

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 31, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2017-0131

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: July 19-20, 2017
 August 23, 2017

Respondent.

Office of Dispute Resolution
Washington, D.C.
Rooms 2006, 2003

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or GUARDIAN), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not ensuring that Student was comprehensively evaluated and determined eligible for special education before June 2016 and not offering appropriate Individualized

¹ Personal identification information is provided in Appendix A.

Education Programs (IEPs) and educational placements since the 2014-2015 school year.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 10, 2017, named DCPS as respondent. The undersigned hearing officer was appointed on May 11, 2017. The parties met for a resolution session on May 22, 2017 and were unable to reach an agreement. My final decision in this case was originally due by July 24, 2017. On May 24, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. After the due process hearing dates were set, upon the consent continuance request of DCPS' counsel, I entered an order extending the final decision due date to August 4, 2017. The due process hearing initially ended on July 20, 2017. Subsequently, Petitioner's attorney requested that the hearing be reopened in order for the Petitioner to introduce evidence on an alternative prospective private school placement. This request was granted and the hearing was reconvened on August 23, 2017. In order to complete this hearing officer determination after the additional hearing session, I granted Petitioner's unopposed request to extend the due date for the final decision to September 1, 2017.

The due process hearing was held before the undersigned impartial hearing officer on July 19 and 20, 2017 and August 23, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by RESOLUTION FACILITATOR and by DCPS' COUNSEL.

The Petitioner testified and called as additional witnesses EDUCATIONAL CONSULTANT, NONPUBLIC SCHOOL 1 ADMINISTRATOR, PLAY THERAPIST, INDEPENDENT PSYCHOLOGIST and NONPUBLIC SCHOOL 2 ADMINISTRATOR. DCPS called as witnesses SCHOOL SOCIAL WORKER, SPECIAL EDUCATION COORDINATOR (SEC) and Resolution Facilitator. Petitioner's Exhibits P-1 through P-26 and P-28 through P-64 were admitted into evidence without objection, with the exception of Exhibits P-17 and P-26 which were admitted over DCPS' objections and Part D of Exhibit P-50 which was not admitted. I sustained DCPS' objection to Exhibit P-27. DCPS' Exhibits R-1 through R-75 were admitted into evidence without objection, with exceptions of Exhibits R-65 and R-68 which were admitted over Petitioner's objections. Counsel for the respective parties made opening statements and closing arguments. Neither party requested leave to file a post-hearing written closing.

An the beginning of the due process hearing, I dismissed claim "h" in Petitioner's due process complaint, whether DCPS failed to implement the services required by Student's Section 504 plan in the 2015-2016 school year, on the grounds that in the District of Columbia, special education hearing officers do not have jurisdiction over claims under Section 504 of the Rehabilitation Act of 1973.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the May 24, 2017 Prehearing Order:

- a. Did DCPS fail to timely find Student eligible for special education and

related services before June 2016?

b. Has DCPS failed to comprehensively evaluate Student in all areas of suspected disabilities by not conducting an appropriate and sufficiently comprehensive psychological evaluation or a timely functional behavioral assessment?

c. Was DCPS' June 17, 2014 IEP inappropriate for Student because it did not address Student's behavioral issues, provided only 2 hours per month of Speech and Language services and no specialized instruction?

d. Was DCPS' June 15, 2016 IEP inappropriate for Student because it did not address Student's specific learning disabilities and behavioral dysregulation, and provided insufficient specialized instruction services? Was the June 15, 2016 IEP inadequate because this IEP did not include information on the staff or resources that would be used to implement the services and support?

e. Is DCPS' March 10, 2017 IEP inappropriate for Student because it did not provide for a full-day self-contained placement and did not address Student's specific learning disabilities and behavioral dysregulation? Was the March 10, 2017 IEP inadequate because this IEP did not include information on the placement location to be provided to implement the IEP?²

f. Is the March 10, 2017 IEP inappropriate for Student because it does not provide for an appropriate full-day, self-contained, placement, which has an appropriate staff and is able to provide Student with appropriate educational services and behavioral support?

g. Did DCPS fail to implement the speech and language services required by Student's June 17, 2014 IEP?

For relief, the Guardian requests that the hearing officer order DCPS to fund Student's prospective placement at NONPUBLIC SCHOOL 2 with transportation and ensure that Student's disability classification is identified as Multiple Disabilities, to include Emotional Disturbance and Learning Disability. Petitioner also seeks compensatory education for the denials of FAPE alleged in the complaint. Petitioner's Counsel stated at the prehearing conference and confirmed on the record at the due

² In closing argument, Petitioner's counsel withdrew that part of the original claim "e", alleging that the March 10, 2017 IEP did not include related services to assist Student to benefit from special education and did not include speech and language services.

process hearing that Petitioner does not seek relief for alleged violations which occurred more than two years prior to the May 10, 2017 filing date of the due process complaint.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this hearing officer's Findings of Fact are as follows:

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

Testimony of Guardian. Student is eligible for special education under the IDEA disability classification Other Health Impairment - Attention Deficit Disorder or Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Exhibit P-36.

2. Guardian is Student's maternal grandmother and legal guardian. Student has resided with Guardian since Student was about 1 year old, after the mother abandoned Student. Student's father has been incarcerated for all of Student's life.

Testimony of Guardian.

3. For the 2016-2017 school year, Student was enrolled in GRADE at CITY SCHOOL 2. Previously Student attended CITY SCHOOL 1. Student changed schools when the family moved in the middle of the 2014-2015 school year. Exhibit P-10.

Testimony of Guardian.

4. Student was initially referred for evaluation for special education eligibility in December 2012. At that time Student was determined not to qualify. In 2014, Guardian referred Student for another evaluation due to concerns about Student's behaviors. Guardian reported that City School 1 was considering a shortened school day for Student due to Student's challenging behaviors. A DCPS Early Stages Psychologist evaluated Student in May 2014. The psychologist reported that Student had average intellectual and academic skills. Student had several behavioral difficulties that

impacted Student within the general education setting, including hyperactivity, aggression, limited executive functioning, defiance and attention-seeking behaviors. The evaluator reported that these behaviors could cause classroom disruptions and negatively impact peer relationships and classroom participation. However, the evaluator noted that many of the behaviors exhibited by Student were consistent with a history of possible attachment disruption and trauma, and that Student's behaviors were not consistent with Attention Deficit-Hyperactivity Disorder (ADHD). The evaluator recommended that Student did not meet special education eligibility criteria as a student with an Other Health Impairment. The evaluator recommended that in order to increase Student's class participation and reduce disruptive behaviors, a functional behavioral assessment (FBA) should be completed in order to develop a "Positive Behavior Support Plan." Exhibit P-6.

5. In May 2014, an Early Stages Occupational Therapist conducted an Occupational Therapy (OT) evaluation of Student. The evaluator determined that Student demonstrated age appropriate fine motor skills but that Student presented with severe receptive vocabulary delays and expressive and receptive delays. Responses to the Short Sensory Profile indicated that Student was demonstrating behaviors that may have been related to sensory processing issues, including tactile sensitivity, sensory seeking behaviors, and auditory filtering concerns. Exhibits P-7, P-8.

6. On June 17, 2014, Student was determined eligible for special education and related services under the disability classification Speech or Language Impairment (SLI). Exhibit P-8.

7. Student's initial June 17, 2014 IEP provided for Student to receive 2 hours per month of Speech-Language Pathology in the general education setting. The initial

City School 1 IEP did not provide for Specialized Instruction or for other related services. Exhibit P-9.

8. Student transferred from City School 1 to City School 2 after the first term of the 2014-2015 school year. Exhibits P-10, P-11.

9. On May 18, 2015, Guardian executed a DCPS form revoking consent for Student to receive special education and related services. She was requested to execute the form by a woman at City School 2 who said that Student did not need speech-language services anymore. Testimony of Guardian, Exhibits R-15, R-18. On two Prior Written Notices issued by DCPS on the same date, it was stated that Student had mastered all of the prescribed speech and language goals and exceeded expectations-based developmental levels and that Student's teacher had noted that there were no speech and language concerns for Student. Student was exited out of special education and related services. Exhibits R-16, R-17, R-19, R-20.

10. In July 2015, Guardian had Student evaluated by LICENSED CLINICAL PSYCHOLOGIST. This psychologist diagnosed Student with Attention Deficit-Hyperactivity Disorder (ADHD), Combined Type. Exhibit P-13. Student began treatment with a psychiatrist for medication management of the condition. Mother informed DCPS of Student's ADHD diagnosis right away. Testimony of Guardian.

11. In the beginning of the 2015-2016 school year, Guardian requested City School 2 to redetermine Student's eligibility for special education based upon an Other Health Impairment, Attention Deficit-Hyperactivity Disorder (OHI-ADHD) disability. DCPS SCHOOL PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student on September 10, 2015. This evaluator reported that Student did not have a specific learning disability and that although Student had ADHD, Student did not meet

IDEA eligibility criteria for OHI-ADHD, because of the absence of a significant impact from Student's ADHD on Student's achievement in math, reading or written language.

Exhibit P-14.

12. Student's 2015-2016 school year home room teacher told DCPS School Psychologist that Student's temperament was hyperactive and stated that Student required one-to-one attention more than Student's peers; that Student completed less class work than classmates; that Student often failed to pay close attention to details and made careless mistakes; that Student had difficulty sustaining attention in tasks or play activity; that Student did not follow through on instructions and failed to finish schoolwork; that Student often had difficulty organizing tasks and activities and gave up easily on grade level desk work. The teacher stated that Student was able to handle grade level instruction if these attention deficits were addressed and reversed and that she provided Student individualized attention and differential instruction to address Student's attention deficits. Exhibit P-14.

13. On October 29, 2015, a City School 2 multidisciplinary team (MDT) determined that Student did not meet criteria as a child in need of special education. Exhibit P-15. The MDT team determined that Student was eligible for services under Section 504 of the Rehabilitation Act of 1973 because Student's ADHD substantially limited life activities of concentrating, learning, reading and thinking. Exhibit P-16. Student's October 29, 2015 Section 504 Plan provided for Counseling/Behavioral Support for 30 minutes per week on a consult basis, as well as accommodations for testing and a behavior plan and chart. Exhibit P-17.

14. Guardian did not see any improvement in Student's behavior after the Section 504 Plan was developed. In March 2016, she retained her present attorneys' law

firm to assist her. This resulted in a request on Guardian's behalf for DCPS to fund an Independent Educational Evaluation (IEE) comprehensive psychological evaluation and functional behavioral assessment (FBA) of Student. Testimony of Guardian, Exhibit P-18.

15. In May 2016, Independent Psychologist conducted a multi-day psychoeducational and psychological evaluation of Student. She reported that Student's intellectual aptitude generally scored in the Average range with a weakness in working memory. Academically, Student's skills all scored below age expectancy. Student's reading level was pre-primer. Writing was similarly well below age expectations. In math, Student's skills also fell well below age expectancy. Independent Psychologist reported that Student met criteria for multiple specific learning disabilities in reading, written express and mathematics, at the severe level due to the wide scope of the learning deficits. In the emotional realm, Independent Psychologist diagnosed Student with an Adjustment Disorder with mixed disturbance of emotions and conduct. Exhibit P-20.

16. On June 15, 2016, Student's City School 2 MDT team met to review the IEE psychological evaluation of Student. The MDT team determined that Student met IDEA criteria for both SLD and OHI-ADHD disabilities. The team decided that Student should receive special education and related services under the OHI-ADHD classification to increase access to the general education curriculum and that Student's learning disability would be addressed under the OHI-ADHD classification. Exhibit R-48. The Guardian's counsel indicated in a written note that while the Guardian did not disagree with the OHI-ADHD "diagnosis," they believed that Student's diagnosis should include SLD with impairment in reading, written expression and mathematics. Exhibit

R-44.

17. Student's 2016 IEP was developed at the June 15, 2016 MDT meeting. The IEP team identified as areas of concern Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. The initial IEP provided for Student to receive 7.5 hours per week of Specialized Instruction in general education and 120 minutes per month of Behavioral Support Services outside general education. Exhibit

P-23.

18. For Student's IEE Functional Behavioral Assessment (FBA), Educational Consultant made observations of Student at the Extended School Year program in July 2016 and at City School 2 on November 15, 2016 and on January 12, 2017. In his January 17, 2017 FBA report, Educational Consultant observed that attention and focus were more of a problem for Student when engaging in learning activities. Behavior displays were seen as a combination of impaired ability mixed with difficulty controlling impulses and regulating emotions associated with educational demands. Educational Consultant recommended, *inter alia*, that Student have a small class size in a highly structured setting with the entire staff trained in providing therapeutic behavioral support. Exhibit R-50.

19. On December 7, 2016, one of Petitioner's attorneys wrote City School 2 to request an IEP team meeting for Student. Counsel stated in the letter that Guardian had been told that Student had been having considerable difficulties accessing the curriculum since the beginning of the school year and that Student had to be removed from class regularly. Exhibit P-26.

20. Student's IEP team was convened at City School 2 on January 15, 2017. Guardian, her attorney and Educational Consultant attended the meeting. At the

meeting, Student's classroom teacher reported that when Student is not engaged in an extreme sense, Student elopes from class and is often unable to be de-escalated.

Student was reported to be on-task approximately 35 percent of the time. Exhibit R-51.

21. That school year, Student spent countless time in School Social Worker's office just to keep safe (from absconding from the classroom.) Testimony of School Social Worker.

22. On February 7, 2017, LRE OBSERVER from DCPS' central office conducted an observation of Student at the request of City School 2's Special Education Coordinator. In her written report, LRE Observer recommended that the general education setting at City School 2 was the least restrictive environment for Student. She also made a number of specific recommendations for academic and behavioral support to enhance Student's academic and behavioral progress in the then-current educational setting. Exhibit R-52.

23. On March 10, 2017, Student's IEP team at City School reconvened to review and revise Student's IEP. Guardian, her attorneys and Educational Consultant attended the meeting. Student's IEP was revised to update present levels of performance and annual goals, and to change Student's special education and related services. Student's Specialized Instruction was increased to full-time outside general education instruction (27.5 hours per week) and Behavioral Support Services were increased to 60 minutes per week. The IEP provided that Student requires a structured classroom setting with clear behavioral expectations along with an individualized behavior plan to stay on task and obey classroom rules. The IEP team specified that Student's least restrictive environment is a full-time program to meet Student's requirement for significant academic support and strategies as well as supportive

therapeutic support. Exhibit P-36. Student moved to the Early Learning Support (ELS) classroom at City School 2. Student was the 7th child in the program, taught by a special education teacher and 2 assistants. Testimony of Special Education Coordinator.

24. At a meeting on March 29, 2017, DCPS authorized funding for Student to receive 60 hours of tutoring and 60 hours of Behavioral Support Services from independent providers. This was done unilaterally by DCPS and was not part of a settlement agreement. The purpose was to compensate Student for the lack of expected academic progress during the period from October 29, 2015 to June 15, 2016, when Student was determined ineligible for special education and had a Section 504 plan. Exhibit R-61.

25. By the end of the 2016-2017 school year in the ELS classroom, Student had made a good amount of progress. Student stopped eloping from class and was on task three days out of five. On the other days, Student would be off task for short periods, but was able to be redirected within 15 minutes. Student's reading fluency and accuracy improved, although Student was still one year below grade level. Testimony of Special Education Coordinator. Student thrived in the smaller, self-contained, classroom setting, which provided a lot of structure, stability and consistency. Testimony of School Social Worker.

26. For the 2017-2018 school year, DCPS assigned Student to the Specific Learning Support (SLS) classroom at City School 3, because Student had aged out of the ELS program. The SLS program is identical to the ELS program, except that it is for older children. The school change was made because City School 2 does not offer an SLS program. Testimony of Special Education Coordinator, Exhibit R-68.

27. As of the date of the original due process hearing, July 19-20, 2017,

Student had been offered admission to Nonpublic School 1. Testimony of Nonpublic School 1 Administrator. Student was able to attend the summer program at Nonpublic School during the summer break using the funding provided by DCPS on March 29, 2017 for independent tutoring and behavioral support. Due to a behavior incident at Nonpublic School 1 during the summer program, the private school withdrew its acceptance of Student. At the request of Petitioner's Counsel, the due process hearing was continued and the record reopened to permit Petitioner to offer evidence concerning an alternative nonpublic placement for Student. When the hearing was reconvened on August 23, 2017, Petitioner informed the hearing officer that Student had been accepted at Nonpublic School 2 for the 2017-2018 school year. Testimony of Guardian, Hearing Officer Notice.

28. At the start of the 2017-2018 school year, Student was enrolled in the SLS program at City School 3. The first day of school was the day before the August 23, 2017 hearing date. Student's first day of school at City School 3 was a good day. Testimony of Guardian.

29. Nonpublic School 2 is a private day school in the Washington, D.C. suburbs which serves students with learning disabilities, emotional disturbance, speech and language impairments, other health impairments, high-functioning autism spectrum disorder, intellectual disabilities and multiple disabilities. In the summer of 2017, Student made an all-day visit to the school with Guardian and Student has been accepted for admission to the school. There are 24 students in the division where Student would be placed. There would be 7 students in the proposed classroom, taught by a lead teacher certified in special education and a co-teacher. Three of the other students in the class have dedicated aides. Nonpublic School 2 has a behavior plan for

all students. All staff are trained to de-escalate students in crisis. There are behavior counselors, clinical staff and social workers on staff. Student would also be assigned to a psychologist at the school. Nonpublic School holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (OSSE). The annual tuition is around \$63,000. There are no nondisabled children enrolled in the school.

Testimony of Nonpublic School 2 Administrator.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, the Conclusions of Law of this hearing officer are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

I.

- a. Did DCPS fail to timely find Student eligible for special education and related services before June 2016?

b. Has DCPS failed to comprehensively evaluate Student in all areas of suspected disabilities by not conducting an appropriate and sufficiently comprehensive psychological evaluation or a timely functional behavioral assessment?

Petitioner's first claims concern DCPS' alleged failure to ensure that Student was comprehensively evaluated and determined eligible for special education and related services before June 15, 2016. In July 2015, Guardian had Student evaluated by an independent psychologist, who diagnosed Student with Attention Deficit-Hyperactivity Disorder (ADHD). Guardian informed DCPS of Student's ADHD diagnosis and, at the beginning of the 2015-2016 school year, requested City School 2 to evaluate Student for special education eligibility. The DCPS school psychologist who conducted a comprehensive psychological evaluation of Student in September 2015, reported that Student did not have a specific learning disability and that, although Student had ADHD, Student did not meet IDEA eligibility criteria, because Student's ADHD did not have a significant impact on academic achievement. On October 29, 2015, the City School 2 multidisciplinary team (MDT) determined that Student was not eligible for IDEA special education services – but that Student did qualify for services under Section 504 of the Rehabilitation Act of 1973 because Student's ADHD substantially limited life activities of concentrating, learning, reading and thinking. The following spring, after Guardian retained counsel and obtained a second IEE psychological evaluation, the City School 2 eligibility team determined on June 15, 2016 that Student was eligible for special education and related services on the basis of the OHI-ADHD disability. Petitioner contends that DCPS denied Student a FAPE by not finding Student eligible for special education before June 2016. I agree.

The term “child with a disability” is defined in the IDEA regulations as a child

evaluated in accordance with 34 CFR §§ 300.304 through 300.311 as a child . . . having one or more defined disabilities (inclusive of OHI), “and who, by reason thereof, needs special education and related services.” 34 CFR § 300.8(a), (b). In the D.C. Regs., the Other Health Impairment disability is defined as “having limited strength, vitality, or alertness, including a heightened alertness to environment stimuli, resulting in limited alertness with respect to the educational environment, and adversely affecting a child’s educational performance, due to chronic or acute health problems” such as, among others, ADHD. *See* 5E DCMR § 3001.1.

DCPS was on notice by the beginning of the 2015-2016 school year that Student had ADHD and that Student’s ADHD adversely affected Student’s educational performance. This is evidenced by the October 2015 MDT team’s determination that Student qualified for Section 504 services because Student’s ADHD substantially limited life activities of concentrating, learning, reading and thinking. Notwithstanding, the MDT team determined that Student did not meet criteria for the IDEA OHI-ADHD disability because Student was not in need of special education. This was an error.

“Special education” is defined in the IDEA regulations to include specially designed instruction defined as “adapting, as appropriate . . . the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 CFR § 300.39(b)(3). The evidence leaves no doubt that since the 2015-2016 school year, Student needed and was, in fact, provided such “specially designed instruction”

even though it was not identified as special education. In an interview with DCPS School Psychologist in September 2015, Student's 2015-2016 homeroom teacher described Student's temperament as hyperactive and stated that Student required one-to-one attention more than Student's peers; that Student completed less class work than classmates; that Student often failed to pay close attention to details and made careless mistakes; that Student had difficulty sustaining attention in tasks or play activity; that Student did not follow through on instructions and failed to finish schoolwork; that Student often had difficulty organizing tasks and activities and gave up easily on grade level desk work. The teacher stated that Student was able to handle grade level instruction if these attention deficits were addressed and reversed and that she provided Student individualized attention and differential instruction to address Student's attention deficits.

The individualized attention and differential instruction which the classroom teacher provided Student services were examples of "adapting, as appropriate . . . the content, methodology, or delivery of instruction" which meets the definition of specially designed instruction in 34 CFR § 300.39(b)(3). Therefore, I find that Petitioner has met her burden or persuasion that from the beginning of the 2015-2016 school year, DCPS was on notice that Student had an OHI-ADHD disability *and* that Student needed special education and related services. The DCPS MDT team's decision on October 29, 2015 that Student was not eligible for special education was an error and denied Student a FAPE.

Petitioner did not meet her burden of persuasion that DCPS' psychological evaluations of Student were not appropriate or sufficiently comprehensive. DCPS evaluators conducted psychological evaluations of Student in June 2014 and October

2015. There was no evidence that these evaluations were not appropriate or comprehensive.

Petitioner did meet her burden of persuasion that DCPS failed to conduct a timely FBA of Student. Both the Early Stages psychologist and DCPS School Psychologist recommended in their respective June 2014 and October 2015 assessments that an FBA should be completed in order to develop a behavior support plan for Student. Certainly after DCPS School Psychologist made the recommendation in October 2015, it was incumbent upon DCPS to ensure that the FBA was conducted without delay. *See* 34 CFR § 300.304(c)(4) (LEA shall ensure that child is assessed in all areas related to the suspected disability.) It was not until April 2016, six months after receiving DCPS School Psychologist’s recommendation, that DCPS granted the Guardian’s request for funding to obtain an independent FBA. I find that this six month delay was unreasonable. *Cf. Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005) (District must conduct a special education reevaluation, when requested by a parent, in a “reasonable period of time,” or “without undue delay.”)

The failure to conduct a required IDEA evaluation is a procedural violation of the Act. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district’s failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the

decision-making process regarding the provision of a FAPE to the parent's child;
or

(iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). DCPS' failure to conduct a timely FBA of Student would have significantly impeded Guardian's opportunity to participate in the decision making process for Student. I conclude that this was an independent denial of FAPE.

II.

Was DCPS' June 17, 2014 IEP inappropriate for Student because it did not address Student's behavioral issues, provided only 2 hours per month of Speech and Language services and no specialized instruction?

At the due process hearing, Petitioner's Counsel stated on the record that Petitioner was not seeking relief for any alleged violation which occurred more than two years before the May 10, 2017 filing date for the due process complaint. Since this issue concerns the appropriateness of an IEP developed some 35 months before the filing date, I dismiss this claim as withdrawn by the Petitioner.

III.

– Was DCPS' June 15, 2016 IEP inappropriate for Student because it did not address Student's specific learning disabilities and behavioral dysregulation, and provided insufficient specialized instruction services?

– Was the June 15, 2016 IEP inadequate because this IEP did not include information on the staff or resources that would be used to implement the services and support?

Contrary to Petitioner's claim, Student's June 15, 2016 IEP did address Student's learning disabilities and behavioral dysregulation, even though Student's disability classification was identified as OHI-ADHD. The June 15, 2016 IEP identified academics (Mathematics, Reading and Written Expression) as well as Social, Emotional and Behavioral Development as areas of concern for Student. However, the IEP team

provided for Student to receive only 7.5 hours per week of Specialized Instruction. Petitioner's expert, Educational Consultant, opined that these special education services were insufficient and that Student required a self-contained program at the time of the June 15, 2016 meeting. I find that his opinion is supported by the hearing record.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP:

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. *Andrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized education program.*" An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . 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. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] ■■■ educational program must be appropriately ambitious in light of ■■■ 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. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

“The adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.” *District of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (citing *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008)).

Independent Psychologist, evaluated Student over four days in May 2016. In her IEE Psychoeducational and Psychological Evaluation report, Independent Psychologist recommended that due to Student’s extreme difficulties with learning in a regular classroom setting, Student required a small, structured, classroom setting with a reduced number of students taught by, at minimum, a special education teacher and an aide, that is, in a self-contained setting. School Social Worker, a DCPS witness, testified that during the 2015-2016 school year, Student was sent to his office countless times for eloping from the classroom. He explained that if Student was inundated with a lot of stimuli in a large class setting, there were conduct problems. But in a small self-contained classroom that had a lot of structure, Student thrived.

When Student’s MDT team met at City School 2 on June 15, 2016 to develop Student’s initial IEP,³ Independent Psychologist attended by telephone and the team

³ Student had a prior IEP, for speech and language services only, from June 17, 2014. Student was exited from these services in May 2015. Therefore, the June 15, 2016 IEP is considered an “initial IEP.” *Cf.* Department of Education, *Assistance to States for*

reviewed her psychological evaluation report. The IEP meeting notes do not indicate any disagreement with the recommendations of Independent Psychologist.

Notwithstanding, the June 15, 2016 IEP team provided for Student to receive only 7.5 hours per week of Specialized Instruction. School Social Worker testified that in the 2016-2017 school year, he kept Student in his office just to keep Student safe (from eloping from the classroom). This expert also testified that Student's behavior problems at school depended on the setting. I conclude that DCPS did not meet its burden of persuasion that the limited Specialized Instruction Services in the June 15, 2016 IEP, all in the general education setting, were reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances. *See Andrew F., supra*, 137 S.Ct. at 999.⁴

III.

- Is DCPS' March 10, 2017 IEP inappropriate for Student because it did not provide for a full-day self-contained placement and did not address Student's specific learning disabilities and behavioral dysregulation?
- Is the March 10, 2017 IEP inadequate because this IEP did not include information on the placement location to be provided to implement the IEP?
- Is the March 10, 2017 IEP inappropriate for Student because it does not provide for an appropriate full-day, self-contained, placement, which has an appropriate staff and is able to provide Student with appropriate educational services and behavioral support?

the Education of Children with Disabilities, 71 Fed. Reg. 46643, 46682 (August 14, 2006) (After a child has been exited from special education, a subsequent evaluation request is considered a request for an initial evaluation, not a reevaluation.)

⁴ Petitioner's claim that the June 15, 2016 IEP was also inadequate, because the IEP did not include information on the staff or resources that would be used to implement the services and support, was not supported by the record. The June 15, 2016 IEP specified that Student's special education would be provided in the general education setting. The IDEA does not require the IEP team to identify the specific staff or resources that would be used to implement the designated services and support.

On March 10, 2017, Student's IEP team at City School 2 reconvened for the annual review of Student's IEP. Guardian, her attorneys and Educational Consultant attended the meeting. The IEP team revised Student's IEP to update present levels of performance and annual goals and to change Student's special education and related services. Student's Specialized Instruction was increased to full-time outside general education instruction (27.5 hours per week) and Behavioral Support Services were increased to 60 minutes per week. Student's placement was moved from the general education classroom to the Early Learning Support (ELS) classroom at City School 2. Student was the 7th child in the classroom, taught by a special education teacher and 2 assistants. In the 2017-2018 school year, Student's IEP is being implemented in a similar self-contained classroom setting at City School 3.

Petitioner's expert, Educational Consultant, opined that even though Student's educational placement under the March 10, 2017 IEP is largely self-contained, it is still inadequate because the IEP would allow Student to have interaction with nondisabled peers at lunch and recess. However, the March 10, 2017 IEP appears to follow the recommendations of Petitioner's expert, Independent Psychologist. Independent Psychologist recommended that Student be placed in a small, self-contained, structured classroom and that Student should receive special education in all classes. Moreover, Special Education Coordinator testified that the SLS program at City School 3 provides behavior support for lunch and that Student does not need the support at recess. School Social Worker testified that in the last weeks of the 2016-2017 school year at City School 2, Student thrived in the smaller, self-contained, classroom setting, which provided a lot of structure, stability and consistency. He opined that after the March 10, 2017 IEP was implemented, behaviorally, Student had made a great turn-around. With regard to the

appropriateness of DCPS' ELS and SLS programs for Student, I found the opinions of Special Education Coordinator and School Social Worker, who both worked closely with Student in the 2016-2017 school year, more persuasive than that of Educational Consultant.

Petitioner's other concerns about the March 10, 2017 IEP are without support. As with the June 15, 2016 IEP, Petitioner alleges that the March 10, 2017 IEP does not address Student's specific learning disabilities and behavioral dysregulation. This is incorrect. Student's learning disability was addressed in the IEP with annual goals for Mathematics, Reading and Written Expression. Student's behavioral dysregulation was addressed with annual goals for emotional, social and behavioral development and behavioral support related services. Moreover, assuming that Student could meet eligibility criteria for another IDEA impairment, such as Specific Learning Disability or Multiple Disabilities, that does not mean that the IEP with the OHI-ADHD classification was inadequate. The IDEA does not require that a child's disability classification be identified in the IEP, but that the IEP team determine appropriate special education and related services designed to enable the child to advance toward his annual goals. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE.)

Nor does the IDEA require the IEP to specify the school placement location. The IDEA requires that the IEP team determine a student's educational placement, not the specific school that a student will attend. *See N.W. v. District of Columbia*, 2017 WL 2080250 (D.D.C. May 15, 2017) (District did not deny student a FAPE by failing to

propose school placement at July IEP meeting, but instead, offering two placement schools within a week of meeting.) In summary, I conclude that DCPS met its burden of persuasion that the March 10, 2017 IEP was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

V.

Did DCPS fail to implement the speech and language services required by Student's June 17, 2014 IEP?

DCPS' initial June 17, 2014 IEP provided for Student to receive 2 hours per month of Speech-Language Pathology in the general education setting. On May 18, 2015, at the request of staff at City School 2, Guardian executed a DCPS form revoking consent for Student to receive special education and related services. At the time, Guardian signed a completion of services form stating that Student had completed speech and language services. Although Guardian alleged in the due process complaint that she observed that Student did not receive the 2 hours per month of Speech-Language Pathology services specified in the IEP, at the due process hearing, Guardian testified that after Student transferred to City School 2 at the beginning of the 2014-2015 school year, Student received "speech therapy." No other evidence was offered that the IEP's provision for speech and language services was not implemented. I find that Petitioner did not meet her burden of persuasion that DCPS failed to implement the speech and language services required by Student's June 17, 2014 IEP.

Remedy

In this decision, I have concluded that DCPS denied Student a FAPE from October 29, 2015, when the City School 2 MDT team determined that Student was not eligible for special education and related services, until March 10, 2017, when the City

School 2 IEP team developed a full-time IEP for Student. The specific denials of FAPE include failure to find Student eligible on October 29, 2015, failure to conduct an FBA before April 2016 and failure to ensure that Student's June 15, 2016 IEP was reasonably calculated to enable Student to make appropriate educational progress. For relief, the Guardian requests that DCPS be ordered to fund Student's immediate placement at Nonpublic School 2 and to provide Student compensatory education.

With regard to the prospective placement request, "the District must pay for private school placement '[i]f no suitable public school is available[,] . . . [I]f there is an appropriate public school program available . . . the District need not consider private placement, even though a private school might be more appropriate and better able to serve the child.'" *Q.C-C. v. District of Columbia*, 164 F. Supp. 3d 35, 54 (D.D.C. 2016), quoting *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (citations and quotations omitted). *See, also, N.T. v. District of Columbia*, 839 F. Supp. 2d 29, 34 (D.D.C. 2012). An appropriate public school placement must be "based on the child's IEP," 34 C.F.R. § 300.116(b)(2), and be "capable of fulfilling the student's IEP," *Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013); *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119 (RC), 2015 WL 5175885 (D.D.C. Sept. 3, 2015) In this case, DCPS met its burden of persuasion that its March 10, 2017 IEP is appropriate for Student and that City School 3 is capable of fulfilling the IEP. The evidence does not establish that no suitable public school is available for Student. Therefore, I decline to order DCPS to fund Student's private placement at Nonpublic School 2.

The Petitioner also requests that Student be awarded compensatory education for the past denials of FAPE in this case. The FAPE denial period in this case extends from October 29, 2015, when Student should have been determined eligible and provided a

full-time special education placement, until March 10, 2017, when Student's IEP team revised Student's IEP to provide for full-time placement in an ELS/SLS classroom.

If a hearing officer concludes that the school district denied a student a FAPE, he has 'broad discretion to fashion an appropriate remedy,' which may include compensatory education. *See B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). Compensatory education consists of prospective educational services designed to 'compensate for a past deficient program.' *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005) (internal quotation marks omitted). A final award relies on 'individualized assessments,' requires a 'fact-specific' inquiry, and 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.' *Id.* at 524. The Hearing Officer should be guided by the principle that, '[t]o fully compensate a student, the award must seek not only to undo the FAPE denial's affirmative harm, but also to compensate for lost progress that the student would have made.' *B.D.* at 798. That inquiry requires 'figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.' *Id.* at 799.

Butler v. District of Columbia, Case No. 16-cv-01033 (D.D.C. Aug. 14, 2017).

In his March 2017 original compensatory education proposal, Educational Consultant recommended that Student required, for compensatory education, 45 hours of language arts instruction/tutoring, 30 hours of math instruction, and 60 hours of counseling/behavioral services to work on Student's peer relationship issues, self-regulation, anger management and impulsive behavior. *See Exhibit P-38.* At a meeting on March 29, 2017, DCPS authorized funding for Student to receive 60 hours of tutoring and 60 hours of Behavioral Support Services from independent providers. This was done unilaterally by DCPS to compensate Student for the lack of expected academic progress during the period, from October 29, 2015 to June 15, 2016, before Student was initially determined eligible for special education. (The evidence does not establish whether this relief was intended to satisfy Educational Consultant's March 2017 recommendations.) In June 2017, Educational Consultant recommended the following

compensatory education relief, "in addition to what he had recommended in March 2017":

- A fully integrated behavior management system with an embedded hierarchy of rewards and consequences;
- Individualized behavior implementation plans;
- Ongoing data collection for both behavioral and academic areas;
- Access to professionally trained behavioral support team;
- Staff trained in behavioral management and crisis intervention;
- Access to group and individual therapy;
- Integration of related services and other therapies into the classroom and
- Trained staff in evidence-based reading programs.

Educational Consultant also recommended that Student be awarded additional tutoring and counseling, including 30 hours of language arts instructional tutoring, 15 hours of math instruction, and 30 hours of counseling/behavioral services. Educational Consultant opined that with these compensatory education services and an appropriate therapeutic placement, Student would have a reasonable chance to be performing at a level as if the services were appropriately provided as part of the IEPs. *See Exhibit P-57.* Educational Consultant made several formal classroom observations of Student, attended IEP meetings, spoke with Student's instructors and reviewed Student's education records and assessments. I found him to be a credible witness and I will award Student the full amount of compensatory education tutoring and behavioral/counseling services this expert proposed.

With regard to the Educational Consultant's recommendations concerning staffing, services, and behavioral management and support for Student's ongoing educational placement, it appears that these concerns are addressed in Student's March 10, 2017 IEP. The IEP team specified that Student's least restrictive environment is a full-time program to meet Student's requirement for significant academic support and strategies as well as supportive therapeutic support. The IEP provides that Student

requires a structured classroom setting with clear behavioral expectations along with an individualized behavior plan to stay on task and obey classroom rules. In addition to full-time specialized instruction in a self-contained classroom, the IEP provides for 60 minutes per week of Behavioral Support Services. Educational Consultant attended the March 10, 2017 IEP meeting and evidently provided his recommendations to the IEP team. I will, nonetheless, order DCPS to ensure that Educational Consultant's programmatic recommendations are implemented for Student.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. As compensatory education for the denials of FAPE in this case, beginning not later than 21 school days from the date of this decision, DCPS shall provide Student 120 hours of individual academic tutoring by a qualified DCPS or third party tutor and 90 hours of counseling/behavioral services by a qualified social worker or psychologist;
2. DCPS shall ensure that Student's ongoing 2017-2018 school year program includes, *inter alia*, a fully integrated behavior management system with an embedded hierarchy of rewards and consequences and ongoing data collection for both behavioral and academic areas; an individualized behavior implementation plan; access to a professionally trained behavioral support team and staff trained in behavioral management and crisis intervention; access to in-school group and individual therapy; integration of related services and other therapies, as specified in Student's IEP, in the self-contained classroom and an evidence-based reading program taught by a trained reading instructor and
3. All other relief requested by the Petitioner herein is denied.

Date: August 31, 2017

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
OSSE Division of Specialized Education
DCPS Resolution Team