

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

OSSE
Office of Dispute Resolution
April 21, 2016

Confidential

Parent on Behalf Student ¹ , Petitioner, v. District of Columbia Public Schools ("DCPS") ["LEA"] Respondent. Case # 2016-0014 Date Issued: April 21, 2016	HEARING OFFICER'S DETERMINATION Hearing Dates: March 23, 2016 April 8, 2016 <u>Representatives:</u> Counsel for Petitioner: Domiento C.R. Hill, Esq. Florida Avenue, N.E. Washington, D.C. 20005 Counsel for Respondent: Steven Rosenstein, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 March 23, 2016, and concluded on April 8, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student currently attends a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School A”) where she began attending in September 2014. The student is currently eligible to receive special education and related services as a student with multiple disabilities (“MD”) including intellectual disability (“ID”) and other hearing impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”).

On January 29, 2016, Petitioner filed the current due process complaint alleging DCPS denied the student a free appropriate public education (“FAPE”) by: (1) failing to provide the student with an appropriate individualized educational program (“IEP”) that was reasonably calculated to provide her with educational benefit at a December 2, 2014, IEP meeting and/or a October 29, 2015, IEP meeting; (2) failing to provide the student with an appropriate placement and location of services since December 2, 2014, and (3) failing to fully implement the student’s IEP during school year (“SY”) 2015-2016.

Petitioner seeks as relief that the Hearing Officer place the student at a non-public school that can implement the student’s IEP; fund an independent functional behavioral assessment (“FBA”) and convene a meeting at the student’s new placement within 30 days of her enrollment to review the independent evaluation, review and revise her IEP and develop a behavior intervention plan (“BIP”) and provide the student with compensatory education services.

On February 4, 2016, DCPS filed a timely response to the Petitioner’s complaint in which it denied that it failed to provide the student with a FAPE. DCPS contends that both the student’s December 2, 2014, and October 29, 2015, IEPs were reasonably calculated to provide her with educational benefit at the time they were developed. DCPS contends that the IEPs were based on the IEP team(s) consideration of independent assessments along with teacher and service provider reports. DCPS asserts that it was not required to complete a BIP and that a failure to conduct a FBA does not make the student’s IEP inappropriate. DCPS denies that it failed to implement the student’s IEP, asserts the student made progress with the IEPs and that School A is an appropriate location of services for the student. DCPS also asserts that if there were any deviations from the student’s IEP those deviations did not amount to a deprivation of FAPE.

The parties participated in a resolution meeting that occurred on February 10, 2016. The parties did not resolve the issues and did not mutually agree to proceed directly to a hearing. Thus, the 45-day period began on February 27, 2016, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on April 11, 2016.

The Hearing Officer convened a pre-hearing conference (“PHC”) on March 1, 2016, and issued a pre-hearing order on January 22, 2016, outlining, inter alia, the issues to be adjudicated.

The hearing was convened on March 23, 2016. Respondent’s counsel could not conclude his case on that date and requested a continuance and extension of the HOD due date that was unopposed and granted. The HOD is now due April 21, 2016. The record was closed with the parties filing simultaneous written closing arguments on April 15, 2016.

ISSUES:²

The issue(s) adjudicated are:

1. Whether DCPS denied the student FAPE by failing to provide the student with an appropriate IEP that was reasonably calculated to provide her with educational benefit at the December 2, 2014, multidisciplinary team (“MDT”)/IEP meeting and/or the October 29, 2015, MDT/IEP meeting due to insufficient specialized instruction, no BIP and inappropriate goals and objectives.³
2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement and location of services from December 2, 2014.⁴
3. Whether DCPS denied the student a FAPE by failing to implement the student’s IEP from start of SY 2015-2016 to the October 29, 2015, meeting.⁵

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1 through 37 and Respondent’s Exhibits 1 through 28) that were admitted into the record and are listed in Appendix A).⁶ Witnesses are listed in Appendix B.

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the hearing and the parties agreed that these were the issue(s) to be adjudicated. The complaint also alleged the following issue: “Whether DCPS denied the student a FAPE by failing to perform a recommended psychiatric evaluation pursuant to 34 C.F.R. §300.304(c)(4) and 30 DCMR §3005.9(g).” Following the PHC Petitioner’s counsel agreed to withdraw this issue.

³ Petitioner asserted the student should have had no less than 27.5 hours of instruction per week for both the IEPs and that the IEP goals and objectives were inappropriate because the student made insufficient academic and behavioral gains.

⁴ Petitioner asserted the student should have been moved out of School A to a separate special education school.

⁵ Petitioner asserted that the student was placed in some general education classes during SY 2015-2016 prior to the October 29, 2015, IEP meeting.

⁶ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

FINDINGS OF FACT:

1. The student is age ____ and in grade ____⁷ and currently attends a DCPS [REDACTED] school, School A, where she began attending in September 2014. (Witness 3's testimony, Petitioner's 22-1)
2. The student is currently eligible to receive special education and related services as a student with MD classification including ID and OHI. Previously the student's disability classification was specific learning disabled ("SLD") and was changed to ID in December 2014 and MD in October 2015. (Petitioner's Exhibits 16-1, 22-1, 28-1)
3. Prior to attending School A the student attended another DCPS [REDACTED] school ("School B"). (Petitioner's Exhibit 16-1)
4. While attending School B the student had a FBA that was conducted in December 2012 that addressed the student's behaviors of physical and verbal aggression and attention seeking. These concerns were cited in the student's IEP and School B implemented a BIP to address these behaviors. (Petitioner's Exhibits 9-1, 9-2, 9-3, 10-1, 16-10)
5. School B convened an IEP meeting for the student on October 10, 2013. The student's 2011 academic scores were reviewed and she was operating below kindergarten level in all academic areas. At the time, the student was receiving 15 hours per week of specialized instruction and related services (speech language pathology, occupational therapy and behavioral support) outside general education. The student was also receiving 60 minutes per month of behavioral support services inside general education. (Witness 2's testimony, Petitioner's Exhibits 8, 16-1, 16-14, 17-1, 17-2, 17-3, 17-4)
6. Petitioner filed a due process complaint that resulted in a HOD issued on August 5, 2014, concluding, inter alia, the student's October 10, 2013, IEP, as well as the student's educational placement, was inappropriate. The HOD granted Petitioner, among other things, independent evaluations: a neuropsychological evaluation and a Vineland. (Petitioner's Exhibit 4-1, 4-13, 4-14, 4-15, 4-18)
7. The independent neuropsychological evaluation was performed in September 2014 when the student was age [REDACTED] in [REDACTED] grade. The neuropsychologist concluded the student's cognitive abilities were extremely low. Her verbal comprehension was at the first percentile, her perceptual reasoning at 0.1 percentile; her working memory at 0.3 percentile; her processing speed at 0.2 percentile and her full-scale IQ composite score was 50, at less than 0.1 percentile. (Petitioner's Exhibit 12-8, 12-9)
8. The student's letter word identification, math calculation, academic skills, spelling and calculation skills were all at kindergarten level and less than 0.1 percentile (with an age equivalency just above 5 years). The neuropsychologist diagnosed the student with

⁷ The student's current age and grade are listed in Appendix B.

ADHD and gave her a provisional diagnosis of mild mental retardation. The evaluator recommended that the student's specialized instruction hours be increased, that she be placed in a small classroom setting and environment that is physically structured to minimize stimulus overload; that the student be provided a BIP; access to technology; individual and group tutoring; continued speech and occupational therapy services; social skills training and possible psychiatric consultation for medication to address ADHD. (Petitioner's Exhibit 12-16, 12-18, 12-19, 12-22)

9. The independent adaptive Vineland evaluation was performed in September 2014, with the report prepared on October 20, 2014. The evaluator reported that the student met the criteria for mild retardation or ID and ADHD and the evaluator recommended full time special education services in a highly structured setting with a small student to teacher ratio. (Petitioner's Exhibit 13-10, 13-11)
10. The independent Vineland and neuropsychological evaluation reports were provided to DCPS. After the student began attending School A, DCPS convened multidisciplinary team MDT/IEP meeting on December 2, 2014, to review the independent evaluations. The student's parent and her educational advocate participated in the meeting. The team agreed to a change in the student's disability classification to ID. The student's IEP was updated and prescribed the student be provided an increase in services from her prior IEP to 22 hours of specialized instruction outside general education and the following related services also outside general education: 240 minutes per month of speech-language pathology, 240 minutes per month of occupational therapy and 120 minutes per month of behavioral support services. (Witness 2's testimony, Petitioner's Exhibits 16-1, 16-14, 22-1, 22-19, 18, 23-1, 23-2)
11. During the December 2, 2014, meeting the Petitioner and her advocate requested the student's instruction be increased further, but the School A staff concluded the level of instruction was sufficient. The parent inquired about a dedicated aide and the School A team members opposed that request. The School A team stated that the student was making progress since she began attending School A and presented data, including work samples, that demonstrated she was still operating on kindergarten level. (Witness 2's testimony, Petitioner's Exhibit 23-1, 23-2)
12. The student's social and emotional functioning and her behavior were discussed during the December 2, 2014, meeting. The team heard from the school social worker about the student's distractibility and impulsivity and that the student had some confrontations with staff and peers. Neither the parent, nor the advocate, asked that a BIP to be developed to address the student's behaviors. The advocate presumed the student's BIP from School B was still being implemented; however, it was clarified at a subsequent meeting that the BIP was no longer being implemented. The student's parent and advocate requested that a meeting be convened in February or March 2015 to review the student's progress. (Witness 2's testimony, Petitioner's Exhibits 20)
13. DCPS convened a meeting to discuss the student's progress and extended school year ("ESY") services on March 25, 2015. During this meeting DCPS advised Petitioner that

the student had made some marginal progress in reading, less progress in math and writing, and was still operating on kindergarten level. The team determined the student would attend ESY because of her inconsistency in math functioning. At the end of the meeting the parent and advocate requested that a comprehensive psychological evaluation be conducted, but they did not request that a BIP be developed. School A did not agree to conduct the requested evaluation. The team determined the student's continued placement in her program at School A was appropriate. (Witness 2's testimony, Respondent's Exhibit 8-1, 8-2, 8-4, Petitioner's Exhibit 25)

14. School A reconvened an IEP meeting on April 8, 2015, to discuss the parent's and her advocate's request that a comprehensive psychological evaluation be conducted to gain a more accurate picture of the student's academic functioning and concerns raised at previous meetings about the student's behaviors. DCPS did not agree to the requested evaluation but did agree to conduct an educational assessment. (Witness 2's testimony, Petitioner's Exhibit 26)
15. The team reconvened on June 11, 2015, to review the DCPS educational assessment. The student's special education teacher presented some handouts of the student's classroom work and represented that even though the student was still operating on kindergarten level she was making some progress given her limited cognitive abilities. During the meeting Petitioner reiterated her request that the student receive a comprehensive psychological evaluation. The evaluation was eventually authorized by DCPS. (Witness 2's testimony)
16. An independent comprehensive psychological evaluation was conducted of the student in July 2015 and September 2015. The evaluation report was completed in September 2015. The evaluation included record reviews, assessments, and observations of the student during summer school and a behavioral survey given to the student's parent. The evaluator determined the student's cognitive functioning was extremely low in all domains measured, with a full-scale IQ composite score of 44. The evaluator concluded there was no substantial difference in the student's cognitive scores when compared to her previous evaluations. The student's academic functioning was below the first percentile and below kindergarten level except for letter word identification, spelling and broad written language that were all at the kindergarten level. The student could do no more than simple addition and subtraction.⁸ (Witness 1's testimony, Petitioner's Exhibit 14-10, 14-11, 14-12, 14-13)
17. The evaluator, noted in her evaluation that the student's low academic achievement scores were consistent with her extremely low intellectual functioning. She noted that when the student's achievement "was measured in 2011, at which point her math, reading and written language fell within the kindergarten grade equivalent as well... this indicates that in four years the student has shown little to no improvement in her academic skills

⁸ The evaluator noted that the student was extremely distracted and had behavior, attention and concentration issues during the evaluation and it was unclear to the evaluator whether the student put forth her best effort on the cognitive and achievement measures.

despite receiving special education services, which is likely attributable to her longstanding cognitive deficits and ADHD symptoms.” The evaluator opined that the student should have made more academic gains in this time period. (Petitioner’s Exhibit 14-14)

18. The evaluator, who was designated an expert witness, opined that the student can still learn and make small academic gains overtime time despite her intellectual disability. The student’s cognitive disability accounts for 50% of her academic performance and the remainder is the result of environmental conditions and the student’s behaviors associated with ADHD. The evaluator recommended a FBA and BIP to look at the environmental triggers that distract the student and to reward her for the desired behaviors.⁹ (Witness 1’s testimony, Petitioner’s Exhibit 14-1, 14-10, 14-11)
19. In sum, the evaluator recommended the student receive a full time special education services under the category of multiple disabilities and be provided specialized instruction in math, reading, written expression and speech and language therapy and behavior support services. The evaluator opined that the student showed little to no improvement academically with the structure currently provided by DCPS. The evaluator concluded the student was not receiving one to one attention, she was not being provided enough services and she needs intensive structure and support in order to complete simple tasks. (Witness 1’s testimony, Petitioner’s Exhibit 14-10, 14-11, 14-15)¹⁰
20. On October 14, 2015, a DCPS School A psychologist conducted a review of the independent psychological evaluation, observed the student in her School A classroom and interviewed the student’s teacher. The DCPS psychologist did not question the validity of the independent evaluation but noted that evaluator only included a parent questionnaire regarding the student’s behavioral functioning and did not include input from the student’s teacher. (Witness 6’s testimony, Respondent’s Exhibit 12-10, 12-11, 12-12)
21. The School A psychologist conducted a classroom observation of the student for 45 minutes to an hour and reviewed the student’s previous progress reports and previous evaluations. During the observation the student was engaged and seated at her desk, was focused throughout the lesson and worked with a student peer on the assigned activity. The student did not display any disruptive behaviors during the observations. The psychologist observed the teacher using the strategies that seemed to work well with the student. The School A psychologist generally observes the student in school 2 to 3 times per week. The psychologist has not seen any disruptive behaviors from the student during lunch and recess and is not aware that any of the student’s teachers have called the

⁹ The evaluator’s report, however, did not include a recommendation for a FBA or BIP to address the student’s ADHD.

¹⁰ On cross examination it was pointed out that there was no behavior rating scale completed by the student’s teacher, the evaluator did not confer with the student’s her teacher regarding the educational material the student was provided or her performance at School A.

student's parent regarding the student's behavior in the classroom. (Witness 6's testimony, Respondent's Exhibit 12-10, 12-11)

22. Although there was a history of behavioral difficulties for the student before coming to School A she has made academic and social emotional gains at School A. The gains are small but incremental. The student is able to do the work presented to her. The DCPS psychologist noted that typically students with this student's level of cognitive abilities would make slow but steady academic gains and the student's academic achievement scores are commensurate with her cognitive abilities. (Witness 6's testimony)
23. The student is currently assigned to a self-contained special education program at School A. The student's class at School A now has ten students with two adults: the teacher and the instructional aide. During SY 2014-2015 there were eight students in her classroom. When the student first began attending School A she talked excessively and walked out of the classroom often. The student's seat in the classroom was changed a few times and she was put on a classroom incentive system. (Witness 3's testimony)
24. The student's classroom teacher has seen no physical aggression from the student in the classroom or at school. The student participates in the classroom, raises her hand and does presentations and projects. She had made friends in the classroom and, in the teacher's opinion, has made academic progress compared to how she was performing when she first arrived at School A. The teacher believes that the student's current classroom is appropriate because she is making academic progress. (Witness 3's testimony)
25. The student has had no classes in a general education setting during SY 2015-2016. In previous years at School A some special education students have been with general education students in special elective classes. However, during the current school year all self-contained classrooms only have special classes such as Music, physical education ("P.E.") and Art with special education students. The student's October 29, 2015, IEP was changed to reflect this. The student is with general education students only during lunch and recess and she interacts well with general education peers during these times. (Witness 7's testimony)
26. At School A the student has demonstrated slow but measurable progress as is expected for a student at her level of cognitive functioning. At School A the student's special education teacher uses a specialized reading program known as "EdMark." This reading intervention program was also used last school year. Since last year the student has moved from pre-reading skills to word discrimination, matching simple words and identifying words and picture phrases. The student is generally functioning academically between pre-K and kindergarten level. But she is operating near first grade level in reading using the EdMark measures. The student is exposed to the same reading materials at beginning of the year, mid-year and at the end of year in order to measure her progress. In the area of math the student has also progressed since she arrived at School A (Witness 3's testimony, Witness 4's testimony, Respondent's Exhibit s 8-4, 17-1, 18-1, 19-16, 20-17)

27. The student's IEP progress reports indicate that the student has been making progress relative to her IEP goals since she has been attending School A. Under the student's December 4, 2014 IEP, the student mastered one of her math goals, one of her reading goals, and one of her adaptive living goals. (Respondent's Exhibit 10-2, 10-3, 10-4)
28. The student's slow but measurable progress continued into the student's [REDACTED] grade year, under her October 29, 2015 IEP. In the beginning of the SY 2015-2016 the student received the following scores on a classroom-based Early Numeracy Assessment: Unit 1: 15/26, Unit 2: 18/30, Unit 3: 11/26, Unit 4: 1/32. On February 11, 2016, the student's scores improved to the following: Unit 1: 26/26, Unit 2: 27/30, Unit 3: 25/26, Unit 4: 26/32. (Respondent's Exhibits 17, 18)
29. At School A the student is provided individual and group counseling. The student has behavior support goals in her IEP that the School A social worker implements. The student's IEP progress reports in reporting period 2 in February 2015 indicated the student had successfully transitioned from School B to School A and was making gains in interacting with others and using coping skills when she is frustrated, sad or angry. The student's self-esteem has improved and she has more positive interactions with others. The student enjoys leading her classmates and is more outgoing in social situations. (Witness 5's testimony, Respondent's Exhibit 7-7)
30. Although the student's current BIP was created when the student was attending School B, the student is not displaying physical aggression at School A. The School A social worker does not believe the student behaviors at School A warrant an updated BIP. The student may respond to questions out loud or may talk to a neighbor at an inappropriate time. However, she is learning how to raise her hand and wait to be acknowledged. (Witness 5's testimony, Petitioner's Exhibit 10)
31. The School A social worker and the student's classroom teacher developed an informal list of behavior interventions regarding the student sleeping in class. The interventions have been effective. (Witness 5's testimony, Respondent's Exhibit 22)
32. The student is progressing but has not mastered her behavior intervention goals and they have therefore stayed the same and the areas of concern and the description of how the student's disability affects her in the general education setting have been carried over into her current IEP. The student remains an attention seeker and on occasion has difficulty following directions and remaining on task and she often tells her peers what to do. (Witness 5's testimony, Respondent's Exhibit 7, Petitioner's Exhibits 16-3, 16-10, 22-12, 22-15, 30)
33. DCPS convened a MDT meeting on October 29, 2015 at which the independent comprehensive psychological evaluation was reviewed. The parent and her educational advocate participated in the meeting along with other School A staff. DCPS recommended the student be classified MD and the team agreed with that classification. The student was still functioning at the kindergarten level. The student's classroom

teacher made mention the student's improvement in math and her improvement in her Edmark reading scores that demonstrated she was working between kindergarten and first grade in reading. The School A staff indicated that during the current school year and the student was having no classes with non-disabled peers and recommended the change in the student's IEP to increase in the student's specialized instruction outside general education. (Petitioner's Exhibits 28, 29, 30, 31, 32, Respondent's Exhibit 14)

34. There was a placement discussion during the October 29, 2015, meeting. The parent and her advocate expressed that School A was not an appropriate placement for the student and asked that she be placed in a separate special education school. DCPS advised Petitioner that the only change it would make to the student's IEP was to increase the student's specialized instructional hours from 22 hours per week to 24.5 hours per week and the student's placement and location of service would continue to be School A. The School A staff expressed their position that School A remained an appropriate placement for the student. (Witness 2's testimony, Respondent's Exhibit 19-1, 19-18, 22, Petitioner's Exhibit 28-8, 30)
35. The School A psychologist, who was designated an expert witness, participated in the student's October 2015 IEP. The DCPS psychologist reviewed the results of the independent evaluation and her teacher interview and classroom observations of the student. She shared that the student has made progress since attending School A and opined that School is an appropriate placement for the student based on the testing conducted, the input from other members of the team, her observations of the student and how instruction is delivered in the student's classroom. The School A psychologist does not believe the student needs to be in a more restrictive placement than she is in at School A. (Witness 6's testimony)
36. The parent's educational advocate sent a letter following the meeting and receipt of the DCPS meeting notes. The advocate pointed out in the letters that although the School A staff including the student's classroom teacher stated during the meeting that the student has made some academic progress, the data shared did not point any progress being made. The advocate reiterated his assertion that the student's academic performance has been stagnant since she was evaluated in 2011 as noted in the more recent evaluations conducted. The advocate reiterated the parent's belief that School A was inappropriate placement for the student given her lack of academic progress and stated that parent believes the student was in need of a separate special education school placement. (Witness 2's testimony, Petitioner's Exhibit 29, 31)
37. The student's parent does not agree that the student is making progress at School A. She believes the student has poor work habits and that the homework she brings is kindergarten work. The parent believes School A is not an appropriate placement for the student and she needs more attention than she is receiving at School A, perhaps one to one instruction. (Parent's testimony)
38. The student visited, was interviewed by and accepted to a non-public school ("School C"). School C serves students with a variety of disability classifications including ID

with a total of 70 students ages 8 to 21 in grades 6 to 12. The students are grouped by ability. The student would make the second student at the school with an ID classification. School C has certified special education teachers and related service providers. The school is a ten-month program and follows Prince George's County Public Schools calendar and offers an ESY program. There are 30 hours of instruction per week available that are reduced for any related services a student is provided. The student would be assigned to [REDACTED] grade classroom at School C and stay in one class for all content subjects except Art, Physical Education and Music for which she would move to a different classroom. (Witness 4's testimony, Petitioner's Exhibit 37)

39. At School C there are no more than 9 students in a class with a teacher and instructional aide. There is a battery of reading interventions available for the student and for two hours in each morning the student would focus on reading and computer programs and have one to one tutoring with a reading specialist. Math instruction is provided in the afternoons. There is also a social skills curriculum. School C offers behavior support services and has a behavior modification level system that allows students to take responsibility for their learning. Attention issues are addressed by students moving every 20 to 25 minutes within the classrooms to different workstations or activities to break up monotony. Some students have special desks and chairs to assist in reducing distractions. (Witness 4's testimony)

40. School C has an annual tuition cost \$35,000 and related services are billed at \$69.85 per hour. The tuition and related services costs are approved by OSSE. All students approved by OSSE are also provided transportation services. School C has 26 District of Columbia students and a DCPS monitor. (Witness 4'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. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student FAPE by failing to provide the student with an appropriate IEP that was reasonably calculated to provide her with educational benefit at the December 2, 2014, MDT/IEP meeting and/or the October 29, 2015, MDT/IEP meeting due to insufficient specialized instruction, no BIP and inappropriate goals and objectives.

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

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 206-07

The court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation." *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008); *District of Columbia v. Walker*, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) (the "adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. See, e.g., *Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while "sympathetic" to parents' frustration that child had not progressed in public school "as much as they wanted her to," court noted that "the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available"). Ultimately, a school district provides a FAPE so long as a child receives some educational benefit. *O.S. by Michael S. and Amy S. v. Fairfax County Sch. Bd.*, 115 LRP 50343 (4th Cir. October 19, 2015).

IDEA provides that in developing and revising a student's IEP, the IEP team must, "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.” 20 U.S.C. § 1414(d)(3)(B)(i); see also 34 C.F.R. § 300.324(a)(2)(i).

There was no evidence presented that demonstrated that DCPS did not comply with procedural requirements in developing the student’s IEP at either the December 4, 2014, or the October 29, 2015, meeting. Petitioner asserted that the student’s two IEPs, developed on December 4, 2014, and October 29, 2015, were both inappropriate because they lacked a BIP, insufficient specialized instruction and inappropriate goals and objectives.

Although Petitioner asserted in closing argument that the August 5, 2014, HOD determined that the student’s IEP that prescribed 22 hours of instruction was inappropriate, the HOD actually concluded that the student’s IEP prescribing only 15 hours of specialized instruction outside general was in effect when the HOD was issued. Therefore, the Hearing Officer does not conclude that the student’s December 2, 2014, IEP was automatically inappropriate based upon any finding or conclusion in the previous HOD.¹¹

Although Petitioner alleges that the student’s December 2, 2014, IEP was inappropriate, that IEP was developed as a result of the team’s review of Petitioner’s independent evaluations. The team determined that the student’s disability classification would be changed from SLD to ID and that her instruction hours outside general education would be increased to 22 hours per week and that all her related services, including all her behavioral support, would be provided outside general education.

The student’s independent evaluations reviewed when the student’s December 2, 2014, IEP was developed indicated the student needed a highly structured environment with a small student to teacher ratio. The level of instruction and placement that was provided the student as of the December 2, 2014, IEP was a significant increase in services and a more restrictive placement than the student’s had previously been provided. At School A pursuant to this IEP the student was in a classroom with two adults and eight students.¹² The student’s remaining hours of instruction were in special classes such a Art, Music and P.E. with non-disabled peers during the student’s first year at School A and then these classes were with only disabled peers during her second year at School A. This change was made to the student’s IEP as of the October 29, 2015, IEP.

Although the Petitioner’s expert witness testified that the student should have made more academic gains in the four years since her 2011 achievement scores where she was operating below kindergarten level, the Hearing Officer notes that the student’s achievement scores in 2014 indicated the student was operating at a kindergarten level in all academic areas assessed. The student’s progress should be measured not from the time she was at School B with her previous IEP but should be measured from the time she arrived at School A and at the time the December 4, 2014, IEP was developed. The 2015 achievement testing by this evaluator indicated the student was operating on kindergarten level in some areas and below kindergarten

¹¹ FOF # 6

¹² FOF # 23

in others but the evaluator also noted that her evaluation it was not clear that the student was making her best efforts.¹³ In addition, this witness did not have input from the student's School A teacher or providers.

Consequently, the Hearing Officer does not conclude simply from this witness' testimony that the student made no academic gains. To the contrary, the evidence from the student's classroom teacher indicates the student has made some progress in reading, and a bit less in math and writing, since she began attending School A.

Both psychologists who testified were qualified as expert witnesses and stated that the student's cognitive functioning would significantly limit the amount academic progression that the student would achieve. They could not accurately state, however, what that achievement would be. Based upon this evidence the Hearing Officer concludes that the student has made some academic gains since attending School A and under her IEPs developed at School A, albeit slight.

As DCPS aptly points out in its closing argument IDEA does not require a BIP except in the case of disciplinary proceedings. IDEA and its implementing regulations only require school districts (and even then, only "as appropriate") to conduct an FBA or to implement a behavioral plan if there is a disciplinary change in placement of the student. See 20 U.S.C. § 1415(k)(1)(D)(ii). Here, the student was not subject to any disciplinary change in placement during her tenure at School A so an FBA and BIP were not statutorily required. Moreover, Petitioner offered no evidence that she or her advocate requested an FBA or BIP on or before December 4, 2014, or on or before the October 29, 2015, meeting.

There is no evidence that the student had been subject to disciplinary proceedings that would have required a BIP or an update of the student's BIP she had at School B. As the evidence demonstrates, although the student had a BIP that was implemented at School B, the behaviors that the student displayed of aggressive have not been displayed at School A.

There was evidence that the student's behavioral difficulties that were evident when she attended School B were initially present when she began to attend School A but the interventions that were used by the classroom teacher and the change of the student's behavior support services to include individual and group therapy outside general education significantly reduced such behaviors and the student began to display better behaviors.¹⁴

Although the parent testified that she received phone calls from the student's teacher regarding the student's classroom behavior it was not clear from her testimony that these calls have continued during the current school year. The student's teacher indicated that the student has not displayed disruptive behaviors at School A. Neither the School A social worker nor the psychologist were aware of any calls to the parent regarding the student's behaviors and they credibly testified that the student has adjusted well to being at School A and that she has begun to demonstrate and enjoy leadership roles at School A.

¹³ FOF # 16

¹⁴ FOF #s 29, 30

There was no testimony or evidence offered by Petitioner regarding the student's IEP goals from which the Hearing Officer could reasonably conclude that these IEP's were inappropriate. To the contrary, the evidence demonstrates that the student was making progress relative to her academic and behavioral goals and that some of the goals were mastered during her time at School A.¹⁵

The evidence sufficiently demonstrates that both the student's IEPs that have been developed since she began attending School A have been reasonably calculated to provide the student educational benefit and the evidence demonstrates that the student has in fact made both behavioral and academic gains under these IEPs. Although the student's academic gains have been modest they have been in line with what could be expected from her low cognitive abilities.

While Petitioner may feel that that the student has not progressed in public school "as much as [she] wanted [her] to," the question is not whether the educational agency has offered the best services available or remediated the student's disability. See *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 (5th Cir. 2012) ("educational benefit, not solely disability remediation, is IDEA's statutory goal...") *Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011).

There was insufficient evidence presented by Petitioner to demonstrate that the student's IEPs, since she attended School A and her placement in the program there, were not reasonably calculated to provide the student educational benefit. Consequently, the Hearing Officer concludes the student's December 2, 2014, and October 29, 2015 IEP were both reasonably calculated to provide educational benefits. Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement and location of services.

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

IDEA requires that "consistent with § 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." 34 C.F.R. §300.327. This requirement is also contained in 34 C.F.R. § 300.501(b) ("the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to – (1) the identification, evaluation, and the educational placement of the child."). In this case the placement decision should include the student.

Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and

¹⁵ FOF #s 26, 27

related services. This continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. Additionally, when determining the Least Restrictive Environment of a student, “in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.” 34 C.F.R. § 300.116(d).

The term “educational placement” is defined in IDEA as any one of the placements on the “continuum of alternative placements.” 34 C.F.R. § 300.115 lists this continuum as including: “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” See also, 34 C.F.R. § 300.39(a)(1)(i). The group determining the placement must select the placement option on the continuum in which it determines that the child’s IEP can be implemented in the LRE.” 71 Fed. Reg. 46587 (August 14, 2006), See also, 34 C.F.R. §§ 300.114 and 300.116. While educational placement is some point on the continuum of placement options, “location” is described “as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services.” Id. at 46588. “[T]he physical school alone does not constitute an ‘educational placement’” *D.K. v. District of Columbia*, Civ. 13-110, p. 11 (D.D.C. 2013). In fact, according to 20 U.S.C.A. § 1414(d)(1)(A)(i)(VII), an IEP must include “the...location...of those services and modifications.”

Pursuant to D.C. Code § 38-2561.02. (c): Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:

1. DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
2. Private or residential District of Columbia facilities; and
3. Facilities outside of the District of Columbia.

IDEA requires that children with disabilities be placed in the least restrictive environment (“LRE”) so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5)(A). 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.” See 20 USC 1412(a)(5), 34 CFR 300.114(a)(2)(i)-(ii) (emphasis added); 34 C.F.R. § 300.550; *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.”) Further, an appropriate location of services under the IDEA is one that is capable of “substantially implementing” a Student’s IEP. *Johnson v. District of Columbia*, 962 F. Supp. 2d 263 (D.D.C., 2013).

The evidence demonstrates that on December 4, 2014, the student’s IEP team, that included Petitioner and her advocate, agreed that the self-contained classroom at School A was appropriate and could meet the student’s academic needs. The advocates follow-up letter did not dispute this statement from the DCPS notes. This placement comported with the independent evaluation reviewed by the School A team that recommended that the student be

“placed in a small class size” and, as IDEA requires, provided the student opportunities to have contact with non-disabled peers.

As of October 29, 2015, the IEP team modified the student’s placement. DCPS proposed that the student be removed from the general education setting for “specials,” e.g. Art, Music and P.E. Thus, the student’s IEP contemplates that she will be outside of the general education for all of her academics. The DCPS witnesses testified that the student does not have problems with her non-disabled peers at lunch or recess. The evidence demonstrates the student has become engaged, is beginning to take initiative and responsibility for her actions, and show leadership in and outside of the classroom.

There is no evidence in the record that the student could not, as of October 29, 2015, participate in lunch and recess with her non-disabled peers during the school day. DCPS would have defaulted on its obligation to ensure an LRE by placing the student in a separate school placement as of that date. Petitioner presented no evidence that School A was unable to implement or did not implement the student’s IEP during SY 2014-2015 or SY 2015-2016.

Thus, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student’s placement or location of services was inappropriate.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to implement the student’s IEP.

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

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child’s IEP.

5E DCMR 3002.3 provides that:

- (c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.
- (d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...
- (f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant portions of the IEP “Savoy v. District of Columbia (DC Dist. Court) February 2012 adopted Houston Indep. School District v. Bobby R. 200 F3d 341 (5th Circ. 2000)

As to the current school year, Petitioner asserted that School A did not provide the student with all of her special education hours. However, the evidence demonstrates that during the current school year the student special classes have all been with her disabled peers. Although these

classes may not have been taught by special education IDEA does not define “special education” to include only education by certified special education teachers, but rather encompasses a broader range of instruction. See 20 U.S.C. § 1401(29) (defining “special education” to mean “specially designed instruction ... designed to meet the unique needs of a child with a disability”); see also 34 C.F.R. § 300.39(b)(3) (defining “specially designed instruction” without reference to certification).

The evidence demonstrates that School A substantially implemented the student’s IEP from August 2015 until October 2015. Based on the foregoing the Hearing Officer concludes that Petitioner did not sustain the burden of proof on this issue.

ORDER:

Based upon the findings of fact and conclusion of law determined herein, the Hearing Officer concludes that Petitioner’s due process complaint should be and is hereby dismissed with prejudice. All requested relief 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 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: April 21, 2016