

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
Student Hearing Office
August 04, 2014

Confidential

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| <p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> | <p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: July 30, 2014 <u>Representatives:</u></p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p> |
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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 July 30, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student _____ resides with his parent in the District of Columbia. He is child with a disability pursuant to IDEA with a disability classification of other health impairment (“OHI”) due to a congenital brain abnormality. The student was in pre-kindergarten during school year (“SY”) 2013-2014 in a full-time self-contained program located at a DCPS elementary school (“School A”).

On April 3, 2013, DCPS convened an individualized educational program (“IEP”) meeting at School A and developed an IEP for the student that prescribed all services outside general education: 26 hours per week of specialized instruction and related services including 30 minutes per week of behavioral support, 2 hours per month of speech language pathology and 2 hours per month of occupational therapy.

Petitioner filed a previous due process complaint on March 20, 2014, prior to the development of the student’s April 3, 2013, IEP. That due process complaint challenged, inter alia, the student’s prior IEP developed in April 2013 at the student’s prior school. Prior to the hearing on the _____ complaint DCPS conducted a functional behavior assessment (“FBA”) of the student due to his disruptive behaviors in his classroom at School A and developed a behavior intervention plan (“BIP”) and ultimately revised the student’s IEP on April 3, 2014, to include behavioral supports.

The March 20, 2014, due process complaint resulted in a Hearing Officer’s Determination (“HOD”) issued May 9, 2014, that included language stating that the student’s needs were not being met at School A and urging DCPS to review and revise the student’s April 3, 2014, IEP in light of the student’s continued behavior difficulties.²

² The HOD was issued by another Hearing Officer and did not adjudicate the appropriateness of the student’s April 3, 2014, IEP or his current educational placement at School A since that IEP was created. The language in the HOD describing School A as not meeting the student’s needs was neither a finding of fact or conclusion of law. However, the Hearing Officer urged DCPS to review the appropriateness of the student’s April 3, 2014, IEP, in light of the student’s behaviors and the student’s teacher’s difficulties in controlling his behaviors. In the HOD the Hearing Officer stated the following:

“Student’s April 4, 2014 IEP continues Student’s placement for all special education and related services in a special class, outside the General Education setting. The appropriateness of this IEP, which was developed after the parent’s due process complaint was filed, is not at issue in this proceeding. Notwithstanding, I note that the evidence in this case, from the written reports of DCPS’ employees, establishes that Student’s 2013-2014

On May 23, 2014, Petitioner filed the current due process complaint, challenging, *inter alia* the student's April 3, 2014, IEP and placement at School A. Petitioner seeks as relief revision of the student's IEP including a change in his disability classification from OHI to emotional disability ("ED") and/or autism, the addition of a dedicated aide and the student's placement in a private full time special education day school as well as compensatory education.³

On June 3, 2014, after the current due process complaint was filed, DCPS convened an IEP meeting and reviewed and revised the student's April 3, 2014, IEP. The student's placement at School A was continued through the end of SY 2013-2014. However, in light of the June 3, 2014, meeting DCPS conducted a review of the student's placement and concluded School A was not available as a placement location for the student for his kindergarten year SY 2014-2015. Although DCPS made mention to the parent of a possible school location that can implement the student's June 3, 2014, IEP, that location was not officially noticed to the parent by either a prior notice of location of services letter.

After the current due process complaint was filed Petitioner did not seek leave to amend the complaint to either challenge the appropriateness of the student's IEP that was developed on June 3, 2014, or the appropriateness of the proposed location DCPS mentioned at the June 3, 2014, IEP meeting. Thus, the appropriateness of the student's June 3, 2014, IEP and/or placement or the proposed location of services offered by DCPS at the June 3, 2014, meeting are not at issue. Thus, in this current due process hearing the only time period for which the issues of the appropriateness of student's IEP and placement were adjudicated was between April 3, 2014, to June 3, 2014.

In addition, at the June 3, 2014, IEP meeting the parent consented to and DCPS has now initiated two additional evaluations (occupational therapy ("OT") evaluation and speech-language) to further assess the student's disability classification and special education needs. One of the two evaluations has been conducted. However, an IEP team has not yet been reviewed that

classroom setting has not met his educational needs, even though the placement was appropriate when determined by the April 10, 2013 IEP team at City School 1.

The IDEA requires DCPS to ensure that Student's IEP team periodically revises his IEP, as appropriate, to address, *inter alia*, any lack of expected progress toward his annual goals, the results of his FBA and other reevaluations, information from teachers and the parent and the child's anticipated needs. *See* 34 CFR § 300.324(b). Even though the question of whether the April 3, 2014 IEP is appropriate for Student is not before me in this case, I exhort DCPS to ensure that the new IEP is promptly reviewed and revised, as appropriate, in light of the at the due process hearing of Student's current educational and behavioral needs, particularly the inability of Student's special education teacher to manage his behaviors with the existing classroom staffing."

³ Petitioner originally also sought as relief that DCPS revise the student's IEP to include extended school year ("ESY") but that request became moot as result of a subsequent IEP meeting on June 3, 2014, when ESY was granted.

evaluation. In addition to those two evaluations Petitioner is now also seeking from the Hearing Officer a comprehensive psychological evaluation to further assess whether the student's disability classification should be changed. However, Petitioner continues to seek the private school placement for the student prior to the evaluations being completed and the student's disability classification, IEP and placement being reviewed as a result of the pending and requested evaluations.

DCPS filed a timely response to the complaint on May 23, 2014. DCPS denied any alleged violation(s) and asserted the student's April 3, 2014, IEP was appropriate and DCPS provided significant and appropriate interventions to address this student's behavioral challenges in school. In addition, during the pre-hearing conference held on July 7, 2014, DCPS counsel noted that at the June 3, 2014, IEP meeting the team agreed to ESY and DCPS offered to conduct evaluations in order to reconsider the student's disability classification and there was no mention of the student's need for a dedicated aide at that IEP meeting. As to the school location DCPS counsel asserted that case law does not support moving the student at the end of the school year and it was agreed for the student to remain in the current program and there is no information that the student should have no contact with general education peers.

A resolution meeting was held June 3, 2014. Nothing was resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on June 21, 2014, and ends (and the Hearing Officer's Determination ("HOD") is due) on August 3, 2014.

The Hearing Officer convened a pre-hearing conference on July 7, 2014, and issued a pre-conference order outlining, inter alia, the issues to be adjudicated.

ISSUES: 4

The issues adjudicated are:

1. Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to provide the student an appropriate April 3, 2014, IEP and placement because the IEP lacks (1) a dedicated aide, (3) appropriate goals and baselines, evaluation procedures and schedules, behavior strategies and interventions.⁵

⁴ 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 outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. Petitioner asserted the student's current IEP and placement lacks the following: ESY, a dedicated aide, appropriate goals and baselines, evaluation procedures and schedules, behavior strategies and interventions and/or disability classification. Petitioner also asserted the records and evaluations upon which the IEP is based were not provided to the student's parent timely. In June 2014 at a RSM/IEP meeting Petitioner was provided a copy of the student's confidential psychological evaluation and DCPS agreed to conduct additional evaluations: clinical, behavior functioning and adaptive functioning.

⁵ Petitioner also asserted that the student's least restrictive environment ("LRE") and the appropriateness of the student location of services at School A was also being challenged. The Hearing Officer determined at the outset of the hearing that these concerns were encompassed within the two issues as already articulated by challenging both the student's placement and school location.

2. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate and school location that can meet his needs. Petitioner alleges the student's current program at School A is inappropriate and the student was receiving some of his instruction in general education.

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 80 and Respondent's Exhibits 1 through 17) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

FINDINGS OF FACT:⁶

1. The student _____ resides with his parent in the District of Columbia. He is child with a disability pursuant to IDEA with a disability classification of OHI due to a congenital brain abnormality. The student was in pre-kindergarten during SY 2013-2014 attending a full-time self-contained program at School A. (Petitioner's Exhibits 5-1, 28-1, 73)
2. In July 2012 DCPS conducted initial evaluations of the student including an educational evaluation and psychological evaluation to assess his intellectual functioning and social-emotional development. The student was determined to have a developmental delay. However, because of the scatter of his cognitive scores his IQ was not solidified. The student was found eligible with the disability classification of OHI. (Petitioner's Exhibits 22-2, 25, 26, 27, 28)
3. The student attended a DCPS full-time special education separate day school during SY 2012-2013. At the end of SY 2012-2013 the student's school closed and he was placed in a non-categorical, self-contained special education classroom of eight to nine children taught by a special education teacher and a full time paraprofessional at School A for SY 2013-2014. Sometime prior to the end of SY 2013-2014 an additional paraprofessional was added to the classroom. (Parent's testimony, Witness 4's testimony, Petitioner's Exhibit 55-5)
4. From the beginning of SY 2013-2014 the student's mother received telephone calls from the student's classroom teacher or the school principal several times per week to take the student home because of his behaviors in class, _____ and running out of the classroom. Although the student may have displayed behavioral difficulties at his prior school the parent was not repeatedly called about his behaviors as was done at School A. Consequently, the parent believes that the

⁶ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

student should be placed in separate day school as he was prior to attending School A. (Parent's testimony)

5. At School A the student had difficulty sustaining attention, was physically aggressive, oppositional and, on occasion, escaped from the classroom when he became upset.

he School A social worker based on his classroom observation of the student while conducting a FBA in March 2014 concluded the student was dangerous to himself and others. (Petitioner's Exhibit 29-1)

6. On March 13, 2014, DCPS drafted a BIP for the student which was intended to target his aggressive and non-compliant behaviors, including the use of a personal visual schedule, of a token system to reinforce targeted behaviors and of progressive steps by school staff to ward off unsafe and disruptive behaviors and to de-escalate the student. At a March 25, 2014, meeting the FBA was reviewed and a BIP was developed. (Petitioner's Exhibits 17-1, 17-2, 17-3, 30-1, 30-2)
7. On April 3, 2014, School A convened an IEP team meeting and revised the student's IEP to include behavioral supports. The IEP team added three goals under the area of "Emotional, Social, and Behavioral Development." However, the goals did not contain baseline data or the evaluation procedures or evaluation schedule to measure accomplishment of the three goals under this area. The IEP team noted in the student's IEP that the student was academically on grade level and one of the smartest students in his class; however, his maladjusted behaviors of physical aggression and failure to respond to verbal redirection was of great concern. The IEP team reduced the student's specialized instruction from 26.5 to 26 hours per week and added 30 minutes per week of behavioral support services. The IEP also includes 2 hours per month of speech language pathology and 2 hours per month of occupational therapy. The IEP states that all of the student's special education and related services are to be provided outside of the general education setting. (Petitioner's Exhibits 5-1, 5-5, 5-6, 5-9, 5-10, 16-3, 16-4)
8. During the April 3, 2014, IEP meeting the student's parent requested that the IEP team provide the student a dedicated aide. The School A staff believed that the student's BIP should be implemented for at least six weeks to determine if it was effective prior to concluding the student was in need of a dedicated aide. The DCPS staff believed the student had not displayed the level of behavioral concerns as to warrant a dedicated aide and he should not yet be provided that level of restriction in the classroom without first trying the less restrictive alternative of the BIP implementation. The School A staff was also reluctant to consider any modification in the student's disability classification without sufficient data. (Witness 4's testimony)
9. Petitioner filed a previous due process complaint on March 20, 2014, prior to the development of the student's April 3, 2013, IEP. That due process complaint challenged, inter alia, the student's prior IEP that was developed in April 2013 at the student's prior school. The March 20, 2014, due process complaint resulted in a HOD issued May 9,

2014, that included language stating that the student's needs were not being met at School A and urging DCPS to review and revise the student's April 3, 2014, IEP in light of the student's continued behavior difficulties. (Petitioner's Exhibit 55-17, 55-18)

10. On May 23, 2014, Petitioner filed the current due process complaint, challenging, inter alia the student's April 3, 2014, IEP and placement at School A. On June 3, 2014, after the current due process complaint was filed, DCPS convened an IEP meeting and reviewed and revised the April 3, 2014, IEP. The student's placement at School A was continued through the end of SY 2013-2014. However, the student's June 3, 2014, IEP notes "The team recommends that [the student] remain in a full time out of general education setting in Kindergarten due to his inability to self regulate. He is unable to access academic instruction without a controlled classroom environment with reduced distractions, small class size, and small student to teacher ratio..." (Petitioner's Exhibits 1, 56-1, 56-10)
11. In light of the June 3, 2014, meeting DCPS conducted a review of the student's placement and concluded School A was not available as a placement location for the student for his kindergarten year SY 2014-2015. Although DCPS made mention to the parent of a possible school location that can implement the student's June 3, 2014, IEP, that location has not been officially noticed to the parent by either a prior notice or a location of services letter. (Parent's testimony, Witness 4's testimony, Respondent's Exhibits 11-1, 11-11, 12-2, 12-3, 56-10)
12. At the June 3, 2014, IEP meeting the parent consented to, and DCPS has now initiated, two additional evaluations (OT evaluation and speech-language) to further assess the student's disability classification and special education needs. One of the two evaluations has been conducted. However, an IEP team has yet to review the evaluation. (Petitioner's Exhibit 56, Respondent's Exhibits 14, 16)
13. In addition to those two evaluations Petitioner is also seeking a comprehensive psychological evaluation to further assess whether the student's disability classification should be changed. Nonetheless, Petitioner continues to seek the private school placement for the student prior to the evaluations being completed and the student's disability classification and IEP and placement being reviewed as a result of the pending and requested evaluations. (Parent's testimony)
14. Following the end of SY 2013-2014 at School A the student began attending a pre-kindergarten program for ESY in another DCPS school. The student is advancing to kindergarten. (Parent's testimony)
15. The parent engaged an independent clinical psychologist to review the student's records and meet with the student and his parent and provide an opinion as to the student's functioning and educational needs. The psychologist opined that the student at times displays behavioral symptoms that look like autistic spectrum disorder systems. Whether the student has autism has not been fully assessed and determined. The student's parent wants the right educational setting to address the student's behavior dis-

regulation and his inability to self-soothe and pay attention to social cues and give adequate responses. As a result of the uncertainty of the student's correct disability classification the independent psychologist recommended a full comprehensive psychological evaluation be conducted to uncover whether OHI or autism is the correct disability classification for the student. Because of the student's attention seeking and behavior difficulties the psychologist opined that the student would do well in small class setting that provides the requisite attention and modifications to address his behaviors and rather than address his behaviors in a punitive manner he should be in a school where staff expect and effectively address his behaviors based on the student's diagnosis. The student perhaps he needs a full time special education day school and the evaluations to nail down his disability should be conducted promptly. (Witness 1's testimony, Petitioner's Exhibit 75)

16. The student has been interviewed by and accepted to a full time special education day school that services students with autism. The school has 49 students and has classrooms of 6 to 7 students in classroom with a staff to student ratio of 2 to 1. The school costs \$ 311.00 per day for kindergarten through 3rd grade and is a year round program. There is no additional cost for speech-language services and OT services have additional costs and are provided depending on a student's need for the service. There is no additional cost for behavior support services or counseling. All staff is trained in crisis management, prevention intervention. The school has been approved by OSSE and has a certificate of approval. Its staff believes the school can meet the student's academic and behavioral support needs. (Witness 3's testimony, Petitioner's Exhibit 70)
17. Petitioner's educational consultant prepared a compensatory education plan for the denials of FAPE alleged. During the Hearing the consultant modified her proposal to compensate for the student not being in a separate day school for a period from April 3, 2014, to June 3, 2014. The student would benefit from independent tutoring and tutoring would serve to place the student in a position he would have been had he received an appropriate IEP and placement. The proposed plan recommended the student be provided 50 hours of independent tutoring, and 1 hour each of speech language services, OT services and behavioral support. (Witness 3's testimony, Petitioner's Exhibit 77)

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 a free appropriate public education ("FAPE") by failing to provide the student an appropriate April 3, 2014, IEP and placement because the IEP lacks (1) a dedicated aide, (3) appropriate goals and baselines, evaluation procedures and schedules, behavior strategies and interventions.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student's April 3, 2014, IEP was inappropriate because it lacked appropriate baselines, and evaluation procedures and schedules for the goals in the area of Social, Emotional and Behavior Development. However, there was insufficient evidence that the student's IEP was inappropriate because it did not prescribe appropriate goals, behavior strategies and interventions or dedicated aide.

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

⁷ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

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

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

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

"Educational placement" means educational program, not the particular institution where that program is implemented." *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

The "educational placement" consists of: (1) the education program set out in the student's IEP, (2) the option on the continuum in which the student's IEP is to be implemented, and (3) the school or facility selected to implement the student's IEP. *Letter to Fisher*, 21 IDELR 992 (1994).

In this jurisdiction, the educational placement is the child's IEP, and the school designated by the public agency to implement the child's IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012).

The evidence demonstrates that in March 2014 DCPS conducted an FBA and developed a BIP to address the student's disruptive classroom behaviors and that at the student's April 3, 2014, IEP

meeting the team reviewed the BIP and added behavioral support services to the student's IEP.⁸ These were direct actions taken by the team to address and hopefully resolve the student's in class behaviors. There was no convincing evidence that following the development of this April 3, 2014, IEP the student's behavioral difficulties remained as severe as the evidence clearly indicates they were prior to the FBA, BIP and update of the IEP on April 3, 2014.

The IEP team included behavior support goals and services in the student IEP. However, the April 3, 2014, IEP lacked any baseline data or a schedule by which the student's success or failure relative to the new IEP goals would be measured.⁹

The IEP simply stated the behaviors the student had been displaying in the classroom. The Hearing Officer concludes that with severity of disruptive and dangerous behaviors the student had been displaying¹⁰ it was incumbent upon the IEP team when it added the behavioral support services to comprehensively address the student's behaviors with adequate baseline data and the frequency by which the student's progress or lack thereof relative to these new goals would be measured. The Hearing Officer concludes based upon the severity of the student's behaviors prior the development of this IEP, the absence of this vital data and standards in the IEP was more than simply a procedural violation and resulted in an IEP that was not reasonably calculated to provide the student educational benefit and the student was denied a FAPE as a result.

The evidence demonstrates, however, that the BIP had been developed and contained behavior interventions that would be initiated in the classroom and that it was reasonable for School A to attempt the interventions in the BIP as a less restrictive measure than immediately providing the student a dedicated aide at the parent's request.¹¹ Consequently, the Hearing Officer concludes that the student's April 3, 2014, IEP was not inappropriate due to a lack of a dedicated aide and behavior interventions.

The student's April 3, 2014, IEP prescribed that the student be totally removed from general education. The evidence demonstrates that during the student's time at School A he was totally removed from general education and did not receive services with non-disabled peers.¹² Although Petitioner asserts that the student's placement or LRE should have prescribed a full time special education day school, there was insufficient evidence that the student's required such a an additional restriction in his IEP. There was insufficient evidence from which the Hearing Officer could conclude that the student required an LRE more specific or restrictive than prescribed by the April 3, 2014, IEP.

There was, however, an indication that at least prior to the development of the student's April 3, 2014, IEP and development of the BIP the student's needs were not being met at School A because of the school's inability to adequately address his behaviors up to that point. The Hearing Officer also notes with grave concern that the student's disability has not been adequately and comprehensively determined. Petitioner's expert witness' testimony, the

⁸ FOF #s 6, 7

⁹ FOF # 7

¹⁰ FOF # 5

¹¹ FOF # 8

¹² FOF # 3

student's medical records, and even the School A staff have expressed concerns as to whether the student should be more appropriately classified with Autism Spectrum Disorder and his programming consequently modified.¹³ In addition, the student's cognitive functioning was not fully determined in his initial evaluations in 2012.¹⁴ Consequently, the Hearing Officer concludes that an appropriate remedy for the denial of FAPE determined herein includes a directive that prompt evaluations be conducted and reviewed by an IEP team.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate and school location that can meet his needs.

Conclusion: The evidence was inconclusive as to whether School A after the modifications made to the student's IEP on April 3, 2014, and implementation of the BIP was an appropriate location of services for the student. In addition, there was insufficient evidence that the student had any educational services in general education while at School A following the development of his April 3, 2014, IEP. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

The school district is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

The IDEA only mandates a "basic floor of opportunity." *Id.*; *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995). To accomplish this, an IEP must only "be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009) (quoting *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004)).

The evidence in the record clearly demonstrates that prior to development of the student's April 3, 2014, IEP the student needs were not being met at School A because of the student's severe behavioral difficulties.¹⁵ The student's behaviors resulted in the School A social worker concluding that the student was danger to himself and others. Up to the point of the development of the student April 3, 2014, IEP School A had demonstrated that it was not an appropriate location of services for the student. However, evidence was lacking to prove that the interventions and modifications to the student's programming and IEP initiated on April 3, 2014, as well as the additional of staff in the student's classroom did not alter School A's ability to meet the student's needs. There was evidence that the student was otherwise performing well academically at School A and was perhaps one the smartest children in his class.¹⁶ Because of the was insufficient evidence that School A did not begin meeting the student's needs following

¹³ FOF #s 1, 15, 8

¹⁴ FOF # 2

¹⁵ FOF #s 5, 9

¹⁶ FOF #s 3, 7

the development of the April 3, 2014, IEP the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

School A does not have a program at the kindergarten level appropriate for the student for SY 2014-2015 and thus he needs a new school location.¹⁷ Because so much of the student's school year at School A during SY 2013-2014 was replete with dysfunction because of the student's severe behaviors the Hearing Officer concludes that equity requires that the parent participate fully in the selection of the student's next school location.

Compensatory Education

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

The Hearing Officer concludes based on the testimony offered at hearing that tutoring would serve to place the student in the stead he would have been had received an appropriate IEP.¹⁸ However, the evidence did not support the amount of services Petitioner requested because the proposed plan was based on the student having not been in a full-time separate day school, a requirement the Hearing Officer concluded Petitioner failed to prove. Despite the conclusion that Petitioner's proposed amount of services was inappropriate the Hearing Officer concludes that to award the student no compensation for the inappropriate IEP would be inequitable and therefore concludes that the student should be awarded at least nominal services as compensation. Consequently, the Hearing Officer directs that the student be provided academic tutoring in the order below.

ORDER:¹⁹

1. DCPS shall within five (5) business days of the issuance of this order issue the parent authorization for an independent comprehensive psychological evaluation that also assesses the student's social, emotional and behavioral functioning at the OSSE/DCPS prescribed rate.
2. DCPS shall within ten business days of the issuance of this order shall convene a placement/location meeting for the student with the parent in attendance and

¹⁷ FOF # s 10, 11

¹⁸ FOF # 17

¹⁹ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

determine a school location for implementation of the student's June 3, 2014, IEP for SY 2014-2015.

3. DCPS shall, within ten (10) business days of its receipt of the independent evaluation authorized by this order, convene an IEP meeting for the student and review that evaluation and all other evaluations that the student's parent has consented to and DCPS has agreed to conduct (OT and S/L)²⁰ and review and make a determination as to the student's disability classification and review and revise the student's IEP as appropriate and determine an appropriate placement and school location.
4. As compensatory education DCPS shall within 20 calendar days of the issuance of this Order provide the student 20 hours of independent tutoring at the prescribed OSSE/DCPS rate. Petitioner shall use and complete this award by December 31, 2014.
5. All other 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: August 3, 2014

²⁰ The Hearing Officer concludes that these evaluations shall be completed by DCPS at latest by the start of SY 2014-2015.