, but the team at School B never deemed an aide for Student to be appropriate. However, School B did complete a dedicated aide referral form during SY 2015-2016 to help ensure Student stayed in the classroom and completed work. (Witness 4's testimony, Petitioner's Exhibit 101)
5. Although Student showed mastery in some of Student's IEP goals, because the areas of concern remained a challenge for Student, Student's IEP goals remained the same in IEPs Student had for the two years at School B. It was important to continue to monitor the skills and the goals were kept on the IEP. (Witness 4's testimony, Respondent's Exhibit 2)
6. While at School B, Student participated in a weekly social skills group of 4 to 5 special education students using a curriculum to support areas of need, including rigidity. Student came to use social skill language to assist in regulating behaviors with peer and adult interactions. (Witness 4's testimony)
7. At School B, on rare occasions Student would get upset and begin shouting and ripping papers. However, typically when Student would get frustrated, Student would resort to pacing, and mumbling within the classroom. In very rare cases, Student would step out the classroom and try to get away from the catalyst causing stress. Student never left the School B campus. (Witness 4's testimony)
8. While at School B, Student was assessed annually by DCPS AT personnel and had the use of an iPad, which was fitted with software programs. Student knew how to use the device and would often use it to video large group activities and to type lists and notes. Student also had the use of a laptop computer in the classroom. (Witness 4's testimony)

9. Student's March 30, 2016, IEP developed at School B, under the section entitled Considerations of Special Factors, with regard to positive behavior interventions and supports, the IEP stated: When the activity or the environment becomes frustrating for Student, Student tries to initiate coping skills, soothing strategies and processing strategies. These can sometimes cause Student to walk around the room, calling out or engaging in other activities that are not part of the grade activities. The positive behavior interventions and strategies that are put in place are teacher making schedule or routine changes known to Student ahead of time, taking a break, using language from the Unstuck and On Target Program, and writing Student's problem down to show the teacher. (Petitioner's Exhibit 3-3)
10. In that same IEP section, with regard to communication, the March 30, 2016, IEP stated: There are concerns that Student doesn't always verbalize what Student's feeling. Student will sometimes shutdown and Student has difficulty expressing [] self. Student can become very frustrated, because of a change in routine when Student doesn't have prior knowledge; when Student is overwhelmed and anxious, Student may revert to moaning and trying to avoid eye contact. With regard to assistive technology, the IEP noted that Student used an iPad or a laptop as needed. (Petitioner's Exhibit 3-3)
11. The March 30, 2016, IEP included a list of other classroom aides and services including among other things, sensory breaks in the classroom when necessary, visual supports such as an individual schedule, allowed to not stand in line during lunch, receiving friendship and social skills support in a small group setting with school-based counselor, being made aware of changes in routines (fire drills, substitute teacher, schedule changes), being excused from recess in needed, reduced amount of work focusing on quality not quantity. Additional time to complete assignments as well as assignments that are checked for quality not quantity. (Petitioner's Exhibit 3-16)
12. The March 30, 2016, IEP included classroom and testing accommodations, including among other things a human scribe, speech to text, human signer or external assistive technology for selected responses on ELA literacy assessments. Laptop for writing, oral response to tests, preferential seating, location with minimal distractions, individual testing, extended time and flexibility in scheduling. (Petitioner's Exhibit 3-18)
13. The March 30, 2016, IEP prescribed the following services: 4 hours per week of specialized instruction inside the general education setting, 4 hours per month of speech language pathology outside the general education setting, 120 minutes per month of occupational therapy outside the general education setting, and 120 minutes per month of behavioral support services inside the general education setting. (Petitioner's Exhibit 3-15)
14. The March 30, 2016, IEP prescribed ESY services and included ESY goals. The IEP did not include the services of a dedicated aide. (Petitioner's Exhibit 3-16, 3-19)

15. The March 30, 2016, IEP included one math goal: Student will solve multi-step, multi-operational word problems, using learned computational strategies, and visually breaking down the problem into chunks, in 8/10 data checks and with at least 85% accuracy. The present levels of performance (“PLOP”) in the area of math stated Student is able to count, read, write and compare numbers to the 1000’s place. Student can subtract single and double digits, with and without regrouping. Student is multiplying up to 2 digits using a multiplication chart. Student sometimes has difficulty solving multi-step word problems, keeping track of Student’s classwork and turning in completed work. Student receives small group and 1:1 instruction in the gen. ed. Setting. Progress monitoring is conducted using unit tests and informal assessments. (Petitioner’s Exhibit 3-4)
16. The March 30, 2016, IEP included two written expression goals: (1) Student will independently complete a 5 sentence paragraph using correct capitalization, either with paper/pencil or an electronic device, with 80% accuracy in 4 out of 5 trials. (2) With some guidance and support from adults, Student will: plan, draft, edit and revise Student’s writing piece, focusing on punctuation, capitalization, and proper grammar in 8/10 trials with at least 85% accuracy. The PLOP for written expression states, among other things, that Student struggles to write stories independently and becomes agitated when requested to expand Student’s ideas on paper. Using a graphic organizer has proved helpful. Student tends to “free write” Student’s thoughts, so the result reads as random. When Student receives help from an adult, Student can either write it on Student’s own or dictate Student’s words to a teacher for them to write for Student. Student has shown Student can write on Student’s own, but at times finds it difficult; sometimes will rush through work and forget to use correct capitalization and punctuation. Student likes using electronic devices to help with writing, but there are times when Student will not use Student’s tablet for writing. (Petitioner’s Exhibit 3-5, 3-6)
17. The March 30, 2016, IEP included emotional, social and behavior development (“ESBD”) goals. The PLOP in the area of ESBD stated that Student shuts down or ignores one’s efforts to solicit expression of upset or overwhelmed feelings 50% of the time. When responding to read aloud, Student is able to label the emotion a character may be feeling with consistent accuracy. When Student is not flooded, Student can express emotions 90% of the time. Currently, Student frequently remains in Student’s space and does not respond to instructions or prompts if [they] are coaching Student to engage in a non-preferred activity. Once Student initiates Student’s self-soothing strategies, which may be disruptive or appear inappropriate for the situation, Student is not receptive to effort to solicit Student’s expression of upset or overwhelmed feelings upwards of 90% of the time per mom’s report... Currently Student rarely expresses what Student needs to be successful. It changes situationally, with predictable cycles averaging 20% success rate. (Petitioner’s Exhibit 3-10)
18. The March 30, 2016, IEP included three ESBD goals: (1) Student will express Student’s emotions through verbal, written or another appropriate mode, when Student is overwhelmed or flooded 50%.⁹ (2) Student will demonstrate cognitive flexibility when

⁹ The goals had three objectives: (1) identify triggers which lead to a state of emotional overload (2) recognize the

dealing with non-preferred tasks (i.e. joining a morning meeting) or change of routine (i.e. substitute, schedule) by shifting gears and responding to non-verbal or verbal prompts 75% of the time. (3) Student will increase Student's self advocacy skills to provide feedback when a personal obstacle is keeping Student from access[ing] the general curriculum 50% of the time. The evaluation procedure for the goals is to log progress once a month. (Petitioner's Exhibit 3-11)

19. The March 30, 2016, IEP PLOP for adaptive/daily living skills indicates, among other things, that Student is very routine oriented. If there is a change in Student's routine, Student appreciates a warning. Student is using and respondent to the vocabulary: Flexible, Rigid/Stuck, Compromise, Big Deal/Little Deal and Plan A/Plan B. Student is very responsive to incentives and rewards and works well with classroom peers during preferred subjects and activities, but prefers to work on Student's own for non-preferred activities. When Student's routine is changed or Student finds something difficult, Student will try to activate coping skills. When younger, there were episodes of elopements. This has been dramatically reduced as Student has used coping mechanisms when upset, but it can be an issue from time-to-time. (Petitioner's Exhibit 3-6)
20. Student began attending School A at the start of SY 2016-2017. In August of 2016, Petitioner met with IEP team at School A and explained Student's behavior, particularly the tendency to elope when over-stimulated. Petitioner told the team it was not a matter of if the behaviors would arise, but when they would arise, and was thus trying to have a plan before hand. School A team members wanted to allow Student to demonstrate Student's capabilities before taking the action Petitioner requested at the August 2016 meeting. During the time of the meeting, Petitioner became aware Student had left the school building and was stopped by School A staff and returned to school. (Petitioner's testimony)
21. School A offered, as an accommodation, the use of one of the educational aides to provide support in classes and with class transitions. Student was provided an iPad at School A, but was not trained on its use. At this meeting, Petitioner asked about the dedicated aide, and requested an AT evaluation, FBA and BIP. Petitioner also asked for Student to have more transition time and ability to carry a backpack. School A did not agree to the requests. (Petitioner's testimony)
22. School A convened another meeting with Petitioner in October 2016. The aide was providing Student with support most of the time. The aide was not a dedicated aide for Student, but was assigned by School A to assist the student. School A told Petitioner that DCPS had denied Petitioner's request for the dedicated aide. (Petitioner's testimony)
23. On October 16, 2016, School A developed a safety plan for Student to address running, leaving the building, and leaving the classroom without permission or supervision. The safety plan indicated Student had yet to elope from the school building. (Respondent's Exhibit 33)

signals of stress which lead to a state of emotional overload, (3) access a coping strategy which lead[s] to a state of emotional overload.

24. During the first and second advisories of SY 2016-2017, Student earned above average grades in all courses. (Petitioner's Exhibits 25, 26)
25. At School A, Student received all instruction in general education. When Student arrived at School A, Student started off well. Student had typical anxiety about locker and traveling on Student's own. Student would interact with adults and not students, and if interested in something, would immerse in the task, but if uninterested in the task, Student would not try. Student had no behavior or elopement issues during Student's first semester at School A. Student was not stellar academically but was doing well, with the exception of Math. Student needed more attention in math than English Language Arts ("ELA"). Math was a class student did not like. (Witness 5's testimony, Witness 6's testimony)
26. Student proved Student could do the work in the general education environment, but had difficulty with the number of people in the hallway. Student was assigned an educational aide, although the School staff did not see a need for Student to have a dedicated aide. Despite the fact that Student had not eloped during the first semester of SY 2016-2017, and a safety plan was put in place based on the parents' concerns. Student's parent agreed to the safety plan being used, and Student having social skills training during the school day. During lunch, Student would go to the School A social worker a few days a week. (Witness 5's testimony)
27. On January 5, 2017, School A conducted an annual review of Student's IEP. Petitioner participated in the meeting with her counsel. At the meeting, Petitioner request that Student be provided a dedicated aide in the student's IEP and School A declined the request. (Petitioner's Exhibit 8-1, 8-5)
28. In the IEP section entitled Consideration of Special Factors, the IEP maintained the language in the previous IEP regarding positive behavior interventions and supports, and noted that School A had provided Petitioner with a copy of Student's safety plan. In that same IEP section, the IEP maintained the language regarding Student's communication in not verbalizing feelings and shutting down and becoming frustrated because of change in routine and behavior when Student is overwhelmed and anxious. The IEP noted under assistive technology that Student uses an iPad or classroom computer as needed. (Petitioner's Exhibits 7-1, 7-3, 8)
29. The January 5, 2017, IEP expanded the list of other classroom aides and services to include additional supports that were to be provided at School A, including support during transition between classes, time to process information, check-ins for understanding and task completion, scaffolding of information, repetition of directions and information, breaking directions into parts, prompts to hand in work, movement breaks to help sustain attention, friendship and social skills support in small group setting with the school-based guidance counselor, check-ins with the social worker or counselor as needed, , time limit prompts to complete a task, and timelines for long-term projects. (Petitioner's Exhibit 7-14)

30. The January 5, 2017, continued the classroom and testing accommodations from the Student's previous IEP, including among other things, a human scribe, speech to text, human signer or external assistive technology for selected responses on ELA literacy assessments, laptop for writing, oral response to tests, preferential seating, location with minimal distractions, individual testing, extended time, and flexibility in scheduling. (Petitioner's Exhibit 7-17)
31. The January 5, 2017, IEP increased Student's specialized instruction from 4 hours per week to 10 hours per week: 5 hours per week of specialized instruction inside the general education setting in math, 3 hours per week of specialized instruction inside the general education setting in written expression, 2 hours per week of specialized instruction inside the general education setting in reading, 4 hours per month of speech language pathology outside the general education setting, 120 minutes per month of occupational therapy outside the general education setting, and 120 minutes per month of behavioral support services inside the general education setting. (Petitioner's Exhibit 7-13)
32. The January 5, 2017, IEP prescribed ESY services and included ESY goals. The IEP did not include the services of a dedicated aide. (Petitioner's Exhibit 7-18, 7-19)
33. The January 5, 2017, IEP updated Student's Math goal: Student will solve multi-step, multi-operational word problems, using learned computational strategies, on paper to solve problems without assistance from teacher or calculator 85% of the time. The present levels of performance ("PLOP") in the area of math noted the PLOP from the previous IEP, and added that in the current year based on iReady diagnostic test on 9/1/16 Student scored an overall Level 5 (42nd percentile) and was generally on, or just below, grade level in Math and noted Student's difficulties with division and multi-step word problems and Math fluency. The PLOP also noted Student preferred using a calculator, and the teacher's efforts to have Student's first complete math problems on paper then check for accuracy with a calculator. (Petitioner's Exhibit 7-4)
34. The January 5, 2017, IEP noted Student was reading on grade level and scored proficient when assessed with the iReady diagnostic test on 9/2/16. The IEP updated Student's written expression goals to read: (1) Student will write a multi-paragraph response that includes a topic sentence that clearly addresses the prompt, body paragraphs with relevant supporting details, and a conclusion sentence with an 80% accuracy. (2) With both short and longer writing assignments, Student will be able to develop and strengthen Student's writing by improved planning, revising, editing rewriting, or trying a new approach, focusing on how well the purpose/prompt of the assignment and the audience have been addressed, with 80% accuracy. The written expression goals were more challenging than the previous goals. The PLOP from the previous IEP is noted, and the current PLOP was updated to note that Student sometimes has difficulties interpreting and responding to writing prompts, but once Student understands what is required, Student is able to complete the task, but struggles under time constraints and writing on topics that don't interest Student. The PLOP also noted that if Student's work is hand

written, it is difficult to self-regulate and Student makes grammatical and editing errors. (Petitioner's Exhibit 7-5, 7-6, 7-7)

35. The January 5, 2017, IEP included ESBD goals. The PLOP in the area of ESBD restated the PLOP from the previous year and updated it noting Student's responses to a beginning of the year self response report in which Student scored very high for overall stress, and the PLOP noted that during unstructured time Student does not socialize with peers but works with peers cooperatively in class. Student prefers to socialize with adults and chooses to spend the majority of the lunch period in the library. The IEP updated and changed the ESBD goals to read: (1) Student will express emotions through verbal, written or another appropriate mode when overwhelmed or flooded 75% of the time. (2) Given an organizational and monitoring system, Student will independently come prepared to class and appropriately organize classroom materials at the end of period in order to successfully transition to next class on 3 out of 5 trials. (3) Student will demonstrate improved emotional functioning as evidenced by Student being able to identify triggers and stressors that cause emotional distress by actively participating in behavior support services in 4 out of 5 trials. The goals were measured by observation each nine week period. (Petitioner's Exhibit 7-10, 7-11)
36. The January 5, 2017, IEP PLOP for adaptive/daily living skills restated the PLOP from the previous IEP and noted that in the current school year there were no adaptive issues presented at the time the IEP was developed. (Petitioner's Exhibit 7-7)
37. There was a shift in Student's behavior after January 2017. Student was more defiant and less interested in class, and Student's interactions toward the special education teacher and other members of the team changed. Math continued to be difficult, and then in ELA Student refused do class work, tearing up Student's paper and getting up and leaving. Student's special education teacher speculated that the behavior change was related to things occurring outside of school. (Witness 5's testimony, Witness 6's testimony)
38. After winter break Student began laying Student's head down and sleeping through Math class, and Student's elopement behavior increased. (Petitioner's testimony, Witness 6's testimony)
39. On February 14, 2017, Student's special education teacher sent an email to Petitioner addressing some of Petitioner's concerns, indicating Student had the full use of the assigned educational aide. The email also stated that Student had left the building twice, was followed by staff both times and returned to the school, and that the incidents had been documented. Prior to February 2017, School A did not believe an FBA was warranted but because of Student's increased behavioral concerns School A moved forward with conducting a FBA and provided a consent form for Petitioner to sign. (Witness 6's testimony, Petitioner's Exhibit 56).
40. On February 14, 2017, Petitioner granted DCPS consent to conduct evaluations of the student. (Respondent's Exhibit 39)

41. On February 27, 2017, DCPS completed an AED (Respondent's Exhibit 40)
42. On March 16, 2017, DCPS completed an AT evaluation. The DCPS evaluator observed Student in Student's classroom and spoke with the classroom teacher. The evaluator noted that Student's continued use of the iPad was appropriate and that additional training was available to Student on the use of the iPad by request. The evaluator observed that Student did not use the iPad to log behavior during the classroom observation and suggested that Student's teachers collaborate with Student regarding which assignments may or may not be completed on the iPad. The evaluator did not recommend additional AT devices, as Student appeared to be able to access all facets of the curriculum. The evaluator noted that after that an FBA was being conducted and that additional technologies might be considered to help address behaviors, but at the time of the AT evaluation, Student was able to access the curriculum and there was no need for additional AT devices. (Respondent Exhibit 41)
43. On March 23, 2017, a DCPS representative conducted an observation of the student to determine the appropriateness of the assignment of a dedicated aide. (Respondent's Exhibit 52)
44. On March 28, 2017, DCPS issued a prior written notice ("PWN") indicating its intention to conduct a psychological evaluation. (Respondent's Exhibit 43)
45. On March 31, 2017, DCPS conducted a FBA to address the concerns of Student getting out of Student's seat, and being off task when seated. The FBA included interviews of Student and Student's parent and a Motivation Assessment Scale to help analyze Student's behaviors. The FBA noted Student is allowed to get out of Student's seat and pace in the back of the classroom as an accommodation when Student needs a break. The pacing is an indicator that Student has emotional distress that could increase, resulting in Student leaving the academic setting. Student's pacing was also a distraction to peers in the classroom. The FBA noted the behavior is more likely to occur at the beginning of the day when asked to complete a non-preferred activity such as a writing assignment. The data indicated Student was more likely to display appropriate behaviors when there is more than one adult in the room, when the class is co-taught, or an educational aide is present in the class. The FBA noted that when the educational aide who assists Student in all but two of Student's classes is not present, Student's problematic behaviors tend to increase. The FBA recommended development of a BIP, continuation of the safety plan, and use of behavior tracker. (Respondent's Exhibit 44)
46. On May 25, 2017, a DCPS school psychologist completed her psychological evaluation report. The evaluation was conducted at Petitioner's request to gain an understanding of Student's strengths and weaknesses in written expression and executive functioning. The DCPS psychologist reviewed the student's education records, including prior evaluations, administered an academic achievement assessment, behavior rating scales, autism rating scales, and conducted a classroom observation. The psychologist noted Student's cognitive assessments from a 2015 reevaluation in which the Full Scale IQ score was 83

in the Low Average range and prior academic achievement the High Average Range for reading and Average range for math. (Respondent's Exhibit 46-1, 46-2)

47. The student's mother reported to the psychologist that Student does not have meltdowns at home or in the community. The School A social worker reported that Student's major deficit is emotional control and a slight deficit in having flexibility. Student's emotional control negatively impacts Student's ability to access the general education curriculum because at time Student is unable to be in the classroom, and when stuck or displaying rigid thinking, Student is not able to access the curriculum. Student's teacher stated Student struggles with writing assignments, has difficulties staying on topic and will not complete writing assignments in which Student is not interested. The teacher reported Student will initiate and complete preferred tasks, and will often shut down and refuse to do any work in class. (Respondent's Exhibit 46-6, 46-7)
48. Student rated within the Average to Very High range of performance on the written expression assessment and behavior rating inventory assessment, indicating the Student struggles with executive functions. Student's ability to shift, inhibit, monitor, self-regulate and exhibit emotional control is inhibited. In addition Student's ability to complete task, utilize working memory plan/organize and task monitor are weaknesses that impact Student's ability to perform written tasks in the classroom consistently. The evaluator recommended Student continue to receive specialized instruction in written expression and Student's IEP team determine if Student's executive functioning needs and challenges are accurately described in Student's IEP. (Respondent's Exhibit 46-15, 46-16)
49. On June 2, 2017, School A convened an IEP meeting with Petitioner and her counsel. Petitioner had an educational consultant who also participated by telephone. The team reviewed the recent psychological evaluation and the FBA. (Petitioner's testimony, Witness 7's testimony, Respondent's Exhibit 49)
50. On June 2, 2017, School A conducted an annual review of Student's IEP. Petitioner participated in the meeting with her counsel. At the meeting Petitioner requested Student have use of a laptop computer rather than an iPad, voice recognition software to allow the typing process to be easier, and that Student be provided a dedicated aide in the student's IEP. School A declined the request for the dedicated aide. Petitioner stated her consideration of enrolling Student at a non-public school. (Respondent's Exhibit 49)
51. In the June 2, 2016, IEP section entitled Consideration of Special Factors, the IEP maintained the language in the previous IEPs regarding positive behavior interventions and supports, the safety plan. The IEP noted that as of 3/27/17, Student has been diagnosed with ADHD, anxiety, and has challenges with self-regulation. Student has been diagnosed and is known to wander and elope from various school settings, including the building. In that same IEP section, the IEP maintained the language for regarding Student's communication in not verbalizing feelings and shutting down and becoming frustrated because of change in routine and behavior when Student is overwhelmed and

anxious. The IEP noted under assistive technology that Student uses an iPad or classroom computer as needed. (Petitioner's Exhibits 10-2)

52. The June 2, 2017, IEP expanded the list of other classroom aides and services to note Student's additional diagnoses of visual-perception deficits, sensory deficits, sun/smoke sensitivities, and noted Student will be provided small group instruction as frequently as possible to ensure participation and understanding of content, and Student will be provided prior notice for group work activities, support with initiation, and tasks completed during group work. (Petitioner's Exhibit 10-13)
53. The June 2, 2017, IEP continued the classroom and testing accommodations from Student's previous IEP, including among other things a human scribe, speech to text, human signer or external assistive technology for selected responses on ELA literacy assessments. Laptop for writing, oral response to tests, preferential seating, location with minimal distractions, individual testing, extended time and flexibility in scheduling. (Petitioner's Exhibit 7-17)
54. The June 2, 2017, IEP changed Student's specialized instruction to 10 hours per week: 5 hours per week of specialized instruction inside the general education setting in math, 5 hours per week of specialized instruction inside the general education setting in written expression, 4 hours per month of speech language pathology outside the general education setting, 120 minutes per month of occupational therapy outside the general education setting and the behavioral support services were increased to 240 minutes per month of behavioral support services and changed to outside the general education setting, and added 60 minutes per month of behavior support services inside the general education setting. The special education and related services page added AT for the student's use of an iPad for learning and studying. (Petitioner's Exhibit 10-12, 10-15)
55. The June 2, 2017, IEP prescribed ESY services. The IEP did not include the services of a dedicated aide. (Petitioner's Exhibit 10-14, 10-19)
56. The June 2, 2017, IEP continued Student's math goal from the January 5, 2017, IEP: Student will solve multi-step, multi-operational word problems, using learned computational strategies, on paper to solve problems without assistance from teacher or calculator 85% of the time. The PLOP in the area of math noted the PLOP from the previous IEP, and added that Student is in a 27-student classroom with 2 teachers where Student receives small group instruction 2-3 times a week in math. When asked a question, Student needs extra time to process and respond to the question. (Petitioner's Exhibit 10-3)
57. The June 2, 2017, IEP eliminated reading as an area of concern for Student. As noted, the previous IEP noted Student was reading on grade level. The June 2, 2017, IEP continued Student's written expression from the January 5, 2017, IEP. The writing PLOP from the previous IEP is noted and the current PLOP was updated to cite the results of the May 25, 2017, psychological evaluation and among other things noted Student's

executive functions are likely to negatively impact writing performance. (Petitioner's Exhibit 10-4, 7-6, 7-7)

58. The June 2, 2017, IEP included ESBD goals. The PLOP in the area of ESBD restated the PLOP from the previous IEP and updated it noting Student's challenges with self-regulation and inability to appropriately communicate and that Student will wander or elope from the classroom or building. The PLOP also noted Student's struggles with organization, class preparedness and time management and planning. Two of the three ESBD goals was continued and third goal was changed to the following: Student will learn to practice pro-social skills in therapeutic environment as evidenced in Student's ability to initiate conversation with peers during unstructured settings through the use of modeling, instructive feedback, etc. in 4 out of 5 trials. (Petitioner's Exhibit 10-7, 10-8, 10-9)
59. On June 2, 2017, DCPS developed a BIP for Student to address Student's behaviors of being off task and getting out of Student's seat in the classroom and pacing which could be a sign of increasing emotional distress resulting in Student leaving the classroom or school building. The BIP identified changes in the student's environment to prevent the behaviors, including more than one adult in the classroom with Student, using positive rather than negative reinforcements, praise and recognition, daily check-ins with the school social worker, daily behavior tracker being of task, providing a safe space for Student to de-escalate, and when Student leaves the classroom or building immediately notifying security staff and communicating with Student's parent. (Witness 6's testimony, Respondent's Exhibit 50)
60. Student's earned above average grades in nearly all courses during the third and fourth advisories of SY 2016-2017. (Petitioner's Exhibits 27, 28)
61. Student's June 2, 2017, IEP included ESY services for summer 2017. Petitioner refused the ESY services and Student did not attend ESY during summer 2017. (Respondent's Exhibit 51)
62. Student's IEP goals were based on i-Ready data and what was being worked on in the curriculum. The goals addressed skills the student would need to master. At the June 2, 2017, IEP meeting, Student's parent requested changes to Student's IEP PLOP and goals. (Witness 5's testimony)
63. During SY 2017-2018, Student did well for the first two days of school but soon began not going to classes, hiding in stairwells, sleeping in class, and leaving the building. Student does not have an iPad in the current school year. (Petitioner's testimony)
64. Student's grades thus far during SY 2017-2018 are average to above average, except in the Social Studies in which Student's grade is D+. (Petitioner's Exhibit 99)

65. Student needs an educational setting in a school building with fewer students than School A and fewer transitions, but Student does not necessarily need to be excluded from non-disabled peers. (Witness 6's testimony)
66. Petitioner has toured another DCPS school as possible location for Student other than School A. The school building is a bit smaller, but Petitioner had concerns about Student's safety as the environs of the school were busier than School A, and the class sizes were as large as those at School A. Petitioner did not believe School A or the other DCPS school she visited is appropriate for Student. (Petitioner's testimony)
67. Petitioner engaged the services of an educational consultant who conducted an observation of Student at School A and had brief conversations with Student's teachers. The consultant observed Student in two settings other than school. The consultant also reviewed the student's IEPs, educational records and evaluation(s), and talked with Student and Student's behavioral psychologist. The consultant opined that the student needs increased behavior services, social skill support training, a full time out of general education placement because of Student's difficulty navigating social situations, patterns of behaviors including becoming overwhelmed and eloping, and because Student is not interacting with peers in a social way, so that Student's placement in a separate special education school such as School C would be appropriate. The consultant also offered his opinion on the appropriateness of the student's level of special education services and the setting of those services in Student's IEP while attending School B and School A. The consultant did not confer with Student's teachers or anyone else about the validity of the grades Student has earned while attending School A. (Witness 1's testimony)
68. Student has been interviewed by and accepted at School C, a non-public special education separate school. School C's education program that is designed for supporting students who learn differently and have ADHD. School C holds an OSSE certificate of approval ("C of A") and is authorized to serve student with the autism disability classification along with a number of other classifications. School C's social skills program is imbedded in the curriculum. Teachers are helping to facilitate peer interactions. The related service providers go into the classrooms to support students in addition to the pull out services. School C uses Second Step Social emotional intervention led by a psychologist in the class once per week and another psychologist observations once per week. (Witness 2's testimony)
69. School C has seven psychologists who work with students 1 on 1 and group therapy, four occupational therapists that work in the classroom and pull out sessions with students. School C has two middle school classrooms and Student will be the eighth student in the classroom that has been identified. Students in the classroom have similar academic abilities as the Student. School C provides specialized reading and writing programs and math is broken into smaller groups and some with 1 on 1 instruction. The cost of the program is \$45,000.00 annually for the 10-month program. Related services and ESY are billed separately. (Witness 2's testimony, Petitioner's Exhibits 82, 89)

70. At the resolution meeting following Petitioner's filing of a due process complaint, DCPS granted Petitioner an IEE for an AT evaluation. The independent evaluation has been conducted; however, an IEP team has not yet reviewed the evaluation report. The evaluator opined that the student's current use of the iPad is not specifically defined. The evaluator recommended that in addition to the iPad, Student would benefit from a dedicated laptop with text to speech software and writing support software to help Student get the work done and scaffold ideas to generate sentences and then paragraphs. Student may also benefit from the use of double highlighting, an adaptive mouse and smart watch with vibration and would need training in these devices and software. (Respondent's Exhibit 57)

71. Petitioner has obtained an independent Vineland adaptive evaluation that was conducted on September 27, 2017. An IEP team has not yet reviewed the Vineland evaluation. (Witness 1's testimony, Petitioner's Exhibit 103)

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").

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

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.

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)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Petitioner has both the burden of production and persuasion on the following

issues above: #3, #4, #5, #6. Respondent holds the burden of persuasion on the following issues #1, #2 after Petitioner established a prima facie case on issues #1 & #2. 10 The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student FAPE by failing to develop appropriate IEPs for the student on June 2, 2017, January 5, 2017, March 30, 2016, because the IEP(s) lacked: (a) sufficient hours of specialized instruction, (b) appropriate mathematics and writing goals, (c) behavior support services and social skills instruction (d) appropriate social emotional goals, (e) a BIP with appropriate intervention strategies and positive behavioral supports (f) appropriate accommodations and modifications, (g) extended school year (“ESY”) services, (h) a dedicated aide, (i) appropriate assistive technology (beyond an iPad).

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

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.

Under the recent Supreme Court decision, *Andrew F. v. Douglas County School District Re-1*, a district must provide “an IEP reasonably calculated to enable a child to make progress appropriate, in light of the child's circumstances.” 137 S. Ct. 988, 999 (2017).

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled

¹⁰ DC Code § 38-2571.03 (6) provides:

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

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

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

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

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.” *Schaefer v. Weast*, 554 F.3d 47. The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child’s parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Petitioner alleges that the student’s IEPs were inappropriate for various reasons and principally offered Petitioner’s testimony and that of Petitioner’s education consultant who was designated as an expert witness to support those contentions. Petitioner alleged the student required more specialized instruction; however, the evidence demonstrates that the student made educational progress both at School B and at School A under the IEPs, with the level of specialized instruction prescribed.

Respondent’s witness, who was also designated as an expert witness, credibly testified that Student’s IEP team at School B believed the level of specialized instruction was sufficient. Petitioner’s consultant’s testimony was based simply on his review of the Student’s records and one school observation of the student. Although the consultant also interviewed Student and Student’s behavior psychologist, there was nothing from those interviews that was directly related to the amount of specialized instruction that would be appropriate for Student. Student’s School A special education teacher credibly testified that the Student was capable of doing the class work presented in the general education environment with the level of specialized instruction provided. In addition, Student’s assessments and above average grades indicate Student is operating at or near grade level in all areas. As a result, the Hearing Officer concludes Student’s IEPs identified herein and alleged to be inappropriate, with regard to the amount of specialized instruction, were/are appropriate.

As to the goals in the student’s IEPs, Petitioner’s witness testified that the goals in Student’s earlier IEPs at School B were appropriate, but that the IEP developed in Student’s last year at School B that Student brought to School A, and the IEPs developed at School A were inappropriate, generally because the goals were repeated. However, a review of the goals indicate that the goals in Student’s subsequent IEPs were not identical, and to the extent the goals were similar, there were some increases in the level of proficiency required of Student in the goals. Respondent’s witnesses credibly testified that the Student’s goals were appropriate for when Student attended School B and after Student began attending School A. Consequently, the Hearing Officer concludes that the student’s IEPs identified herein and alleged to be inappropriate, with regard to the IEP goals, were/are in fact appropriate.

Petitioner presented a witness who conducted a recent AT evaluation of the student, an evaluation that has yet to be reviewed by an IEP team. That witness, although designated an

expert in AT, testified that the student's IEP did not indicate how the iPad DCPS provided Student should be used. There was scant evidence that the student was not using the IEP, except that Student did not appear to be tracking behaviors in the one class Petitioner's other expert witness observed. On the other hand, Respondent's witness from School B credibly testified that the student was assessed annually for AT while at School B, and that Student received instruction on the use of the iPad and used the iPad for recording and taking notes.

Although Petitioner's AT expert testified there are other AT devices Student would benefit from, that testimony was insufficient to demonstrate that the student's IEPs were/are inappropriate because they lack any AT devices beyond the iPad. Unless and until the recent AT evaluation is reviewed by an IEP team, it is pre-mature to conclude that when the student's IEPs were developed, they were not reasonably calculated to provide the student educational benefit because an iPad was the only device listed in the IEP, or that the parameters for the Student's use of the iPad were not in the IEP. Consequently, the Hearing Officer concludes that the student's IEPs identified herein and alleged to be inappropriate, with regard to AT, were/are in fact appropriate.

Petitioner alleges the Student's IEPs were/are inappropriate because of the lack of ESY services. However, when the documents presented as evidence are reviewed, each of the IEPs indicate Student was to be provided ESY services. Although there was evidence that Student did not attend ESY for one or more summers, the IEPs do not reflect that the Student was not prescribed ESY services. Consequently, the Hearing Officer concludes that Student's IEPs identified herein, and alleged to be inappropriate, with regard to ESY services, were/are in fact appropriate.

Petitioner alleges the student's IEPs were/are inappropriate because of lack of behavior support services, inappropriate social emotional goals, lack of a BIP with inappropriate intervention strategies and positive behavior supports and modifications. Petitioner again relied principally upon her expert witness' testimony to substantiate this claim. The Hearing Officer did not find Petitioner's expert witness' testimony convincing in this regard.

The evidence clearly demonstrates that Student was provided behavior support services to address Student's social emotional and behavior concerns. Although the student still, from time to time, displayed concerns at School B, the behaviors of eloping and severe emotional distress were rare at School B. The evidence demonstrates that when Student began attending School A at the start of SY 2016-2017, Petitioner met early with the school team members to give a heads up on behaviors the student was likely to display. Until October 2016 the student had not displayed any of the described behaviors, except for the single incident Petitioner recounted of the student leaving the building on the day of that meeting. On the other hand, the School A staff members who worked closely with the student, credibly testified that until the second semester of SY 2016-2017, the student had not displayed behavior that raised concerns. Nonetheless, in response to Petitioner's concerns, School A put a safety plan in place to address the potential for the student to elope and otherwise demonstrate problematic behaviors.

The evidence demonstrates that after the winter break in the second half of SY 2016-2017 Student began to display more problematic behaviors, resulting in School A conducting an FBA, and eventually developing and implementing a BIP by the June 2, 2017, IEP meeting. At that

June 2, 2017, meeting School A also significantly increased the Student's behavior support services, and changed the setting in which the services would be delivered to better address Student's behaviors. Respondent's expert witness and social worker credibly testified about the interventions in the BIP and the circumstances why the FBA and BIP were not warranted and were not completed prior to the student's displaying the problematic behaviors during the second half of SY 2016-2017. That witness also credibly testified about the individualized behavior support that she provided to the student.

The evidence demonstrates that Student's IEPs also included extensive classroom and testing accommodations to address Student's academic and behavioral concerns and that these accommodations and modifications were expanded at School A by the School A team based upon the team members' experience with the student. Consequently, despite Petitioner's expert's testimony that the student lacked appropriate behavior support services and social skills instruction, appropriate social emotional goals, a BIP with appropriate intervention strategies and positive behavioral supports, appropriate accommodations and modifications, based upon the documentary evidence and the credible and more convincing testimony of the DCPS witnesses, the Hearing Officer concludes that the student's IEPs identified herein, and alleged to be inappropriate were/are in fact appropriate with regard to the specific areas addressed above.

Lastly, Petitioner alleges that Student's IEPs were inappropriate because the IEPs did not include a dedicated aide. The evidence demonstrates, based on the credible testimony of the Student's School B special education teacher, that while student attended School B, there was no need for Student to have a dedicated aide. Although there seems to have been a referral form for a dedicated aide generated while the student attended School B, the evidence demonstrates the student made educational progress under the IEP while at School B and that behavioral concerns were effectively managed without a dedicated aide, and the student rarely had behaviors of leaving the classroom as a result of being overwhelmed and never left the school building. The Hearing Officer was convinced by this testimony that the student was not in need of a dedicated aide while at School B.

When the student arrived at School A, Petitioner made a request for a dedicated aide early in SY 2016-2017. The Hearing Officer finds it reasonable for School A not to have provided Student a dedicated aide simply based on Petitioner's request, when the student's IEP did not prescribe an aide and School A wanted to first observe the Student's behavior. Nonetheless, the evidence demonstrates that some time in the first semester of SY 2016-2017, School A assigned an educational aide to assist Student in most classes and during transitions, although the aide was not formally assigned as a dedicated aide to Student and the student's IEP was not amended to include an aide. In addition, it appears that Petitioner was told that a request was made to DCPS for the student to have a dedicated aide, but the request was denied.

The evidence demonstrates that by second semester, Student was displaying negative behaviors and by Student's annual IEP review on January 5, 2017, Student was clearly using, and need of, an aide to assist Student with transitions and in most classes. In addition, the evidence demonstrates that DCPS conducted an observation to make a determination as to whether Student was in need of a dedicated aide. Although the observation did not result in the student being assigned a dedicated aide, and there was testimony by School A witnesses that Student

might become dependent on a dedicated aide if one were officially assigned, it is clear from the evidence at least with regard to the student's ability to navigate a middle school as large as School A, that the School A staff de facto concluded the student needed an aide. Yet, the School A team never included the dedicated aide in Student's IEP.

Consequently, the Hearing Officer concludes that as of the January 5, 2017, IEP Student was in need of a dedicated aide for transitions and for most classes, and the IEP team did not include the dedicated aide in the Student's IEP. It is for this reason, the Hearing Officer concludes the Student's January 5, 2017, IEP was inappropriate and not reasonably calculated to provide educational benefit. Thus, the student was denied a FAPE.

The evidence demonstrates that on June 2, 2017, the student's IEP also did not prescribe a dedicated aide. However, it appears that in this meeting, Petitioner requested the student be placed in a setting outside general education and did not insist upon the need for a dedicated aide if the Student were in such a setting.

Nonetheless, the School A team again did not determine the student was in need of a dedicated aide. While it appears from the evidence that the student might not be in need of dedicated aide, if the student were in a middle school setting that was not as large and did not have as many students as School A, the reality is that the Student remains at School A. Thus, the evidence supports a conclusion the student remains in need of a dedicated aide at School A. Consequently, the Hearing Officer concludes that Student's June 2, 2017, IEP is inappropriate and not reasonably calculated to provide Student with educational benefit. Thus, Student was denied a FAPE.

ISSUE 2: Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate special education placement, to wit: an appropriate least restrictive environment ("LRE").

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is determined at least annually and is based on the child's IEP. 34 CFR § 300.116(b) (1) (2). *At the beginning of each school year*, each public agency must have *in effect*, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320. 34 C.F.R. § 300.323(a) (emphasis added).

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

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.")

Petitioner alleges the student should have a small teacher to student ratio and a self-contained environment as of March 27, 2017. It is unclear from the record why this particular date is alleged to have been the date by which the student was in need of a placement in a self-contained environment; however, in March 2017, DCPS determined that an FBA would be conducted and DCPS observed the student to determine if the student was in need of dedicated aide.

Petitioner presented an expert witness who testified that the student was in need of a placement totally removed from general education students in a full time out of general education placement because of Student's difficulty navigating social situations, patterns of behaviors including becoming overwhelmed and eloping, and because Student is not currently interacting with non-disabled peers in any social way.

Respondent's witness also testified that Student's behaviors of being overwhelmed, refusing to perform class work and eloping began to increase in the second half of SY 2016-2017, and have continued. Clearly, by the time the School A team met on June 2, 2017, it was abundantly clear, or should have been to the team, that Student was in need of different placement. Although the team increased Student's level of specialized instruction and behavior support services, the team did not change the setting in which the Student's specialized instruction would be delivered, and did not take any action to change the student's placement and school location from School A.

Respondent's expert witness testified that although she did not believe Student was necessarily in need of placement totally removed from general education peers, Student is in need of an educational setting in a school building with fewer students than School A and fewer transitions. Although there is a distinction between educational placement in an IEP, a student's LRE and the actual school building that any student attends, in this instance, because the evidence demonstrates that Student is so negatively impacted at School A that Student's being there has resulted in behavioral difficulties, refusal to do work, and elopement and these behaviors are continuing at School A, the Hearing Officer concludes that Student's current placement in a general education middle school with all specialized instruction being provided inside the general education setting is an inappropriate placement for Student.

Based upon the evidence, the Hearing Officer concludes that by June 2, 2017, it was clear that the Student's education placement/LRE was inappropriate. Thus, the student was denied a FAPE.

ISSUE 3: Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate assistive technology assessment as early as August 8, 2016.

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

34 C.F.R. § 300.303(a) makes clear that, “A local education agency (“LEA”) shall ensure that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist.of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

Petitioner asserts that DCPS failed to conduct an appropriate AT evaluation of Student pursuant to the request made on August 2016. The evidence demonstrates that while Student attended School B, an AT assessment was conducted annually and Student received training on the use the iPad DCPS provided. Although IDEA allows for reevaluations upon parental requests, reevaluations are only mandated annually. Although Petitioner requested the AT evaluation in August 2016, as soon as Student arrived at School A, the Hearing Officer does not find the DCPS AT evaluation performed in March 2017 to be an inordinate delay in acting on an evaluation request, particularly considering that Student had been assessed at School B annually.

Although Petitioner presented a witness who testified that the AT evaluation that DCPS conducted was inappropriate, the Hearing Officer did not find that testimony convincing. Although the DCPS AT evaluation may not have been as detailed as the most recent evaluation the witness conducted, the evaluation considered the factors that seem to the Hearing Officer reasonable in determining what AT Student should have been provided to access the curriculum. The most recent and independent evaluation has not yet been reviewed by an IEP team. Upon team review, due consideration can be given to the AT Student can be provided in the full context of Student’s needs and all services Student is being provided. Accordingly, 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 the student a FAPE by failing to timely provide the student with FBAs requested on August 8, 2016, and September 2, 2016.

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

As stated, 34 C.F.R. § 300.303(a) makes clear that, “A local education agency (“LEA”) shall ensure that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist.of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

Petitioner asserts that DCPS failed to conduct an FBA as requested in August and September 2016. The evidence demonstrates that Petitioner requested an FBA be conducted as soon as Student arrived at School A, along with the other requests for evaluations. The evidence demonstrates that School A staff indicated a desire to observe Student for a reasonable time before immediately granting Petitioner’s requests and conducting evaluations. The evidence demonstrates that in the first half of SY 2016-2017, School A was not seeing behaviors that warranted an FBA being conducted.

By the second half of SY 2016-2017 the student was clearly demonstrating behaviors that raised concerns for the School A staff, and after the January 2017 IEP meeting Petitioner granted consent for evaluations to be conducted. The Hearing Officer concludes based on this evidence, that it was reasonable for School A to have initiated the FBA at the start of the second half of SY 2016-2017, and that the FBA being conducted in March 2017 was not an unreasonable delay. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 5: Whether the LEA denied Student a FAPE by delegating authority to central office staff that were not members of the MDT to make the decision regarding a dedicated aide on October 18, 2016, and November 4, 2016.

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

IDEA requires that an IEP team that includes a student's parent develop and determine a student's IEP.¹¹ A dedicated aide is one of the aides and services that can be provided a student under an IEP. Petitioner alleges that School A delegated the determination of whether Student's IEP would contain a dedicated aide to DCPS' central office, and the determination about the dedicated aide was not made by the student's IEP team.

The evidence demonstrates that School A generated a referral to DCPS for an observation to be conducted to assist in the determination of whether Student was in need of a dedicated aide. Although the DCPS observer did not recommend that Student receive a dedicated aide, there was no evidence that the School A IEP team simply deferred to the recommendation.

On the other hand, the student's School A special education teacher, who was a member of that team, credibly testified that the team, with the exception of Petitioner and her representative, was of the independent opinion that Student was not in need of a dedicated aide. Based upon her classroom experience of Student, Student did not need a dedicated aid, and she expressed her

¹¹ 34 CFR § 300.321 provides:

The public agency must ensure that the IEP Team for each child with a disability includes--

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who--
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) Whenever appropriate, the child with a disability.

concern that Student would become dependent upon a dedicated aide and no longer perform at the level of independence Student had up to that point.¹² Based upon this testimony, the Hearing Officer concludes that the School A IEP team did not delegate its authority regarding a dedicated aide to DCPS' central office and that Petitioner did not sustain the burden of persuasion on this issue.

ISSUE 6: Whether the LEA denied Student a FAPE by failing to review and revise Student's IEP to reflect declining grades, a smaller class ratio, and self-contained environment on March 27, 2017, and June 2, 2017.

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

34 CFR § 300.324 (b) provides that a student's IEP should be reviewed periodically, but not less than annually.¹³

The evidence demonstrates that School A conducted an IEP meeting for Student on January 5, 2017, and that at the meeting the team determined that additional evaluations would be conducted. Petitioner provided written authorization for those evaluations to be conducted in February 2017. The evidence demonstrates that although School A completed an FBA and AT evaluation in March 2017, School A had not yet completed the psychological evaluation until May 2017. The Hearing Officer finds the timing of the IEP meeting reasonable given the fact that School A had just held an IEP meeting in January 2017. It was not unreasonable for School A to await completion of all the evaluations before convening an IEP meeting in June 2017. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

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.)

¹² The Hearing Officer points that whether the team delegated its authority and whether the student was acutally in need of a dedicated aide are distinct considerations and determinations.

¹³ 34 C.F.R. § 324 (b) Review and revision of IEPs.

(1) General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team--

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address--

(A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under Sec. 300.303;

(C) Information about the child provided to, or by, the parents, as described under Sec. 300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

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 516 & 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 Hearing Officer concluded based on the evidence that while Student has attended School A Student has been without an appropriate IEP, due to the lack of a dedicated aide and an appropriate placement since January 5, 2017, and June 2, 2017, respectively. Petitioner has requested that the student be placed at School C. There was no other request or evidence to consider regarding compensatory education. The Hearing Officer concludes that although there is evidence that Student may be able to function in a placement where Student has interaction with non-disabled peers, the evidence demonstrates that School A is an inappropriate placement for Student. The evidence demonstrates that although Student will not have contact with non-disabled peers if Student attends School C, School C can provide Student educational benefit and School C otherwise meets the requirements that the Hearing Officer must weigh in considering a placement proposed by a parent in a due process hearing.¹⁴

Consequently, the Hearing Officer grants Petitioner's request in the order below that DCPS place, fund, and provide transportation for the student to attend School C for the remainder of SY 2017-2018 as compensation for the denials of FAPE determine herein.¹⁵

ORDER:¹⁶

1. DCPS shall, within ten (10) school days of the issuance of this order, place and fund the student at School C and provide transportation services.

¹⁴ *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) Specifically, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment.

¹⁵ Once a plaintiff "has established that she is entitled to [a compensatory education] award, simply refusing to grant one clashes with *Reid*, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting *Reid*, 401 F.3d at 524, 527).

¹⁶ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

2. DCPS shall, within thirty days of the student's start at School C, conduct an IEP meeting to review the student's transition to School C, review all evaluations that have not been yet reviewed and review and revise the student's IEP as appropriate.
3. DCPS shall, within 30 calendar days prior to the end of SY 2017-2018, convene an IEP/placement meeting and review the student's progress and review and revise the student's IEP as appropriate and determine an appropriate placement for the student for SY 2018-2019. DCPS shall then determine an appropriate location of services for the student for SY 2018-2019.
4. All other relief requested by Petitioner, if any, is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: October 15, 2017

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