

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
810 First Street, N.E., Suite 2001
Washington, DC 20002

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Case No. 2015-0277</p> <p>Date Issued: November 16, 2015 - CORRECTED</p> <p>Dates of Hearing: November 4 and 5, 2015</p> <p>Hearing Room 2006</p> <p>Representatives: Carolyn Houck, Esq. and Stevie Nabors, Esq. for Petitioner</p> <p>Tanya Joan Chor, Esq. for Respondent</p> <p>Impartial Hearing Officer: Charles M. Carron</p>
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The Student is female, Current Age, and attends Current Grade at Non-Public School, a general education school outside the District of Columbia. The Student previously had been determined to be eligible for special education and related services

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

as a child with a disability, Other Health Impairment (“OHI”) as a result of Attention Deficit Hyperactivity Disorder (“ADHD”), under the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.* However, prior to the commencement of School Year (“SY”) 2015-2016, Respondent determined that the Student no longer was eligible.

Petitioner, the Student’s parent, claims that Respondent has denied the Student a Free Appropriate Public Education (“FAPE”) by failing to evaluate the Student fully before determining that she was no longer eligible, by failing to issue a Prior Written Notice (“PWN”) before the determination of ineligibility, by failing to develop an Individualized Education Program (“IEP”) for her for SY 2015-2016, by failing to provide an appropriate placement for her prior to the commencement of SY 2015-2016, and by failing to include Petitioner in the placement decision for SY 2015-2016, all as described in more detail in Section IV *infra*.

Respondent asserts that the Student was properly evaluated and determined not to be eligible and therefore not entitled to an IEP or special education placement, and that Respondent provided all required notices to Petitioner.

II. SUBJECT MATTER JURISDICTION

This is a Due Process Complaint (“DPC”) proceeding pursuant to the IDEA. The Due Process Hearing (“DPH”) was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA’s implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the Hearing Officer Determination (“HOD”) pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

III. PROCEDURAL HISTORY

On January 6, 2015, Petitioner filed a DPC against Respondent, District of Columbia Public Schools (“DCPS”). This DPC was assigned case number 2015-0006 and was assigned to Impartial Hearing Officer (“IHO”) Michael Lazan.

The DPC in case number 2015-0006 asserted that on June 1, 2014, Respondent had failed to develop an appropriate IEP for the Student and to provide her with an appropriate Location of Services (“LOS”).

On March 29, 2015, IHO Lazan issued an HOD, which he corrected on April 8, 2015 (the “Lazan HOD”).

On June 11, 2015, Petitioner filed another DPC against Respondent. This DPC was assigned case number 2015-0203 and was assigned to IHO Coles Ruff.

On July 31, 2015, the parties entered into a settlement agreement resolving case number 2015-0203.

On August 20, 2015, Petitioner filed the instant DPC against Respondent, together with a Notice alerting the Office of Dispute Resolution (“ODR”) of case number 2015-0006 and requesting that the instant case be assigned to IHO Lazan.

However, on August 24, 2015 ODR appointed the undersigned as the IHO for the instant case.

On August 25, 2015 Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a FAPE.

A Resolution Session Meeting (“RSM”) was held on September 4, 2015 but it failed to resolve the DPC.

The undersigned held a Prehearing Conference (“PHC”) by telephone on September 15, 2015, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by September 28, 2015 and that the DPH would be held on October 5 and 6, 2015,

subject to rescheduling pursuant to a motion for continuance that Petitioner's counsel anticipated filing. The undersigned issued a Prehearing Conference Summary and Order (the "PHO") on September 15, 2015.

On September 17, 2015, Petitioner filed objections to the PHO.

The statutory 30-day resolution period ended on September 19, 2015.

On Saturday, September 19, 2015, Petitioner filed a motion for a continuance,² seeking a postponement of the DPH to November 5 and 6, 2015, and an extension of the deadline for this HOD to December 3, 2015.

The Chief Hearing Officer granted the motion on September 21, 2015.

On September 22, 2015, the undersigned issued an Amended Prehearing Conference Summary and Order (the "Amended PHO").

After 5:00 p.m. on October 23, 2015, Petitioner filed Petitioner's Motion for Leave to Amend Complaint, which was deemed filed on the next business day, October 26, 2015.

On October 28, 2015 Petitioner filed her five-day disclosures, comprising a cover letter with lists of witnesses and documents (which was numbered P-1), and 23 proposed exhibits numbered P-2 through P-23 and PSupp-1.

On October 28, 2015 Respondent filed its five-day disclosures, comprising a cover letter with lists of witnesses and documents, and 28 proposed exhibits numbered R-1 through R-22 and R-24 through R-29.

On October 29, 2015, Petitioner withdrew her Motion for Leave to Amend Complaint.

On October 30, 2015, Petitioner filed a document styled "Petitioner's Objections to Respondent's Disclosures and Motion to Exclude in Limine."

² Because the ODR is closed on weekends, the motion was deemed filed on Monday, September 21, 2015.

On October 30, 2015, Respondent filed a document styled “Respondent’s Objections and Exceptions to the Petitioner’s Disclosures.”

After 5:00 p.m. on November 3, 2015, Respondent filed a document styled “Respondent Opposition Motion for Petitioner’s Motion in Limine.”

After 5:00 p.m. on November 3, 2015, the undersigned issued an Order Denying Petitioner’s Motion to Exclude in Limine.

The DPH was held on November 4, 2015 from 9:30 a.m. to 1:22 p.m. and on November 5, 2015 from 9:38 a.m. to 5:37 p.m. in Room 2006 at the ODR, 810 First Street, NE, Washington, DC 20002. Petitioner elected for the hearing to be closed.

Petitioner participated in the DPH in person.

At the DPH, the following documentary exhibits were admitted into evidence without objection: Petitioner’s Exhibits: P-6 through P-10, P-12 through P-17, P-18-1³ through P-18-13, P-18-26,⁴ P-19, P-20, P-22, P-23 and PSupp-1; and Respondent’s Exhibits: R-6, R-7, R-10, R-12 through R-15, R-19, R-20, R-22, and R-25 through R-28.

The following exhibits were admitted into evidence over Respondent’s objection for the reasons stated on the record at the DPH: P-1 through P-5 and P-21.

P-11 was excluded based upon Respondent’s objection for the reasons stated on the record at the DPH.

The following exhibits were admitted into evidence over Petitioner’s objection for the reasons stated on the record at the DPH: R-8, R-29, and R-30.

The following exhibits were excluded based upon Petitioner’s objections for the reasons stated on the record at the DPH: R-1 through R-5, R-9, R-11, R-16, R-17, R-18, R-21 and R-24.

³ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

⁴ At the DPH, Petitioner withdrew the remaining pages of P-18, which Petitioner referred to as P-18e, f and g, referring to numbering of the documents on the first page of P-1.

The following witnesses testified on behalf of Petitioner at the DPH: Petitioner and Petitioner's Psychologist, who was admitted by stipulation as an expert in clinical psychology.

The following witnesses testified on behalf of Respondent at the DPH: Teacher; Resolution Specialist; and School Psychologist, who was admitted, over Petitioner's objection, as an expert in school psychology, specifically with regard to eligibility.

The parties gave oral closing arguments and did not file briefs.

IV. ISSUES

As discussed at the PHC and confirmed in the PHO, the following issues were presented for determination at the DPH:

(a) On or about August 18, 2015, did Respondent deny the Student a FAPE by exiting the Student from special education without evaluating her, or without evaluating her in all areas of suspected disability?

(b) Did Respondent violate IDEA, and if so, did the violation deny the Student a FAPE, by failing to issue a Prior Written Notice ("PWN") before determining that she was no longer eligible for special education?

(c) Did Respondent deny the Student a FAPE by failing to have an IEP in place for the Student prior to the beginning of School Year ("SY") 2015-2016?

(d) Did Respondent deny the Student a FAPE by failing to provide an appropriate placement for her prior to the beginning of SY 2015-2016⁵ and/or by failing to involve the Student's parents in determining that placement?

⁵ The PHO incorrectly stated the time period of this issue as SY 2014-2015, which the undersigned corrected via email to counsel for the parties on October 29, 2015, and on the record at the DPH.

Also as discussed at the PHC and confirmed in the PHO, the DPC raised as an additional issue whether Respondent had retaliated against Petitioner for exercising her legal rights and for contacting the City Council. However, IDEA contains no provisions on retaliation, so the undersigned struck that issue as beyond his authority.

V. RELIEF REQUESTED

Petitioner requests the following relief:⁶

(a) an Order that Respondent rescind its finding that the Student is not eligible for special education⁷;

(b) an Order that Respondent convene a meeting of the Student's IEP Team, including individuals who have taught, observed and interacted with the Student, within 90 days of issuance of the HOD to develop an IEP for the Student modeled upon her current placement;

(c) an Order that Respondent provide Petitioner 30 days' notice of the IEP Team meeting with three dates;

⁶ In the DPC, Petitioner also requested the following relief which the undersigned determined to be inappropriate: (a) a finding that Respondent revoked the Student's eligibility in bad faith and in retaliation for her exercise of IDEA rights, which is not cognizable because IDEA has no prohibition against bad faith or retaliation; (b) an Order that Respondent's failure to file a timely response constitute waiver of the right to challenge the arguments and facts in the DPC, which is moot because Respondent filed a timely Response; (c) an Order that Respondent's failure to file a timely notice of insufficiency bar a subsequent filing of a notice of insufficiency, which is not ripe because Respondent has not filed a notice of insufficiency; (d) an Order that Respondent's failure to schedule a timely RSM act as a waiver of the RSM and accelerate the deadline for this HOD, which is moot because Respondent scheduled the RSM timely; and (e) a finding that Petitioner is the prevailing party, which only a court can find.

⁷ At the PHC, as reflected in the PHO, Petitioner had requested a finding that the Student is eligible. At the DPH, Petitioner clarified that Petitioner sought rescission of the finding of non-eligibility.

(d) an Order that Respondent provide Petitioner copies of all proposed documents, including any eligibility forms or IEPs, 15 days in advance of the IEP Team meeting;

(e) an Order that Respondent fund the following Independent Educational Evaluations (“IEEs”): (i) ADHD; (ii) anxiety disorder; (iii) language processing; and (iv) an assessment to collect classroom observations, teacher interviews and/or behavior ratings, staff interviews and/or behavior ratings, interventions provided in the current school setting, the Student’s responses to interventions, and school data and teacher input regarding the impact of the Student’s ADHD on her academic performance;

(f) an Order that Respondent communicate with Petitioner through her counsel; and

(g) an Order that Respondent fund all costs and expenses of the Student’s educational program at Non-Public School for SY 2015-2016.

VI. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the IHO by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VII. CREDIBILITY

Petitioner was not a reliable witness. Often her testimony was unresponsive to the question posed, even on direct examination. For example, when asked whether she discussed with the Student's teachers how the Student was being taught, Petitioner described the Student's schedule and her disagreement with the Student being assigned to study hall rather than an academic class. When asked whether the Student talked to Petitioner more about school when the Student attended Special Education School and Public School than she does now that she attends Non-Public School, Petitioner responded that she and the Student were very excited about Public School, tried it for a few months, then decided with the IEP Team that it was a bad move—never responding to the question which was about the frequency of their conversations about school. Much of Petitioner's testimony was contradictory. For example, when asked if the Student was seeing a psychiatrist at Non-Public School, Petitioner testified that the Student was now "seeing someone else here," a doctor with whom she communicated via Skype, and that it was "working out well." She subsequently testified that the Student had only one such conversation with that doctor, in the nature of a consultation.

Petitioner's Psychologist, in her written review of records (P-21) drew very selectively from those records, thereby overstating the impact of the Student's disability on her education. *See*, Finding of Fact 113, *infra*. She testified repeatedly about the Student's need for classroom accommodations, but on cross-examination, apparently realizing that the need for accommodations would not qualify the Student for special education, she equivocated repeatedly about whether accommodations constituted

specialized instruction. Accordingly, the undersigned has assigned little weight to her testimony when it conflicted with other evidence.

The undersigned found all of Respondent’s witnesses to be credible, to the extent of their professional expertise and/or firsthand knowledge.

VIII. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a female of Current Age. P-8-1.
2. The Student resides in the District of Columbia. *Id.*

Early Evaluations

3. On September 24, 2007, a neuropsychological evaluation of the Student was conducted at Kennedy Krieger Institute. P-3-1. The Student’s Full Scale IQ (“FSIQ”) was found to be in the upper end of the High Average Range, but her academic achievement was below expectations. P-3-3. The evaluator noted that the Student had been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and determined that another diagnosis—Developmental Reading (and Writing) Disorder—was warranted. P-3-5.

4. On October 26, 2007, the Kennedy Krieger Institute discharged the Student with the following diagnosis: “Minor neuromotor dysfunction with hypotonia, ADHD (Attention Deficit Hyperactivity Disorder), combined hyperactive/impulsive and inattentive type, learning disability in reading, rule out LD in math.” P-3-7.

5. On February 26, 2008, a neuropsychological and clinical evaluation of the Student was conducted by a licensed clinical psychologist selected by Petitioner and her counsel. P-4. The evaluator confirmed the diagnosis of ADHD and found that the Student did not have a fundamental weakness in language-based functioning or significant emotional factors. P-4-11.

6. On April 7, 2008,⁸ a DCPS school psychologist reviewed the September 27 and October 26, 2007 reports. P-2-2. Apparently the February 26, 2008 evaluation was not provided to the DCPS school psychologist. P-2, *passim*. The DCPS school psychologist was not permitted to evaluate the Student. *Id.* The DCPS school psychologist concluded that there was insufficient information for the Student's Multidisciplinary Team ("MDT") to make appropriate recommendations or diagnoses. P-2-6.

7. On July 18, 2008, a speech-language assessment of the Student was conducted by a certified/licensed audiologist and speech-language pathologist. P-5. The evaluator found no deficits in any area of receptive language/language comprehension, speech production (articulation), voice, or fluency of speech. P-5-5. The evaluator did find that the Student had significant deficits in expressive language processing, specifically word finding, organizing verbal responses, and staying on target with verbal responses. *Id.*

SY 2012-2013

8. During SY 2012-2013, the Student attended Special Education School and did very well. Lazan HOD at 7, para. 18.

⁸ The document is dated April 7, 2007 but from the context and the fax machine header, it is apparent that it was prepared a year later.

9. The parties agreed that the Student should move on from Special Education School. *Id.*

SY 2013-2014

10. The Student began SY 2013-2014 at Public School, with 22-23 students in the classroom. *Id.* at 7, paras. 19-20.

11. The Student did not do well at Public School due to stress, and after three to four months, she returned to Special Education School with Respondent's concurrence. *Id.* at 7, para. 21.

SY 2014-2015

12. The Student's IEP Team met on May 1, 2014 for the annual review of her IEP. P-8-1.

13. At that time the Student had been determined to be eligible for special education and related services as a child with OHI. *Id.*

14. On May 7, 2014, the Student was awarded a grant of \$30,000.00 toward her tuition at Non-Public School for SY 2014-2015. P-6-1.

15. On May 11, 2014, Petitioner accepted the grant and made a commitment to pay all tuition, fees, and expenses not covered by the grant. *Id.*

16. On May 14, 2014, Petitioner enrolled the Student at Non-Public School for SY 2014-2015. Lazan HOD at 8, para. 25.

17. On June 3, 2014, Petitioner emailed the Student's DCPS Progress Monitor, stating, *inter alia*, that she had enrolled the Student in a boarding school because the

Student's behavior was "a factor." P-7-1. Petitioner stated that she wished to "discuss this further." P-6-1.

18. On June 4, 2014, the Student's DCPS Progress Monitor replied that Respondent did not subsidize tuition for students attending "non specialized schools" and could only "send funded students to schools that have their COA (certificate of approval) from OSSE..." *Id.* The DCPS Progress Monitor offered the Student continued placement at Special Education School even though she did not think the Student required that restrictive a setting. *Id.*

19. On June 5, 2014, Respondent convened an IEP meeting, at which Respondent informed Petitioner that Public School was the only school Respondent would offer the Student. Lazan HOD at 8, para 29.

20. The IEP developed on June 5, 2014 provided 30 hours per week of specialized instruction in the outside of general education setting, 120 minutes per month of speech and language pathology, and 360 minutes per month of behavioral support services. *Id.* at 8, para. 30.

21. The IEP developed on June 5, 2014 was inappropriately restrictive (*Id.* at 14) because, although the Student required a small class size with individualized interventions to address her executive functioning, attentional, emotional and organizational issues, her strong academics required her to be integrated into a full-time general education environment (*Id.* at 17).

22. The inappropriate IEP denied the Student a FAPE for SY 2014-2015. *Id.* at 16.

23. The Student attended Non-Public School during SY 2014-2015 (*Id.* at 9, para. 39) and did reasonably well, with passing grades in all of her classes and no major social or emotional problems preventing her from accessing her education (*Id.* at 17, P-13-8).

24. Petitioner's unilateral placement of the Student at Non-Public School for SY 2014-2015 was proper under IDEA. Lazan HOD at 18.

25. IHO Lazan ordered Respondent to fund half of Petitioner's obligation to pay for the Student's tuition at Non-Public School for SY 2014-2015, but he did not order placement of the Student at Non-Public School. *Id.* at 22.

October 16, 2014 Neuropsychological Evaluation

26. A neuropsychological evaluation of the Student was conducted on October 16, 2014⁹ by a pediatric neuropsychologist and a psychological associate/testing technician at Children's National, Division of Pediatric Neuropsychology. P-10.

27. Petitioner requested and arranged for this evaluation. R-8-2.

28. The Student's intellectual functioning, processing speed and problem solving speed were found to be in the Average to High Average range. P-10-3.

29. The Student's attention was variable. P-10-4.

30. The Student demonstrated significant weakness in executive functioning, specifically planning, organization, flexibility, inhibitory control, working memory, and self-monitoring. *Id.*

⁹ The report of the evaluation is not dated. The report indicates that feedback was provided on November 6, 2014. The date "11/16/14" is handwritten in the upper right corner of P-10-1, but the document itself clearly states that the evaluation was conducted October 16, 2014. Some subsequent references to this evaluation incorrectly refer to it as the *November* 16, 2014 neuropsychological evaluation.

31. The Student's language was an area of relative strength, although her ability to use language effectively to communicate her ideas was limited by her executive function weaknesses. *Id.*

32. The Student's academic skills fell in the average range and higher. P-10-5.

33. The Student demonstrated emotional reactivity and defensiveness when asked about past suicidal ideation. *Id.*

34. The evaluators confirmed the Student's prior diagnosis of ADHD, Combined Presentation, with associated executive function deficit; mild weaknesses in reading and writing (although she no longer met the criteria for Specific Learning Disability); significant difficulties in emotional regulation; notable reported anxiety; and observed performance anxiety. P-10-6.

35. Due to the Student's defensiveness during the evaluation, the evaluators did not specify the exact nature or severity of her anxiety, instead diagnosing her with Unspecified Anxiety Disorder "with further specification to come from a treating mental health professional ... who may more appropriately classify [her] symptom patterns, duration and severity." *Id.*

36. The evaluators recommended small to medium class size (*i.e.*, 12-18 students) with typically developing peers. P-10-7. The evaluators recommended against placing the Student in "self-contained or co-taught learning disabled and/or emotionally disturbed classrooms." *Id.*

37. The evaluators recommended a number of classroom and testing accommodations. P-10-7 and -8.

38. The evaluators did not recommend specialized instruction. P-10, *passim.*

August 6, 2015 DCPS Review of October 16, 2014 Neuropsychological Evaluation

39. On August 6, 2015, School Psychologist reviewed the Student's October 16, 2014 neuropsychological evaluation. P-17-1.

40. Because the review was conducted during summer vacation when school was out of session, School Psychologist was instructed by her supervisor to fill in a checklist rather than performing the comprehensive review that would have been conducted during the school year when School Psychologist would have made classroom observations; interviewed the Student, teachers and staff; obtained behavior ratings from teachers and staff; and obtained information on interventions the Student was receiving and her response to those interventions. Testimony of School Psychologist.

41. School Psychologist accepted the October 16, 2014 neuropsychological evaluation and waived a DCPS assessment, despite the following considerations:

- 1) This reviewer has not had direct contact with [the Student].
- 2) There is no summary of [the Student's] functioning in the current school environment included in the report.
- 3) There is no summary of current interventions provided in the school setting to assist [the Student] with reported difficulties, and (sic or) data to demonstrate [the Student's] response to interventions provided.
- 4) The neuropsychological report does not contain any classroom observations, teacher or staff interviews, and/or behavior ratings from teachers and staff. This information would be prudent to include in order to determine continued eligibility under the disability classification of Other Health Impairment for ADHD.
- 5) Finally, there is not information included in the neuropsychological report about the educational impact of [the Student's] disability of ADHD. There are multiple mentions of [her] neuropsychological profile putting her at risk for difficulties in the school setting, but there is not data included to summarize how her difficulties manifest in the school setting.

P-17-2 and -3.

42. The review stated that it would be best practice “to gather additional information in the form of classroom observations, teachers/staff interviews, interventions provided in the current school setting, [the Student’s] response to interventions provided, behavior ratings from teachers/staff, as well as the academic impact of [the Student’s] disability of ADHD via school data and teacher input.” P-17-3.

43. School Psychologist testified that an interview of the Student would have been helpful; however, she did not seek to interview the Student. Testimony of School Psychologist.

44. At the time she wrote this review, School Psychologist had the SY 2014-2015 progress reports and report card, with teacher comments, from Non-Public School; however, she still considered the available information insufficient. *Id.*

45. School Psychologist relied heavily upon the fact that the Student performed at or above grade level in reaching the conclusion that the Student did not meet the criteria for special education, while acknowledging on cross-examination that she did not know enough about “twice exceptional” children. *Id.*

46. School Psychologist acknowledged on cross-examination that she did not know how the Student’s ADHD affects her in the classroom. *Id.*

47. Based upon the entire record, the undersigned finds that the information School Psychologist identified as lacking was necessary to assess the educational impact of the Student’s ADHD and the impact of interventions, both of which were necessary to determine the Student’s need for specialized instruction.

August 14, 2015 DCPS Speech and Language Evaluation Review

48. On August 14, 2015, DCPS Speech Language Pathologist (“SLP”) reviewed the Student’s speech and language data, and issued a report on August 17, 2015. R-12-1.

49. SLP noted that although the Student had received speech and language services at Special Education School, she never met DCPS’s eligibility standards for such services. R-12-6.

50. According to SLP, the Student had average to above average oral language skills and no difficulties reported with regard to articulation, voice or fluency. *Id.*

51. The Student was not receiving speech language services at Non-Public School and was excelling academically. R-12-7.

52. SLP concluded that the Student no longer required speech and language services to access and gain benefit from the general education curriculum. *Id.*

Scheduling the August 2015 IEP Team Meeting

53. On July 13, 2015, Resolution Specialist emailed Petitioner and her counsel to convene an IEP meeting to update the Student’s IEP and provide a school placement for SY 2015-2016. P-15-2.

54. The parties exchanged numerous emails regarding scheduling the IEP Team meeting, blaming each other for the failure to set a mutually agreeable date. P-15, *passim*; R-25, *passim*.

55. Petitioner’s counsel repeatedly asked to receive a draft IEP in advance of the meeting. *Id.*

56. In none of the emails prior to August 14, 2015, did Respondent inform

Petitioner or her representatives that the meeting would be an eligibility meeting; rather, all of the emails related to developing an IEP for the Student. *Id.*

57. This omission was because Resolution Specialist had not reviewed the October 16, 2014 neuropsychological evaluation or School Psychologist's review of that evaluation and therefore did not know that eligibility was an issue. Testimony of Resolution Specialist.

58. On August 14, 2015, Resolution Specialist emailed Petitioner and her counsel, confirming August 18, 2015 as the meeting date and forwarding a Letter of Invitation ("LOI")¹⁰ and School Psychologist's review of the October 16, 2014 neuropsychological evaluation. R-25-33.

59. The LOI stated that the purpose of the meeting was to review the results of the evaluation or reevaluation to determine, *inter alia*, whether the Student continued to have a disability and needed special education and related services. R-25-36. The LOI did not state why Respondent had determined that no additional data were needed to determine eligibility, or that Petitioner had the right to request an assessment. *Id.*

60. Petitioner testified that before the eligibility meeting she did not receive any indication that Respondent was considering determining the Student not to be eligible, and that she thought the meeting was "an IEP meeting."¹¹ Testimony of Petitioner.

¹⁰ The LOI bears the date meeting date, "08/18/2015" in the upper right corner. The date the document was created is noted above the bar code in the lower right corner: "Document Created on '08/14/2015.'" R-25-36. In the absence of any evidence to the contrary, the undersigned finds that this was the attachment to Resolution Specialist's August 14, 2015 email to Petitioner and her counsel.

¹¹ Whether or not Petitioner received the LOI, and if so, whether or not she read or understood it, Petitioner's experienced counsel received the LOI.

61. Although the LOI identified eligibility as the topic of the meeting, the cover email did not state that eligibility was an issue. R-25-33.

62. No draft IEP was provided to Petitioner because Respondent's representatives on the IEP Team thought the evidence pointed "the other way" [*i.e.*, that the Student would be found ineligible]. Testimony of Resolution Specialist.

63. However, there is no evidence in the record that Resolution Specialist or any other representative of Respondent shared this "change in direction" with Petitioner or her counsel prior to the August 18, 2015 meeting.

64. Based upon the entire record, the undersigned finds that the LOI, although technically accurate, was insufficient to put Petitioner on notice that the purpose of the August 18, 2015 meeting had changed from updating the Student's IEP to determining her eligibility.

65. The undersigned also finds that it would be inequitable to deprive Petitioner of her right to adequate notice even if her counsel failed to read the LOI carefully.

Respondent's Preparation for the August 18, 2015 IEP Team Meeting

66. On July 22, 2015, Petitioner signed a release authorizing Respondent to obtain school records. P-14-1.

67. Resolution Specialist spoke by telephone with the head of Non-Public School and on August 3, 2015 wrote an email to Non-Public School requesting the Student's report cards, progress reports and any accommodation plans, evaluations or teacher comments, to assist in creating the Student's IEP. Testimony of Resolution Specialist, R-25-11.

68. On August 5, 2015, Non-Public School's attorney responded denying the requests and stating that because of the nature of the program at Non-Public School the Student did not have an IEP. *Id.*

69. Meanwhile, on or about August 4, 2015, Respondent received the Student's Non-Public School report cards and progress reports for SY 2014-2015. P-15-4 and -6.

70. No other information was received from Non-Public School. Testimony of Resolution Specialist.

71. On August 5, 2015, Resolution Specialist emailed Petitioner's counsel asking if there were any accommodation plans "that DCPS should consult in the creation of the IEP? If not, DCPS can move forward with crafting a draft IEP based on the information in the progress notes and report cards." R-25-13.

72. On August 7, 2015, Petitioner's counsel replied to the request for accommodation plans as follows: "As to accommodations, etc. the neuropsychological report ... lists many accommodations, most, if not almost all, of which the school is providing...." R-25-33.

73. About a week prior to the August 18, 2015 IEP Team Meeting, Respondent's representatives on the Team held their own meeting. Testimony of Teacher, testimony of Resolution Specialist.

74. Most of Respondent's representatives on the Team were of the opinion that the Student no longer met the eligibility requirements for special education because her ADHD did not have educational impact. *Id.*

75. Respondent's representatives on the Team thought that a [Rehabilitation Act] "504 Plan" would be more appropriate for the Student because she still would require some accommodations due to her ADHD. *Id.*

76. Teacher attempted to obtain information including records and teacher notes from Non-Public School by contacting Non-Public School through its website, but he received no response. Testimony of Teacher.

August 18, 2015 IEP Team Meeting

77. The IEP Team met on August 18, 2015. P-18.

78. Respondent's representatives on the Team stated that the purpose of the meeting was to determine the Student's eligibility, to discuss School Psychologist's review of the Student's October 16, 2014 neuropsychological evaluation, and to use that information to develop a "504 Plan" for the Student if she were determined to be ineligible for special education. P-18-2 and -3.

79. Petitioner's counsel stated that her understanding of the purpose of the meeting was to create and review an IEP for the Student, and that Petitioner and she were not prepared to discuss a "504 Plan." *Id.*

80. School Psychologist reviewed the October 16, 2014 neuropsychological evaluation. P-18-3.

81. Respondent's representatives stated that they did not believe the Student's ADHD had an adverse effect on her educational performance, but Petitioner and her representatives disagreed. P-18-3 and -4.

82. Petitioner’s counsel stated that the Student was receiving specialized instruction at Non-Public School because the teachers were adapting the curriculum to meet her needs (P-18-4) and because she was receiving small group instruction (Testimony of Teacher).

83. Neither Petitioner nor her counsel elaborated on how the Student’s curriculum was being adapted. Testimony of Teacher, testimony of School Psychologist.

84. Resolution Specialist stated that adapting curriculum “is what all good teachers do and specialized instruction must be delivered by a licensed special educator or under the collaboration with one.” *Id.*

85. The Team discussed the behavior support services received by the Student at Non-Public School. P-18-3 and -4.

86. Respondent’s representatives asked whether there was any updated information and Petitioner or her representative stated that there was not. Testimony of Resolution Specialist.

87. Petitioner and her representatives did not offer any additional information concerning the Student’s needs. P-18, *passim*.

88. Petitioner and her representatives left the meeting prior to the discussion of a proposed “504 Plan” although they were encouraged to stay. Testimony of Resolution Specialist.

89. Based upon the entire record, the undersigned finds that Petitioner and her counsel were significantly impeded in their opportunity to participate in the eligibility determination due to the lack of adequate notice that eligibility was the topic to be discussed.

90. Based upon the entire record, the undersigned finds that the lack of information about the specific supports being received by the Student at Non-Public School—even if not provided by certified special education teachers—and the Student’s responses thereto significantly impeded determination of the Student’s eligibility. However, Petitioner has not met her burden of proof regarding the need for any other assessments (*e.g.*, ADHD, anxiety disorder, language processing, or updated academic achievement).

August 18, 2015 Final Eligibility Determination Report, Prior Written Notice, and Identification of the Student’s DCPS School for SY 2015-2016

91. On August 18, 2015, Respondent issued a Final Eligibility Determination Report finding the Student ineligible for special education and related services, and a PWN related to that determination. P-18-5 through -13.

92. On August 18, 2015, Respondent sent a letter to Petitioner informing her what DCPS school would be the Student’s LOS for SY 2015-2016. P-18-26.

93. The undersigned finds that these documents could not have been issued prior to the August 18, 2015 meeting because they reflected decisions made at that meeting.

Petitioner’s Psychologist’s Interview of the Student and Review of Records

94. Petitioner’s Psychologist interviewed the Student by videoconference for 30 minutes on October 26, 2015, after approximately 15 minutes of rapport-building via text or “chat.” Testimony of Petitioner’s Psychologist, P-21-2.

95. The interview took place after class. Testimony of Petitioner’s Psychologist.

96. During the interview, the Student had difficulty remaining on track, which she attributed to her ADHD medication not being as effective at night. P-21-2.

97. The Student receives her medication between 7:30 and 8:00 a.m., has classes until 4:00 p.m., and the medication lasts six hours. Testimony of Petitioner.

98. Therefore, after classes are over, the Student's medication has worn off.

99. When the Student is not medicated, she cannot sit still, cannot focus, frustrates her teachers, distracts other students, etc. *Id.*

100. The undersigned finds that Petitioner's Psychologist's interview of the Student, taking place after the school day when her medication no longer was effective, was not a reliable basis for an expert opinion as to the Student's disability¹² or her educational needs.

101. The Student described Non-Public School as "awesome" due to the small classes and individualized attention she received. *Id.*

102. The Student stated that her teachers varied their techniques and strategies if the initial approach did not work. *Id.*, testimony of Petitioner's Psychologist.

103. The Student stated that her classes are small, usually 10 to 12 students, and that her teachers worked with her individually and helped her organize her binders.

Testimony of Petitioner's Psychologist.

104. The Student stated that she received tutoring from a teacher and another Student. *Id.*

¹² Petitioner's Psychologist testified that the Student has ADHD, Combined Type which is "at the upper end" of severity. She further testified that the Student's educational needs have not changed since March 2015. The undersigned finds that Petitioner's Psychologist had insufficient basis to reach these conclusions.

105. In her testimony, Petitioner’s Psychologist referred to these as “accommodations.” *Id.* On cross-examination, she testified that having a teacher help a student with ADHD organize her materials “definitely could be specialized instruction.” *Id.* Petitioner’s Psychologist then testified that “modifications” are changes in curriculum (*i.e.*, what the student is learning) while “accommodations” are changes in how the curriculum is delivered. *Id.*

106. Petitioner’s Psychologist testified that assisting a student with organizational activities is “modifying instruction.” *Id.*

107. Petitioner’s Psychologist acknowledged on cross-examination that Non-Public School is not a special education school, although based upon its website, “they do accommodate students’ learning differences.” *Id.* She further testified that based upon her interview of the Student, “it appears [she] is receiving some accommodations” at Non-Public School. *Id.*

108. Petitioner’s Psychologist did not testify to any specialized instruction that the Student is receiving at Non-Public School—or that she requires—other than small classes, individualized attention, and help with organization, which Petitioner’s Psychologist characterized alternately as accommodations and specialized instruction. *Id.*

109. On October 27, 2015, Petitioner’s Psychologist reviewed the Student’s October 16, 2014 neuropsychological evaluation and the Student’s education records from SY 2014-2015. P-21-1.

110. The Student’s first progress report indicated that she had high grades and a high energy level, but needed to work on being calm and focused, getting to class on time, and completing assignments. P-21-3.

111. The Student's second progress report noted that her grades in Math and English had declined. *Id.* Teacher comments on the Student's attention level were mixed. *Id.*

112. The Student's grades on her first report card were three Bs and two Cs, a decline from the second progress report.¹³ *Id.* According to Petitioner's Psychologist, teachers noted that the Student had missed some classes and had not turned in some work, and one teacher noted that the Student could be distracted from classroom tasks. *Id.*

113. Petitioner's Psychologist failed to mention in her report (but acknowledged on cross-examination) that the reason for the Student missing class and not turning in assignments was that she had been ill. *Id.* The very teacher notes that Petitioner's Psychologist relied upon indicated that the Student had been "sick a lot this quarter and missed quite a bit of school, and I attribute her low homework score to scrambling to catch up on missed work" and that the Student "had a bit of a hard time getting all the material down that she missed during her absences." P-13-3.

114. The Student's second report card showed improvement, with mostly Bs, although the Student got Cs on exams in Spanish and Science, courses in which she had higher grades going into the exams. P-21-3.

115. The Student's final report card showed further improvement. *Id.*

116. Petitioner's Psychologist found various faults with the Student's October 16, 2014 neuropsychological evaluation. P-21-4, -5 and -7; testimony of Petitioner's Psychologist.

¹³ At the DPH, Petitioner testified that she did not know Non-Public School's grading scale and that she made assumptions regarding the relationship between numerical and letter grades. The undersigned does not find the Student's grades to be determinative of any of the issues in the instant case.

117. Petitioner's Psychologist concluded that there was not sufficient information available to the [IEP] team on August 18, 2015 to determine that the Student was not eligible for special education. P-21-7; testimony of Petitioner's Psychologist.

118. According to Petitioner's Psychologist, the following additional information should have been obtained prior to the eligibility determination:

1. What services, if any, she was receiving at [Non-Public School]
2. Whether she was receiving specialized instruction at [Non-Public School].
3. The educational impact of the symptoms of AD/HD in the school setting.
4. More recent academic achievement testing, as the testing is now one-year-old.

Id.

119. The undersigned agrees with Petitioner's Psychologist that items 1 through 3 in Paragraph 118, *supra*, were required to determine the Student's eligibility, and that in the absence of that information, Respondent unreasonably relied upon the October 16, 2014 neuropsychological evaluation as the primary source of information about the Student's disability and the educational impact of her disability.

120. Petitioner's Psychologist did not evaluate the Student and did not offer her opinion as to whether the Student requires special education services. P-21-6.

SY 2015-2016

121. On May 22, 2015, Petitioner reenrolled the Student at Non-Public School for SY 2015-2016. P-20-2.

122. The tuition for SY 2015-2016 is \$46,500.00, of which Petitioner is responsible for \$15,000.00 because the Student has received a partial scholarship.

Testimony of Petitioner.

123. Petitioner paid Non-Public School \$4,216.19 on July 22, 2015, \$4,146.19 on August 13, 2015, and \$1,300.00 in September 2015. *Id.*

Non-Public School

124. Non-Public School is a private day and boarding school with a religious affiliation, an average class size of 12, and a student-teacher ratio of eight to one. P-21-2.

125. At Non-Public School, the Student receives preferential seating. Testimony of Petitioner.

126. The Student's math teacher at Non-Public School, who works with her one-on-one for 12 to 20 minutes per day, has shown her how to cover up most of a page of problems so that she can focus on just one. *Id.*

127. At Non-Public School, the Student has a math tutor twice each week. *Id.*

128. At Non-Public School, the Student has a mentor (a 12th grade student at Non-Public School) who helps keep the Student organized, reminds her of deadlines, helps her organize her room, and helps her with time management. *Id.*

129. At Non-Public School the Student does not have an IEP or an Individual Learning Plan ("ILP"), with goals and objectives in academic areas of deficit designed to build her up to grade-level foundational skills. Testimony of Resolution Specialist.

130. At Non-Public School the Student does not have an IEP or ILP stating what specialized instruction she requires, what her Least Restrictive Environment is, or what accommodations she requires. *Id.*

131. At Non-Public School the Student does not receive instruction from a certified special education teacher or a teacher working in collaboration with a certified special education teacher. *Id.*

132. Petitioner testified that she is unaware of any change in the Student's educational needs since November 2014. *Id.*

133. However, the Student and Petitioner rarely talk about school. *Id.*

134. Based upon the entire record, the undersigned finds that Petitioner does not have sufficient information about Non-Public School or the Student's experience there to determine the Student's educational needs or judge whether there has been a change in those needs.

135. At the same time, Respondent introduced no evidence that the Student's educational needs have changed since March 2015.¹⁴

136. The Student is making academic progress at Non-Public School. R-7.

137. Based upon the entire record, the undersigned finds that the Student is receiving educational benefit at Non-Public School.

¹⁴ Resolution Specialist testified that the Student's educational needs must have changed because she continued to do well in school after an entire year without special education, an IEP, an ILP, an accommodation plan, etc. This conclusion is a *non sequitur*. Respondent's counsel argued that the finding of non-eligibility in August 2015 establishes that the Student's educational needs had changed since March 2015. This is another *non sequitur*. Moreover, the undersigned has rejected the determination that the Student was not eligible as being without sufficient basis.

IX. CONCLUSIONS OF LAW

Res Judicata

1. The parties are precluded from re-litigating the findings of fact and conclusions of law in the Lazan HOD. *See, Theodore v. District of Columbia*, 772 F. Supp. 2d 287 (D.D.C. 2011).

Purpose of the IDEA

2. The IDEA is intended

“(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...”

20 U.S.C. §1400(d)(1), *accord*, DCMR §5-E3000.1.

FAPE

3. The IDEA requires that all students be provided with FAPE, meaning:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

Reevaluation Before Exiting a Child from Special Education

4. Unless the parent and the Local Educational Agency (“LEA”) agree that a reevaluation is unnecessary, a reevaluation of a child with a disability must be conducted before determining that a child is no longer a child with a disability. 20 U.S.C.

§1414(a)(2); 34 C.F.R. §300.303; DCMR §5-E3005.7.

5. As part of a reevaluation, the IEP Team and other qualified professionals, as appropriate, are required to:

- (A) review existing evaluation data on the child, including—
 - (i) evaluations and information provided by the parents of the child;
 - (ii) current classroom-based, local, or State assessments, and classroom-based observation; and
- (B) on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine—
 - (i) whether the child is a child with a disability . . . , and the educational needs of the child, or, in the case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
 - (ii) the present levels of academic achievement and related developmental needs of the child;
 - (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

20 U.S.C. §1414(c)(1); *accord*, 34 C.F.R. §300.305. District of Columbia regulations paraphrase these federal provisions, while adding to the role of the IEP team determining whether the child has “a particular category of disability.” DCMR §5-E3005.4(b)(1).

6. If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child

with a disability and to determine the child's educational needs, the LEA must notify the child's parents of that determination and the reasons for the determination, and of the parents' right to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs. 20 U.S.C. §1414(c)(4); 34 C.F.R. §300.305(d).

7. In the instant case, the IEP Team determined that no additional data were required to determine whether the Student continued to be a child with a disability and to determine her educational needs. Finding of Fact 41.

8. Respondent did not notify Petitioner of her right to request an assessment to determine, *inter alia*, whether the Student continued to be a child with a disability (Finding of Fact 59), which constituted a violation of Petitioner's procedural rights under IDEA.

9. A procedural violation does not necessarily equate to a denial of FAPE. Rather, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006); *but see*, *G.G. v. District of Columbia*, 924 F. Supp. 2d 273 (D.D.C. 2013) (“GG”).

10. Petitioner was represented by experienced counsel who knew her right to an assessment, having represented her in a prior DPC proceeding involving reimbursement for the October 16, 2014 neuropsychological evaluation. R-8. Accordingly, the undersigned concludes that this procedural violation did not deny Petitioner or the Student a FAPE.

Prior Written Notice

11. An LEA is required to provide prior notice to a child’s parents before the LEA proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. §300.503(a).

12. That notice must include, *inter alia*:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;

* * *

- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected....

34 C.F.R. §300.503(b).

13. Because Respondent failed to provide *adequate* prior notice to Petitioner that the Student’s continued eligibility for special education would be discussed at the August

18, 2015 IEP Team meeting (Finding of Fact 64), Respondent violated 34 C.F.R. §300.503(b).

14. Because Respondent’s failure to notify Petitioner *adequately* of the purpose of the August 18, 2015 meeting significantly impeded Petitioner’s opportunity to participate in the decisionmaking process (Findings of Fact 89 and 90), the undersigned concludes that Petitioner and the Student were denied FAPE.

Whether the Student is a Child With a Disability

15. The IDEA defines a child with a disability as a child—

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A).

16. “Child with a disability” is further defined in 34 C.F.R. § 300.8(a) as a child evaluated

as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

17. “Other Health Impairment” is defined as

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9).

18. The fact that a child gets average grades and advances from grade to grade does not disqualify the child from special education eligibility, although academic performance can be considered as one factor in an eligibility inquiry. *See, e.g., Corchado v. Bd. of Educ., Rochester City*, 86 F. Supp. 2d 168 (W.D.N.Y. 2000) and *Letter to Delisle*, 62 IDELR 240, 114 LRP 2895 (OSEP 2013).

19. Accordingly, the Student’s high academic achievement and her progress from grade to grade do not mean she is *not* a “child with a disability.”

20. To qualify as a “child with a disability” under IDEA, a child must have an IDEA-covered disability *and* need special education. 34 C.F.R. §300.8(a)(2)(i).

21. “Special education” means:

specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. §1401(29); *accord*, 34 C.F.R. §300.39.

22. “Specially designed instruction” means

adapting, as appropriate to the needs of the eligible child under this part, 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 C.F.R. §300.39(b)(3).

23. Petitioner has not met her burden of persuasion that the Student requires “specially designed instruction.” There is no evidence in the record that the Student requires the content, methodology or delivery of instruction to be adapted to meet any unique needs that result from her ADHD.

24. Rather, the evidence presented at the DPH only establishes that at Non-Public School the Student has been instructed in small classes with individualized attention from teachers who varied their teaching strategies, and that she has received various classroom accommodations, tutoring and mentoring. Findings of Fact 101 through 109 and 124 through 128.

25. Additional data, particularly observations of the Student in the classroom, interviews of and behavioral ratings by teachers and staff, and data on the Student’s responses to interventions, were and are required to determine her need for specially designed instruction (Findings of Fact 42 and 47); accordingly, the undersigned cannot conclude on the current record that the Student is a “child with a disability” under IDEA.

IEP

26. The “primary vehicle” for implementing the goals of the IDEA is the individualized education program (“IEP”) which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general: The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

* * *

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

* * *

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications ...

20 U.S.C. §1414(d)(1)(A).

When an IEP is Required

27. At the beginning of each school year, each LEA “shall have in effect, for each child with a disability in the agency’s jurisdiction, an individualized education program.”

20 U.S.C. §1414(d)(2)(A); *accord*, 34 C.F.R. §300.323(a).

28. Accordingly, in the instant case, had the Student's eligibility not been terminated at the August 18, 2015 meeting, Respondent was obligated to develop an IEP for her for SY 2015-2016.

29. Because the determination of non-eligibility was improper, the failure to develop an IEP necessarily caused a failure to provide a FAPE to the Student.

Presumption of Continuity

30. If a child's circumstances continue unchanged,

any placement that was appropriate for him in the initial year would continue to meet his educational needs in succeeding years. Although circumstances obviously may change, and often do, the nature or direction of change is unpredictable (except for the children's inevitable aging), so that a presumption of continuity seems most practical.

Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989).

31. In the instant case, there is no evidence that the Student's circumstances changed. Finding of Fact 135.

32. Accordingly, applying the presumption of continuity, Non-Public School remained a proper placement for the Student for purposes of tuition reimbursement in the absence of an offer of FAPE.

Authority of Hearing Officer to Order Tuition Reimbursement and/or Prospective Placement

33. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). That relief may include compensatory award of tuition reimbursement or prospective services. *Id.*

34. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) (“*Branham*”).

35. A hearing officer “may require the agency to reimburse the parents for the cost of . . . enrollment [in a private school] if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. §300.148(c); *see also*, DCMR §5-E3018.3 and *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985).

36. Based upon the entire record, the undersigned concludes that such a remedy is equitable in the instant case.

Appropriateness of Non-Public School as a Prospective Placement and LOS

37. A determination of the appropriateness of a prospective special education placement requires consideration of at least the following factors: (a) the nature and severity of the student’s disability; (b) the student’s specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement if it is a non-public school; and (e) the extent to which the placement represents the Least Restrictive Environment (“LRE”) for the Student. *Branham*.

38. In the instant case, if the Student is found to be eligible for special education and related services, an IEP will be developed for her.

39. Apparently Non-Public School is incapable of implementing (and/or unwilling to implement) an IEP. Finding of Fact 68.

40. Accordingly, the undersigned concludes that Non-Public School is not an appropriate *prospective* placement or LOS for the Student if she is determined to be eligible.

Summary

1. On or about August 18, 2015, Respondent denied the Student a FAPE by exiting the Student from special education without evaluating her in all areas of suspected disability.

2. Respondent violated IDEA by failing to provide sufficient advance notice to Petitioner that the Student's eligibility would be discussed and determined at the August 18, 2015 meeting; however, the PWN issued after the meeting was sufficient to inform Petitioner of the decisions made at that meeting.

3. Respondent denied the Student a FAPE by failing to have an IEP in place for the Student prior to the beginning of SY 2015-2016.

4. Respondent denied the Student a FAPE by failing to provide an appropriate placement for her prior to the beginning of SY 2015-2016. Because the Student was found ineligible, and no placement was offered, the issue of whether Petitioner was involved in determining the placement is moot.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:¹⁵

1. No later than November 30, 2015, Respondent shall rescind the August 18, 2015 finding that the Student is ineligible for special education and related services. Respondent's records shall indicate that the Student has been found eligible, but has no IEP, in the same manner as a child whose initial eligibility for special education has been determined but whose initial IEP has not yet been developed.

2. No later than November 30, 2015, Respondent shall reimburse Petitioner the sum of \$8,362.38 for the Non-Public School tuition payments she made on July 22 and August 13, 2015.

3. If Petitioner wishes to be reimbursed for additional tuition payments for the Student's attendance at Non-Public School, including the \$1,300.00 payment she testified she made in September 2015, she must provide Respondent documentary evidence of those payments such as receipts from Non-Public School or copies of cancelled checks or electronic payments to Non-Public School. Petitioner may submit a request for reimbursement each time she makes a payment. Within 30 days of receipt of each request with proper supporting documentation, Respondent shall reimburse Petitioner that amount.

4. If Respondent has made, or makes, any SY 2015-2016 tuition reimbursements to Petitioner pursuant to the Student's "stay put" rights, those reimbursements shall be

¹⁵ The specificity of this Order is required due to the apparent inability of the parties and their counsel to work cooperatively, even to schedule meetings.

deducted from the reimbursements described in the two preceding paragraphs to avoid duplicate reimbursement of the same tuition payment.

5. Respondent shall not be required to reimburse Petitioner for any tuition payments made after the earlier of (a) the date Respondent determines the Student not to be eligible pursuant to Paragraph 21 below, or (b) the effective date of the Prior Notice of Placement (“PNOP”) or other document issued pursuant to Paragraph 28 below.

6. Respondent’s obligation under this Order to reimburse Petitioner shall in no event exceed \$15,000.00 less any reimbursements made for SY 2015-2016 pursuant to the Student’s “stay put” rights.

7. If Petitioner receives from Non-Public School any refund(s) of tuition for which she has been reimbursed by Respondent, Petitioner shall, within three business days, remit such refund(s) to Respondent.

8. No later than November 30, 2015, Respondent shall notify Petitioner of two weekdays between January 19 and January 27, 2016, and two weekdays between February 2 and 11, 2016, that a DCPS school psychologist or contract psychologist other than School Psychologist (*i.e.*, the School Psychologist who testified in this DPC proceeding) proposes to observe the Student at Non-Public School, interview the Student’s Non-Public School teachers and/or obtain their responses to behavior ratings, interview Non-Public School staff and/or obtain their responses to behavior ratings, and obtain any information that Non-Public School has on interventions provided to the Student, the Student’s responses to interventions, and school data and teacher input regarding the impact of the Student’s ADHD on her academic performance.

9. Respondent shall ensure that a school psychologist or contract psychologist reserves the four dates described in the preceding paragraph pending confirmation of the date that is acceptable to Non-Public School.

10. Petitioner shall obtain the written permission of Non-Public School for the DCPS school psychologist or contract psychologist to observe the Student in her classrooms on one of the four proposed dates and to obtain the information described in Paragraph 8 above from the Student's teachers and Non-Public School staff during the remainder of the same day.

11. If Non-Public School requires a court order to permit the observations, interviews, and other data collection described in Paragraph 8 above, Petitioner shall take the necessary legal action, at Petitioner's expense, to obtain that order. Respondent shall cooperate in any such proceeding if requested by Petitioner.

12. Petitioner shall provide Respondent a copy of Non-Public School's written permission within one business day of receiving it from Non-Public School.

13. If Non-Public School fails or refuses to provide permission by the last of the four dates proposed pursuant to Paragraph 8 above, Respondent may reinstate the finding of the Student's ineligibility for special education and related services and Respondent shall not be obligated under this Order to reimburse Petitioner for the Student's tuition for her attendance at Non-Public School from that date forward.

14. If Non-Public School does provide permission, the DCPS school psychologist or contract psychologist shall conduct classroom observations, teacher interviews and/or behavior ratings, staff interviews and/or behavior ratings, and obtain any information that Non-Public School has on interventions provided to the Student, the Student's responses

to interventions, and school data and teacher input regarding the impact of the Student's ADHD on her academic performance.

15. No later than 14 calendar days after the DCPS school psychologist or contract psychologist has conducted the observations, interviews, and other data collection at Non-Public School, Respondent shall provide Petitioner (a) a copy of a report from the DCPS psychologist or contract psychologist on those observations, interviews, etc., (b) copies of any other evaluations, assessments, or reviews of evaluations or assessments prepared or obtained by Respondent since the August 18, 2015 meeting, and (c) an LOI to a meeting to discuss and determine the Student's eligibility for special education and related services.

16. The LOI described in the preceding paragraph, or a cover letter or email forwarding that LOI, shall propose three different dates, and the times on those dates, for the meeting and provide Petitioner three business days to respond, selecting one of those dates and times.

17. Petitioner shall respond to the LOI within three business days, selecting one of the dates and times, and providing Respondent copies of the reports of any assessments or evaluations of the Student that Petitioner or her representatives have obtained subsequent to the October 16, 2014 neuropsychological evaluation (whether or not those reports, assessments or evaluations support the Student's eligibility). If none of the dates and times proposed by Respondent is acceptable to Petitioner, then in her response, Petitioner shall propose three other DCPS school days,¹⁶ no later than ten school days

¹⁶ The DCPS calendar for SY 2015-2016 can be accessed at: <http://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Calendar%20School%20Year%202015-2016%20Large%20Version.pdf>

after the last date proposed by Respondent, and times on those days between 9:00 a.m. and 3:30 p.m., for the meeting, in which case Respondent shall respond within three DCPS school days agreeing to one of those days and times, whether convenient or not.

18. If Petitioner fails to respond as described in the preceding paragraph, Respondent may reinstate the finding of the Student's ineligibility for special education and related services and Respondent shall not be obligated under this Order to reimburse Petitioner for the Student's tuition for her attendance at Non-Public School after the third business day after delivery of the LOI.

19. Petitioner may invite Non-Public School teachers and/or staff members to attend the eligibility meeting, either in person or by telephone. At least two DCPS school days in advance of the meeting Petitioner shall inform Respondent the names and titles of any Non-Public School teachers and/or staff who will participate.

20. The following individuals who participated in the DPC proceeding shall not participate in the eligibility meeting and shall not communicate about the Student (orally or in writing) with any of Respondent's representatives who attend the eligibility meeting: Resolution Specialist, Teacher, and School Psychologist (*i.e.*, the DCPS witnesses who testified in this DPC proceeding).

21. If the Student is determined not to be eligible for special education and related services, Respondent shall not be obligated under this Order to reimburse Petitioner for the Student's attendance at Non-Public School after that date. Nothing in this Order precludes Petitioner from filing a new Due Process Complaint over such a finding of non-eligibility. However, Petitioner may not challenge the adequacy of the Student's evaluation on the ground that additional assessments should have been conducted.

22. If the Student is determined to be eligible for special education and related services, then no later than three DCPS school days after the determination of eligibility, Respondent shall provide Petitioner a PWN or other documentation of the finding of eligibility, together with an LOI to a meeting to develop the Student's IEP. The LOI or a cover letter or email shall propose three different dates, and the times on those dates, for the IEP meeting and shall provide Petitioner three business days to select one of those dates.

23. Petitioner shall respond to the LOI within three business days, selecting one of the dates and times. If none of the dates and times proposed by Respondent is acceptable to Petitioner, then in her response, Petitioner shall propose three other DCPS school days, no later than ten school days after the last date proposed by Respondent, and times on those days between 9:00 a.m. and 3:30 p.m. In that event, Respondent shall respond within three DCPS school days agreeing to one of those days and times, whether convenient or not.

24. If Petitioner fails to respond as described in the preceding paragraph, Respondent shall not be obligated under this Order to reimburse Petitioner for the Student's tuition for her attendance at Non-Public School after the third business day after delivery of the LOI.

25. Petitioner may invite Non-Public School teachers and/or staff members to attend the IEP meeting, either in person or by telephone. At least two DCPS school days in advance of the meeting Petitioner shall inform Respondent the names and titles of any Non-Public School teachers and/or staff who will participate.

26. If Respondent prepares a draft IEP in advance of the IEP meeting, Respondent shall provide a copy to Petitioner at least five calendar days in advance of the meeting.

Respondent shall take this requirement into account when proposing meeting dates.

27. No later than five school days after the IEP meeting, Respondent shall provide Petitioner a copy of the Student's final IEP. Nothing in this Order precludes Petitioner from filing a new Due Process Complaint challenging the IEP.

28. No later than ten school days after the IEP meeting, Respondent shall issue to Petitioner a PNOP or other document informing Petitioner of the LOS that will implement the Student's IEP and the effective date of that LOS, which shall be no earlier than 14 calendar days after delivery of the PNOP or other document. Petitioner and her representatives shall be permitted to visit the LOS and observe classes there, but they shall not have the right to reject the LOS. However, nothing in this Order precludes Petitioner from filing a new Due Process Complaint asserting that the LOS is incapable of substantially implementing the Student's IEP.

29. Nothing in this Order shall be construed as a determination that Non-Public School is an appropriate prospective placement for the Student if she is found eligible for special education.

30. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

31. All written communications from Petitioner to Respondent concerning the above matters shall include copies to Respondent's counsel by facsimile or email.

32. Any delay caused by Petitioner or Petitioner's representatives other than those described above shall extend Respondent's deadlines under this Order by the same number of days.

33. Any delay caused by Respondent or Respondent's representatives other than those described above shall extend Petitioner's deadlines under this Order by the same number of days.

Petitioner's other requests for relief are DENIED.

Dated this 16th day of November, 2015.



Charles Carron
Impartial Hearing Officer

Copies to: Petitioner's Counsel Carolyn Houck, Esq.
 Petitioner's Counsel Stevie Nabors, Esq.
 Respondent's Counsel Tanya Joan Chor, Esq.
 Office of Dispute Resolution
 Chief Hearing Officer Virginia Dietrich, Esq.
 OSSE Division of Specialized Education
 Contact.Resolution@dc.gov

XI. NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).