District of Columbia

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Confidential

Parents on Behalf of Student[1], Petitioners, v. District of Columbia Public Schools ("DCPS") Local Educational Agency ("LEA") Respondent. Case # 2017-0147 Date Issued: August 27, 2017	CORRECTED HEARING OFFICER'S DETERMINATION[2] Hearing Dates: August 9, 2017 August 10, 2017 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

[2] This "Corrected" HOD is issued to make typographical and/or grammatical changes only; no substantive changes have been made. The HOD issuance date, August 27, 2017, remains unchanged, as does the applicable appeal date.

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 August 9, 2017, and August 10, 2017, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003 and Hearing Room 2006 respectively.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____and in grade _____.[3] The student resides with parents in the District of Columbia and is a child with a disability pursuant to IDEA.

The student attended a District of Columbia Public Schools ("DCPS") school ("School A") during school year ("SY") 2014-2015, SY 2015-2016, and SY 2016-2017. DCPS is the student's local educational agency ("LEA").

The student's parents ("Petitioners") filed the current due process complaint on June 20, 2017, alleging, inter alia, that DCPS denied the student a free appropriate public education by failing to implement its Child Find obligations.

The parties participated in a resolution meeting on June 9, 2017, and the parties did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on June 30, 2017, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on August 13, 2017. Respondent filed an unopposed motion to continue and extend the HOD due date to allow for the hearing dates requested by the parties because of their unavailability for the initial hearing dates of July 26, 2017 and July 27, 2017. The motion was granted and the HOD due date was extended by fourteen (14) calendar days to August 27, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on June 22, 2017, and issued a pre-hearing order ("PHO") on June 27, 2017, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner seeks as relief: That the Hearing Officer find the LEA has denied the student a FAPE, and order DCPS issue a Prior Written Notice regarding the student's placement at a non-public school of the parents' choosing, consistent with the student's needs, and for DCPS to fund the student's tuition and transportation at that school. Petitioners request the Hearing Officer order DCPS to revise the student's IEP to reflect a minimum of 31 hours per week of specialized

[3] The student's current age and grade are in indicated in Appendix B.

instruction outside of the general education setting and 1 hour per week of behavioral support services outside of the general education setting.

Petitioners want information concerning the student's LRE as a full-time, separate, special education day school for students with ADHD and ED as well as appropriate, measurable goals reasonably calculated to provide the student with appropriately ambitious educational benefit.

Should the Hearing Officer disagree with Petitioners' requested IEP changes, Petitioners request that the Hearing Officer order DCPS to convene an IEP meeting to review and revise the student's IEP in accordance with the Hearing Officer's Determination ("HOD"). Finally, Petitioners request that the Hearing Officer order DCPS to fund Petitioners' compensatory education plan, or in the alternative, develop a compensatory education plan.

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on June 12, 2017. The LEA denies that there has been any failure to provide the student with a FAPE.

The LEA contends, that on or about 2010, the student received initial evaluation for special education eligibility. However, the team determined that did not qualify for special education and related services pursuant to the IDEA. The LEA contends that its Child Find obligation was completed at this time and there is no indication of additional referrals or notice of changed circumstances.

The LEA asserts that on or about October 6, 2015, during SY 2015-2016 Petitioners made a referral for a reevaluation, which the LEA had 120-days to complete. The LEA contends one evaluation report was completed on November 23, 2015, and a functional behavior assessment ("FBA") was completed on November 30, 2015. The LEA asserts that a meeting was held on January 28, 2016, and a behavior intervention plan ("BIP") was developed. The LEA asserts the student's initial individualized education program ("IEP") was developed on February 4, 2016. The LEA asserts the IEP document indicates that the team agreed it represented the least restrictive environment ("LRE") for the student.

The LEA contends that on or about January 13, 2017, the team met and determined that the student qualified as a child with an emotional disturbance. The LEA asserts that the team also held an annual IEP review and updated the student's IEP. The LEA contends that on or about February 14, 2017, the student's IEP was amended to include a disability category of MD due to OHI and ED.

The LEA asserts that after reviewing the student's existing data the LEA proposed a draft IEP on June 9, 2017, which provided the student with 23 hours of specialized instruction outside of the general education setting and 240 minutes per month of behavior support services to be provided outside the general education environment. However, the LEA asserts that since filing of their complaint, Petitioners have refused to engage in further IEP development. The LEA asserts it will continue to program for the student and that they have a full-time special education classroom at multiple school settings at the start of SY 2017-2018, and location of service

("LOS") will be provided to Petitioners well in advance on the start of the new school year. The LEA contends Petitioners have fully participated in the placement decision-making process.

ISSUES: [4]

The issues adjudicated are:

1. Whether the LEA denied the student a free and appropriate public education ("FAPE") by failing to implement its Child Find obligations from June 1, 2015, to the present because it failed to perform a comprehensive psychological evaluation and a FBA.

2. Whether the LEA denied the student a FAPE by failing provide with a FBA pursuant to the parent's written request on March 24, 2015, failing to update the FBA appropriately, leading to an ineffective and rarely implemented BIP.

3. Whether the LEA denied the student a FAPE by failing to provide with an appropriate educational placement from August 2015 to the present by: (1) failing to provide an appropriate therapeutic setting and (2) failing to appropriately and consistently implement the student's behavior plans.

4. Whether the LEA denied the student a FAPE by failing to provide with an appropriate IEP on February 4, 2016, through failing to provide: (1) sufficient hours of specialized instruction; (2) an appropriate educational placement; (3) sufficient behavioral support services outside of the general education setting; (4) an IEP with reasonable, measurable goals, calculated to provide the student with appropriately ambitious educational benefit, and (5) an IEP to appropriately address the student's behavioral needs through an appropriate and consistently updated and implemented BIP.

5. Whether the LEA denied the student a FAPE by failing to provide with an appropriate IEP in February 15, 2017, through failing to provide; (1) sufficient hours of specialized instruction; (2) an appropriate educational placement; (3) sufficient behavioral support services outside of the general education setting; (4) an IEP with reasonable, measurable goals, calculated to provide the student with appropriately ambitious educational benefit, and (5) an IEP to appropriately address the student's behavioral needs through an appropriate and consistently updated and implemented BIP.

6. Whether the LEA denied the student a FAPE in and/or around January through February 2017 by delegating the educational placement decision to the LRE team, which did not include the parents or those knowledgeable about the student.

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

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 45 and Respondent's Exhibits 1 through 7) that were admitted into the record and are listed in Appendix A.[5] Witnesses' identifying information is listed in Appendix B.[6]

SUMMARY OF DECISION:

The Hearing Officer concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence on issues #1, and #2 with regard to the FBA, and on issue #6. Petitioner sustained the burden of proof on issue #2 with regard to the implementation of the student's BIP during SY 2016-2017.

Respondent sustained the burden of proof by a preponderance of the evidence on issue #2 and issue # 3 with regard to the student's initial IEP. Respondent did not sustain the burden of proof by a preponderance of the evidence on issue #2 and issue #3 as to the student's February 2017 IEP and the student's placement following development of that IEP in the second half of SY 2016-2017.

As a result of the finding of denial of FAPE the Hearing Officer directs DCPS to place and fund the student at School C for SY 2017-2018 as compensatory education.

FINDINGS OF FACT: [7]

1. The student resides with parents in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of multiple disabilities ("MD") including emotional disturbance ("ED") and other health impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). (Petitioners' Exhibit 14-1)

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

[6] Petitioner presented six witnesses: Petitioners (both the student's parents), an independent educational consultant, an independent psychiatrist, a representative of the non-public school Petitioners are seeking, and an educational advocate employed with the law firm representing Petitioners. Respondent presented four witnesses: the former DCPS special education coordinator for School A, special education coordinator for School B where DCPS proposes the student should attend for SY 2017-2018, a compliance specialist, and an educational administrator from School A.

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

2. The student was first determined eligible for special education on January 4, 2016, and initial IEP was developed on February 4, 2016. (Respondent's Exhibit 4-1, 4-2)

3. DCPS is the student's LEA. The student attended School A during SY 2014-2015, SY 2015-2016, and SY 2016-2017. Prior to attending School A, the student attended a DCPS school where had a 504 plan to address ADHD. (Respondent's Exhibit 2-3)

4. The student's parents had an independent psychological evaluation conducted in 2010 that diagnosed the student with ADHD. The evaluation revealed that the student's cognitive and academic functioning were average. (Respondent's Exhibit 2-4)

5. During the student's first year at School A (SY 2014-2015), the student earned average to above average grades in the first and second advisories. During the second semester, the student's grades declined. The student began missing class assignments and began to display defiant behaviors, refusing to comply with teacher requests. However, the student was not belligerent. (Respondent's Exhibit 2-3, Petitioner's Exhibit 2-7, 2-9)

6. On March 8, 2015, the student's parent sent an email to School A stating that he believed the student was in need of an IEP due to poor grades, problems with ADHD and depression and refusal to perform work at school or at home. (Petitioners' Exhibit 2-12, 2-13)

7. On March 24, 2015, School A convened a multidisciplinary team ("MDT") meeting to address the parents' concerns. The School A team members along with the student's parents discussed the student's concerns. The team discussed three options: (1) a 504 plan, (2) use of teacher interventions and (3) continuing the IEP process. The team determined the next steps would be to schedule a 504-plan meeting on April 9, 2015, and to conduct a FBA and develop a BIP for the student and change the student's class schedule and continue with in-school counseling and reading intervention. The team did not conclude that they would proceed immediately with the IEP process. (Petitioner's Exhibit 2-18, 2-19)

8. On March 25, 2015, the student was suspended for five school days for threatening another student and destroying school property. During SY 2014-2015, the student received the following discipline referrals: 8 referrals for skipping class, 5 for defiance, 3 for tardiness, 2 for physical aggression and 1 for class disruption. (Petitioner's Exhibit 2-21, 20-3)

9. School A convened two 504 plan meetings with the student's parents in April and May 2015. On May 22, 2015, the student's parent sent an email to the School A social worker/Section 504 coordinator expressing frustration about the student's continued decline in grades, missing assignments, and that the parents had yet to receive a finalized 504-plan from School A. On May 23, 2015, School A sent a copy of the student's 504 plan for the parent's review. (Petitioner's Exhibit 2-24, 2-25)

10. The Student ended SY 2014-2015 with a "C" in all courses except Art, in which earned an "A." The student was promoted to the next grade and returned to School A for SY 2015-2016. (Respondent's Exhibit 2-3)

11. In general, during the student's first year at School A, the student worked well with many of teachers. At the end of SY 2014-2015, Petitioners requested a meeting to plan for SY 2015-2016. (Petitioners' Testimony)

12. On August 17, 2015, School A provided the student's parents with a revised 504-plan for the student. On August 28, 2015, School A staff met with the student's parents to discuss class schedule changes for the student and ways to ensure the student was successful during the new school year. (Petitioner's Exhibit 3-1, 3-8)

13. At the start of SY 2015-2016, the student refused to attend school on occasion but not due to problems at school. During the first month of SY 2015-2016 the student continued to give parents push back about attending school and began to fall behind in assignments. The student was also displaying occasional defiant behaviors in school. (Petitioner's Exhibits 3-11, 8-18, 8-19)

14. As a result, on September 21, 2015, the parents requested that alternatives beyond the provisions in the student's 504 plan be taken. (Petitioners' Exhibit 3-14)

15. On October 6, 2015, School A acknowledged the parents' request that the student be evaluated, but indicated that prior to obtaining the parents' consent to evaluate the student, DCPS needed to first conduct a data review that would be completed within a couple of weeks. (Petitioner's Exhibit 3-15)

16. On October 21, 2016, the student's parents signed the consent form for DCPS to evaluate the student for special education services. (Petitioner's Exhibit 21-1)

17. The student's parents employed the services of an educational consultant to assist them in working with School A staff to address their concerns with the student's behavior and academics at School A. On October 13, 2016, School A convened a MDT meeting, which included the student's parents and their educational consultant. (Witness 1's testimony, Petitioner's Exhibit 3-16)

18. During the first advisory of SY 2015-2016 the student earned the following grades in the following subjects: (Respondent's Exhibit 2-3)

ELA	D
Science	C
Health Phys. Ed.	A
World Geography	A
Mathematics	C
Spanish	D

19. On October 14, 2015, School A completed the Analysis of Existing Data ("AED") (Petitioner's Exhibit 20)

20. On October 21, 2015, School A updated the student's 504 plan. (Respondent's Exhibit 2-4)

21. On October 30, 2015, and November 2, 2015, a DCPS school psychologist conducted a psychological evaluation of the student and issued an evaluation report on November 23, 2015. The psychological evaluation that DCPS conducted mentioned that the student had been previously evaluated and determined ineligible for special education. The psychologist assessed the student's cognitive and behavioral functioning and academic achievement. The student's cognitive functioning was average. academic achievement was average but showed a comparative weakness in reading, particularly letter word identification and passage comprehension. The student's behavior assessment confirmed the student's inattentiveness and hyperactivity/impulsivity. The assessment also pointed to significant levels of defiance and aggression that impacts learning and peer relations at home and in community settings. The student did not report any feelings of depression, anxiety anger or low self-esteem. The psychologist noted the student's most significant issue was refusal to do work in the classroom, for which counseling and strategies to address the student's defiance and work refusal were recommended. (Respondent's Exhibit 2-2, 2-8, 2-11 2-12, 2-13, 2-14, 2-15, 2-16, 2-17, 2-18)

22. On November 30, 2015, DCPS conducted a FBA of the student by interviewing the school staff, the student's parent(s) and teachers, and conducting observations and reviewing the student's records, to address the student's defiance in the classroom, struggle to complete non-preferred tasks and negative attention seeking behaviors. (Respondent's Exhibit 3-1)

23. On December 4, 2015, DCPS completed a social history assessment report. (Respondent's Exhibit 2-22)

24. On January 14, 2016, DCPS found the student eligible for special education with the OHI disability classification. (Respondent's Exhibit 4-1)

25. On January 28, 2016, School A convened a team meeting to develop a BIP for the student to address the issues identified in the FBA of defiance in the classroom, problems with completing non-preferred tasks and attention seeking behaviors. The BIP listed replacement behaviors and strategies to be used by the student, the teaching staff, the school social worker, and the student's parents. The BIP also listed the means of measuring the success of the strategies implemented. The BIP pointed out that the student was most likely to be compliant and engaged in the academic environment when it is highly structured, when receives positive feedback, and when feels competent performing the class work. The BIP noted that the function of the student's behavior is a manifestation of ADHD symptoms and a way to gain attention from adults and a means of avoiding non-preferred tasks. (Respondent's Exhibit 3-7, 3-8, 3-9, 3-10, 3-11, 3-12)

26. The student's initial IEP was developed on February 4, 2016, and prescribed the following services: 3 hours per week each of specialized instruction in reading and written expression for a total of 6 hours per week of specialized inside general education. The IEP also prescribed 120 minutes per month of behavioral support services, and included goals in the areas of reading, written expression and emotional, social and behavioral development. (Respondent's Exhibit 4-2, 4-5, 4-6, 4-7, 4-8, 4-15, 4-18)

27. The student's IEP progress reports for the remainder of SY 2015-2016, after was provided IEP, indicated that did not make progress on academic goals of reading and written expression due to the student's lack of work production. The student initially refused to participate in sessions with the school social worker for behavior support services. Eventually, began to attend the sessions and began to make some progress toward social, emotional and behavioral goals but did not participate in individual and group counseling sessions in the last two months of the year either because was absent or refused to participate. (Petitioner's Exhibits 16, 18)

28. At school, the student continued, on occasion, to display defiant behavior, use profanity, and refuse to do work. School A documented the disciplinary infractions when they occurred. By year-end the student had accumulated 55 discipline referrals, 50% of which were for defiance or class disruptions. 84% of the student's discipline referrals occurred in the classroom, 51% of the student's referrals were from the student's Science class, 11% in the hallway and 4% during lunch. (Petitioners' Exhibit, 8-1, 8-2, 8-3, 8-4, 8-5, 8-6, 8-7, 8-8, 8-9, 8-10, 8-11)

29. School A convened a MDT meeting in May 2016 that the student's parents and their educational advocate attended. The team discussed the student's services and progress and the fact that was at risk of failing some subjects because of missing assignments. Between that meeting and the end of SY 2015-2016 the student's teacher communicated with the student's parents to identify what assignments were required for the student to pass on to the next grade. (Witness 1's testimony, Petitioner's Exhibit 3-77, 3-78, 3-79, 3-80, 3-81)

30. Although the student was able to pass to the next grade, when SY 2016-2017 began the student continued to have behavioral difficulties and was often assigned to in-school suspension. (Respondent's Exhibit 3-30, 3-31, 3-32, 3-33).

31. On October 13, 2016, School A convened a multi-disciplinary team meeting to determine if the student's BIP needed to be updated, and to review the student's progress. The student's parents attended along with their educational advocate. The team acknowledged that the student was displaying similar behaviors as the previous school year. The student had been sent to in-school suspension but the School A staff directing in-school suspension did not inform the special education team that the student was in suspension. The student's teachers reported that the student often did not come to class prepared and even though knew how to do the classwork often did not complete

assignments despite prompting and redirection. The team agreed on a number of actions including updating the student's BIP. (Respondent's Exhibit 4-16, 4-17)

32. There was no coordination between the IEP team at School A and the staff member in charge of discipline at School A. The staff member was not aware of the student's BIP and did not use it when addressing the student's behavior issues. However, the student's teachers were implementing the student's BIP and the school-wide disciplinary tracking system. (Witness 5's Testimony)

33. The student experienced some behavior and classroom participation improvements following the October 13, 2016, meeting, but was suspended for an incident that occurred on October 26, 2016. As result, the parents' education advocate sent School A an email on behalf of the parents requesting, among other things, that the student be evaluated for emotional disability. (Petitioner's Exhibit 4-33, Respondent's Exhibit 3-28)

34. The student continued to have behavior difficulties through the rest of the first semester, including defiance, destroying property, using profanity, skipping class and creating class disruptions. (Respondent's Exhibit 3-23, 3-24, 3-25, 3-26, 3-27)

35. On January 13, 2017, School A determined the student met the criteria for ED classification and updated the student's IEP. The IEP prescribed the following services: 8 hours per week of specialized instruction in general education, 120 minutes per month of specialized instruction outside general education and 120 minutes per month of behavior support services outside general education. (Respondent's Exhibits 2-35, 4-27, 4-33)

36. The student's IEP was amended on February 15, 2017, to update the present levels of performance, academic and behavioral support goals. (Petitioner's Exhibits 14-1, 14-4, 14-5, 14-6, 14-7)

37. In February 2017, School A updated the student's BIP. The updated BIP added some additional strategies to assist the student in learning replacement behaviors. The updated BIP also added additional incentives to encourage the student to establish, maintain, and generalize the replacement behaviors. The updated BIP reduced the amount of time the team targeted that the student would not display defiant behavior from 98% of the time to 85% of the time. (Respondent's Exhibit 3, Petitioner's Exhibit 9)

38. On February 22, 2017, a DCPS staff member conducted a classroom observation of the student. The observer noted that in the past two semesters the student earned an F in all of classes and teachers complained about outbursts, use of profanity, and refusal to complete classwork as reasons that contributed to failing classes. The observer noted that as of the date of the observation the student had 48 behavior referrals, 34% for skipping class, and 16% for classroom disruptions. The observer noted the student's oppositional and off task behavior in the classroom affect ability to access the general education curriculum. Despite the observer's assessment of the student's behavior difficulties, the observer did not recommend that the student be placed in a more

restrictive setting. The report contained a notation that the report was only advisory in nature, and that IEP team will make the final determination regarding the student's educational placement. Although the student's educational setting was reviewed, the student's IEP and placement at School A remained the same. (Petitioner's Exhibit 33-1, 33-2, 33-6)

39. The student continued to have behavior difficulties through the rest of the SY 2016-2017 including defiance, destroying property, using profanity, skipping class and creating class disruptions. (Respondent's Exhibit 3-15, 3-16, 3-17, 3-18, 3-19, 3-20, 3-21)

40. Because of the student's continued behavior and academic difficulties, Petitioners requested that an IEP meeting be convened prior to the end of SY 2016-2017 to update the student's IEP in preparation for moving on to a school setting for SY 2017-2018, and to ensure the student had an appropriate education setting where would be successful. (Witness 1's testimony)

41. When implementing the student's BIP, different staff members had responsibility for parts of the BIP. The School A social worker met several times per week to talk to special education teachers so that the BIP could be reviewed by the team and modified in an attempt to address the student's behaviors. However, the School A team eventually concluded the student was in need of a more restrictive environment. However, because the student engages well with and learns from peers, the School A team did not support the student's total removal from non-disabled peers. (Witness 5's Testimony)

42. Prior to School A convening the requested IEP meeting, Petitioner filed their due process complaint on May 30, 2017. On June 9, 2017, DCPS convened a resolution meeting at which DCPS presented Petitioners with a proposed IEP to be implemented at start of SY 2017-2018. The IEP proposed the following services: 23 hours per week of specialized instruction outside general education and 240 minutes per month of behavioral support services outside general education. The LRE section of the IEP indicates, that in addition to the services listed outside general education the student would be provided (1) "pull-out/push-in with social skills training with general education peers (2) Individual counseling." (Witness 5's testimony, Witness 6's testimony, Respondent's Exhibits 4-12, 4-13, 4-42, 4-47, 4-49)

43. DCPS offered to implement the proposed IEP at a DCPS School ("School B") in a special education program for students with ED classification. The School A team members did not support that student being a placement where was totally removed from non-disabled peers. Petitioners' counsel stated during the meeting that Petitioners declined the IEP and maintained that the student needed to be outside general education for all classes. (Witness 5's testimony, Witness 6's testimony, Respondent's Exhibits 4-12, 4-13, 4-42, 4-47, 4-49)

44. School B can implement the IEP that was developed for the student on June 9, 2017. DCPS has provided Petitioners a LOS letter for the student to attend the School B Behavior Education Support ("BES") program. The students in the BES program change

classrooms, but will have classes in the same cohort of students. The student would have lunch with general education students at grade level. (Witness 6's testimony)

45. The student has interviewed at, and has been accepted to a non-public special education school ("School C") that has an OSSE certificate of approval ("C. of A."). School C serves students with a variety of disability classifications, including ED. School C has a school with 40 students. School C uses an A-day and B-day schedule with four classes each day for a total of 8 courses. All classes are in one main hallway. Classroom staff and behavior support managers are all located in the hallway to make certain all students get to their classes. (Witness 2's testimony, Petitioner's Exhibit 44)

46. School C has a maximum of nine students in a classroom with a teacher and assistant teacher and some of the student's have dedicated aides. Meals are consumed in the homeroom class. School C has teachers who are certified in special education and can offer the student a DCPS diploma. Tuition for the school's 10-month program is $49,000 and includes behavioral support services. School C has 4 full time licensed counselors, 2 behavior managers for behavior support and crisis intervention. There is a school wide behavior system and engaging lesson plans to motivate students and limit academic frustration. (Witness 2's testimony, Petitioner's Exhibit 44)

47. Petitioners presented an educational advocate who developed a proposed compensatory education plan that sought to compensate the student for having not been identified pursuant to Child Find, not having an appropriate IEP and placement from October 2015. The advocate proposed the following services in compensation for denials of FAPE that were alleged in the due process complaint: 300 hours of independent tutoring and 200 hours of a combination of mentoring and counseling. (Witness 4's testimony, Petitioner's Exhibit 1)

CONCLUSIONS OF LAW:

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

34 C.F.R. § 300.17 provides:
A free appropriate public education or FAPE means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. 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.

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Petitioner has both the burden of production and persuasion on the following issues above: #1, #2, and #6. Respondent shall hold the burden of persuasion on the following issues #3, #4 and # 5. Petitioner shall establish a prima facie case on issues #3, #4 & #5 before the burden of persuasion falls to Respondent.[8] The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to implement its Child Find obligations from June 1, 2015, to the present because it failed to perform a comprehensive psychological evaluation and a FBA.

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

The "Child Find" requirements of IDEA at 20 U.S.C. 1412 (a); 34 C.F.R. Section 300.11 require every state to effectuate policies and procedures to ensure that all children with disabilities

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[8] 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.

residing in the state, including wards of the state, who are in need of special education and related services are "identified, located and evaluated." This Circuit in *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005) held: "School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that "all children with disabilities residing in the State...regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated." See also *Branham v. District of Columbia*, 427 F. 3d 7, 8 (D.C. Cir. 2005)

In *Scott v. District of Columbia*, 2006 U.S. Dist. LEXIS 14900, the Court held: "The Circuit's holdings require DCPS to identify and evaluate students in need of special education and related services, whether or not parents have made any request, written or oral." The "Child Find" requirement is an affirmative obligation on the school system. A parent is not required to request that a school district identify and evaluate a child. In *N.G., et al. v. District of Columbia*, 556 F. Supp. 2d 11, (U.S.D.C. 2008) the Court stated: "This Court has held on numerous occasions that as soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process."

This "affirmative obligation" does not necessarily hinge on parents' flagging issues -- though parental concerns are still relevant. *D.L. v. District of Columbia*, 109 F. Supp. 3d 12, 35 (D.D.C. 2015); see Reid, 401 F.3d at 518 ("School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction."); *Horne*, 2016 WL 3962788 (describing "affirmative duty"); see also *Kruvant v. District of Columbia*, No. 03-1402, 2005 WL 3276300 (D.D.C. Aug. 10, 2005) ("A child may be suspected of having a disability based on written parental concern."). The process instead begins once the district is "on notice of substantial evidence that [the student] may have qualified for special education ... such that she should have been evaluated." N.G., 556 F. Supp. 2d at 26.

The evaluation component of "Child Find" requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days as mandated by the District of Columbia) and to determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

Petitioners assert that DCPS should have located, identified and evaluated the student pursuant to Child Find by June 1, 2015, so that the student would have had an IEP in place at the start of SY 2015-2016. However, the evidence does not prove this out. When the student began School A during SY 2014-2015, School C was aware that the student had been diagnosed with ADHD and had a 504 plan in place in previous school.

In March 2015, at the behest of the student's parents School A convened a meeting to address the parent concerns about the student's academic difficulties and particularly behaviors. The team considered several options including, among other things, proceeding with the IEP evaluation process or updating the student's 504 plan. The team chose to move forward with a 504 plan and conducting a FBA. Although there was some delay in providing parent with the 504 plan, a plan was presented to the student's parent before the end of SY 2014-2015. There

was no decision made at the meeting, and no insistence at that March 2015 meeting that the school move forward with evaluating the student for special education.

Based upon the student's prior psychological evaluation, the Hearing Officer finds that it was reasonable for DCPS to first proceed with exploring options and interventions to address the Petitioners' concerns about the student's performance prior to evaluating the student for special education. Early after the start of SY 2015-2016, in October 2015, DCPS convened a meeting to address the student's behaviors. At that meeting it was determined that DCPS would proceed with evaluating the student for special education eligibility. The student's parents gave their consent to evaluate the student in October 2015. The student was evaluated in October 2015 and was found eligible for special education by January 2016. This was well within the required time frame. Consequently, the Hearing Officer does not conclude that DCPS failed in this instance to meet its Child Find obligations relative to this student.

ISSUE 2: Whether the LEA denied the student a FAPE by failing provide with a FBA pursuant to the parent's written request on March 24, 2015, failing to update the FBA appropriately, leading to an ineffective and rarely implemented BIP.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on the issue of conducting a FBA, but sustained the burden of proof by a preponderance of the evidence regarding full implementation of the BIP.

Pursuant to 34 C.F.R. §300.303, "A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311…if the child's parent or teacher requests a reevaluation."

34 C.F.R. § 300.304 and § 300.305 require that in evaluating a student a LEA must ensure that a child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities, and as part of an initial evaluation, review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers; and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child is a child with a disability.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016); The IDEA is violated when a school district deviates materially from a student's IEP. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citation omitted). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP. *Holman v. District of Columbia*, No. 14-1836, 2016 WL 355066 (D.D.C. 2016) (citing *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist*. 5J, 502 F.3d 811, 822 (9th Cir. 2007)). In other words, for the court to find a failure to implement an IEP, the school board or local authorities must have "failed to implement substantial or significant provisions of the IEP." *Wilson*, 770 F. Supp. 2d at

274 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). There is no requirement that the child suffer educational harm in order to find a violation; rather, the proportion of services mandated compared with those provided is "the crucial measure for purposes of determining whether there has been a material failure to implement" an IEP.

The evidence demonstrates that at the March 24, 2015, meeting the team determined that an FBA would be conducted for the student to address behavior difficulties. At that juncture, however, the team had not determined that evaluations for special education were moving forward. As pointed out above, the team determined that the 504 plan would be the appropriate course of action for the student.

A 504 plan was presented to Petitioners by the end of SY 2015-2016. Although a FBA was not conducted of the student until November 2016, the FBA was not a formal evaluation included in the eligibility evaluation process and there was no prescribed timeline by which the FBA needed to be conducted following the March 24, 2015, meeting. As of the October 16, 2015, meeting the team determined the student would be evaluated for special education and the Petitioners signed the consent form for evaluations to proceed. The FBA was completed in November 2015. The Hearing Officer concludes, therefore, that there was no violation in the FBA not being completed prior to November 2015.

Petitioner asserts that DCPS failed to update the student's FBA. However, there is no indication or authority cited that requires that a second FBA be conducted. School A did agree that in light of the student's continued behavioral difficulties during SY 2016-2017, that BIP would be updated. That update was completed in February 2017. Consequently, the Hearing Officer does not conclude that there was any violation proved regarding DCPS' failure to conduct a second FBA.

However, with regard to implementation of the student's BIP, the evidence does demonstrate that the BIP was a major component of addressing the student's behavioral difficulties, and that the student's behavior was the major impact of disability and inability to access the curriculum. The evidence clearly demonstrates that the student's behavioral difficulties, particularly during SY 2016-2017, were principally addressed through disciplinary means and that the student was routinely placed in in-school suspension as result of behaviors. This was often done without the knowledge of the student's teachers and without the knowledge and coordination of the special education coordinator and team. In fact, the evidence demonstrates that often the student was suspended without the special education team being aware, and the School A staff person in charge of disciplinary issues was unaware that the student had a BIP that needed to be followed to address behaviors. Consequently, the Hearing Officer concludes, based on this evidence, that there was a substantial deviation from the student's special education services that amounted to a denial of FAPE.

ISSUE 3: Whether the LEA denied the student a FAPE by failing to provide with an appropriate educational placement from August 2015 to the present by: (1) failing to provide an appropriate therapeutic setting and (2) failing to appropriately and consistently implement the student's behavior plans.

Conclusion: Respondent presented sufficient evidence to demonstrate that prior to January 2017 the student's placement at School A was appropriate. However, Respondent did not sustain the burden of proof by a preponderance of the evidence with regard to providing the student an appropriate educational placement after January 2017 through the conclusion of SY 2016-2017.

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

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.")

Petitioners asserted that the appropriate LRE/placement for the student is for all instruction and services to be provided outside general education. The evidence demonstrates that the student's first year at School A was relatively successful and that in second year began to display behavioral difficulties that School A addressed through a 504 plan. Soon after the start of the student's second year at School A began to display significant enough behavioral difficulties, and based on the concerns of the both the student's parents and School A, action was taken to evaluate the student for special education services. The student was found eligible with the OHI classification, provided specialized instruction inside general education, and was provided behavioral supports.

Given the student's average cognitive functioning and average academic achievement scores in the evaluation, it was reasonable for School A to have provided the student with an IEP and placement at School A that was a next step in the level of restriction in placement. Based upon the evidence available at the time to the team when the student's initial IEP was developed and initial educational placement was determined, it was reasonable. Consequently, the Hearing Officer concludes based on the evidence that DCPS sustained the burden of proof that the student's educational placement at School A from the time was provided initial IEP until IEP was reviewed and revised the following year was appropriate.

However, the evidence demonstrates that by SY 2016-2017 the student began to demonstrate such severe behaviors that School A took action to review the student's disability classification and included the ED classification. School A at that point did not significantly alter the student's IEP or placement to address the student's escalating behaviors. Rather, the student's behavior difficulties were addressed through the school wide disciplinary process and as noted above, the staff in charge of in-school suspension did not implement the student's BIP. Consequently, based upon this evidence, the Hearing Officer concludes that as of the date the student's disability classification was changed in January 2017, it was clear to School A that the student

was in need of a more restrictive placement than was being provided at School A. The Hearing Officer concludes that DCPS' failure to provide the student a more restrictive placement as of that date, as well as the failure to fully implement the student's BIP, was a denial of FAPE to the student.

ISSUE 4: Whether the LEA denied the student a FAPE by failing to provide with an appropriate IEP on February 4, 2016, through failing to provide: (1) sufficient hours of specialized instruction; (2) an appropriate educational placement; (3) sufficient behavioral support services outside of the general education setting; (4) an IEP with reasonable, measurable goals, calculated to provide the student with appropriately ambitious educational benefit, and (5) an IEP to appropriately address the student's behavioral needs through an appropriate and consistently updated and implemented BIP.

Conclusion: Respondent sustained the burden of proof by preponderance of the evidence that the student's initial IEP at the time it was developed was reasonably calculated to provide the student educational benefit.

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

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

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

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 47 The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

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." 34C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a

disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

Petitioner asserts that the student's initial IEP was inappropriate because of (1) sufficient hours of specialized instruction; (2) an appropriate educational placement; (3) sufficient behavioral support services outside of the general education setting; (4) an IEP with reasonable, measurable goals, calculated to provide the student with appropriately ambitious educational benefit, and (5) an IEP to appropriately address the student's behavioral needs through an appropriate and consistently updated and implemented BIP.

As noted above, the evidence demonstrates that the student's first year at School A was relatively successful and that in second year began to display behavioral difficulties that School A addressed through a 504 plan. Soon after the start of the student's second year at School A began to display significant enough behavioral difficulties and based on the concerns of both the student's parents and School A, action was taken to evaluate the student for special education services. The student was found eligible with the OHI classification and provided specialized instruction inside general education and was provided behavioral supports.

Given the student's average cognitive functioning and average academic achievement scores in the evaluation it was reasonable for School A to have provided the student with an IEP and placement at School A that was a next step in the level of restriction. Based upon the evidence available at the time to the team when the student's initial IEP was developed, it was reasonable. Consequently, the Hearing Officer concludes based on the evidence that DCPS sustained the burden of proof that the student's initial IEP was reasonably calculated to provide educational benefit. Consequently, the Hearing Office concludes that Respondent sustained the burden of proof by a preponderance of the evidence on this issue.

ISSUE 5: Whether the LEA denied the student a FAPE by failing to provide with an appropriate IEP in February 15, 2017, through failing to provide; (1) sufficient hours of specialized instruction; (2) an appropriate educational placement; (3) sufficient behavioral support services outside of the general education setting; (4) an IEP with reasonable, measurable goals, calculated to provide the student with appropriately ambitious educational benefit, and (5) an IEP to appropriately address the student's behavioral needs through an appropriate and consistently updated and implemented BIP.

Conclusion: Respondent did not sustain the burden of proof by preponderance of the evidence.

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

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

As noted above, the evidence demonstrates that by SY 2016-2017 the student began to demonstrate such severe behaviors that School A took action to review the student's disability classification and included the ED classification. School A at that point did not significantly alter the student's IEP or placement to address the student's escalating behaviors. Rather, the student's behavior difficulties were addressed through the school wide disciplinary process, particularly by the staff in charge of in-school suspension. However, School A staff did not consistently implement the student's BIP during in-school suspension, where the student spent much of time during SY 2016-2017. Consequently, based upon this evidence, the Hearing Officer concludes that as of the date the student's disability classification was changed in January 2017, it was clear to School A that the student was in need a greater level of services and a more restrictive IEP than was being provided at School A. The Hearing Officer concludes that DCPS' failure to provide the student with significantly more services and a more restrictive IEP as of that date, as well as the failure to fully implement the student's BIP, was a denial of FAPE to the student.

Petitioner asserts that the student is in need of a placement where is totally removed from non-disabled peers and prospective placement should be the non-public school Petitioner has proposed. However, the evidence demonstrates that the student gets along well and learns from non-disabled peers. Although there was some evidence that the student had disciplinary issues during lunch, the vast majority of disciplinary infractions occurred in the classroom. There was insufficient evidence presented that the student's least restrictive environment is a placement totally removed from non-disabled peers.

DCPS presented evidence that it has offered the student placement in a restrictive program designed for ED students housed in a general education school where the student would still have contact and interaction with non-disabled peers. Along the continuum of placements, it seems reasonable that the placement proposed by DCPS would be the next logical step. However, in light of the evidence of the denial of FAPE that has been demonstrated, the Hearing Officer concludes that the reasonable remedy to address the denials of FAPE is to grant part of Petitioners' requested relief and place the student in the non-public school Petitioners have requested. Albeit the student will not have access to non-disabled peers in such a setting, the student would benefit from the structure and significant behavioral supports that might likely allow to reorient focus to academic progress, and that placement in a less restrictive setting the following school year might then be appropriate. Consequently, the Hearing Officer, in the order below, grants Petitioners' requested relief that the student be placed at School C for SY 2017-2018.

ISSUE 6: Whether the LEA denied the student a FAPE in and/or around January through February 2017 by delegating the educational placement decision to the LRE team, which did not include the parents or those knowledgeable about the student.

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

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.

The evidence in this case demonstrates that DCPS conducted an LRE observation of the student at School A and a report of the observation was developed. The report from that observation clearly contains a notation that the report was only advisory in nature, and that IEP team will make the final determination regarding the student's educational placement. Although School A reviewed the LRE observation report, the School A IEP team, in which the student's parents were participants, made the ultimate determination that the student's placement would remain A. Based on this evidence the Hearing Officer concludes Petitioners did not sustain the burden of proof on this issue.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

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.

The Hearing Officer concludes the student is entitled to compensatory education for having not had an appropriate IEP and placement from January 2017 until the end of SY 2016-2017. The Hearing Officer considered the compensatory education plan that Petitioner's proposed. That plan presumed denials of FAPE that the Hearing Officer did not determine had been demonstrated. The Hearing Officer concluded based on the evidence that in January 2017 the student should have been placed in a self-contained special education program such as the one the DCPS has offered for SY 2017-2018. However, the evidence presented did not convince the Hearing Officer that the student's LRE is total removal from non-disabled peers. The evidence demonstrated that the student's primary difficulty of defiance and refusal to complete

work in the classroom and there was testimony that the student's behavior difficulties outside the classroom were generally refusal to follow rules in the lunchroom.

Consequently, the Hearing Officer concluded that it was reasonable for DCPS to first propose a higher level of restriction on the placement continuum before moving to total removal from non-disabled peers. Based upon the evidence of the student's average cognitive and academic achievement scores, the Hearing Officer is convinced the student has the capability to achieve and perform well academically in the proper environment with sufficient behavior supports.

However, the Hearing Officer concludes that although it was not sufficiently demonstrated that total removal from non-disabled peers is the student's LRE, would none-the-less benefit from the services and environment that would be provided at School C. Given the fact that the student was denied a FAPE by not having an appropriate IEP and placement the last half SY 2016-2017, the Hearing Officer concludes that a more appropriate remedy is for the student to be placed and funded at School C for SY 2017-2018 as compensatory education for the denials of FAPE. At the end of that SY 2017-2018 DCPS should then convene a MDT to review and revise the student's IEP as appropriate and determine an appropriate placement for the student for SY 2018-2019.

The evidence demonstrates that School C can provide the student with educational benefit and meets the requirements that the Hearing Officer must weigh in considering an educational placement proposed by a parent. *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005)

ORDER: [9]

1. Within ten (10) school days of the issuance of this order DCPS shall place and fund the student at School C for SY 2017-2018 and provide the student transportation services.

2. DCPS shall convene an MDT meeting at School C within thirty (30) calendar days of the student attending School C and update the student's IEP to reflect the services that will be provided while at School C for SY 2017-2018.

3. Thirty days prior to the end of SY 2017-2018, DCPS shall convene an MDT meeting to review and revise the student's IEP as appropriate and determine an appropriate placement for the student for SY 2018-2019.

4. All other relief requested by Petitioner is denied.

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

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: August 27, 2017

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