

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3<sup>rd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
October 23, 2018

---

PARENT,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: October 23, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0200

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: October 5 and 9, 2018

Respondent.

Office of Dispute Resolution, Room 111  
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 (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 Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by not conducting timely comprehensive reevaluations, by not developing appropriate Individualized Education Programs (IEPs) and by failing to fully implement Student’s IEPs during the summer Extended School Year (ESY) programs.

---

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

Petitioner's Due Process Complaint, filed on July 31, 2018, named DCPS as respondent. The undersigned hearing officer was appointed on August 1, 2018. On August 21, 2018, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The earliest mutually available dates for the due process hearing were October 5 and 9, 2018. To accommodate those hearing dates, by order of October 11, 2018, I granted Petitioner's unopposed request to extend the final decision due date to October 24, 2018.

The due process hearing was held before the undersigned impartial hearing officer on October 9 and 11, 2018 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 appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called EDUCATIONAL ADVOCATE 1, PROGRAM DIRECTOR and EDUCATIONAL ADVOCATE 2 as additional witnesses. DCPS called as witnesses SCHOOL SOCIAL WORKER, SCHOOL PSYCHOLOGIST, LEA DESIGNEE, and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1 through P-66 were admitted into evidence, with the exceptions of Exhibits P-6 and P-64 which were withdrawn. Exhibits P-12 and P-49 through P-58 were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-29 were all admitted into evidence without objection. Counsel for the respective parties made closing arguments. There was no request to file post-hearing written 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 issues for determination, as certified in the August 27, 2018 Revised Prehearing Order, are:

- A. Whether from October 2017 forward, DCPS has failed to provide an appropriate IEP to address Student's severe behaviors;
- B. Whether from April 2018 forward, DCPS has failed to provide an appropriate IEP and location of services to address Student's severe behaviors;
- C. Whether from October 2017 forward, DCPS has failed to timely and comprehensively reevaluate Student;
- D. Whether From October 2017 forward, DCPS has failed to conduct a needed Functional Behavior Assessment (FBA) for Student or develop and implement an appropriate Behavior Intervention Plan (BIP);
- E. Whether from August 2016 to July 2017, DCPS denied Student a FAPE when it failed to provide Student with all of Student's IEP Occupational Therapy and Speech and Language services during Extended School Year (ESY) sessions and failed to introduce the majority of the ESY goals in Student's IEP.

For relief, the parent requests that DCPS be ordered to:

- a. Conduct a psychiatric evaluation, a psychological evaluation, an occupational therapy evaluation, and a speech and language evaluation of Student;
- b. Conduct an FBA and develop an appropriate BIP for Student within 30 days of receiving the Hearing Officer Determination;
- c. Ensure that an appropriate IEP for Student is developed within 15 days of receiving the completed evaluations;
- d. As compensatory education for Student, make up all missed IEP services within one year of receiving the Hearing Officer's Determination, authorize tutoring and counseling services (in the form of individual, group, and child-centered play therapy) to help Student improve academic and behavioral challenges within 10 days of receiving the Hearing Officer Determination and

fund additional compensatory education, as warranted and

e. Alternatively, that the hearing officer order and require DCPS to fund any assessment or screening necessary for determining a compensatory education award.

### **STIPULATION OF COUNSEL**

At the beginning of the due process hearing on October 5, 2018, the parties, by counsel, stipulated that if the hearing officer finds that Student has been denied a free appropriate public education (FAPE) by DCPS, the appropriate compensatory education remedy would be 60 hours of academic tutoring and 40 hours of counseling to be provided by independent professionals at the compensation rate approved by the D.C. Office of the State Superintendent of Education (OSSE). This compensatory education award does not include compensation for DCPS' failure to implement IEP Speech and Language and OT services for Student as alleged in the due process complaint. DCPS reserved its position that Student has not been denied a FAPE.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, resides in the District of Columbia with Mother.

#### **Testimony of Mother.**

2. Student is currently enrolled in GRADE at CITY SCHOOL, where Student has attended since pre-kindergarten. Testimony of Mother. Student was evaluated and found eligible for special education when in pre-kindergarten. Exhibit R-8. Student's most recently eligibility classification was Developmental Delay. Exhibit P-5.

3. A DCPS school psychologist conducted a comprehensive psychological evaluation of Student in April 2016. That psychologist reported, *inter alia*, that Student

was referred for a psychological evaluation to address concerns for behavioral and cognitive development. Student's medical records indicated a diagnosis of bilateral club feet for which braces and crutches were prescribed. The Wechsler Preschool and Primary Scale of Intelligence, 4<sup>th</sup> Edition (WPPSI-IV) was used to assess Student's general cognitive abilities across multiple areas of intellectual functioning. Student's General Ability Index (GAI) score of 85 fell in the low average range when compared to other children the same age. Student's Verbal Comprehension score of 81 also reflected low average abilities, although fluid reasoning and visual spatial subtests were in the average range. In assessing Student's emotional/behavioral profile using the Conners Early Childhood assessment (the CEC), average scores across Student's global indexes were noted on the parent ratings, while teacher ratings reflected very elevated concerns for restless-impulsive behaviors and emotional lability. Teacher ratings of communication and play skills were in the average range, although they also supported the presence of significant behavioral concerns related to restlessness, impulsivity, and emotional lability in the school setting. The teacher also described concerns for Student's safety awareness, aggression, and transition difficulties. The psychologist concluded that data from observations, questionnaires, and standardized assessments supported an adverse impact on Student's educational performance and on the attainment of age-appropriate developmental skills and supported the presence of a disability due to Developmental Delay. Exhibit P-29.

4. Student's City School February 28, 2017 IEP identified Mathematics, Reading, Adaptive/Daily Living Skills, Communication/Speech and Language, Emotional/Social/Behavioral Development, Health/Physical and Motor Skills/Physical Development as areas of concern. The IEP team reported that Student's behaviors

impeded Student's learning or that of other children – including temper outbursts, defiance, aggression, refusal, inattention and hyperactivity. For Special Education and Related Services, the IEP provided that Student would receive 15 hours per week of Specialized Instruction, including 10 hours outside general education, 30 minutes per month of OT, 2 hours per month of Speech-Language Pathology, 2 hours per month of Behavioral Support Services and 30 minutes per month of Physical Therapy (PT). The IEP stated that Student did not require the support of a dedicated aide. The February 28, 2017 IEP provided for ESY services, including, *inter alia*, 30 minutes per week of PT<sup>2</sup>, 30 minutes per week of OT and 1 hour per week of Speech-Language Pathology.

5. On October 16, 2017, School Social Worker conducted a Functional Behavioral Assessment of Student, in which she reported that on a daily basis, Student was engaging in off-task, disruptive, and non-compliant behaviors in the classroom. These included walking around the room, throwing materials, yelling, screaming, saying “no” to adults, and refusing to follow directions. Student was leaving the classroom without permission on an average of five times per day. When Student was redirected back to class, Student often refused and escalated. Escalations included climbing furniture, sliding down stairs, running away from the adults, kicking, hitting, spitting, and scratching adults, crying and running out of the building. Off-task and disruptive behaviors occurred repeatedly throughout the day. Aggressive and unsafe behaviors occurred 1 to 2 times per day. Suicidal statements had occurred six times, once with gestures of self-choking. When in the resource room, Student could complete 30 minutes of work, with breaks. After this length of time, Student appeared exhausted

---

<sup>2</sup> In an evident typographical error, the IEP provided for Student to receive “30 hr per week” [*sic*] of both PT and OT.

and unable to continue sustaining attention. Student was inconsistently performing at this level. About 90% of the time, when Student was asked to transition to Resource, Student refused by saying “no,” walking away, and falling to the floor. During the unsafe behaviors such as climbing the stairway railing, Student affirmed an intent to be unsafe and wanting to do self harm. School Social Worker reported that the behaviors were less likely to occur at lunch and recess, as well as when Student was receiving individualized adult attention. School Social Worker concluded that the primary function of Student’s concerning behavior was to gain attention from adults, and to a lesser extent, from peers. However, Student’s behavior also served the function of avoiding school work and gaining preferred activities such as play, coloring or computer time. School Social Worker reported that Student was most likely to remain on task and engaged when receiving one-on-one adult attention and working in 5 minute increments with frequent play breaks. Exhibit P-11, Testimony of School Social Worker.

6. School Social Worker developed a BIP for Student on October 16, 2017. In the BIP, she recommended, *inter alia*, that the parent should take Student for a psychiatric assessment and psychological appointment to rule out underlying disorders and contributing factors and to set up community-based counseling to support Student in addressing underlying issues. Exhibit P-11.

7. In October 2017, the City School principal hired a substitute teacher to serve as a 1:1 aide for Student. The aide worked with Student for the remainder of the school year. Having the aide helped Student very much, primarily with stopping Student’s elopements. The aide was also a big help with getting Student to stay on task. Testimony of School Social Worker. Student’s IEP was never amended to indicate that Student required the support of a dedicated aide. Exhibit P-5, Testimony of Mother.

8. The 2017-2018 school year was the first year that Student had been placed in a classroom with only one teacher. This teacher did what she could, with 16 other children in the classroom, but it was not enough to meet Student's needs. Testimony of School Social Worker.

9. School Social Worker provided Student the regular 120 minutes per month of Behavioral Support Services required by Student's IEPs, in the form of child-centered play. She also provided Student many more hours of as-needed services for non-scheduled crisis intervention, de-escalation and on occasion, taking Student to an alternative space. Student's IEP was not revised to reflect the additional services, because they were only provided on an as-needed basis. Testimony of School Social Worker.

10. For the 2018-2019 school year, Student is placed in an Early Learning Support (ELS) Classroom at City School. This classroom has a 3:1 student to teacher ratio, with 9 students total. One of the three adults in the classroom is an aide assigned to Student. Behaviorally, Student is doing better in the current school year. Student is still showing work refusal, defiance and work avoidance, but the behaviors are less intense and of shorter duration than in the prior school year. Student is placed in an ELS classroom, rather than a Behavior and Education Support (BES) classroom, because City School does not have a BES classroom. Testimony of School Social Worker.

11. On February 6, 2018, Student's City School IEP team met for the annual review of Student's IEP. Mother and FORMER ATTORNEY, from the same law firm now representing Mother, participated in the meeting. Mother inquired about the status of obtaining a dedicated aide for Student. LEA Designee responded that

paperwork had been sent to DCPS' Central Office, which had requested more data. The IEP team discussed the benefits of having the substitute teacher working 1:1 with Student. (The school principal had evidently hired the substitute teacher, pending DCPS' decision on the request for a dedicated aide.) After discussion, the team decided to increase the hours of Specialized Instruction for Student to 21 hours per week in a self-contained classroom. Mother and Former Attorney agreed with this decision.

Exhibit R-18.

12. The February 6, 2018 IEP provided for Student to receive 21 hours per week of Specialized Instruction Services outside general education, 2 hours per month of Speech-Language Pathology, 2 hours per month of Behavior Support Services, 60 minutes per year of consultation PT services and 15 minutes per month of consultation OT services. The February 6, 2018 IEP provided for ESY services, including 24.5 minutes per week of Specialized Instruction and 120 minutes per month of Behavioral Support Services. Exhibit P-5.

13. On April 24, 2018, Student's IEP team at City School convened for a "30-day" review of Student's IEP. Mother and Educational Advocate 1 attended the meeting. Student was reported to be in a self-contained classroom for all of the school day, except for morning meeting, lunch/recess and Specials classes. School Social Worker reported that they had seen some progress on Student's social-emotional goals with 1:1 support and the BIP, but that Student continued to demonstrate defiance and tantrums when not receiving individualized support, when in a group, when asked to work and when transitioning after recess. She stated that Student did not demonstrate motivation when offered rewards and that Student responded best to a system of alternating preferred and non-preferred activities with individualized support. Educational Advocate 1

proposed a change of location to a private school. The school team members responded that they would prefer to conduct a reevaluation of Student, and afterwards reconvene to consider placement concerns. Exhibits R-19, P-47.

14. At the April 24, 2018 MDT team meeting, Speech-Language Pathologist reported that Student sometimes refused to go to Speech-Language therapy and that when Student would attend, she often spent 35 minutes trying to settle and engage Student and was left with only 10 minutes for actual speech-language work. Exhibit R-19.

15. Student's scores on the I-Ready on-line assessment for overall Reading were 340 at the beginning of the 2017-2018 school year, 403 in the middle of the year and 356 at the end of the year. Only the middle of year score was approaching grade level. Exhibit P-34. Student's scores on the I-Ready on-line assessment for overall Math were 360 at the beginning of the 2017-2018 school year, 350 in the middle of the year and 351 at the end of the year. Exhibit P-35.

16. Student's IEP progress reports at the end of the 2017-2018 school year indicated no progress on annuals goals for academics, adaptive-daily living or speech and language. Student was reported to be progressing on goals for Emotional, Social and Behavioral Development and Motor Skill/Physical Development and to have Mastered the Health/Physical goal, for which Student was seen once a year for PT on a consultative basis. Exhibit P-41.

17. In September 2018, after the due process complaint was filed in this case, School Psychologist conducted a comprehensive psychological reevaluation of Student. She interviewed Student, Mother and Student's homeroom teacher and conducted two classroom observations. School Psychology also administered a battery of tests to

Student and had Mother and the teacher complete behavior rating scales. Cognitively, on the Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2), Student obtained a Composite Intelligence Index (CIX) score of 56, in the Significantly Below Average range. On this measure, Student's verbal and nonverbal intelligence were similarly developed. Student scored in the Average range on the Composite Memory Index (CMI) and within the Below Average range on the Speeded Processing Index (SPI). Educationally, Student's standard scores on the Woodcock Johnson IV Tests of Achievement (WJ-IV ACH) were Low for Broad Mathematics and Very Low for Reading and Written Language. On the Adaptive Behavior Assessment System, 3<sup>rd</sup> Edition (ABAS-3) rating scales, the teacher's responses indicated a General Adaptive Composite (GAC) or overall adaptive functioning standard score of 79, which fell within the Low range of adaptive functioning. The teacher and Mother returned the Behavior Assessment System for Children, 3<sup>rd</sup> Edition (BASC-3), the Conners, 3<sup>rd</sup> Edition (Conners 3), and the Scales for Assessing Emotional Disturbance, 2<sup>nd</sup> Edition (SAED-2) rating scales. Their responses indicated that Student was experiencing significant behavior concerns such as inattentiveness, distractibility, engaging in rule-breaking behaviors, concerns with social interaction, an inability to learn, and displaying inappropriate behaviors. Exhibit P-28.

18. School Psychologist did not feel that Student's results on the RIAS-2 cognitive measure were valid, because Student had been very much off-task during testing. She subsequently assessed Student using the Comprehensive Test of Nonverbal Intelligence (CTONI), which uses nonverbal formats to measure general intelligence. Student's cognitive functioning score of 86 on the CTONI was Below Average. School Psychologist also obtained additional behavioral data on Student from Mother. School

Psychologist proposed that the data she obtained supported a diagnosis of Attention Deficit-Hyperactivity Disorder (ADHD) for Student. As of the due process hearing date, School Psychologist has not yet presented her evaluation results to Student's IEP team.

Testimony of School Psychologist.

19. DCPS conducted an OT evaluation of Student in February 2016. Exhibit P-31. As of June 13, 2018, there were no concerns for Student in the area of Occupational Therapy. Exhibit P-23.

20. Speech-Language Pathologist has conducted a new Speech and Language evaluation of Student, which will be reviewed by Student's IEP team in October 2018.

Testimony of LEA Designee.

**CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law 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 student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency 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 agency. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

### Analysis

- A. Whether from October 2017 forward, DCPS has failed to provide an appropriate IEP to address Student's severe behaviors;
- B. Whether from April 2018 forward, DCPS has failed to provide an appropriate IEP and location of services to address Student's severe behaviors;
- C. Whether from October 2017 forward, DCPS has failed to timely and comprehensively reevaluate Student;
- D. Whether From October 2017 forward, DCPS has failed to conduct a needed Functional Behavior Assessment (FBA) for Student or develop and implement an appropriate Behavior Intervention Plan (BIP).

From the beginning of the 2017-2018 school year, Student's severe behavior issues greatly impeded Student's progress at City School. On October 16, 2017, School Social Worker reported in a Functional Behavioral Assessment that on a daily basis, Student was engaging in off-task, disruptive, and non-compliance behaviors in the classroom. These behaviors included leaving the classroom without permission multiple times per day, running away from the adults, crying, yelling, screaming, kicking, hitting, spitting, and scratching adults. For the school year, Student made no progress on IEP academic goals.

School staff were proactive in addressing Student's behavior issues. Notably, beginning in October 2017, the school hired a substitute teacher as a full-time aide for Student. However until September 2018, DCPS did not reevaluate Student. The Parent contends that DCPS' failure to timely reevaluate Student was a denial of FAPE. I agree. The IDEA requires that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. 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 parent or teacher requests a reevaluation. *See* 34 CFR § 300.303(a). *See, also, M.M. ex rel. Matthews v. District of Columbia*, 607 F. Supp. 2d 168, 174 (D.D.C. 2009) (Where student failed to make any progress in two years, DCPS needed to take steps to reevaluate the student and consider what services and placement were necessary to ensure that she received a FAPE); U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46644, -648 (August 14, 2006) (One of the purposes of a reevaluation is to determine the educational needs of the child, including whether any additions or modifications to the special education and related services are needed to enable the child to meet IEP goals and to participate in the general education curriculum.)

Prior to September 2018, DCPS last evaluated Student in the spring of 2016. In light of Student's worsening behaviors from the beginning of the 2017-2018 school year, I find that Student's educational and related services needs, notably Student's social-emotional-behavioral needs warranted reevaluation, and that this reevaluation should have been completed in time to inform the decisions of Student's February 6, 2018 IEP team.

The failure to timely conduct an IDEA reevaluation is a procedural violation of the IDEA. *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.) 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). In this case, not having a updated comprehensive evaluation of Student undoubtedly limited the February 6, 2018 IEP team's understanding of Student's disability issues and needs and impeded Mother's opportunity to participate in the IEP decision-making process. This was a denial of FAPE.

On February 6, 2018, the City School IEP team revised Student's IEP to provide for Student to receive 21 hours per day of Specialized Instruction Services outside general education. The revised IEP stated that Student did not need the support of a dedicated aide, even though the school had been providing this service since October 2017. Following the February 6, 2018 IEP revision, Student was placed in a resource classroom and was supported there, one-on-one, by the substitute teacher. In the current school year, Student is placed in the ELS classroom with a very low student-to-teacher ratio. An additional aide is assigned to assist Student one-on-one, but that service has apparently not been formalized in writing.

"Understanding the particulars of a child's current skills and needs is critical to developing an 'individualized' educational plan: 'An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth.'" *Z. B. v. District of Columbia*, 888 F.3d 515, 522 (D.C. Cir. 2018), quoting *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999; 197 L.Ed.2d 335 (2017). Without an updated reevaluation of Student, the City School IEP team lacked the data to understand the particulars of Student's current skills and needs. It follows that the February 6, 2018 revised IEP was

inappropriate, because without an updated reevaluation, the IEP was not “reasonably calculated to enable [this] child to make progress in light of the child’s circumstances.” See *Andrew F.*, *supra*, 137 S.Ct. at 999. Furthermore, the IEP fails to identify Student’s requirement for a dedicated aide, even though Student’s need for one-on-one support was not in dispute and, in fact, the school had hired a substitute teacher for that role in October 2017. I conclude that DCPS did not meet its burden of persuasion that the February 6, 2018 IEP was appropriate for Student.

Petitioner also claimed that from October 2017 forward, DCPS has failed to conduct a needed Functional Behavior Assessment (FBA) for Student or to develop and implement an appropriate Behavior Intervention Plan (BIP). Petitioner did not meet her burden of persuasion on this claim. School Social Worker conducted an FBA of Student in October 2017. Petitioner does not dispute that this FBA was adequate when conducted. School Social Worker, with Student’s IEP team, developed BIPs for Student, based on the FBA, in October 2017 and September 2018. Educational Advocate 1 testified that she objects to the September 2018 BIP because it was based on the October 2017 FBA. However, School Social Worker testified, credibly, that it is not necessary to update Student’s FBA, which assesses the function of a child’s challenging behaviors, whenever a BIP is adjusted. I found School Social Worker, who worked very closely with Student, to be a more credible witness than Educational Advocate 1, who never met or evaluated the child.

The Petitioner has also requested that I order DCPS to conduct Speech and Language, Psychiatric and OT reevaluations of Student. Generally, when a child has been evaluated for special education eligibility and the appropriateness of the agency’s evaluation is at issue, the hearing officer must consider whether the agency adequately

gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1–3); 34 C.F.R. § 300.304(b)(1–3), (c)(4, 6).

Student's Speech and Language reevaluation was recently completed. Student's last OT reevaluation was conducted in February 2016 and, as of June 2018, there were no concerns for Student in the area of OT. I find that Petitioner did not meet her burden of persuasion that Student requires a Speech and Language or OT reevaluation at this time.

Educational Advocate 1 opined in her testimony that Student needed a psychiatric evaluation because of the level of Student's emotional concerns and because a psychiatrist would be able to prescribe psychotropic medications. In October 2017, School Social Worker recommended to Mother that she obtain an outside psychiatric evaluation of Student to rule out underlying disorders and determine if a medication regime was appropriate for Student. However, School Social Worker opined that a psychiatric evaluation was not necessary for school and I found her opinion more persuasive than that of Educational Advocate 1, who never met Student. I conclude that whether Student would, or would not, benefit from a psychiatric evaluation for medication therapy is a health care issue, not information needed by the IEP team to determine Student's educational needs. *See* 34 CFR § 300.305(a)(2)(i)(A) (IEP team must identify what additional data are needed to determine whether the child is a child with a disability and the educational needs of the child;) § 300.174 (Prohibition on mandatory medication as a condition of attending school.)

At the beginning of the due process hearing on October 5, 2018, Petitioner and

DCPS stipulated that if I were to find that Student has been denied a free appropriate public education (FAPE) by DCPS, the appropriate compensatory education remedy would be 60 hours of academic tutoring and 40 hours of counseling to be provided by independent professionals compensated at the OSSE-approved rate. I do find that Student was denied a FAPE by DCPS' failure to reevaluate Student and to ensure that Student was provided an appropriate IEP in the 2017-2018 school year. Accordingly, I will order DCPS to fund the compensatory education award stipulated to by the parties.

E. Whether from August 2016 to July 2017, DCPS denied Student a FAPE when it failed to provide Student with all of Student's IEP Occupational Therapy and Speech and Language services during ESY and failed to introduce the majority of the ESY goals in Student's IEP.

Student's February 28, 2017 IEP provided that Student would receive 30 minutes per week of OT services and 1 hour per week of Speech-Language Pathology during the 4-week Extended School Year (ESY) session. ESY Speech-Language Pathology and OT services were not part of Student's February 6, 2018 IEP. Educational Advocate 1 testified that based on her review of DCPS' related services Service Trackers, Student's OT and Speech-Language services were not provided during the 2017 ESY program. Although Educational Advocate 1 was not able to confirm that information from Student's related services providers, neither did DCPS offer any evidence that the services were actually provided. On this limited record, I find that the Petitioner has met her burden of persuasion that DCPS failed to provide some 120 minutes of OT services and some 4 hours of Speech and Language services to Student during the 2017 ESY session. Petitioner presented no probative evidence that DCPS otherwise failed to introduce the majority of Student's ESY goals.

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the U.S.

District Court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party “must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”

*Beckwith*, 208 F. Supp. 3d at 49 (quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000)). I find that DCPS’ not providing any of Student’s ESY Speech and Language and OT services in the summer 2017 ESY session was a failure to implement a substantial provision of Student’s IEP. This was a denial of FAPE. Educational Advocate 1 testified that she had spoken to Student’s former OT provider, who indicated that there are currently no OT concerns for Student. Student’s February 6, 2018 IEP team determined that Student still needed Speech-Language Pathology services. Therefore, instead of ordering DCPS to make up Student’s ESY OT services, I will order, as compensatory education, that DCPS provide Student 6 hours of compensatory Speech and Language services as compensation for DCPS’ failure to fully implement Student’s IEP related services requirements in the 2017 summer ESY session.

#### Nonpublic School

At the due process hearing, Petitioner requested that I order DCPS to immediately fund Student’s enrollment at NONPUBLIC SCHOOL. DCPS argues that ordering a nonpublic placement for Student is premature because DCPS is in the midst of conducting Student’s reevaluation and Student’s IEP team is scheduled to meet in the current month to review and revise Student’s IEP based on the new assessments. I note that the relief requested by Petitioner, as identified in the August 27, 2018 Revised

Prehearing Order, did not include public funding for a nonpublic placement for Student. On balance, I find that it is appropriate to defer to Student's IEP team to decide, in the first instance, what revisions to Student's IEP are needed and whether a special school is Student's least restrictive environment. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012) (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.) Accordingly, I will deny, without prejudice, the Petitioner's request for a nonpublic placement and will order that DCPS ensure that Student's need for a more restrictive placement is carefully considered by Student's IEP team.

### **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, not later than 10 school days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain 60 hours of academic tutoring and 40 hours of counseling for Student to be provided by independent professionals, compensated at the OSSE-approved rate. DCPS shall also provide Student 12 hours of supplemental Speech and Language services, which DCPS may provide directly or through a funding authorization for the Parent to retain an independent provider.
3. Upon completion of DCPS' current reevaluation of Student, DCPS shall promptly convene Student's IEP team to review and revise, as appropriate, Student's IEP and educational placement. DCPS shall ensure that Student's revised IEP provides for a full-time dedicated aide, unless Student is placed in a nonpublic therapeutic day school, where the services of a dedicated aide are not needed,. DCPS shall ensure that Student's IEP team carefully considers whether Student requires a more restrictive placement in a nonpublic special school, serving children, like Student, who have severe behavioral challenges and
4. All other relief requested by the Petitioner herein is denied without prejudice to Petitioner's right to seek administrative review in a new

proceeding of the decisions made by Student's IEP team, pursuant to this Hearing Officer Determination, including, without limitation, the appropriateness of the educational placement provided for Student in the revised IEP.

Date: October 23, 2018

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  
OSSE - SPED  
DCPS Resolution Team