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Confidential

Parent on Behalf of Student, Petitioner, v. District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”), Respondent. Case # 2018-0146 Date Issued: October 20, 2018	CORRECTED HEARING OFFICER’S DETERMINATION ¹ Hearing Dates: September 26, 2018 September 28, 2018 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, October 20, 2018, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on September 26, 2018, and September 28, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112 and the parties submitted written closing arguments on October 5, 2018.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides with Student's parent (“Petitioner”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of multiple disabilities (“MD”) including specific learning disability (“SLD”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). District of Columbia Public Schools (“DCPS”) is Student's local educational agency (“LEA”). Student attends a DCPS school (“School A”)

On June 8, 2018, Petitioner filed the current due process complaint asserting DCPS denied Student a free appropriate public education (“FAPE”) by, inter alia, by failing to provide Student an appropriate individualized educational program (“IEP”) including an appropriate least restrictive environment (“LRE”) and failing to timely and comprehensively evaluate Student.

Relief Sought:

Petitioner seeks as relief that DCPS be ordered to:

- a. Fund a placement at a full-time therapeutic day school;
- b. Alternatively, convene a meeting within 10 days of receiving the Hearing Officer’s Determination to discuss the appropriate setting for Student;
- c. Within 10 days: fund Adaptive and Assistive Technology (“AT”) evaluations;
- d. Within 10 days: amend Student’s Behavior Intervention Plan (“BIP”);
- e. Within 10 days: develop an appropriate IEP, including but not limited to, 60 minutes per week of speech-language pathology and regular behavior support services (“BSS”) hours that are not on a consultation basis for Student within 15 days of receiving completed evaluation reports;
- f. Authorize tutoring and counseling services to help Student improve in the areas of behavior and academics within 10 days of receiving the Hearing Officer’s Determination;
- g. Fund compensatory education, as warranted; alternatively, order and fund any assessment or screening necessary for determining compensatory education.

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

LEA Response to the Complaint:

The LEA filed a response to the complaint on June 18, 2018. The LEA denies that there has been any failure to provide the student with a FAPE. In its response DCPS asserts, inter alia, the following:

Student was enrolled at another DCPS school ("School B") during school year ("SY") 2014-2015 and SY 2015-2016. On February 2, 2015, the multidisciplinary team ("MDT") convened to reevaluate Student and determined Student eligible under the MD classification to include SLD and OHI under the disability classification of MD. Student's February 2, 2015, IEP includes a typographical error, identifying Student as having a speech-language impairment ("SLI").

DCPS is unaware of any requests for evaluation of Student in June 2016. The MDT convened an IEP meeting on January 13, 2017, and agreed to maintain the level of services in Student's IEP, which was 5 hours of specialized instruction per week inside general education and 5 hours per week of specialized instruction outside general education. The IEP was appropriate when it was developed. The team agreed to reevaluate Student at the request of the parent. DCPS conducted the following assessments: comprehensive psychological, occupational therapy ("OT"), and functional behavior assessment ("FBA"). A BIP was developed on March 21, 2017.

The MDT convened on June 7, 2017, to review the evaluations. During the meeting, the team determined Student continued to be eligible for special education and related services under the MD classification. Student's IEP was revised to include 10 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of occupational therapy outside general education, and 60 minutes per month of behavior support consultation services. The IEP was appropriate when it was developed. The parent requested, and DCPS agreed, to fund independent neuropsychological and speech-language evaluations. On January 26, 2018, the MDT convened to review the independent neuropsychological evaluation.

Student's IEP was revised to include 15 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of OT outside general education, and 60 minutes per month of behavior support consultation services. Student's IEP was appropriate when it was developed. Petitioner's independent evaluations did not include adaptive functioning testing. DCPS agreed to conduct additional assessments to evaluate Student's adaptive functioning skills. On April 25, 2018, the MDT convened to review the independent speech-language evaluation. The team agreed to revise Student's IEP to include 120 minutes per month of speech-language pathology outside general education.

On June 5, 2018, the MDT convened to review the adaptive testing conducted by DCPS and an independent occupational therapy assessment provided by the parent. The June 5, 2018, IEP requires the Student receives 15 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of occupational therapy outside general education, 120 minutes per month of speech-

language pathology outside general education, and 60 minutes per month of behavioral support consult services. The IEP was appropriate when it was developed.

At the conclusion of the hearing DCPS counsel acknowledged and was willing to stipulate that as of the resolution meeting, discussed below, DCPS acknowledged that Student's June 5, 2018, IEP was no longer appropriate. Consequently DCPS offered to place Student in a self-contained special education program and increased student's specialized instruction outside general education to 20 hours per week.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on July 27, 2018, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on July 8, 2018, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on August 22, 2018.

Respondent filed an unopposed motion to continue/extend the HOD due date by 29 calendar days to accommodate the hearing dates that were requested beyond the original hearing dates of August 6, 2018, and/or August 7, 2018, moving the HOD due date from August 22, 2018, to September 20, 2018. The motion was granted.

Counsel for Petitioner requested that the hearing be postponed and the HOD due date be extended to accommodate the new hearing dates of September 26, 2018, and September 28, 2018. The HOD due date was extended 30 calendar days and the HOD is now due October 20, 2018.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on June 29, 2018, and issued a pre-hearing order ("PHO") on July 9, 2018, and a revised PHO on July 27, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide Student an appropriate IEP and location of services to address Student's behavioral and academic challenges from November 2017 forward.⁴

³ The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

⁴ Petitioner alleges Student has required a full-time IEP with appropriate goals and related services, and placement at a full-time therapeutic day school since November of 2017. Petitioner also alleges the IEP lacks direct Behavior Support Services ("BSS") and assistive technology. Petitioner claims Student's independent speech and language evaluation recommended 60 minutes of direct language therapy per week, but Student only receives 120 minutes of speech-language pathology per month. Concerning the IEP goals, Petitioner's counsel stated at the outset of the hearing that the IEP lacked speech-language goals and the other IEP goals generally were inappropriate because of the lack of a comprehensive evaluation as alleged in issue #2.

2. Whether DCPS denied the student a FAPE by failing to timely and comprehensively evaluate Student from June 2016 forward.⁵
3. Whether DCPS denied the student a FAPE by failing to implement and/or develop an appropriate FBA and BIP from December 2016 forward.⁶

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 60 and Respondent's Exhibits 1 through 64) that were admitted into the record and are listed in Appendix 2.⁷ The witnesses testifying on behalf of each party are listed in Appendix B.⁸

SUMMARY OF DECISION:

Respondent held the burden of persuasion on issue #1 after Petitioner met a prima facie case. Petitioner had both the burden of production and persuasion on issues # 2 and #3. Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #1. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issues #2 and #3. The Hearing Officer did not conclude Student's LRE was a non-public special education day school, but directed DCPS to amend Student's IEP to prescribe the program DCPS provided evidence of during the hearing and ordered to DCPS to conduct a 90 day review of Student's performance in that program. The Hearing Officer also awarded Petitioner compensatory education for the denials of FAPE determined in the HOD.

⁵ Petitioner alleges DCPS knew or should have known, Student required an OT, speech and language, and assistive technology evaluation by June of 2016, and an adaptive evaluation by March of 2017. Speech, OT, and adaptive evaluations have now been completed.

⁶ Petitioner alleges that during SY 2016-2017 Student's behavioral records showed a history of elopement, work avoidance, defiance, and class disruption. Petitioner, through counsel, requested that DCPS conduct an FBA in December 2016. However, DCPS did not conduct an FBA and BIP until March 2017. Although the BIP was developed, Student's behaviors continued to occur daily during SY 2017-2018. Thus, the FBA was unsuccessful in determining the causes of Student's behaviors, the BIP was unsuccessful in determining the appropriate strategies to address Student's behaviors, or the BIP was not being implemented.

⁷ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁸ Petitioner presented six witnesses: (1) Student's parent ("Petitioner"), (2) an independent speech-language pathologist, (3) an independent psychologist who evaluated Student, (4) Petitioner's educational advocate employed by the law firm representing Petitioner, (5) a representative of the non-public school at which Petitioner is seeking to have student placed, (6) a psychologist testifying about compensatory. Respondent presented three witnesses: (1) a DCPS speech-language pathologist who evaluated Student, (3) a DCPS psychologist who evaluated Student, (4) a DCPS program manager of specific learning support ("SLS") classrooms.

FINDINGS OF FACT:⁹

1. Student resides with Petitioner in the District of Columbia and has been determined eligible for special education and related services pursuant to the IDEA with an MD disability classification, including SLD and OHI, due to ADHD. DCPS is Student's LEA. Student attends School A, a DCPS school, where Student enrolled at the start of SY 2016-2017. (Petitioner's testimony, Petitioner's Exhibit 16-1)
2. Student was enrolled at School B, another DCPS school, during SY 2014-2015 and SY 2015-2016. Student's 2015 IEP includes an error, identifying Student with SLI. In January 2014, while Student attended School B, DCPS conducted a comprehensive psychological evaluation. The evaluator assessed Student's cognitive and academic functioning. Student's cognitive functioning was in the Borderline range, with a Full-Scale IQ Score of 79 at the 8th percentile rank. Student's academic functioning was assessed using the Woodcock-Johnson Tests of Achievement - Third Edition (WJ-III). At that time, Student was operating at approximately two (2) grade levels below Student's grade at the time in reading, math, and written expression. No adaptive assessment was warranted at the time of this evaluation. (Witness 7's testimony, Petitioner's Exhibits 15-1, 15-5, 15-10, 20-1, 20-2)
3. While Student was attending School B, DCPS developed an IEP for Student on January 20, 2016. Petitioner participated in the IEP meeting by telephone. The IEP included goals in the areas of math, reading and written expression and prescribed 5 hours per week of specialized instruction outside general education and 5 hours per week of specialized instruction insider general education. The IEP prescribed no related services. (Respondent's Exhibit 3)
4. After Student began attending School A at the start of SY 2016-2017, from October 6, 2016, to December 12, 2016, Student was sent to detention six (6) times for failing to follow directions and being disruptive. On December 8, 2016, December 12, 2016, and January 30, 2017, Student received behavioral referrals for leaving class without permission. (Petitioner's Exhibit 4, Respondent's Exhibit 60)
5. Student's March 22, 2017, report card indicates that Student achieved failing grades in three (3) classes in the first term and in two (2) classes in the third term. This progress report also indicated that Student did not complete classwork and/or homework and had poor behavior. (Petitioner's Exhibit 2)
6. School A convened an IEP meeting on January 13, 2017. Petitioner participated in person along with her educational advocate. The team agreed to reevaluate Student at Petitioner's request. DCPS conducted the following assessments: comprehensive

⁹ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

psychological, OT and FBA. (Respondent's Exhibits 5, 6, 7)

7. A DCPS psychologist assigned to School A conducted a Comprehensive Psychological Reevaluation of Student in February 2017, with an evaluation report dated March 5, 2017. The psychologist assessed Student's cognitive, academic, social-emotional, and behavioral functioning, interviewed Student, Student's parent, and teachers and observed Student in the classroom. Student's cognitive functioning was assessed using the Wechsler Intelligence Scale for Children - Fifth Edition ("WISC-V). Student's cognitive functioning fell within the Borderline range with a Full-Scale IQ ("FSIQ") Score of 58, below the 1st percentile. Student's low working memory and low processing speed significantly lowered the FSIQ score. Student's academic functioning was assessed using the Woodcock-Johnson Tests of Achievement - Fourth Edition (WJ-IV). In reading, math and written expression Student was operating approximately 3 to 4 years below Student's age at the time of the evaluation. The DCPS psychologist concluded that the depression in Student's cognitive scores is understandable because Student was not paying sufficient attention during the testing. (Witness 7's testimony, Petitioner's Exhibit 20-1, 20-2, 20-4, 20-5, 20-8, 20-11, 20-12)
8. Student's social-emotional and behavioral functioning was assessed using the Conners - Third Edition (Conners-3) designed to assess ADHD and the Behavior Assessment System for Children-Second Edition (BASC-2). The BASC-2 is designed to facilitate the differential diagnosis of a variety of emotional and behavioral disorders in children and aid in the design of treatment plans. Two of Student's teachers and Student provided ratings on the Conners-3. The parent rating form was not returned. Student's scores on the Conners-3 in each area and by each rater was Very Elevated, except one teacher who rated Student as Average in peer relations. The teachers rated Student as having significant concerns in Hyperactivity, Aggression, Conduct Disorders, Atypicality, and clinically significant concerns by at least one teacher in Learning Problems, Adaptability, Social Skills, Atypicality, School Problems, Study Skills, and Functional Communications. (Petitioner's Exhibit 20-15, 20-16)
9. The DCPS psychologist recommended, among other things, that Student be found eligible for special education services and that an Adaptive Measure be administered to Student to rule out Mild Intellectual Disability ("ID"). She also recommended informal screening by a speech-language pathologist be completed to assess the degree to which Student is impacted by verbal and non-verbal language and Student's ability to comprehend and process information. The psychologist also recommended Student be provided counseling, wrap-around emotional and behavioral supports between home, community and school, and continued medication management for Student's ADHD. (Petitioner's Exhibit 20-22)
10. On March 9, 2017, DCPS conducted an FBA. A BIP was developed on March 21, 2017, to address Student's targeted behaviors of verbal outbursts in class and class disruptions. The BIP noted Student was less likely to engage in the behavior in less structured settings such as gym class and when Student was in small group or one-to-one instruction. Student's teachers and case manager were to use the strategies outlined in the BIP to

prevent and address Student's targeted behaviors. (Respondent's Exhibits 8, 9)

11. DCPS conducted an OT evaluation of Student on March 1, 2017, with the evaluation report dated March 31, 2017. The evaluator concluded Student presented with difficulties in fine motor integration, motor coordination, fine motor precision, visual perception and sensory processing, all of which impact Student's ability to consistently produce quality written work and impact Student's ability to sustain attention to classroom assignments. (Petitioner's Exhibit 18-1, 18-5, 18-6)
12. School A convened an IEP meeting on June 7, 2017, to review the evaluations. During the meeting, the team determined Student continued to be eligible for special education and related services under the MD classification. Student's IEP was revised to increase Student's services to 10 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of OT outside general education, and 60 minutes per month of behavior support consultation services. Positive behavior interventions that exist school-wide at School A were available to Student. (Witness 7's testimony, Respondent's Exhibits 10-1, 10-8, 10-9, 55)
13. Petitioner requested, and DCPS agreed, to fund independent neuropsychological and speech-language evaluations. On September 14, 2017, and November 7, 2017, an independent psychologist evaluated Student and completed a Comprehensive Neuropsychological Evaluation report dated November 28, 2017. The psychologist assessed Student's cognitive, academic, social-emotional, and behavioral functioning, interviewed Student, Student's parent, and teachers and observed Student in the classroom. Student's cognitive functioning was assessed using the Wide Range Assessment of Memory and Learning- Second Edition (WRML-2) and the Wechsler Abbreviated Scale of Intelligence- Second Edition, ("WASI-II). Student cognitive functioning fell in the Extremely Low range with a Full-Scale IQ ("FSIQ") Score of 68. The independent psychologist concluded that his results were consistent with the results obtained by DCPS in its evaluation. The psychologist also recommended that Student be assessed with an adaptive behavior assessment to rule out ID. (Witness 2's testimony, Petitioner's Exhibits 1-1, 1-2, 11-1, 11-8, 11-9)
14. The independent psychologist suggested that the apparent decline in Student's cognitive scores from 2012 to 2017 would typically have been evident if there had been some form of brain damage or injury. However, absent any such evidence, the evaluator concluded Student's lower cognitive scores were probably the result of little or no advancement in Student's knowledge base due to Student's lack of attention during academic instruction caused by ADHD or the lack of appropriate services to support Student's knowledge acquisition. (Witness 2's testimony)
15. The independent psychologist assessed Student's academic functioning using the Wide Range Achievement Test - Fourth Edition (WRAT-IV). In reading, math and written expression Student was operating approximately 4 to 5 grade levels below Student's grade at the time of the evaluation. The independent psychologist noted that during the

assessments that he conducted, Student's attention and motivation varied and Student was not invested in the testing. However, the evaluator, based on observation and interaction with Student, concluded Student has the capacity and ability to learn and progress. (Witness 2's testimony, Petitioner's Exhibits 1-1, 1-2, 11-1, 11-8, 11-9, 11-10)

16. Student's social-emotional and behavioral functioning was assessed using the Conners Behavior Rating Scale - Teacher's Form, completed by two of Student's teachers. Two of Student's teachers provided ratings on the Conners and described Student as having extreme levels of emotional and behavioral concerns including hyperactivity, inattention, conduct problems, oppositional defiance, and aggression. The parent on BASC-2 rating form rated Student as having elevations of behavior concerns marked by impulsivity, poor self-control, and short attention span. (Witness 2's testimony, Petitioner's Exhibit 11-15, 11-16)
17. The psychologist concluded that Student met the criteria for the MD disability classification and recommended Student be in a highly-structured, small student to teacher ratio classroom setting, with counseling and behavior management strategies. The psychologist noted that Student needs a much more advanced and structured program than currently being provided; however he noted that the location should be left to the IEP team. (Witness 2's testimony, Petitioner's Exhibit 11-18, 11-19)
18. During the first semester of SY 2017-2018 Student had 15 behavior referrals for skipping class, defiance, and tardiness to class. (Petitioner's Exhibit 26)
19. Student's SY 2017-2018 report card, however, showed some improvement over the previous school year. Student had passing grades in all courses, at least through the third term, except for a failing grade in Language Arts during the second term. (Petitioner's 8)
20. On January 26, 2018, School A convened an IEP meeting to review the independent neuropsychological evaluation. Petitioner participated in the meeting along with her educational advocate. The DCPS psychologist noted that she would be completing an addendum to her previous evaluation to include an adaptive assessment. Petitioner and her advocate mentioned Student's need for a therapeutic day school, but the team agreed that before any change was made, they needed to monitor Student's response to the increase in services. Student's IEP was revised to include 15 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of OT outside general education, and 60 minutes per month of behavior support consultation services. (Witness 7's testimony, Respondent's Exhibits 15, 16, Respondents Exhibit 54)
21. An independent speech-language evaluation was conducted in January 2018, with an evaluation report dated January 24, 2018. The evaluator conducted two assessments that assessed Student's language skills: Clinical Evaluation of Language Fundamentals - Fifth Edition ("CELF-5") and the Expressive One-Word Picture Vocabulary Test-Fourth Edition ("EOWPVT-4"). Student's scores on the CELF-5 subtests that combine for an

Expressive Language Index resulted in an Expressive Language score of 58, which is in the "Poor" range. Student's Receptive Language Score was 65, 7 points below the Expressive Language score. On the EOWPVT-4, Student achieved a standard score of 61, which was below the first percentile. The evaluator concluded Student has weaknesses in forming complex sentences and using concepts of causality and time, and Student had difficulty with the amount of language Student was required to recall and organize. The evaluator concluded Student's depressed language skills negatively impact access to the general curriculum. As a result, the evaluator recommended Student receive one (1) hour of direct language services per week and be in a small classroom with a special educator. (Witness 1's testimony, Petitioner's Exhibit 12-1, 12-2, 12-3, 12-4)

22. On January 24, 2018, a DCPS speech-language pathologist conducted a review of the independent speech-language evaluation and prepared a report dated March 16, 2018. The DCPS speech-language pathologist concluded that the independent evaluation was complete but not comprehensive as it did not include all areas of communication including voice, fluency, hearing, oral, peripheral, and receptive vocabulary. In addition to reviewing the independent evaluation, the DCPS evaluator conducted her own assessments of Student, including the Receptive One-Word Picture Vocabulary Test-Fourth Edition ("ROWPVT-4"), and informal assessments of Student's hearing, oral peripheral, voice, and fluency. (Petitioner's Exhibit 17-1, 17-2)
23. The DCPS speech-language pathologist spoke with the independent evaluator regarding the independent evaluation and also spoke with Student's teacher and observed Student in the classroom. Student's skills in voice, fluency, hearing, oral peripheral and pragmatic language were within normal limits. However, Student's expressive and receptive language, as well as language memory and language content, were all well below that of Student's same age peers. Student also had a mild receptive vocabulary delay. The DCPS evaluator concluded that it was questionable how significant an impact Student's language delays had on Student's ability to access the curriculum and perform academically due to Student's struggles with maintaining attention and completing tasks within the classroom setting. Despite the question raised by the DCPS evaluator, the evaluation report noted that the results of the skills assessments suggested that Student has inadequate skills to support academic success as it pertains to Student's ability to comprehend and listen to oral language, retain and recall information, provide verbal and written response, and participate in classroom discussions. (Witness testimony, Petitioner's Exhibit 17-15, 17-16)
24. On April 25, 2018, the MDT convened to review the independent speech-language evaluation. As a result of the findings and determinations contained in the speech and language report as well as the team discussion, DCPS agreed to revise Student's IEP. Although the DCPS speech-language pathologist considered Student' language deficits to be mild, she agreed to add speech-language services to Student's IEP because Student was struggling with maintaining focus. DCPS agreed to include 120 minutes per month of speech-language pathology outside general education. Other than Student's disability classification being incorrectly coded in the past as SLI, there was no data that that indicated that Student had a speech-language impairment or speech-language concerns

that would have necessitated the need for a speech-language evaluation before the independent evaluation being conducted. (Witness 6's testimony, Respondent's Exhibit 16, Petitioner's Exhibit 16-1, 16-11)

25. Student's April 25, 2018, IEP states that Student's behavior impedes Student's learning because Student is often off task, inattentive in class, has impulsive behaviors, is unable/willing to remain seated during instruction, displays disrespectful behavior, is verbally and physically aggressive with peers and adults, is distracted, is continually disruptive and defiant, and leaves class without permission. (Petitioner's Exhibit 16-2)
26. In March 2018, the DCPS psychologist initiated an Adaptive Behavior Data Summary Report that was completed on April 25, 2018, to supplement the psychological evaluation that had been conducted that suggested Student had depressed cognitive scoring. The adaptive report was designed to rule out or to rule whether Student qualified as ID. The evaluation included a standardized scale that measured Student's adaptive and daily living skills used to function in everyday life. Two of Student's teachers completed the rating scales. Both teachers who provided rating scales rated Student as Extremely Low in the Conceptual Composite (Communication, Functional Academics and Self-Direction). One teacher rated Student as Extremely Low in the Social Composite (Leisure and Social) and the Practical Composite (School/Home Living, Health and Safety and Self-Care). The other teacher rates Student as Low in the Social Composite and the Practical Composite. Both teachers rated Student within the Average range in the single factor of Self-Care. The DCPS psychologist provided Student's parent a rating scale, which is typically done in an adaptive assessment; however, the parent did not complete the rating scale. (Witness 7's testimony, Petitioner's Exhibit 10)
27. On May 4, 2018, an independent OT evaluation report was completed. The evaluator recommended that Student continue to receive OT services. (Petitioner's Exhibit 58)
28. On June 5, 2018, the MDT convened to review the adaptive testing conducted by DCPS as well as an independent OT evaluation. The June 5, 2018, IEP requires 15 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of occupational therapy outside general education, 120 minutes per month of speech-language pathology outside general education, and 60 minutes per month of behavioral support consult services. (Respondent's Exhibit 17)
29. Petitioner has found that Student struggles with reading at home and experiences difficulty with adding and subtracting money. When Student becomes frustrated concerning learning difficulties, Student may begin to cry, become silent, and/or simply stop all efforts. Student has significantly younger siblings who assist Student with learning to read at home. School A has notified Petitioner regarding Student disrupting class, walking out of class, refusing to perform classroom assignments, being distracted, and being disrespectful. Student has always had behavioral problems at school, and Student's problems have become worse as Student has aged. Student has temper

tantrums at school and at home. Petitioner attempts to discipline Student by taking away rewards. (Petitioner's testimony)

30. DCPS stipulates that Student's June 8, 2018, IEP is inappropriate as of July 27, 2018, and DCPS proposed a Specific Learning Support ("SLS") classroom for Student for SY 2018-2019. The program that DCPS has proposed for Student is a self-contained classroom for students who are unable to access curriculum inside of a general education classroom but can access it with accommodations and modifications and for whom behavior is not the primary barrier to academic achievement. The SLS program has one (one) teacher, one (1) instructional aide, up to twelve (12) students in the middle school program, and up to fifteen (15) students in the high school program. Students receive related services outside of the general education setting. The individual providers determine whether, and what, other services are provided to students on a push-in or pullout basis. The SLS program has a teacher-developed based Positive Behavior Interventions System ("PBIS") model. There are seven (7) middle school SLS classrooms within the DCPS system. (Witness 8's testimony, Respondent's Exhibit 64)
31. Student has been interviewed by and accepted to School C, a non-public special education day school. School C serves a student population of 6th through 12th graders, who are mostly within the categories of ED and SLD. The middle school (6th – 8th grades) and the high school (9th – 12th grades) are separated, and the student to teacher ratio in the middle school is 8:1. School B implements its own behavior management system, and some students have BIPs. Students at School B have significant and minor aggression issues and some experience problems remaining within the classroom. School B offers social skills counseling, incentive-based programs, crisis intervention, and integrates restorative practices. School B has two (2) behavior specialists and teachers who implement student BIPs and collaborate with specialists. School B can provide OT and other related services. (Witness 4 testimony, Petitioner's Exhibit 51)
32. Petitioner's educational consultant asserts that Student should participate in an intervention program that promotes school engagement and prevents truancy, and that Student be provided 250 hours of remediation tutoring services in written language, reading and math and 60 hours of direct counseling hours in a community-based setting. The educational consultant based the amount of services requested on the Student having allegedly missed 16 months of specialized instruction and related services. Petitioner's educational consultant for compensatory education views the failure to immediately conduct an evaluation of Student's adaptive functioning to have been a grave error because the adaptive test would have assessed Student for a possible ID classification. The consultant opined that absent this testing, the FBA, and the BIP were inadequate to respond to Student's needs. (Witness 3's testimony Petitioner's Exhibit 44)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner has both the burden of production and persuasion on issues: # 2 and #3. Respondent held the burden of persuasion on issue #1 after Petitioner established a prima facie case on issue #1. ¹⁰ The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to provide Student an appropriate IEP and location of services to address Student's behavioral and academic challenges from November 2017 forward.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

¹⁰ DC Code § 38-2571.03 (6) provides:

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

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

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

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

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, what the IEP offered was reasonably calculated to enable the specific student's progress...."Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved

satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

34 C.F.R. § 300.324 (b) Review and revision of IEPs—(1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child’s anticipated needs; or (E) Other matters.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

“Educational placement” means educational program, not the particular institution where that program is implemented.” *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

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

Petitioner alleges Student has required a full-time IEP with appropriate goals and related services, and placement at a full-time therapeutic day school since November of 2017. Petitioner also alleges the IEP lacks direct BSS and assistive technology and 240 minutes per month of speech-language therapy. Due to the aforementioned concerns, Petitioner claims Student’s IEP is inappropriate and Student’s location of services is inappropriate.

Concerning the IEP goals, Petitioner's counsel stated at the outset of the hearing that the IEP lacked speech-language goals and the other IEP goals generally were inappropriate because of the lack of a comprehensive evaluation. Petitioner presented no specific evidence of the inappropriateness of any of Student’s IEP goals. In addition, Petitioner presented no evidence that Student was in need of assistive technology. Thus, the Hearing Officer concludes that Petitioner did not present a prima facie case with regard to these components of her allegation in issue #1.

Concerning Petitioner's claim that Student's IEPs were inappropriate because of inappropriate related services, Petitioner alleges Student's IEPs should have included speech-language services earlier and direct, rather than consultative, behavioral support services.

First as to speech-language services, the independent speech-language therapist who evaluated Student testified that had Student's disability classification previously included SLI then a speech-language evaluation should have been conducted earlier than her independent evaluation. However, the evidence demonstrates that Student's IEP included a typographical error and that Student was not previously determined to have an SLI disability classification. The DCPS speech-language pathologist credibly testified that Student, once evaluated, demonstrated a mild language deficit and there was no indication prior to the evaluation that Student was in need of speech-language services. Consequently, the Hearing Officer concludes that DCPS conducted Student's speech-language evaluation timely and there was insufficient evidence that Student was in need of speech-language services prior to those services being added to Student's IEP in April 2018.

In essence, Petitioner alleges there should have been 240 minutes per month of speech-language services and direct behavior support services in Student's IEP as of November 2017. However, there was insufficient evidence that the speech-language services that DCPS prescribed in Student's IEP were lacking. The DCPS speech-language pathologist credibly testified that the amount of services prescribed in the IEP was sufficient to meet Student's needs. Even the independent speech-language pathologist stated that the speech-language goals in Student's IEP were sufficient to address the language deficits that she had identified. She offered no testimony that the amount of speech-language services prescribed was insufficient. Consequently, the Hearing Officer does not conclude that Student's IEPs since November 2017 were inappropriate due to no or insufficient speech-language services.

When we look at Petitioner's claim of an inappropriate IEP we must review the facts surrounding the development of each of Student's IEPs. In reviewing the facts, what we see is a series, assessments performed by DCPS, independent assessments and reviews of the independent assessments. After each assessment, DCPS convened an MDT meeting to review the results of the testing. At each of these IEP meetings, DCPS revised Student's IEP to reflect some need detailed in an evaluation report.

During a January 12, 2017, meeting Petitioner requested a comprehensive psychological re-evaluation, an occupational therapy evaluation and an FBA. DCPS performed the comprehensive psychological re-evaluation, the FBA, and the OT evaluations. After the evaluations were completed, DCPS convened a MDT and reviewed the evaluations.

After conducted the FBA on March 9, 2017, DCPS developed a BIP on March 21, 2017, to address Student's targeted behaviors of verbal outbursts in class and class disruptions. The BIP noted Student was less likely to engage in the behavior in less structured settings such as gym class and when Student was in small group or one-to-one instruction. Student's teachers and case manager were to use the strategies outlined in the BIP to prevent and address Student's targeted behaviors.

School A convened an IEP meeting on June 7, 2017, to review the evaluations. During the meeting, the team determined Student continued to be eligible for special education and related services under the MD classification. Student's IEP was revised to increase Student's services to 10 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of OT outside general education, and 60 minutes per month of behavior support consultation services. Positive behavior interventions that exist school-wide at School A were available to Student.

The Hearing Officer notes that each time Student was evaluated by DCPS using Conners and the BASC-2, which requires parental response to determine a scale for Student's behaviors at home, Petitioner did not respond. DCPS requested responses of Petitioner in February 2017 for the Comprehensive Psychological re-evaluation and for an Adaptive Behavior summary report. Petitioner only responded to the BASC-2 provided by her independent psychologist.

On January 16, 2018, Student's MDT met to review Petitioner's independent neuropsychological evaluation. As a result of the review and discussion of the findings contained in the evaluation report, the team revised Student's IEP and increased Student's hours of specialized instruction from 10 hours per week of special education services outside of general education, to 15 hours of specialized instruction outside of general education. The team maintained the 5 hours per week of specialized instruction Student received inside the general education setting as well as the OT and behavior consultation service.

During the January 16, 2018, MDT meeting Petitioner requested, and DCPS consented to, an independent speech and language evaluation. On April 25, 2018, the team convened to review the evaluation report. The team discussed the findings contained in the report and determined that Student required 60 minutes per week of speech and language pathology outside of general education. These services were added to Student's IEP.

On June 5, 2018, the MDT convened to review the adaptive testing conducted by DCPS as well as an independent OT evaluation. The June 5, 2018, IEP requires 15 hours per week of specialized instruction outside general education, 5 hours per week of specialized instruction inside general education, 60 minutes per month of occupational therapy outside general education, 120 minutes per month of speech-language pathology outside general education, and 60 minutes per month of behavioral support consult services.

This record demonstrates a history of DCPS responding to the needs of Student and the requests made by Petitioner. Petitioner, at all times, was a vital member of the team making decisions regarding Student's well being within the school environment. The facts support that DCPS was diligent in the process of testing, reviewing the evaluation reports, monitoring Student's behavior, and revising Student's IEP to reflect Student's needs.

Although Petitioner points to Student's longstanding "neurocognitive" issues, Petitioner's own independent psychologist found that Student's lower cognitive scores were likely due to Student's lack of knowledge acquisition related to the effects of Student's inattention due to ADHD. The psychologist, nonetheless, concluded Student met the criteria of a MD classification and recommended an adaptive behavior assessment to rule out ID. However, there

is still a need for Petitioner to weigh in on this assessment.

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. DCPS modified Student's IEP to reflect Student's increasing needs. The IEP included changes to the total number of specialized instructional hours as well as changes in Student's setting for the hours. Related services were added to Student's IEP in response to Student's diagnosed needs. With respect to specialized instruction and related services, Student's IEPs were appropriate and reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances.

Based upon the record in this case, it appears that Petitioner wanted the MDT to simply change Student's LRE from a public school, where Student has contact with non-disabled peers, to a non-public school where Student would have no contact with non-disabled peers. Pursuant to the case law and statutory and regulatory authority, children with disabilities should remain in the general education setting whenever possible.

The MDT, which included Petitioner and Petitioner's educational advocate, made conscientious decisions to increase Student's specialized instruction and add and/or increase related services based upon data provided through evaluation reports, teacher and parental reporting and testing. These revisions incrementally changed Student's educational environment to provide more time outside of the general education setting than inside of general education. This appears to be a more appropriate way of transitioning a Student's LRE to a more restrictive placement. The Hearing Officer concludes Student's IEPs since November 2017 were reasonably calculated to provide Student's education benefit in light of Student's circumstances. Thus, the Hearing Officer concludes that Petitioner's assertion that Student's LRE is a non-public therapeutic day school is unsupported by the evidence and the Hearing Officer does not grant Petitioner's request for relief that Student be placed at School C.

However, DCPS has subsequent to the filing of Petitioner's due process complaint stipulated that the Student's June 8, 2018, IEP and LRE lacks sufficient restriction and that DCPS is now recommending that Student's specialized instruction be further increased and that Student be placed in self-contained special education SLS program in a DCPS School. DCPS presented a credible witness as to the services that can be provided in such a program. The Hearing Officer considers this another incremental step to address Student's academic and social-emotional concerns and in the order below directs DCPS to amend Student's IEP in accordance with DCPS's stipulation that Student be placed in the DCPS SLS program, that DCPS conduct a ninety (90) day review of Student's progress in that program to determine Student's progress therein and whether further changes to Student's IEP, programming and placement are appropriate.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to timely and comprehensively evaluate Student from June 2016 forward.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence with regard to the speech-language, OT and AT evaluation. However, with regard to

the adaptive assessment Petitioner sustained the burden of persuasion that the assessment should have been conducted sooner than April 2018.

34 C.F.R. § 300.303(a) makes it clear that, "A local education agency ("LEA") *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years. (*Emphasis added*)

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

Petitioner alleges DCPS knew or should have known, Student required an OT, speech and language, and assistive technology evaluation by June of 2016, and an adaptive evaluation by March of 2017.

As discussed in issue #1 above, there was insufficient evidence presented that a speech language evaluation should have been conducted of Student prior to the independent speech language evaluation being conducted. Petitioner presented no evidence that an OT evaluation should have been conducted earlier than it was, and there was no evidence at all presented regarding an AT evaluation. Thus, the Hearing Officer concludes Petitioner did not sustain the burden of persuasion with regard to these evaluations.

Concerning the adaptive assessment, the evidence demonstrates that an adaptive assessment was warranted and should have been conducted by DCPS soon after the DCPS psychologist completed her evaluation in March 2017. The cognitive scoring that resulted from her evaluation would typically have dictated an adaptive assessment to rule in or rule out ID. Both

the DCPS psychologist and the independent psychologist testified in this regard. After the independent psychological was conducted and recommended an adaptive assessment, the DCPS psychologist conducted an adaptive assessment that was completed in April 2018 and reviewed in June 2018. The adaptive assessment, however, did not include input from Student's parent. The independent psychologist testified that the adaptive assessment supported a finding of ID; however, he also noted that based on his own observation of Student and his assessment there was no apparent indication that Student met the criteria for ID, but the assessment was nonetheless warranted.

Given the fact that this assessment was delayed for nearly a year from the time DCPS conducted its psychological evaluation of Student and the evaluation did not include input from the parent, the evidence supports a finding that the evaluation was untimely and not comprehensive. Although most of the individuals who testified who had interacted with Student, including Petitioner, did not indicate they believe Student qualifies as ID, there remains some uncertainty. Consequently, the Hearing Officer concludes that Student has been denied a FAPE as a result of DCPS failing to timely conduct an adaptive assessment and directs in the order below that DCPS conduct an adaptive assessment.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to implement and/or develop an appropriate FBA and BIP from December 2016 forward.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that Student failed to develop and or implement an appropriate BIP during SY 2017-2018.

34 C.F.R. §300. 324 (a) (2) provides: The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

However, IDEA does not specifically mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions are not applicable to this case. Nonetheless, in the instant case, DCPS conducted an FBA and developed a BIP to address Student's behaviors.

Petitioner alleges that during SY 2016-2017 Student's behavioral records showed a history of elopement, work avoidance, defiance, and class disruption. Petitioner asserts she requested that DCPS conduct an FBA in December 2016.

DCPS conducted an FBA and developed a BIP in March 2017. Although Petitioner asserts that this was unreasonable delay in conducting the FBA and developing the BIP, Petitioner presented insufficient evidence in this regard. The Hearing Officer considers the fact that the FBA and BIP were completed within three months of Petitioners request to have been reasonable, absent evidence to the contrary.

There was scant evidence presented that the FBA that was conducted was inappropriate. Although Petitioner's educational consultant asserted that because adaptive testing was not done the FBA was flawed, but he offered no explanation of that opinion. The BIP addressed Student's

targeted behaviors of verbal outbursts in class and class disruptions that had been identified by the FBA. Student's teachers and case manager were to use the strategies outlined in the BIP to prevent and address Student's targeted behaviors.

Petitioner asserts that Student's BIP once developed was not implemented or was not appropriate because Student's behavioral difficulties persisted. However, there was no specific evidence presented that the BIP was not being used by School A staff to address Student's behaviors. Therefore, the Hearing Officer concludes Petitioner did not present sufficient proof that the BIP was not being implemented by School A staff.

Nonetheless, there was clear evidence that despite the BIP being in place, Student's behavior difficulties during SY 2017-2018 persisted. During the first semester of SY 2017-2018 Student had 15 behavior referrals for skipping class, defiance, and tardiness to class.

Student's April 25, 2018, IEP states that Student's behavior impedes Student's learning because Student is often off task, inattentive in class, has impulsive behaviors, is unable/willing to remain seated during instruction, displays disrespectful behavior, is verbally and physically aggressive with peers and adults, is distracted, is continually disruptive and defiant, and leaves class without permission.

In addition, Petitioner credibly testified being informed by School A regarding Student disrupting class, walking out of class, refusing to perform classroom assignments, being distracted, and being disrespectful.

The evidence demonstrates that despite the BIP being in place, the BIP did not sufficiently address Student's behaviors. Although Student's SY 2017-2018 report card showed some improvement over the previous school year, Student earned a failing grade in Language Arts during the second term. Based upon the evidence that Student's behavioral difficulties persisted in SY 2017-2018, including off task, impulsive behaviors, displays of disrespectful, verbally and physically aggressive behavior toward peers and adults, and Student leaving class without permission, the Hearing Officer concludes Student's BIP was ineffective and thus inappropriate to address Student's behavioral difficulties. Thus, Student was thereby denied a FAPE.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11-12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401

F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner's educational consultant recommended 250 hours of independent tutoring services, 60 hours of independent counseling services as compensatory education for the alleged violations in the complaint. However, the recommendation was based upon alleged denials of FAPE that were not proved by the evidence. Nonetheless, based upon the evidence of Student's deficits and the testimony of Petitioner and the individuals who work with Student, the Hearing Officer has determined that student would benefit from tutoring and counseling services to compensate and ameliorate for the untimely evaluation and the inappropriate BIP and concluded that an appropriate award is half of the amount of services recommended by Petitioner's expert witness.

ORDER: ¹¹

1. DCPS shall, within ten (10) business days of the issuance of this order, amend Student's IEP to prescribe at least 20 hours of specialized instruction per week outside general education, in addition to Student's current related services, and that Student be placed in the DCPS SLS classroom.
2. DCPS shall, within ten (10) business days of the issuance of this order, provide Petitioner a prior written notice or location of service letter identifying the location of the SLS classroom to which Student will be assigned.
3. DCPS shall, within twenty (20) business days of the issuance of this order conduct an adaptive assessment of Student and include Petitioner's input in the assessment and convene an IEP team meeting to review that assessment.
4. DCPS shall, within ninety (90) calendar days of Student's start of attendance in the SLS classroom, convene an IEP team meeting to review Student's progress in that program and determine whether further changes to Student's IEP, programming and placement are warranted.
5. DCPS shall, within ten (10) business days of the issuance of this order, authorize Petitioner to obtain, 125 hours of independent tutoring, and 30 hours of independent counseling at the OSSE approved rate.
6. All other relief requested by Petitioner is denied.

¹¹ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: October 20, 2018

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