

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
1050 First Street, N.E., Third Floor  
Washington, D.C. 20002

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Office of Dispute Resolution  
October 13, 2018

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2018-0139
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 10/13/18
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Date and Room: 10/1/18 (112)
("DCPS"),	)	& 10/5/18 (404)
Respondent.	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been comprehensively evaluated and provided appropriate IEPs and placement. DCPS responded that it had sufficiently evaluated Student and provided suitable IEPs and placement.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

**Procedural History**

Following the filing of the due process complaint on 5/31/18, the case was assigned to the undersigned on 6/1/18. Petitioner amended her due process complaint on 7/30/18 and the timeline began anew on that date. Respondent filed a response on 6/7/18 and an amended response on 8/6/18 and did not challenge jurisdiction. An initial resolution session meeting (“RSM”) was held on 6/12/18; an RSM following the amended complaint was held

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<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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on 9/7/18. The 30-day resolution period for the amended complaint ended on 8/29/18. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 10/13/18.

The due process hearing took place on 10/1/18 and 10/5/18, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in much of the hearing.

Petitioner’s Disclosures, submitted on 9/24/18, contained documents P1 through P40, which were all admitted into evidence over objection to two documents. Respondent’s Disclosures, submitted on 9/24/18, contained documents R1 through R24, which were admitted into evidence without objection.

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Parent
2. *Private Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
3. *Clinical Psychologist* (qualified over objection as an expert in Clinical Psychology)
4. Student

Respondent’s counsel presented 3 witnesses in Respondent’s case (*see* Appendix A):

1. *School Speech-Language Pathologist* at DCPS (qualified without objection as an expert in Speech-Language Pathology)
2. *Special Education Coordinator* at *Prior Public School* (qualified without objection as an expert in Special Education)
3. *School Psychologist* at *Prior Public School* (qualified without objection as an expert in Clinical and School Psychology)

Petitioner’s counsel recalled Parent as Petitioner’s only rebuttal witness.

The issues to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability in 2016/17<sup>2</sup> or 2017/18 or when it did not conduct a comprehensive triennial evaluation, including (a) a neuropsychological evaluation concerning Attention Deficit Hyperactivity Disorder (“ADHD”) and a seizure

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<sup>2</sup> All dates in the format “2016/17” refer to school years.

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disorder; (b) testing to confirm or rule out ADHD; (c) an occupational therapy (“OT”) evaluation; and (d) testing to address attendance and tardiness issues, such as a comprehensive psychological and a functional behavioral assessment (“FBA”).<sup>3</sup> *Petitioner has the burden of persuasion on this issue.*

**Issue 2:** Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of services on 4/5/17, 4/4/18, 4/30/18, 6/12/18 or thereafter, where (a) there was no IEP update of present levels of performance (“PLOPs”), goals and baselines (4/5/17 and 4/4/18); (b) specialized instruction outside general education was not provided in all academic courses, despite Student’s ongoing academic and behavior concerns (4/5/17 and 4/4/18); (c) speech-language services were terminated (4/30/18 and 6/12/18); and (d) supports such as behavior intervention plans (“BIPs”) were not added (4/5/17, 4/4/18 and 6/12/18).<sup>4</sup> *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

**Issue 3:** Whether DCPS denied Student a FAPE by failing to allow Parent meaningful participation in the triennial eligibility meeting on 4/30/18, when inadequate notice was given about the meeting. *Petitioner has the burden of persuasion.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall convene an IEP team meeting to provide an appropriate IEP for Student, including appropriate and updated PLOPs, baselines, speech-language goals and services, and other goals.<sup>5</sup>
3. DCPS shall fund independent evaluations, including (a) a neuropsychological evaluation, (b) an occupational therapy evaluation, (c) an assessment to confirm or rule out ADHD, and (d) an assessment to address attendance and tardiness.<sup>6</sup>

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<sup>3</sup> At the beginning of the due process hearing, Petitioner withdrew without prejudice subpart (d), which was “a vocational evaluation”; the current subpart (d) was subpart (e) in the 8/27/18 Prehearing Order.

<sup>4</sup> At the beginning of the due process hearing, Petitioner withdrew without prejudice from subpart (b) the assertion of a violation at the 4/30/18 meeting. At the prehearing conference, Petitioner withdrew without prejudice issue IV on page 11 of the amended due process complaint as it relates to placement in 2018/19, while the remainder of issue IV (placement in 2017/18) is incorporated in Issue 2 herein.

<sup>5</sup> At the beginning of the due process hearing, Petitioner withdrew the request for relief in subpart (b) of the inclusion in an IEP of “appropriate level of services, including specialized instruction outside general education for all academic courses.”

<sup>6</sup> At the prehearing conference, Petitioner withdrew without prejudice the requested relief of an independent vocational evaluation on page 7 of the amended due process complaint.

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4. DCPS shall fund compensatory education for any denial of FAPE.<sup>7</sup>
5. Any other just and reasonable relief.

### Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>8</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>9</sup> Student is *Age*, *Gender* and was in *Grade* at Prior Public School in 2017/18; in 2018/19 Student began at Public School.<sup>10</sup>

2. Student was initially found eligible for special education services in 2009 based on Other Health Impairment ("OHI") due to ADHD and "partial complex seizure disorder."<sup>11</sup> As a young child, Student experienced habitual seizures and later was diagnosed with partial complex seizure disorder.<sup>12</sup> School Psychologist has known Student for years and there has been little evidence of seizures; Student told School Psychologist that Student has not had a seizure since Student was "little."<sup>13</sup> Seizures have never been observed at school; the disorder is not now affecting Student's academics.<sup>14</sup>

3. IEPs. The first of the three IEPs developed for Student at Prior Public School – all of which are at issue in this case – was dated 4/5/17 and provided for 5 hours/week of

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<sup>7</sup> Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence at the due process hearing supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denials of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denials of FAPE. Respondent was encouraged at the prehearing conference to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event any denial of FAPE is found.

<sup>8</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>9</sup> Parent.

<sup>10</sup> *Id.*

<sup>11</sup> P6-11.

<sup>12</sup> P6-1; Clinical Psychologist (history of seizures).

<sup>13</sup> School Psychologist.

<sup>14</sup> P6-2; R23-3; School Psychologist.

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specialized instruction inside general education, with 30 minutes/month of OT outside general education, 30 minutes/month of speech-language pathology outside general education, 60 minutes/month of Behavioral Support Services (“BSS”) inside general education and 60 minutes/month of BSS outside general education.<sup>15</sup>

4. The next IEP, dated 4/4/18, was revised before evaluations were completed; it provided for the exact same services, except that all 120 minutes/month of BSS were outside general education (rather than half inside general education).<sup>16</sup> Parent expressly asked to wait for the evaluations to be completed before increasing Student’s hours of specialized instruction on the 4/4/18 IEP.<sup>17</sup> Special Education Coordinator noted that Student would have to change schools if specialized instruction was increased.<sup>18</sup>

5. The third IEP, dated 6/12/18, increased specialized instruction to 20 hours/week outside general education, with 30 minutes/month of OT outside general education and 120 minutes/month of BSS outside general education.<sup>19</sup> Prior Public School agreed to 20 hours/week of specialized instruction outside general education since Parent and counsel wanted it, knowing that an increase in specialized instruction hours would require Student to attend elsewhere; the school team believed the increase in specialized instruction would not harm Student, but was overly restrictive.<sup>20</sup>

6. Evaluations. Parent made no evaluation request in 2016/17; Student’s behavior was not out of the ordinary, so Student’s team did not call for evaluations.<sup>21</sup> Parent requested evaluations through counsel early in 2018.<sup>22</sup> Triennial re-evaluations had occurred in late spring 2015, so were not due until late spring 2018.<sup>23</sup>

7. A 4/22/15 psychoeducational evaluation of Student found average cognitive abilities; Student presented as “fidgety, distractible, and impulsive” with global impairments in executive functioning, which were likely associated with ADHD.<sup>24</sup> Student suffers from distractibility, too much stimulation, inattention and frustration, so is disruptive.<sup>25</sup> ADHD is not appropriately assessed in a neuropsychological evaluation, but in a psychoeducational evaluation.<sup>26</sup> Clinical Psychologist testified that she has no doubt about Student’s ADHD.<sup>27</sup>

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<sup>15</sup> P18-1,9.

<sup>16</sup> Special Education Coordinator; P20-1,9.

<sup>17</sup> P21-2; P36-123.

<sup>18</sup> P21-3.

<sup>19</sup> P23-1,9.

<sup>20</sup> School Psychologist; P23-10.

<sup>21</sup> School Psychologist; Special Education Coordinator.

<sup>22</sup> P19-2.

<sup>23</sup> Special Education Coordinator.

<sup>24</sup> P6-1,11; School Psychologist.

<sup>25</sup> Clinical Psychologist.

<sup>26</sup> R23-3; School Psychologist.

<sup>27</sup> Clinical Psychologist.

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8. School Psychologist credibly testified that a neuropsychological evaluation could not confirm or rule out seizures, which would require a neurological evaluation; in any case, seizures were not related to Student's behavior and academics.<sup>28</sup> Clinical Psychologist concurred that a medical doctor should be involved to diagnose seizures.<sup>29</sup> School Psychologist did not believe a new cognitive assessment was needed, as there was no reason to suspect any decline in Student's cognition.<sup>30</sup> Special Education Coordinator subsequently emailed Petitioner's counsel that DCPS did not have sufficient data to authorize a neuropsychological evaluation, but would administer a psychological evaluation to review current cognitive levels.<sup>31</sup>

9. School Psychologist's 4/10/18 comprehensive psychological evaluation found that Student was "solidly average"; cognitive testing with the WISC-V showed a Full Scale IQ of 103, with Working Memory of 89 which is Low Average range, and Processing Speed of 123 which is Superior range.<sup>32</sup> Achievement testing with the WJ-IV showed a Broad Reading score of 94, Broad Math score of 95, and Broad Writing score of 104, all of which are in the Average range.<sup>33</sup> School Psychologist also conducted the Integrated Visual and Auditory Continuance Performance Test ("IVA"), which is used in neuropsychological evaluations; the IVA indicated that Student can pay attention, but School Psychologist testified that he would not recommend any change to the well-established determination of ADHD.<sup>34</sup> Based on abilities, Student should be at or above grade level with decent grades, but in 2017/18, Student failed nearly all classes.<sup>35</sup>

10. A speech-language evaluation of Student was conducted in March 2015 in which Student's "overall language" was in the Average category and Student's language skills were found "adequate to facilitate success in the academic setting."<sup>36</sup> Student was Below Average on the Understanding Spoken Paragraphs subtest, with a scaled score of 6.<sup>37</sup> The evaluation found no concerns for Student that warranted continued speech-language services; Student was advised to work in the classroom to build a strong vocabulary.<sup>38</sup> School Speech-Language Pathologist agreed with the decision to exit Student from speech-language services in 2015.<sup>39</sup> After not receiving speech-language services in 2016 and 2017, speech-language services "reappeared" on Student's 4/5/17 IEP without documentation of new concerns or other rationale.<sup>40</sup> School Speech-Language Pathologist

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<sup>28</sup> School Psychologist.

<sup>29</sup> Clinical Psychologist.

<sup>30</sup> R5-1 (2/28/18); School Psychologist.

<sup>31</sup> P36-27 (3/7/18).

<sup>32</sup> R10-4,5,6,9.

<sup>33</sup> R10-6,7,8.

<sup>34</sup> R10-8; School Psychologist.

<sup>35</sup> School Psychologist.

<sup>36</sup> P4-1,7.

<sup>37</sup> P4-4,5.

<sup>38</sup> P7-14; R23-2 ("Speech is not getting in the way of academic achievement").

<sup>39</sup> School Speech-Language Pathologist.

<sup>40</sup> *Id.*

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provided speech-language services to Student in 2017/18 until the need could be reassessed.<sup>41</sup>

11. School Speech-Language Pathologist conducted a speech-language re-evaluation of Student on 4/13/18 in which she concluded that Student's overall communication skills were commensurate with age and linguistic environment; Student's Oral Peripheral Mechanism, Articulation, Voice, and Fluency were all fine.<sup>42</sup> Student's "speech and language skills do not adversely impact or interfere" with educational performance and Student "should not have difficulty communicating effectively in [the] general education environment."<sup>43</sup> School Speech-Language Pathologist recommended that Student no longer qualified for speech-language services as there was no need for a speech-language provider for vocabulary; vocabulary could be obtained in the classroom.<sup>44</sup> Student's 2018 speech-language scores were not significantly different from 2015, so there was no reason to increase speech-language services for Student.<sup>45</sup> Student shouldn't qualify for speech-language services based on receptive and expressive vocabulary issues alone; School Speech-Language Pathologist would not target vocabulary alone for speech-language pathology.<sup>46</sup>

12. School Speech-Language Pathologist noted in her speech-language re-evaluation that Student sought to start over the Understanding Spoken Paragraphs subtest because Student had not been listening, but that particular subtest cannot be repeated, so that score was no doubt lower than it otherwise would have been, which in turn depressed Student's Receptive Language Index on the CELF-5 to Borderline/Mild, although School Speech-Language Pathologist testified that if Student had listened it likely would have been Average.<sup>47</sup> The depressed Receptive Language standard score of 84 was within one standard deviation from Student's 2015 score of 98, so was not a statistically significant decline from the earlier evaluation.<sup>48</sup>

13. Throughout Student's two years at Prior Public School, Student's behavior was consistently found on Student's IEPs to impede Student's learning or that of others.<sup>49</sup> Student arrived at Prior Public School in 2016 with a BIP, which was adopted by Prior Public School.<sup>50</sup> Not until 4/13/18 was an FBA conducted at Prior Public School, focusing on Student's academic disengagement and disruptive/off task behaviors.<sup>51</sup> Student was found to be "academically disengaged, highly distractible and not successfully accessing the

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<sup>41</sup> *Id.*

<sup>42</sup> P11-5,9; Private Speech-Language Pathologist (acknowledged average range of Student).

<sup>43</sup> P11-10.

<sup>44</sup> School Speech-Language Pathologist.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> P11-4,7,9; School Speech-Language Pathologist.

<sup>48</sup> Private Speech-Language Pathologist; School Speech-Language Pathologist; P4-6.

<sup>49</sup> P16-2; P18-2; P20-2.

<sup>50</sup> P18-2; Special Education Coordinator.

<sup>51</sup> R12-1.

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general education curriculum.”<sup>52</sup> A BIP-Level II dated 4/12/18 was prepared for Student, also focusing on academic disengagement and disruptive/off task behaviors.<sup>53</sup>

14. Student’s OT focused on writing and fine motor skills.<sup>54</sup> On 3/6/18, Special Education Coordinator emailed Petitioner’s counsel that DCPS would not be re-evaluating Student in OT, as the OT therapist said that new testing was not needed.<sup>55</sup> Special Education Coordinator didn’t recall Parent raising any specific concerns about OT.<sup>56</sup> In the absence of an OT re-evaluation, OT services remained on Student’s IEPs at the same level.<sup>57</sup>

15. Classes/Grades/Testing/Behavior. In 2016/17, Student’s GPA for the year was 1.89 (just below a “C” average), with “Bs,” “Cs” and “Ds,” and only one “F” in Art; Student’s grades in many subjects worsened over the year.<sup>58</sup> Student’s grades were bad from the beginning of 2017/18; in the first half of that year, Student received all “Fs” except for a single “D” in Individual and Dual Sports 1.<sup>59</sup> In 2016/17, Student’s report card indicated that Student was absent 30 days, of which 24 were unexcused; Student was tardy another 26 days.<sup>60</sup>

16. In 2017/18, Student was in an English class of 20, but in a small group of 3-4 others inside the classroom; in math there were 24 total, but 3-8 in a small group inside the classroom.<sup>61</sup> Student’s “horseplay” and “socialization” in the classroom was a small issue in 2016/17 and a bigger issue in 2017/18.<sup>62</sup> Student was late “quite often” toward the end of 2016/17.<sup>63</sup>

17. In reading, Student’s SRI lexile was 557 at the beginning of 2016/17 and 806 on 2/3/17, which was a notable increase, but four to five grades behind.<sup>64</sup> In math, Student’s MAP on 9/2016 indicated that Student was about four to five grades behind; Student’s performance in math by 2/28/18 was about six grades behind.<sup>65</sup> Student did not complete

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<sup>52</sup> R12-4.

<sup>53</sup> P10-1.

<sup>54</sup> Clinical Psychologist.

<sup>55</sup> P36-25; Special Education Coordinator.

<sup>56</sup> Special Education Coordinator.

<sup>57</sup> P20-9; P23-9.

<sup>58</sup> R4-1,2,3.

<sup>59</sup> P28-1; Special Education Coordinator; *cf.* P30-1.

<sup>60</sup> R4-1.

<sup>61</sup> P19-1; P36-7 (Special Education Coordinator pulling Student for small group instruction in English).

<sup>62</sup> Special Education Coordinator.

<sup>63</sup> *Id.*

<sup>64</sup> P18-4; R4-5; Special Education Coordinator; *cf.* P19-2.

<sup>65</sup> P18-3; P19-2; Special Education Coordinator.

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the SRI at the end of January 2018; Student did not complete the ANET at the end of the [second] quarter.<sup>66</sup>

18. On 9/25/17, Student's chemistry teacher emailed Parent about Student causing "a LOT" of class disruption; Student was failing but had not come to tutoring or to retake any tests.<sup>67</sup> Parent responded that she intended for Student to attend tutoring because other teachers had also expressed concern.<sup>68</sup> On 10/5/17, Parent wrote Student's chemistry teacher to confirm Student's claims of going to tutoring, but learned that the teacher had not seen Student once.<sup>69</sup> As of 12/7/17, Student was not on track to pass chemistry because Student was making little, if any, attempt to attend tutoring and did not retake tests and quizzes.<sup>70</sup> Student's IEP Progress Report noted that despite receiving an "F" in math and making no progress, Student didn't stay for academic support after school.<sup>71</sup>

19. By midway through 2017/18, Student was "absolutely unengaged" in school work, although normally responded positively when redirected.<sup>72</sup> Student was not completing or even starting classwork and not doing homework "100% of the time."<sup>73</sup> School Psychologist's 4/10/18 comprehensive psychological evaluation stated that Student's teachers uniformly reported that Student "consistently shows up late, unprepared, and insufficiently responsive to directions and norms."<sup>74</sup> Student arrived at school about an hour late each day since January 2018; Student did better after the 2/28/18 meeting, but by 4/4/18 was late and missing 15-30 minutes of instruction each day.<sup>75</sup> Parent emailed counsel on 6/12/18 that she only had one meeting "this year" about Student's attendance, and had just started getting notifications about Student being late.<sup>76</sup>

20. In 2017/18, when Student was not doing well and behavior was getting worse, Prior Public School wanted to try everything before adding supports; Student was often pulled out of general education to try to provide help.<sup>77</sup> Special Education Coordinator was willing to "re-teach" what Student missed by being late, but "absences from class and distractions cause [Student] to miss the re-teach."<sup>78</sup> Special Education Coordinator was also available to tutor Student on Tuesdays after school.<sup>79</sup> Student was placed on a token economy, which

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<sup>66</sup> P19-1.

<sup>67</sup> P31-1 (emphasis in original).

<sup>68</sup> P31-1.

<sup>69</sup> P31-2.

<sup>70</sup> P31-5.

<sup>71</sup> P29-1,2 (dated 2/9/18; term 2 ended 1/19/18).

<sup>72</sup> R5-2.

<sup>73</sup> P19-1.

<sup>74</sup> R10-3.

<sup>75</sup> P19-1; P21-1; R5-1 (Student "usually late to school and missing a significant chunk of instruction"); Special Education Coordinator.

<sup>76</sup> P36-122.

<sup>77</sup> Special Education Coordinator.

<sup>78</sup> P21-1.

<sup>79</sup> *Id.*

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offered access to preferred activities, but refused to engage.<sup>80</sup> Student was mostly apathetic and didn't care about school.<sup>81</sup> Student was not going to tutoring generally.<sup>82</sup>

21. School Psychologist's 4/10/18 comprehensive psychological evaluation found that Student was "significantly struggling with academic perseverance and motivation"; the evaluation recommended that Student "should receive intensive, outside of the general education setting, supports as a means of helping [Student] develop internal regulation in academic spaces."<sup>83</sup>

22. PLOPs, Goals, Baselines. Petitioner's counsel and Special Education Coordinator recognized the lack of updated formal and informal assessments from which to obtain information for PLOPs, goals and baselines in the 4/4/18 IEP meeting, as Student often refused to take ANET, SRI and the like, or was not there.<sup>84</sup>

23. Student's IEP goals in math were identical on the 4/5/17 and 4/4/18 IEPs (the 4/4/18 IEP contained an additional duplicate goal).<sup>85</sup> Petitioner's counsel asked to add last year's goals for math to Student's 4/4/18 IEP since they were not mastered; Special Education Coordinator concurred.<sup>86</sup> The math PLOPs were not detailed, but were modified; the baselines were not copied from one to the other.<sup>87</sup>

24. Student's single reading goal was very similar between 4/5/17 to 4/4/18, but not identical; Special Education Coordinator noted in the IEP meeting that reading goal 1 was staying the same.<sup>88</sup> The PLOPs had little detail, but were not copied; the baseline was not copied.<sup>89</sup>

25. Student's writing PLOPs and single goal did not appear objectionable; the baseline was identical, which may have been appropriate.<sup>90</sup> The writing goal had been kept from last year.<sup>91</sup>

26. As for other areas of concern, Student's Communication/Speech-Language PLOPs and goals (reduced from two to one) did not appear objectionable; the baselines were

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<sup>80</sup> R10-3; School Psychologist.

<sup>81</sup> School Psychologist.

<sup>82</sup> R5-1 (as of 2/28/18, "rarely attends extra sessions for Support"); P21-1 (4/4/18); Special Education Coordinator.

<sup>83</sup> R10-9,10.

<sup>84</sup> P21-1,2; Special Education Coordinator.

<sup>85</sup> P18-3; P20-3,4.

<sup>86</sup> P21-2.

<sup>87</sup> P18-3; P20-3.

<sup>88</sup> P18-4; P20-4; P21-2.

<sup>89</sup> P18-4; P20-4.

<sup>90</sup> P18-4,5; P20-5.

<sup>91</sup> P21-2.

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weak.<sup>92</sup> Student's Emotional, Social, and Behavioral Development PLOPs did not appear objectionable (apart from including incorrect biographical information in 4/5/17); the goals and baselines appear appropriate.<sup>93</sup> Student's Motor Skills/Physical Development PLOPs were similar in the two IEPs; the goals were identical (with one dropped), and the baselines were identical.<sup>94</sup>

27. Meetings. Special Education Coordinator emailed Petitioner's counsel on 3/12/18 to see if she and Parent were available the following week for an IEP meeting before Student's IEP expired on 4/4/18.<sup>95</sup> The parties engaged in strenuous efforts to schedule a meeting prior to IEP expiration.<sup>96</sup> Special Education Coordinator worked to get a meeting set with Parent before Student's eligibility expired on 4/30/18, using email, text messages and telephone, reaching out only to Parent and not counsel as the time for the meeting arrived; Special Education Coordinator and Parent talked right before the meeting but she couldn't be there due to work.<sup>97</sup> The eligibility meeting was held on 4/30/18 without Parent or counsel and Student was found eligible based on OHI due to seizures; the school-based team determined that speech-language services were no longer warranted because Student's speech-language scores were average.<sup>98</sup> Prior Public School still sought to meet with Parent after the 4/30/18 meeting, but was not able to find a time before the due process complaint was filed on 5/31/18.<sup>99</sup>

28. Special Education Coordinator explained at the 4/4/18 IEP meeting that Student would be in *Grade+1* in 2018/19 if Student passed English and math in summer school, but if both were not passed Student would repeat Grade.<sup>100</sup> As of 9/7/18, Student was considered to again be in Grade, although Student is taking Grade+1 classes, with previously failed classes to be made up in credit recovery or summer school.<sup>101</sup> Student was to be enrolled in credit recovery in October 2018.<sup>102</sup>

29. Public School. Student is doing much better in 2018/19 at Public School than Prior Public School; in Student's two academic classes Student has good grades, no missing assignments, and good or excellent behavior after several weeks.<sup>103</sup> Student likes the environment at Public School, where the classes are small and there is a lot of staff

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<sup>92</sup> P18-5,6; P20-5,6.

<sup>93</sup> P18-6,7; P20-6,7.

<sup>94</sup> P18-5,6; P20-8.

<sup>95</sup> P36-27.

<sup>96</sup> P36-69 (and many previous pages).

<sup>97</sup> Special Education Coordinator; P36-83,87; R21-1; R23-2.

<sup>98</sup> P25-1; P13-1; Special Education Coordinator.

<sup>99</sup> P36-92,93,103.

<sup>100</sup> P21-3.

<sup>101</sup> R23-3.

<sup>102</sup> R23-4.

<sup>103</sup> P40-1 (9/20/18); Clinical Psychologist (doing much better at Public School); Parent ("doing great" this school year).

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support.<sup>104</sup> Student testified that Student likes Public School because it is easier and people help Student.<sup>105</sup> Student testified in support of one-on-one tutoring after school in order to learn skills missed in Grade.<sup>106</sup> Student committed to fitting in extra tutoring hours each week, even if busy.<sup>107</sup>

### Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme

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<sup>104</sup> Clinical Psychologist.

<sup>105</sup> Student.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the 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 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability in 2016/17 or 2017/18 or when it did not conduct a comprehensive triennial evaluation, including (a) a neuropsychological evaluation concerning ADHD and a seizure disorder; (b) testing to confirm or rule out ADHD; (c) an OT evaluation; and (d) testing to address attendance and tardiness issues, such as a comprehensive psychological and an FBA. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on this issue only as to the FBA, which was not conducted in a timely fashion.

The importance of assessing children in all areas of suspected disability was recently emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), quoting 20

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U.S.C. § 1414(b)(3)(B). The Appellate Court explained in *Z.B.*, 888 F.3d at 524, that failing to conduct adequate assessments, such as an FBA, was a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student's behaviors, leading to them being addressed in the IEP inadequately or not at all. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) ("in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable [the student] to receive educational benefits" (citation omitted)); *Hill v. Dist. of Columbia*, 2016 WL 4506972, at \*18 (D.D.C. 2016); 34 C.F.R. 300.304(c)(4).

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student's parent or teacher requests a re-evaluation, or if DCPS determines that the needs of the student warrant reevaluation. 34 C.F.R. 300.303. Here, based on Student's prior re-evaluation, the current triennial reevaluation was not due until the late spring of 2018, and Parent did not request evaluations until early 2018. Decisions on the areas to be assessed are to be made based on the suspected needs of the child. *Z.B.*, 888 F.2d at 518; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). However, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Cf. James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016). The specific evaluations sought by Petitioner are considered in turn.

(a) Neuropsychological Evaluation. The evaluation sought by Parent most strenuously was a neuropsychological to address her concerns about seizures. But School Psychologist persuasively testified that a neuropsychological evaluation cannot confirm or rule out seizures, which would require a neurological evaluation – a medical, not an educational, assessment. The undersigned found School Psychologist to be highly credible throughout his testimony, which was founded on his expertise in Clinical Psychology, as well as School Psychology. Moreover, Petitioner's Clinical Psychologist concurred that a medical doctor should be involved in diagnosing seizures. Instead of a neuropsychological, School Psychologist conducted a comprehensive psychological evaluation, and included several elements or subtests that are normally found in a neuropsychological evaluation to address concerns of Parent, even though School Psychologist did not feel they were strictly needed by Student.

In any case, Student's seizures have not occurred in years and have not been observed at school. Thus, there was no indication that Student's seizure disorder has any impact on Student's education, or had any impact going back to 2016/17, so the lack of a neuropsychological evaluation is not a denial of FAPE.

(b) ADHD Testing. ADHD is not appropriately assessed in a neuropsychological evaluation as suggested by Petitioner, but can be – and was – determined in a

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psychoeducational evaluation. The 4/22/15 psychoeducational evaluation found that Student presented as fidgety, distractible, and impulsive with global impairments in executive functioning, which are likely associated with ADHD. Indeed, Petitioner's Clinical Psychologist testified that she has no doubt about Student's ADHD, as Student suffers from distractibility, too much stimulation, inattention and frustration. School Psychologist's 4/10/18 comprehensive psychological evaluation included the IVA subtest, which indicated that Student can pay attention, but School Psychologist would not suggest changing the well-established conclusion of ADHD at this point. In sum, no further testing for ADHD is needed at this time. There has been no denial of FAPE.

(c) Occupational Therapy Evaluation. Petitioner did not persuasively explain why an OT evaluation was needed by Student in 2016/17 and/or 2017/18. Special Education Coordinator could not recall Parent raising any specific concerns about OT. Student's OT therapist concluded that new OT testing was not needed, as Special Education Coordinator conveyed to Petitioner's counsel on 3/6/18. Even absent an OT re-evaluation, OT services remain on Student's IEPs at the same modest level. Thus, Petitioner did not meet her burden of persuasion that there was a need for an OT re-evaluation or show any harm from not conducting the assessment. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at \*4,5 (D.D.C. 2010) (no relief warranted where petitioner "has not shown that DCPS' failure to conduct the reevaluations here sooner affected substantive rights" or that the child's "education would have been different" but for the violation).

(d) Attendance/Tardiness Issues. The IDEA does require that school districts respond to a student frequently missing school. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009); *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if not in school, student could not be said to be receiving "a free appropriate public education"). Here, Student's report card for 2016/17 indicated that Student was absent 30 days, of which 24 were unexcused, and tardy another 26 days. Moreover, Student's engagement with school generally declined toward the end of 2016/17 and was much worse in 2017/18, when at times Student was as much as an hour late to school each day.

Here, as suggested by Petitioner, both an FBA and comprehensive psychological evaluation were conducted eventually, but not until April 2018, far too late for changes to be put in place to permit Student to make meaningful progress throughout 2017/18. In the view of the undersigned, Prior Public School should have conducted an FBA much earlier in 2017/18 and developed a BIP to address attendance and tardiness, along with other behavioral issues Student was displaying by that point, as discussed in Issue 2(b) below. This should have occurred no later than midway through 2017/18, when it was clear that Student had more severe behavior problems and was failing almost all classes.

In circumstances such as these, this Hearing Officer concludes that failing to conduct an FBA and develop a BIP goes beyond a procedural violation and is a denial of a FAPE. *See, e.g., Z.B.*, 888 F.3d at 524. The Court in *Long*, 780 F. Supp. 2d at 61, *quoting Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008), explained that an FBA is

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“essential” in addressing behavioral difficulties, so plays an integral role in the development of an IEP. The IDEA requires, in the case of a student whose behavior impedes the student’s own learning or that of others, as here, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. 300.324(a)(2)(i). *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 146 (D.D.C. 2018). Here, the failure to conduct an FBA and develop a BIP caused a deprivation of educational benefit to Student and is thus held by the undersigned to be a substantive violation and a denial of FAPE pursuant to 34 C.F.R. 300.513(a). This denial of FAPE contributes to the compensatory education awarded below.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to propose or provide an appropriate IEP and/or placement/location of services on 4/5/17, 4/4/18, 4/30/18, 6/12/18 or thereafter, where (a) there was no IEP update of present levels of performance (“PLOPs”), goals and baselines (4/5/17 and 4/4/18); (b) specialized instruction outside general education was not provided in all academic courses, despite Student’s ongoing academic and behavior concerns (4/5/17 and 4/4/18); (c) speech-language services were terminated (4/30/18 and 6/12/18); and (d) supports such as behavior intervention plans (“BIPs”) were not added (4/5/17, 4/4/18 and 6/12/18). (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue generally, shifting the burden of persuasion to DCPS, which only failed to prove that specialized instruction outside general education was adequate for Student.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”).

The measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving perfect IEPs, but IEPs reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA “stops short of requiring public schools to provide the best possible education”). *See also Hill*, 2016 WL 4506972, at \*21, *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). The appropriateness of Student’s IEPs is analyzed by considering the

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specific concerns raised by Petitioner, which are considered below in turn.<sup>108</sup> See 34 C.F.R. 300.320(a); *Honig*, 484 U.S. at 311.

(a) IEP Updates. Petitioner first raises concerns about the lack of updates of PLOPs, goals and baselines on the 4/5/17 and 4/4/18 IEPs, even though Petitioner's counsel recognized the lack of updated formal and informal assessments from which to obtain such information during the 4/4/18 IEP meeting, as Student often refused to take ANET, SRI and similar instruments, or was simply absent.

PLOPs. The statements of present levels of performance as required by 34 C.F.R. 300.320(a)(1) were not thorough or detailed in Student's 4/5/17 and 4/4/18 IEPs, but Petitioner did not raise specific concerns and the undersigned does not find them to be so insufficient as to be a violation.

Goals. Similarly, the statements of measurable annual goals required by 34 C.F.R. 300.320(a)(2) were few in number, but do not amount to a violation. Petitioner's counsel emphasized at the due process hearing that Student's math goals were identical on the 4/5/17 and 4/4/18 IEPs. However, Petitioner's counsel had asked at the IEP meeting to add last year's goals for math to Student's 4/4/18 IEP since the goals had not been mastered, to which Public School agreed. This would appear to explain the identical goals and preclude any violation. There was also discussion at the IEP meeting about a reading goal remaining the same and a writing goal being kept.

Baselines. The IDEA does not expressly require "baselines" in IEPs, but does require a description of how progress toward meeting a student's IEP goals will be measured, in 34 C.F.R. 300.320(a)(3). That measurement is typically in the form of baselines stating the level at which a child begins so one can determine whether the special education services provided were sufficient to bring about the desired improvement. The baselines in the 4/5/17 and 4/4/18 IEPs do not appear problematic. One baseline was identical to the previous year, but with everything else being modified, the undersigned does not find that a concern.

(b) Sufficiency of specialized instruction. Consideration of whether Student's 4/5/17 and 4/4/18 IEPs were appropriate with only 5 hours/week of specialized instruction inside general education requires some background information.

Academically, in 2016/17 Student's GPA for the year was 1.89 (just below a "C" average), with "Bs," "Cs" and "Ds," and only one "F" (in Art). Looking quarter by quarter, Student's grades in many subjects worsened over the year. Student's grades were bad from

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<sup>108</sup> A Hearing Officer must also determine whether "the State complied with the procedures" set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. No specific procedural violations were alleged in this case.

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the beginning of 2017/18; in the first half of that year, Student received all “Fs” except for a single “D” in a sports class. In addition, Student was some four to five years behind grade level in both reading and math.

Prior Public School knew that Student was doing very poorly early in 2017/18. On 9/25/17, Student’s chemistry teacher emailed Parent about Student causing “a LOT” of class disruption. Student was also failing the class, but had not gone to tutoring or to retake any tests. Parent responded that other teachers had also expressed concern about Student needing tutoring. Similarly, Student’s IEP Progress Report for second quarter 2017/18 noted that despite receiving an “F” in math and making no progress, Student didn’t stay for academic support after school.

Behaviorally, Student’s horseplay and so-called socialization in the classroom was a small matter in 2016/17, but a bigger issue in 2017/18. Student’s engagement with school changed over time as well. Student was late quite often toward the end of 2016/17. By early 2018, Student sometimes arrived at school about an hour late each day.

At the due process hearing, Special Education Coordinator explained that Prior Public School wanted to try everything before adding supports, and Prior Public School diligently did try to assist Student in many ways. Student was often pulled out of general education to try to provide help. Special Education Coordinator was willing to “re-teach” what Student missed by being late, but Student missed the re-teach as well. Special Education Coordinator was available to tutor Student, but Student didn’t go. Student was placed on a token economy, which offered access to preferred activities, but refused to engage. Student was apathetic and didn’t care at all about school.

Prior Public School had tried everything except increasing Student’s specialized instruction outside general education, which could not be done without finding a new placement for Student. Finally, School Psychologist’s 4/10/18 comprehensive psychological evaluation recommended that Student “should receive intensive, outside of the general education setting, supports as a means of helping [Student] develop internal regulation in academic spaces.” Student’s 6/12/18 IEP increased Student’s specialized instruction from 5 to 20 hours/week and shifted all of it from inside to outside general education.

However, based on the deterioration of Student’s education at school during the first half of 2017/18 and the clear shift in grades from 2016/17 to the first half of 2017/18, this Hearing Officer concludes that Prior Public School should have taken action by midyear 2017/18 in order to provide the support and specialized instruction that Student required, by convening an IEP meeting and making the appropriate changes.

At this stage, changes in specialized instruction have already been accomplished and Student is making progress in a new placement with extensive supports. The only question remaining for the undersigned is the amount of compensatory education needed to make up

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for the denial of FAPE, which this Hearing Officer concludes was from midyear 2017/18 (which was 1/19/18) through the enhanced IEP on 6/12/18. While Clinical Psychologist based her compensatory education proposal on the premise that Student should have received 20 hours/week of specialized instruction outside general education, the undersigned is not convinced that more than 15 hours/week would have been needed if it had been increased by midyear in 2017/18.

In any case, compensatory education is not hour-for-hour and a serious consideration is how many hours of compensatory services will benefit Student without causing overload (on top of credit recovery for failed classes in Grade, which are on top of Grade+1 classes). These considerations result in the award of compensatory education set forth below.

(c) Speech and Language Services. Petitioner next raises concerns about the termination of Student's speech-language services. A speech-language evaluation of Student was conducted in March 2015 in which Student's "overall language" was in the Average category and Student's language skills were found "adequate to facilitate success in the academic setting." The evaluation found no concerns for Student that warranted continued speech-language services and Student was exited from speech-language services in 2015. But after not receiving speech-language services in 2016 and 2017, speech-language services "reappeared" on Student's 4/5/17 IEP without explanation. School Speech-Language Pathologist provided speech-language services to Student in 2017/18 until Student's need could be reassessed, which occurred with a speech-language re-evaluation on 4/13/18 in which School Speech-Language Pathologist concluded that Student's speech and language skills do not adversely impact or interfere with educational performance. Speech-language impairment is defined in 34 C.F.R. 300.8(c)(11) as "a communication disorder . . . that adversely affects a child's educational performance." Thus, School Speech-Language Pathologist recommended that Student no longer qualified for speech-language services, and this Hearing Officer concurs.

School Speech-Language Pathologist credibly explained that there was no need for a speech-language provider for vocabulary, which could be obtained in the classroom. Student's 2018 speech-language scores were not significantly different from 2015, so there was certainly no reason to increase speech-language services for Student, as advocated by Petitioner. Further, Student shouldn't qualify for speech-language services based on receptive and expressive vocabulary issues alone and School Speech-Language Pathologist would not target vocabulary alone. Notably, School Speech-Language Pathologist explained in her speech-language re-evaluation that Student sought to start over a subtest because Student had not been listening, but that particular subtest could not be repeated, so that score was no doubt lower than it otherwise would have been, which in turn depressed Student's Receptive Language Index on the CELF-5, which otherwise would likely have been Average, explaining a major reason for Petitioner's speech-language concerns.

(d) BIPs and Other Supports. Finally, Petitioner asserts that the IEPs should have contained BIPs and other supports for Student. Petitioner did not indicate the scope of any other supports required, but as discussed above Prior Public School in fact provided numerous supports to Student, which were not sufficient. Prior Public School did fail to

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modify and bring current the BIP that Student arrived with at Prior Public School in 2016. This failure is addressed above in Issue 1(d) in connection with the FAPE violation for failure to conduct an FBA followed by a BIP.

Placement. As for placement, the applicable legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements). A conclusion that Student required specialized instruction outside general education results in placement no longer being viable at Prior Public School, which is an “inclusion” school and could not provide Student the special education services needed outside general education. Had Prior Public School taken action to increase specialized instruction midyear in 2017/18, Student would have needed to shift to another school in the middle of the year, which would not have been desirable but should not have been avoided at the cost of another half year of school failure.

**Issue 3:** *Whether DCPS denied Student a FAPE by failing to allow Parent meaningful participation in the triennial eligibility meeting on 4/30/18, when inadequate notice was given about the meeting. (Petitioner has the burden of persuasion.)*

Petitioner met her burden of persuasion on this issue, as the eligibility meeting was not set at a time when she could participate.

Under the IDEA, the process for determining eligibility for special education in 34 C.F.R. 300.306 requires a group of qualified professionals *and parent* to determine whether the child has a disability by carefully considering specified sources of information, including *parental input*. Special Education Coordinator worked diligently to get a meeting set with Parent and counsel before Student’s eligibility expired on 4/30/18, but as with the previous IEP meeting in April, had a difficult time. As the time for the eligibility meeting arrived, however, Special Education Coordinator relied on email, text messages and telephone to reach out to Parent, but left Petitioner’s counsel out of the loop on these critical final communications.

When Parent couldn’t attend due to work (and Petitioner’s counsel was out of the loop), Prior Public School proceeded with the meeting nonetheless. Student was found eligible to continue receiving special education services, but the school-based team also determined that speech-language services were no longer warranted (as discussed above), which Parent and counsel would no doubt like to have addressed at the meeting. Prior Public School sought to meet with Parent after the 4/30/18 meeting, which was a nice gesture but does not remedy Parent actually being able to participate in the meeting when decisions were being made.

Accordingly, this Hearing Officer concludes that under these circumstances, precluding Parent and counsel from participation amounted to a denial of FAPE pursuant to 34 C.F.R. 300.513(a)(2) by significantly impeding Parent’s ability to participate in decision-making relating to the provision of FAPE to Student, which contributes modestly to the

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compensatory education awarded below.

### Compensatory Education

In determining compensatory education for a denial of FAPE, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Here, Clinical Psychologist’s Compensatory Education Proposal is largely based on Student missing 15 hours/week of specialized instruction from the date of the 4/5/17 IEP through the shift to 20 hours/week in the 6/12/18 IEP. However, as discussed at length above, the undersigned concludes that Prior Public School should only have taken action by the middle of 2017/18 and were missing fewer than 10 hours/week, so the appropriate level of compensatory education should be correspondingly reduced. In addition, an increase is included for not conducting an FBA and developing a BIP by at least the middle of 2017/18 and a modest increase is included for not scheduling the eligibility meeting at a time when Parent and counsel could attend.

Thus, taking into account the denials of FAPE found in this case, and carefully considering the totality of the circumstances, the undersigned concludes that it is appropriate to award (a) 150 hours of academic tutoring, and (b) 30 hours of counseling (to make the tutoring more effective) in order to put Student in the place Student should have been, but for the denials of FAPE.

### ORDER

Petitioner has prevailed on certain claims in this case, as set forth above. Accordingly, **it is hereby ordered that:**

DCPS shall provide letters of authorization for (a) 150 hours of academic tutoring, and (b) 30 hours of counseling from independent providers chosen by Petitioner, with such letters to be provided within 10 business days after Petitioner’s request(s).

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Any and all other claims and requests for relief are **dismissed with prejudice**.

**IT IS SO ORDERED.**

Dated in Caption

*/s/ Keith Seat*

Keith L. Seat, Esq.

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).

Copies to:

Counsel of Record (Appendix A, by email)

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