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Office of the State Superintendent of Education
Office of Review and Compliance
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Confidential

Parent on Behalf of Student, Petitioner, v. Public Charter School (“SCHOOL A”) Local Educational Agency (“LEA”), Respondent. Case # 2018-0169 Date Issued: September 18, 2018	CORRECTED HEARING OFFICER’S DETERMINATION ¹ Hearing Date: September 6, 2018 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, September 18, 2018, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on September 6, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides with Student’s parent (“Petitioner”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability (“SLD”). Student attends a public charter school in the District of Columbia (“School A”) that is Student’s local educational agency (“LEA”).

On June 29, 2018, Petitioner filed the current due process complaint asserting, inter alia, that School A failed to timely provide Student with an appropriate individualized education program (“IEP”) with sufficient hours of specialized instruction, a least restrictive environment (“LRE”) and failed to timely evaluate Student in all areas of suspected disability.

Relief Sought:

Petitioner seeks an order directing that the LEA fund compensatory education, alternatively, conduct any assessments, evaluations, observations and or screenings required to appropriately determine compensatory education, and appropriately modify and finalize Student’s functional behavioral assessment (“FBA”) and behavior intervention plan (“BIP”).

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on July 9, 2018. In its response the LEA in pertinent part stated the following:

School A denies that it failed to provide an appropriate IEP or placement during school year (“SY”) 2016-2017 school year. School A did not become its own LEA until SY 2017-2018. Thus, any claims relating to SY 2016-2017 cannot be brought against School A.

Although the complaint does not specify the precise IEP in dispute, the complaint suggests that the IEP in question was developed on March 13, 2017, when School A was not Student’s LEA. There is no IEP that was developed on March 20, 2018, as referenced in the complaint. The IEP that followed the March 13, 2017, IEP was dated April 11, 2018. At that time, a full annual IEP review was conducted. There was no amended IEP created on April 11, 2018, as alleged in the

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

complaint. The April 11, 2018, IEP that was developed is appropriate and was agreed to by the parent and her advocate. That IEP was amended on April 18, 2018, by agreement of the parties. The April 11, 2018, IEP and April 18, 2018, amended IEP are both appropriate. School A also denies that it failed to comprehensively evaluate Student.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting. The parties did not resolve the complaint and did not mutually agree to proceed directly to a hearing in this matter. The 45-day period began on July 30, 2018, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on September 12, 2018. Respondent submitted an unopposed motion to extend the HOD due date by six calendar days to allow for an alternative hearing date. The HOD is now due September 18, 2018.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on July 31, 2018, and issued a pre-hearing order ("PHO") on August 3, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether School A denied Student a free appropriate public education ("FAPE") by failing to provide an appropriate IEP with appropriate hours outside of general education, consultative behavioral support services, and an appropriately restrictive LRE by the end of second advisory of SY 2017-2018.⁴
2. Whether School A denied Student a FAPE by failing to timely and comprehensively evaluate Student in each area of suspected disability, convene a meeting with the parent to review the same, and update the IEP as necessary by the end of second advisory of SY 2017-2018.⁵

³ The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated. Any and all allegations in the complaint regarding SY 2016-2017 when Student had another LEA were eliminated because Petitioner did not include the prior LEA as a respondent in the complaint. Thus, no issue alleged regarding SY 2016-2017 was included in the PHO. At the outset of the hearing Petitioner's counsel withdrew the third issue that was listed in the PHO: "Whether the LEA denied Student a FAPE by failing to furnish Petitioner timely access to Student's full cumulative and special education files, specifically Student's amended or revised IEP(s) and meeting notes from the spring of 2018."

⁴ Petitioner alleges that Student's IEP should have been reviewed and revised such that the services prescribed in Student's April 18, 2018, IEP would have been in effect by the end of the second advisory of SY 2017-2018: to wit: an increase in specialized instruction from 8 hours per week in the March 13, 2017, IEP, to 20 hours per week, and the addition of consultative behavior support services that are prescribed in the April 18, 2018, IEP.

⁵ Petitioner alleges SCHOOL A failed to timely and comprehensively evaluate Student in light of Student's negative behaviors, attention issues, and need for redirection, by conducting and developing an appropriate FBA and BIP, which Petitioner's asserts should have been conducted no later than the end of the second

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 37 and Respondent's Exhibits 1 through 23) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

SUMMARY OF DECISION:

Respondent did not sustain the burden of persuasion by a preponderance of evidence on issue #1 after Petitioner made a prima facie case. The Hearing Officer ordered School A to provide Student with the amount of compensatory education that the Hearing Officer concluded Student was due. Petitioner held the burden of persuasion on issue #2. The Hearing Officer concluded Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #2 and dismissed that claim with prejudice.

FINDINGS OF FACT: ⁸

1. Student resides with Petitioner in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of SLD. (Petitioner's testimony, Respondent's Exhibit 9-1)
2. Student has attended School A since SY 2015-2016. When Student came to School A, Student had an IEP that prescribed among other things a dedicated aide. (Petitioner's testimony, Petitioner's Exhibit 11-9)
3. During SY 2016-2017, the District of Columbia Public Schools ("DCPS") was the LEA for School A. School A developed an IEP for Student dated March 13, 2017, that prescribed the following services and LRE: 4 hours per week of specialized instruction outside general education in math, 2 hours per week of specialized instruction inside general education in reading, 2 hours per week of specialized instruction inside general education in written expression, and 30 minutes per week of behavioral support services

advisory of SY 2017-2018.

⁶ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁷ Petitioner presented three witnesses: (1) Student's parent ("Petitioner"), (2) Student, (3) Petitioner's educational advocate, employed by the law firm representing Petitioner who testified as an expert witness. Respondent presented two witnesses: (1) A special educator and compliance manager of School A, who testified as an expert witness, and (2) An expert witness who testified regarding compensatory education.

⁸ 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 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.

outside general education. During SY 2016-2017 Student failed three subjects: Health Education I, Art, and Math Workshop. (Respondent's Exhibits 1-1, 1-13, 1-14, 17-1)

4. SY 2017-2018 was the first year that School A served as Student's LEA. Student's March 13, 2017, IEP was due for annual review by March 12, 2018. (Respondent's Exhibits 1-1, 1-7, 9-1)
5. During the first semester of SY 2017-2018 Student started losing focus and the ability to complete work because Student felt Student did not belong at School A. While in the general education classroom Student felt Student was not receiving the help Student needed. As a result, Student stopped caring about academic performance and began, on occasion, to act inappropriately within the classroom setting. (Student's testimony)
6. During the first advisory of SY 2017-2018, which ended on October 27, 2017, Student had failing grades in two subjects (Chemistry and Geometry). During the second advisory, which ended on January 26, 2018, Student had failing grades in three subjects (Chemistry, Spanish II, and Recognizing Perspectives). For the first semester, which also ended on January 26, 2018, Student failed three subjects (Chemistry,⁹ Geometry and Recognizing Perspectives). (Petitioner's testimony, Witness 1's testimony, Petitioner's Exhibit 16-2, Respondent's Exhibit 18-1)
7. Petitioner received a letter from School A to attend a meeting to address Student's failing grades. Petitioner was concerned that it took School A so long to inform her that Student was struggling. After attending the meeting and prior to the second advisory of SY 2017-2018, Petitioner made requests to several of the School A staff, including Student's special education case manager, that an IEP meeting be convened to discuss Petitioner's concerns about Student's academic and behavioral performance. School A did not grant Petitioner's requests for a meeting during the first semester of SY 2017-2018. School A did not schedule an IEP meeting until March 2018 when Student's IEP was scheduled for annual review. (Petitioner's testimony, Witness 1's testimony)
8. During the first semester of 2017-2018, Student continued to score below grade level in math and reading and had a slight decline in reading comprehension on school wide standardized testing. (Witness 2's testimony, Petitioner's Exhibit 24-1, 24-4)
9. During the first IEP reporting period, in the first advisory, Student made progress on IEP academic goals but made no progress on the IEP social emotional behavioral development goals related to increasing academic confidence, participating in class activities, and completing assignments.¹⁰ The School A social worker noted Student was

⁹ Student was, however, able to bring Student's numerical percentage in Chemistry up each advisory and in the third advisory earned a passing grade. (Respondent's Exhibit 16-1)

¹⁰ Student was able to make progress on this goal in reporting periods two and three. (Respondent's Exhibit 15-18, 15-28)

often unmotivated, lacked the ability to get on task with assigned class work, and did not always participate in class. (Respondent's Exhibit 15-18)

10. In addition to Student's failing grades, Student was engaged in marijuana use. On October 18, 2017, Student received an out of school suspension for 1.5 days for possessing a lighter and wrapping papers. The School A social worker addressed Student's marijuana use with Student in Student's behavior support sessions and noted that Student was dealing with issues of grief and loss and showed signs of depression. Student's was referred for therapy outside of school. (Petitioner's testimony, Respondent's Exhibit 23-1, Petitioner's Exhibit 22-2, 22-5, 22-7)
11. School A's compliance manager was unaware of Petitioner's requests for an IEP meeting to address Petitioner's concerns about Student's academic performance and behavior. Once the compliance manager began to manage Student's case he initiated a psychological evaluation in February 2018, ahead of Student's triennial evaluation date of June 2018. The evaluation was in response to School A's concerns about Student's decline in academic performance and behavior as well as to determine if Student's programming was appropriate. The compliance manager scheduled an IEP meeting for March 20, 2018. (Witness 2's testimony)
12. School A conducted a psychological evaluation of Student starting in February 2018. The evaluation report is dated April 3, 2018. The psychological evaluation assessed Student's cognitive, academic, and social/emotional functioning. Student's cognitive functioning fell in the Low range. Student's academic achievement scores were five grade levels below Student's current grade. The evaluation noted Student's attention and behavior concerns and recommended that an FBA be conducted and a BIP be developed. (Respondent's Exhibit 3-1, 3-8, 3-10, 3-11, 3-19)
13. School A developed a draft IEP in advance of the scheduled March 20, 2018, IEP annual review meeting. The draft IEP proposed the following services: 10 hours per week of specialized instruction inside general education and 120 minutes of behavioral support services outside general education. Petitioner obtained legal representation subsequent to the MDT meeting being scheduled. Petitioner's attorney requested that the March 20, 2018, IEP meeting be postponed to a later date and that the School A provide Petitioner's attorney with Student's educational records prior to the IEP meeting being held. (Witness 2's testimony, Respondent's Exhibit 2-2, 2-A-14)
14. Petitioner's educational advocate, who is employed by the law firm that represents Petitioner, did not agree with the hours proposed in the draft IEP. The advocate believed that because Student's academic functioning was more than two grade levels below Student's current grade, Student required specialized instruction outside general education. (Witness 1's testimony, Petitioner's Exhibit 9-13)
15. School A rescheduled Student's IEP review meeting to April 11, 2018. Petitioner participated in the meeting along with her educational advocate. The advocate asked for more hours of specialized instruction, that the hours be outside the general education

setting, adaptive goals, and additional behavioral support services. The advocate also questioned why the dedicated aide had been removed from Student's IEP. (Witness 1's testimony, Petitioner's Exhibit 9-13, Respondent's Exhibit 5-2)

16. School A amended Student's IEP on April 18, 2018, with increased hours of specialized instruction, to change the present levels of performance, annual goals, and to add transportation. The amended IEP prescribed 20 hours per week of specialized instruction outside general education, 120 minutes per month of behavioral support outside general education and 30 minutes per month of behavioral support consultation services. School A did not grant the advocate's other requests for changes to the IEP. At the April meeting, the team agreed to conduct an FBA and referred Student to an out of school mentoring program. (Witness 2's testimony, Respondent's Exhibit 9-2, 9-12, 9-14)
17. Starting the fourth advisory of SY 2017-2018, Student had the more restrictive LRE with academics provided in a self-contained special education setting. Student was moved into a small class setting during the fourth advisory for most courses, except for Global Citizenship and Spanish. Student remained in a general education setting for those two courses. Student was then in a setting of approximately 15 to 20 students with 2 to 3 teachers. Student's Physical Education class had 10 to 12 students. Student then found school more satisfying, became more engaged and began learning more. (Student's testimony)
18. Since the April 18, 2018, IEP has been put in place Student's academic performance and behavior has improved. Petitioner did not notice any improvement in Student's grades and behavior until the last advisory of SY 2017-2018. (Witness 1's testimony, Petitioner's testimony)
19. Had Student been in the appropriate program earlier, Student would likely not have shut down and would have made some progress in academics, given Student's immediate improvement once Student was moved to the self-contained setting and was referred to the outside mentoring program. (Witness 1's testimony)
20. Student believes that had Student gotten services in a smaller class setting earlier, Student would have been better able to reach Student's goal of making honor roll. Student now works with a mentor outside of school who has helped Student be in better state of mind regarding school and future pursuits. In the future Student hopes to attend trade school, become a mechanical engineer, and have Student's own business. (Student's testimony)
21. Student believes that tutoring and mentoring will help Student be more appreciative of what people do to assist Student and allow Student to progress more rapidly. Student would like to take advantage of the services that are available and move forward. Student knows the school workload will get heavier as Student is in a higher grade and the tutoring would assist Student in being successful. (Student's testimony)
22. Petitioner's educational advocate developed a proposed compensatory education plan that sought to compensate student for the alleged denials of FAPE in the due process

complaint related to both SY 2016-2017 and 2017-2018. The advocate requested the following: 300 hours of independent tutoring services, 100 hours of independent counseling services, and 100 hours of mentoring. The advocate acknowledged that the requested compensatory education in her proposal would be reduced if the alleged denial of FAPE was from the end of second advisory of SY 2017-2018 to April 18, 2018, when Student's IEP was amended. (Witness 1's testimony, Petitioner's Exhibit 37)

23. Given Petitioner's claim that approximately 2.5 months of additional specialized instruction outside general education should have been provided earlier, Student would have missed approximately 160 hours of instruction. 50 to 75 hours of tutoring is appropriate compensation given that the tutoring will be provided in a one to one setting rather than in a group setting. 25 hours of counseling and/or mentoring, whichever is most beneficial to Student or preferred by the family, would also be appropriate to compensate Student and remediate for any missed behavioral supports for that 2.5 month period. (Witness 3's testimony)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR § 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Respondent held the burden of persuasion on issue #1 after Petitioner established a prima facie case on issue #1. ¹¹ Petitioner

¹¹ 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

held both the burden of production and persuasion on issue #2. The normal standard for the burden of persuasion is a preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether School A denied Student a FAPE by failing to provide an appropriate IEP with appropriate hours outside of general education, consultative behavioral support services, and an appropriately restrictive LRE from the end of second advisory of SY 2017-2018.

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

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

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

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

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

In *Andrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S.

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.

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

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

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

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

Petitioner alleges that Student’s IEP should have been reviewed and revised earlier than Student’s annual IEP review such that the services prescribed in Student’s April 18, 2018, IEP would have been in effect by the end of the second term of SY 2017-2018: to wit: an increase in specialized instruction from 8 hours per week in the March 2017 IEP to 20 hours per week, and the addition of consultative behavior support services that are prescribed in the April 18, 2018,

IEP.

Although Respondent's witness testified that School A acted at the right time, Petitioner credibly testified that she repeatedly requested an IEP meeting to address her concerns about Student in the first semester, to no avail. Petitioner's expert witness credibly testified that the amount of specialized instruction in the Student's March 2017 IEP that was implemented by School A during the first semester of 2017-2018 was insufficient in light of Student's academic functioning. The evidence demonstrates that Student was not engaged and not attempting to perform in the classroom as observed by the School A social worker. Student was disconnected from the behavior support services, was not making any progress in academics and Student's grades fell. Student's low grades provided sufficient evidence that something was going wrong during the first semester of 2017-2018.

As stated, the evidence demonstrates that Petitioner repeatedly asked that School A convene an IEP meeting during the first semester of SY 2017-2018 when student was having academic and behavioral difficulties. However, School A took no action until well after the first semester had ended. School A's compliance officer was not aware of Petitioner's request for an IEP meeting despite Petitioner's requests being made to Student's special education case manager and other School A staff. His testimony was that once he took over Student's case management he ordered a psychological evaluation earlier than required to assess Student's display of academic and behavioral difficulties. Although the evaluation was conducted early, the Hearing Officer notes that Student's triennial evaluation was due only a few months following Student's scheduled annual IEP review of March 12, 2018.

School A scheduled an IEP meeting in time for Student's annual IEP review but not prior to, and not based upon, Petitioner's legitimate concerns and requests for an earlier IEP meeting. Even after School A initiated an evaluation and developed a draft IEP, there was no change to Student's special education services prior to Petitioner's participation in the IEP meeting and requests by Petitioner's advocate on Petitioner's behalf for a significant increase in Student's services.

After Student's services were increased and Student's LRE was changed to a more restrictive setting, Student's academic performance and behavior significantly improved. Student credibly testified that after the change Student began to engage, enjoy school and learn things rather than be disengaged as Student had been prior to the change. This evidence supports a finding that School A was remiss in not convening a meeting to review and revise Student's IEP within the first semester of SY 2017-2018 when Petitioner requested an IEP meeting and as a result Student was denied a FAPE.

ISSUE 2: Whether School A denied Student a FAPE by failing to timely and comprehensively evaluate Student in each area of suspected disability, convene a meeting with the parent to review the same, and update the IEP as necessary from the end of second advisory of SY 2017-2018.

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

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

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

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

34 C.F.R. § 300.303 provides:

- (a) General. A public agency must ensure that a re-evaluation of each child with a disability is conducted in accordance with Sec. 300.304 through 300.311--
 - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
 - (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
 - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
 - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

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

Pursuant to 34 C.F.R. § 300.324 Development, review, and revision of IEP. (a) Development of IEP—(1) General. In developing each child's IEP, the IEP Team must consider— (i) The strengths of the child; (ii) The concerns of the parents for enhancing the education of their child; (iii) The results of the initial or most recent evaluation of the child; and (iv) The academic, developmental, and functional needs of the child. (2) Consideration of special factors. The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to

address that behavior.

IDEA does not specifically mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions are not applicable to this case. Although Student displayed some behavioral concerns that were related to Student's academic frustrations, there was insufficient evidence that Student's behavior rose to the level of concern that would have warranted specific action by School A to address Student's behavior with a FBA and/or BIP. Student's IEP already prescribed behavior support services that were designed to and were addressing the academic and behavioral concerns Student was displaying. The evidence demonstrates that the School A social worker consistently provided Student those services.¹²

The Hearing Officer concludes that there was insufficient evidence to support a finding that School A should have conducted an FBA and/or developed a BIP for Student during the first semester of SY 2017-2018. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue. This claim is dismissed with prejudice.

Remedy:

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

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner's educational advocate requested 300 hours of independent tutoring services, 100 hours of independent counseling services, and 100 hours of independent mentoring. The

¹² Respondent provided two cases that support its position that a FBA and/or BIP were not required in order to sufficiently program for a special education student: *M.W. ex rel. S.W. v. New York City Dept. of Educ.*, 725 F.3d 131, 140 (2d Cir. 2013) (Failure to conduct an FBA does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior.) *Hart v. District of Columbia*, 72 IDELR 241 (D.D.C. 8/27/18) (Concluding that the assessment requested by the parent of a student with emotional disturbance and ADHD would not have resulted in a change in the student's IEP, the U.S. District Court, District of Columbia held that a district did not violate the IDEA when it declined to use the parent's preferred assessment.)

evidence demonstrates that this request was based upon an assumption that there were violations that would be adjudicated with respect to SY 2016-2017. This was not the case and the request by the advocate was far beyond the violation this Hearing Officer determined was proved by the evidence.

Respondent's expert witness provided a far more reasonable opinion as to the appropriate award of compensatory education that would remedy the harm to Student caused by missed services. Based upon the evidence of Student's deficits, Student's educational performance and potential, the services missed, the testimony of Student and the testimony of Respondent's expert witness, the Hearing Officer has determined that Student will benefit from tutoring and mentoring/counseling to compensate for and ameliorate Student's lack of appropriate services from January 26, 2018, to April 18, 2018, when Student's IEP was amended and Student began receiving services pursuant to the amended IEP. Accordingly, the Hearing Officer in the order below grants Petitioner the amount of compensatory education services that the Hearing Officer considers appropriate.

ORDER: ¹³

1. School A shall, within twenty (20) business days of the issuance of this order, authorize Petitioner to obtain, 75 hours of independent tutoring, and 25 hours independent mentoring or counseling (which ever Petitioner chooses) at the OSSE approved rate.
2. All other relief requested by Petitioner is denied.

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: September 18, 2018

Copies to: Counsel for Petitioner
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
contact.resolution@dc.gov

¹³ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner, Petitioner's Counsel or Educational Advocate shall extend the timelines on a day for day basis.