

**District of Columbia  
Office of the State Superintendent of Education**

Student Hearing Office  
810 First Street, N.E., Suite 2001  
Washington, DC 20002

OSSE  
Student Hearing Office  
June 16, 2014

<p><b>STUDENT<sup>1</sup>,</b> <b>By and through PARENT,</b></p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p><b>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</b></p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer:</p> <p>Charles M. Carron</p> <p>Date Issued:</p> <p>June 16, 2014</p>
---	---

**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND**

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed May 2, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools (“DCPS”).

---

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

On May 5, 2014, the undersigned was appointed as the Impartial Hearing Officer.

On May 5, 2014, Respondent filed its timely Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on May 16, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on June 1, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on June 2, 2014 and will conclude on July 16, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on May 27, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by June 2, 2014 and that the Due Process Hearing (“DPH”) would be held on June 9, 2014. The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on May 27, 2014.

On May 29, 2014, Respondent filed a motion for partial summary adjudication, seeking to strike Petitioner’s request for an independent evaluation and for placement of the Student at a private school at Respondent’s expense. Petitioner opposed the motion on June 2, 2014. On June 3, 2014, the undersigned granted the motion in part, striking the request for an independent evaluation.

On June 3, 2014, Respondent filed an objection to one of Petitioner’s proposed exhibits coupled with a motion to strike one of Petitioner’s witnesses. That same date, the undersigned dismissed the motion as untimely filed.

Petitioner elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence without objection<sup>2</sup>: Petitioner’s Exhibits: P-1 through P-12 and Respondent’s Exhibits: R-1 through R-6.

Two witnesses testified on behalf of Petitioner at the DPH: Petitioner and Consultant. Over Respondent’s objection the undersigned qualified Consultant as an expert in the following two areas of special education: (1) the development of Individualized Education Programs (“IEPs”) for students with the disability classification of Emotional Disturbance (“ED”) and (2) compensatory education required to remediate educational deficits for students with ED.

Only one witness, Special Education Coordinator/LEA<sup>3</sup> Representative (“SEC”), testified on behalf of Respondent at the DPH.

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

## **II. JURISDICTION**

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

---

<sup>2</sup> Respondent had objected to one of Petitioner’s exhibits but withdrew that objection at the DPH.

<sup>3</sup> “LEA” is the acronym for Local Educational Agency.

### **III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT**

The circumstances giving rise to the DPC are as follows:

The Student is male of Current Age, and attends Current Grade at a public school (the “Attending School”). The Student has been determined to be eligible for special education and related services as a child with a disability, ED, under the IDEA.

Petitioner claims that Respondent has denied Student a FAPE by failing to reevaluate him in all areas of suspected disability and because his IEP developed in January 2014 is inappropriate because he requires a Behavior Intervention Plan (“BIP”) and a more restrictive placement, all as set forth in more detail in Section IV *infra*.

### **IV. ISSUES**

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

(a) Did Respondent deny the Student a FAPE because the IEP developed for him on or about January 14, 2014 has an inappropriate placement and location of services because he requires a full time out of general education therapeutic program for children with ED?

(b) Did Respondent deny the Student a FAPE by failing to conduct a reevaluation, specifically a Functional Behavioral Assessment (“FBA”) to address his behavior problems since the beginning of School Year (“SY”) 2013-2014?

(c) Did Respondent deny the Student a FAPE by failing to incorporate a BIP in his January 14, 2014 IEP?

(d) Since November 6, 2012 (*i.e.*, three years after the Student’s most recent psychological evaluation), has Respondent denied the Student a FAPE by

failing to reevaluate him in the following areas of concern: social-emotional, cognitive and social history?

## **V. RELIEF REQUESTED**

Petitioner requests the following relief:<sup>4</sup>

- (a) a finding in Petitioner's favor on all issues;
- (b) an Order that Respondent fund the Student's placement at one of several specified non-public schools, with transportation, or any other appropriate public or non-public school<sup>5</sup>;
- (c) compensatory education;
- (d) an Order that Respondent complete the following evaluations: (i) an FBA, (ii) social-emotional assessment, (iii) social history, and (iv) cognitive assessment;
- (e) an Order that Respondent convene a meeting to review the evaluations and revise the Student's IEP as appropriate, including developing an appropriate BIP; and
- (f) any other relief deemed appropriate.

---

<sup>4</sup> In the DPC, Petitioner also requested attorney's fees and costs, which only a court can award.

<sup>5</sup> At the PHC, Respondent's counsel correctly noted that if a public school can implement the Student's IEP, including placement, IDEA does not require Respondent to pay for the Student to attend a non-public school, and an Order requiring Respondent to do so would be inappropriate.

## VI. FINDINGS OF FACT

### Facts Related to Jurisdiction

1. The Student is a male of Current Age. P-2-1.<sup>6</sup>
2. The Student resides in the District of Columbia. Testimony of Petitioner.
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with ED. P-2-1.

### The Student's 2009 Psychological Evaluation

4. In October 2009, Respondent conducted a psychological evaluation of the Student. P-5. The evaluator concluded that the Student had average intelligence and that his academic achievement fell in the average to low average range. P-5-13. The evaluator found that the Student had clinically elevated scores in the areas of hyperactivity, aggression, conduct problems, depression, school problems, attention problems, learning problems, atypicality, withdrawal, adaptability, social skills, study skills, functional communication, emotional self-control, and negative emotionality. P-5-13 and -14.

### The Student's February 2012 Behavior Intervention Plan

5. In February 2012, a BIP was developed for the Student. P-7. The rewards/reinforcements for good behavior were "Free Time (Doing Nothing), Do something fun with a classmate, Play a game, Computer Time." P-7-1. The consequences for

---

<sup>6</sup> When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

unacceptable behavior were “Time out, Parent school staff conference, In school suspension, Out of school suspension.” *Id.*

### The Student’s 2012 Evaluations and Assessments

6. In September 2012, the Student was observed in the classroom. P-9-1. The Student was observed to be out of his seat, talking to other students, distracting other students, spinning in his chair, not focusing on his work and refusing to show his work to his teacher. *Id.*

7. In October 2012, Respondent conducted an FBA of the Student. P-6. The Student’s behaviors of most concern were his inability to remain seated, frequent verbal outbursts, class disruption, and inability to remain on task for more than five minutes.

P-6-1. The evaluator recommended a BIP. P-6-5.

8. In November 2012, the Student was observed in the classroom. P-9-2 through -5. The Student was observed yelling, banging on his desk, talking excessively, making noises, mocking his teacher, getting up from his desk and walking around, and falling asleep. *Id.*

9. In November 2012, the Woodcock Johnson III (“WJ-III”) Normative Update Tests of Achievement were administered to the Student. P-4. The evaluator found that the Student’s ability to apply academic skills was in the low average range and his academic skills and fluency with academic tasks were in the low range. P-4-1. The Student’s score in brief mathematics was average. *Id.* His scores in broad mathematics and math calculation skills were in the low average range. *Id.* His standard scores were low in broad reading, brief reading, broad written language, written expression and brief

writing. *Id.*

10. Respondent's "Data Evaluation Report" dated November 2, 2012, stated, *inter alia*, that the Student was exhibiting social and behavioral concerns and had been suspended nine times that school year, that he was extremely impulsive and unable to control his behaviors, that he engaged in many attention-seeking behaviors, that he was defiant and had no regard or respect for authority, that he was disrespectful to teachers, that he used profanity, that he did not follow class rules, that he often was off-task, that he disrupted the class, and that he ran off and hid. P-8. The evaluator concluded that the Student continued to need special education services as a child with ED. P-8-4.

#### The Student's April 29, 2013 IEP

11. The Student's April 29, 2013 IEP, which amended his January 14, 2013 IEP to revise his Extended School Year ("ESY") services, noted that he had difficulty getting along with peers and working productively in class (P-3-2); that he became frustrated easily, had poor impulse control and was oppositional (P-3-3); that his emotional disturbance had an impact on his reading comprehension because he became easily frustrated (P-3-4); that his emotional disturbance had an impact on his ability to access grade-level curriculum (P-3-6); and that his emotional concerns were not able to be addressed in the general education setting (P-3-7).

12. The April 29, 2013 IEP prescribed 27<sup>7</sup> hours per week of specialized instruction and 360 minutes per month of behavioral support services, all in the outside of

---

<sup>7</sup> Throughout his opening and closing arguments, Petitioner's counsel incorrectly stated that this IEP provided 27.5 hours per week of specialized instruction.

general education setting. P-3-9.

13. The “Least Restrictive Environment” section of the Student’s April 29, 2013, IEP stated that the Student required “a Full Time ED Therapeutic Setting.” P-3-10.

#### The Student’s January 2014 Assessment

14. On January 8 and 9, 2014, Respondent observed the Student in the classroom and found him to be agitated, physically and verbally abusive, disruptive, disrespectful, destructive, aggressive, noncompliant, uncooperative, fidgety, restless, failing to follow teacher directions, investing little effort, not relating well to others, unable to sit correctly, and off-task. R-1-3.

#### The Student’s January 13, 2014 IEP

15. The Student’s January 13, 2014 IEP repeated *verbatim* the statements in his April 29, 2013 IEP that he had difficulty getting along with peers and working productively in class (P-2-3); that he became frustrated easily, had poor impulse control and was oppositional (P-2-5 and -10); that his emotional disturbance had an impact on his reading comprehension because he became easily frustrated (P-2-6); that his emotional disturbance had an impact on his ability to access grade-level curriculum (P-2-8); and that his emotional concerns were not able to be addressed in the general education setting (P-2-11).

16. The January 13, 2014 IEP prescribed 25<sup>8</sup> hours per week of specialized instruction and 360 minutes per month of behavioral support services, all in the outside of general education setting. P-2-12.

17. The “Least Restrictive Environment” section of the Student’s January 13, 2014 IEP repeated the statement in his April 29, 2013 IEP that the Student required “a Full Time ED Therapeutic Setting.” P-2-13.

#### The Student’s February 2014 Evaluation

18. In February 2014, an FBA of the Student was conducted because he was verbally abusive and very angry, avoided class assignments, and engaged in immature and attention-seeking behavior. R-1-1. This behavior occurred “continuously,” at least three to five times daily, for 10 minutes to an hour or longer. R-1-2. This behavior caused disruption, impeded educational progress, “impacted” interpersonal relationships with adults and peers, interfered with social interactions, interfered with instruction, and caused property damage. R-1-3.

#### The Student’s 2014 Behavior Intervention Plan

19. A revised BIP was developed for the Student on or after February 6,

---

<sup>8</sup> SEC credibly testified that “25” was a typographical error, and that the Student was intended to receive, and received, 26 hours per week of specialized instruction in the outside of general education setting. Testimony of SEC. This is one of many examples of sloppy documentation or recordkeeping by Respondent. Another example is that the person listed on the Student’s January 13, 2014 IEP (P-2-1) as General Education Teacher is in fact the behavior technician in the Student’s classroom (Testimony of SEC).

2014. R-5.<sup>9</sup>

20. The revised BIP is similar to the February 2012 BIP except that it lists the rewards/reinforcements in slightly different wording as “Free Time, Play a game, Computer Time.” R-5-2.

#### The Student's Grades

21. During SY 2013-2014 through the third advisory period, the Student has earned Ds in all of his courses except Science, in which he earned an A. R-2-1 and -2.<sup>10</sup>

#### The Student's Attendance During SY 2013-2014

22. During SY 2013-2014 through May 2014, the Student had 63 unexcused absences and was tardy 32 times. R-3.

#### The Student's Disciplinary History During SY 2013-2014

23. On March 13, 2014, the Student engaged in fighting, for which he was suspended five days. P-10-1. There is no evidence of any other suspensions during SY 2013-2014, hence none prior to the January 13, 2014 IEP Team meeting.

---

<sup>9</sup> Another example of sloppy documentation or recordkeeping by Respondent is the lack of a date on this document. The document refers to a “Last IEP Annual Review Meeting Date” of February 6, 2014, which is the only way the undersigned knows that the document was prepared on or after that date.

<sup>10</sup> The Student's report card (R-2) is another example of sloppy documentation or recordkeeping by Respondent. The report card lists the Student's classes with names of various teachers. However, SEC credibly testified that the Student receives all of his instruction in a special education classroom, taught by one teacher who has one aide and one behavior technician in the classroom.

The Student's Placement During SY 2013-2014

24. Petitioner did not want the Student to attend the school to which he initially was assigned for SY 2013-2014. Testimony of Petitioner.

25. Petitioner arranged for the Student to attend Attending School. *Id.*, testimony of SEC.

26. The Student missed approximately the first two weeks of school while Petitioner was arranging for him to attend Attending School. Testimony of Petitioner.

27. Although Attending School has general education students, the Student attends a special behavioral educational support program there for students with ED. Testimony of SEC.

28. The program is a full-time outside-of-general-education program; the only time the students come in contact with general education students is when they go through the metal detector at the front door at the beginning of the day (and the Student is escorted by his bus driver at that time). *Id.*

29. There are six students in the classroom. *Id.*

30. The program is therapeutic. *Id.*

31. The Student's classroom has one special education teacher, one aide, and one behavior technician. *Id.*

32. The Student's classroom is adjacent to the social service office which is staffed by social workers and Attending School's psychologist. *Id.*

33. The program has a "de-escalation room" for students who are having behavior problems. *Id.*

34. Petitioner's expert witness testified that a "full time therapeutic setting" means that the students do not interact with general education students, that the classroom is small with a teacher-student ratio of 2:8 or 2:10 plus an assistant, that the students have access to counseling and a behavior crisis team, that students have a "time out" area so that when they have behavior problems they can "de-escalate," and that the students have a "point system" to chart their behavior. Testimony of Consultant.

35. The Student's placement during SY 2013-2014 meets all of Consultant's criteria for a "full time therapeutic setting" other than a "point system." The undersigned finds that the lack of a "point system" does not render the Student's placement at Attending School less than full-time, or non-therapeutic.

36. Based upon the entire record, the undersigned finds that the Student's placement during SY 2013-2014 matches the placement prescribed in his 2013 and 2014 IEPs as well as the placement recommended by Consultant.

#### The May 16, 2014 Meeting

37. A meeting of the Student's MDT/IEP Team was convened on May 16, 2014, to discuss resolution of the instant DPC. R-4.

38. Respondent offered to conduct a psychological evaluation of the Student. R-4-1 and -2.

39. Petitioner agreed to allow Respondent to conduct the evaluation and stated that having Respondent conduct the evaluation would be a better option [than an independent evaluation] because the Student did not respond well to strangers and might not perform as well if the Attending School psychologist did not evaluate him. R-4-2.

40. The team agreed that after the evaluation was completed an IEP Team meeting would be held and the Student's BIP would be revised. *Id.*

#### Petitioner's Compensatory Education Proposal

41. Petitioner's compensatory education proposal, prepared by Consultant, assumes that the reduction of two hours per week in specialized instruction between the Student's 2013 and 2014 IEPs (*i.e.*, 27 hours per week to 25 hours per week) constituted a "deficit" of 40 hours of specialized instruction justifying 30 hours of one-on-one compensatory education.<sup>11</sup> P-11-4.

42. Consultant was unaware that the Student was in fact receiving 26 hours per week of specialized instruction at Attending School.<sup>12</sup>

43. Based upon the entire record, including the Student's many days of unexcused absence, the undersigned finds that the difference of one hour per week of specialized instruction, equating to less than four percent (4%) of instructional time, is *de minimis* and does not justify any compensatory education.

44. Moreover, Petitioner did not introduce any evidence, through the testimony of Consultant or otherwise, of any specific educational deficits resulting from the reduction in the number of hours of specialized instruction (or from any other alleged denial of

---

<sup>11</sup> Consultant testified that one-on-one instruction is more efficient than classroom instruction, so that 30 hours of the former would compensate for 40 hours of the latter. Testimony of Consultant.

<sup>12</sup> There is no evidence in the record as to why the Student's hours of specialized instruction were reduced by one hour per week from January 2013 to January 2014. At the school the Student attended in January 2013, as well as at the Attending School, he received all of his instruction in the outside of general education setting. Thus, he had a "full time IEP" throughout.

FAPE). Nor did Petitioner introduce any evidence of how the requested 30 hours of compensatory education would remediate the Student's educational deficits, except Consultant's conclusory statement that based upon her experience, it would do so.

## **VII. BURDEN OF PROOF**

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

## **VIII. CREDIBILITY**

Petitioner appeared to be testifying honestly to the best of her recollection, but her memory was so poor that her testimony was totally unreliable. For example, she could not recall which school the Student attended which year. She could not recall the names of Attending School staff members that she said had called her to pick up the Student at school because of his behavior. The person she identified as the Student's teacher that she claimed to speak with weekly is in fact the behavior technician in his classroom. Petitioner based her conclusion that the Student is not progressing, and is failing all of his classes, on telephone conversations with the behavior technician, who would not be in a position to know the Student's academic progress. Petitioner testified that she never received the Student's report cards (which show that he is passing his classes, albeit with Ds), even though she did receive report cards for her other children who attend DCPS

schools. The report card in evidence (R-2) has Petitioner's correct address; accordingly, the undersigned does not find Petitioner's testimony that she did not receive any report cards during SY 2013-2014 to be reliable. Petitioner could not recall how many times the Student had been suspended during SY 2013-2014, or when he was suspended. When questioned about the Student's unexcused absences, Petitioner could not recall how many times the Student had been absent during SY 2013-2014. When questioned about reasons for the Student's absences, Petitioner gave a vague answer about a problem with the school bus not picking the Student up "around when we had the snow," and about two days that the school bus did not pick him up after an incident when he eloped from the school bus. Those responses would not explain the vast number of unexcused absences. Petitioner testified that no one from Attending School ever contacted her about the Student's absences, which the undersigned finds improbable. Petitioner could not even recall much about a meeting that occurred three weeks prior to the DPH. In short, Petitioner's memory cannot be relied upon, and the undersigned therefore has disregarded her testimony.

Consultant was entirely credible. Once she misspoke and immediately corrected her testimony. Although Consultant testified credibly, she willingly acknowledged that she was not very familiar with the Attending School, she did not speak with the Student's teachers or the Attending School staff, and her only source of information about the Student's lack of academic progress was Petitioner. For the reasons discussed in the preceding paragraph, Petitioner is not a reliable historian. Accordingly, Consultant's testimony suffers from a substantial lack of basis.

SEC was entirely credible and her testimony was based soundly on facts within her personal knowledge.

## **IX. CONCLUSIONS OF LAW**

### Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

### FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

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

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

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

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

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

## Reevaluation

3. Unless the parent and the Local Educational Agency (“LEA”) agree that a reevaluation is unnecessary, a reevaluation of a child with a disability must be conducted at least once every three years, or more frequently if conditions warrant reevaluation, if the child’s parent or teacher requests a reevaluation, or before determining that a child is no longer a child with a disability; but no more frequently than once a year unless the parent and the local educational agency agree otherwise. 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303; DCMR §5-E3005.7.

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

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

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

5. The group described in the preceding paragraph may conduct its review without a meeting. 34 C.F.R. §300.305(b).

6. The IEP Team and other qualified professionals, as appropriate, may determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child’s educational needs. 20 U.S.C. §1414(c)(4); 34 C.F.R. §300.305(d). District of Columbia regulations implementing these provisions of IDEA omit the references to determining the child’s educational needs. DCMR §5-E3005.6.

7. If the IEP Team determines that no additional data are needed, the LEA is not required to conduct such an assessment unless requested to do so by the child’s parents. 20 U.S.C. §1414(c)(4)(b); 34 C.F.R. §300.305(d)(2).

8. In the instant case, the Student had classroom observations in September 2012 (Finding of Fact 6), November 2012 (Finding of Fact 8) and January 2014 (Finding of Fact 14); FBAs in October 2012 (Finding of Fact 7) and February 2014 (Finding of Fact 18); and WJ-III achievement tests in November 2012 (Finding of Fact 9). These observations, FBAs and tests constituted assessments, and all were completed within the three years prior to the filing of the instant DPC on May 2, 2014, and all except the February 2014 FBA were completed within a year and a half prior to the January 13, 2014 IEP Team meeting where the Student’s current IEP was developed.

9. Apparently the IEP Team determined that no additional data were required to determine that the Student continued to be a child with a disability, nor to determine his educational needs. *See*, Data Evaluation Report (Finding of Fact 10).

10. There is no evidence that Petitioner requested any additional assessments prior to the filing of the DPC herein.

11. In these circumstances, the undersigned concludes that Respondent met its obligations regarding reevaluation of the Student.

### IEP

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

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

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

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

(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

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

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

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

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

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

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

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

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

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

(VI)

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

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

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

20 U.S.C. §1414(d)(1)(A).

13. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982) (“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

*Rowley*, 458 U.S. at 201.

14. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor 'in determining whether an IEP is reasonably calculated to provide education benefits.’”) (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student's progress, courts should defer to the administrative agency's expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP’s substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate ... . The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, 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) (IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). 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”); *see also D.S. v.*

*Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

*K.S. v. District of Columbia*, \_\_\_ F. Supp. 2d \_\_\_, 113 LRP 34725 (D.D.C. 2013).

15. Based upon the entire record, including the match between the Student’s placement during SY 2013-2014 and Consultant’s opinion of the appropriate placement for him, the undersigned concludes that the Student’s January 13, 2014 IEP—including his placement—was and remains reasonably calculated to confer educational benefit upon him.

#### Location of Services

16. When determining the school that a student with an IEP should attend—sometimes referred to as the Location of Services (“LOS”)—the LEA must select a setting that is able to *substantially* implement the IEP. *Johnson v. District of Columbia*, (D.D.C., Civ. No. 12-0352 (RBW), August 27, 2013).

17. The Student’s program at the Attending School fully implements his IEP (Findings of Fact 27 through 33) and therefore is an appropriate LOS for him.

#### FBA and BIP

18. A child with a disability who is removed from his current educational placement, must receive, as appropriate, “a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior

violation so that it does not recur.” 20 U.S.C. §1415(k)(1)(D)(ii), *accord*, 34 C.F.R. §300.530(d)(ii).

19. In the instant case, there is no evidence that the Student was removed from his educational placement; accordingly, the IDEA provisions requiring an FBA and a BIP were not triggered.

20. Apart from the specific provisions of IDEA regarding FBAs and BIPs, IDEA requires a child’s IEP Team, in developing the IEP of a child whose behavior impedes his learning or that of others, to “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”<sup>13</sup> 20 U.S.C. §1414(d)(3)(B)(i).

21. In the instant case, the Student’s behavior impeded his learning (Finding of Fact 15); accordingly, the IEP Team was required to *consider* behavioral interventions and supports or other strategies to address his behavior.

22. Shortly after the January 13, 2014 IEP Team meeting, Respondent conducted an updated FBA of the Student (Finding of Fact 18), followed by a revised BIP (Findings of Fact 19 and 20).

23. The undersigned concludes that Respondent met its obligation to consider behavior interventions and supports or other strategies to address the Student’s behavior.<sup>14</sup>

---

<sup>13</sup> There is no requirement in IDEA or its implementing regulations that such behavioral interventions and supports be called a BIP or that they be included in the Student’s IEP.

<sup>14</sup> The IEP Team has indicated its intention to review and revise the Student’s BIP after the pending comprehensive psychological evaluation has been completed. Finding of Fact 40. If the Team fails to do so, Petitioner may file a new DPC.

### Compensatory Education

24. Even if Petitioner had established a denial of FAPE by Respondent, Petitioner has not introduced evidence that would support an award of compensatory education, as discussed below.

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

When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

*Id.*

26. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005). Educational programs, including compensatory education, must be qualitative, fact-intensive, and “above all tailored to the unique needs of the disabled student.” *Id.*

27. Mechanical calculation of the number of hours of compensatory education (a “cookie-cutter approach”) is not permissible. *Reid*. Rather, compensatory awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Id.* Awards compensating past violations must “rely on individual assessments.” *Id.*

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended

programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

*Id.* However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an "individually-tailored assessment". *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (citing *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted).

28. The hearing officer must base a compensatory education award on 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.*

29. In every case, "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." *Id.*

30. When, as in the instant case, Petitioner's request for compensatory education is "untethered" to the student's (alleged) "educational deficit or to the necessary and reasonable education reasonably calculated to elevate [the student] to the approximate position he would have enjoyed had he not suffered the denial of FAPE," the hearing officer cannot award compensatory education. *Gill v. District of Columbia*, 751 F. Supp. 3d 104 (D.D.C. 2010) ("*Gill*").

31. In the instant case, at the PHC and in the PHO, the undersigned advised Petitioner of the need to introduce evidence supporting the requested compensatory education. However, the record remains devoid of evidence that would allow the undersigned to craft an order of compensatory education that would be "specifically and

individually tailored to the student to compensate the student for the educational lapse suffered in violation of the IDEIA.” *Gill*.

32. In these circumstances, even if Petitioner had established a denial of FAPE, the undersigned would be unable to grant compensatory education. *Phillips v. District of Columbia*, 736 F. Supp. 2d 240 (D.D.C. 2010).

### **X. ORDER**

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

Petitioner’s DPC dated May 2, 2014, is dismissed in its entirety, with prejudice.

Dated this 16<sup>th</sup> day of June, 2014.



---

Charles Carron  
Impartial Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).