

**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: Charles M. Carron</p> <p>Date Issued:</p> <p>June 16, 2014</p>
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**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 April 4, 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”).

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

On April 8, 2014, Kimm Massey was appointed as the Impartial Hearing Officer.

On April 14, 2014, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on April 24, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on May 4, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on May 5, 2014 and will conclude on June 18, 2014.

On May 15, 2014, the undersigned was appointed as the Impartial Hearing Officer *vice* Hearing Officer Massey.

The undersigned held a Prehearing Conference (“PHC”) by telephone on May 20, 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 May 28, 2014 and that the Due Process Hearing (“DPH”) would be held on June 4, 2014. The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on May 20, 2014.

On June 3, 2014, Petitioner was in an automobile accident requiring postponement of the DPH. The undersigned tentatively rescheduled the DPH for June 10, 2014, not requiring an extension of the HOD due date. The undersigned informed Petitioner’s counsel that no motion was required for this postponement. Nevertheless, Petitioner’s counsel, on June 3, 2014, filed “Petitioner’s Unopposed Motion to Continue Due Process Hearing.” The undersigned requested that Petitioner’s counsel withdraw the motion, which he did.

Petitioner elected for the hearing to be closed.

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

Three witnesses testified on behalf of Petitioner at the DPH: Petitioner, Independent Consultant and Educational Advocate. Only one witness, Social Worker, 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*.

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

The circumstances giving rise to the DPC are as follows:

The Student is male, 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, Other Health Impairment ("OHI") under the IDEA.

Petitioner claims that Respondent has violated IDEA by failing to conduct a Functional Behavioral Assessment ("FBA") of the Student, by failing to develop and implement a Behavior Intervention Plan ("BIP") for the Student, and by failing to review and revise the Student's Individualized Education Program ("IEP"), as set forth in detail in Section IV below.

#### **IV. ISSUES**

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

- (a) Has Respondent denied the Student a FAPE by failing to revise his December 2013 IEP to address his lack of expected progress and ongoing needs?
- (b) Has Respondent violated IDEA's procedural requirements and/or denied the Student a FAPE by failing timely to complete an FBA?
- (c) Has Respondent violated IDEA's procedural requirements and/or denied the Student a FAPE by failing to convene an IEP Team meeting with Petitioner to develop a BIP for the Student?

#### **V. RELIEF REQUESTED**

Petitioner requests the following relief:<sup>2</sup>

- (a) findings in Petitioner's favor on all issues;
- (b) that the Hearing Officer develop an appropriate IEP for the Student or order Respondent to convene an IEP Team meeting within five days to develop an IEP consistent with the allegations in the DPC and to determine placement;
- (c) an Order that Respondent fund an independent FBA and convene an

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<sup>2</sup> In the DPC, Petitioner also requested the following relief which the undersigned determined to be inappropriate: (a) an order that Respondent convene a Multidisciplinary Team ("MDT") to determine compensatory education, which is inappropriate because a Hearing Officer cannot delegate that equitable remedy to a body that includes representatives of Respondent; and (b) attorney's fees and costs, which only a court can award.

IEP Team meeting within 10 days of receiving the completed FBA to develop a BIP;

(d) compensatory education in the form of tutoring and counseling; and

(e) any other relief deemed appropriate.

## **VI. CREDIBILITY**

Petitioner was not a reliable witness. On direct examination she testified that the Student had been receiving special education for two years, but on cross-examination she admitted that it was only one year. She testified that the Student should have 23 hours per week of specialized instruction outside of general education, but she could not explain how he would receive the remaining three hours per week of instruction in the general education classroom as that would equate to just 36 minutes per day. She could not remember even which month the Student received an in-school suspension. Petitioner testified that at the December 19, 2013 IEP Team meeting, she agreed to the proposed IEP but stated to the Team at the time that she was agreeing only “because they were frustrating me” and she told Respondent’s representatives “just do what you’re supposed to do .... I’ll take it up at the next meeting.” However, neither Educational Advocate nor Social Worker recalled Petitioner making any such statements. The undersigned has assigned no weight to Petitioner’s testimony.

Independent Consultant was not credible. His responses on cross-examination were evasive at best and quite possibly deliberately dishonest. On *voir dire*, he acknowledged that most of his livelihood derives from tutoring that he provides to students who receive compensatory education awards in DPC proceedings where he has

testified for the Petitioner. This financial interest in the outcome of the case had not been disclosed in Petitioner's disclosures. Respondent's counsel cited DCMR §5-E3029.5 as a basis for disqualifying the witness. Although the undersigned did not find this a basis for disqualifying Independent Consultant as an expert witness, this financial interest further compromised his credibility. Therefore, the undersigned has assigned no weight to Independent Consultant's testimony.

Educational Advocate was not credible. He testified that the Student did not make academic progress during SY 2013-2014, because the first page of his report card (R-2-1<sup>3</sup>) showed that he repeatedly earned grades of 1, which is "Below Basic" in Reading. As discussed *infra* (Section VII, Finding of Fact 21), a student's number grade in a subject remaining the same does *not* mean that the Student is not progressing. On cross-examination and in response to questions by the undersigned, Educational Advocate reluctantly acknowledged that the detail pages of the report card (R-2-2 and -3) and the Student's IEP Progress Report (R-5) illustrate the Student's academic progress. By relying selectively upon a single line on a single page of a single document to conclude that the Student was making insufficient educational progress, in the face of other documentation of educational progress that he had reviewed, Educational Advocate demonstrated a lack of candor. Educational Advocate testified that at the December 19, 2013 IEP Team meeting, SEC stated that Respondent would conduct an FBA and develop a BIP for the Student. No other witness, and no documentary evidence (such as meeting notes) corroborated this testimony. Social Worker credibly testified to the contrary—that after discussing an FBA and BIP, the Team decided neither was

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

necessary. On cross-examination, Educational Advocate admitted that in a March 2014 telephone conversation with SEC, she denied that Respondent had agreed to an FBA or BIP. Educational Advocate had sent a self-serving email to the Principal of Attending School (P-10-1) asking the status of the FBA that (allegedly) had been agreed to by the IEP Team. Educational Advocate did not send the email to, or copy, any of Respondent's representatives who had attended the December 19, 2013 IEP Team meeting, including SEC with whom he has frequent communication regarding other students. The most logical explanation for this end-run is that Educational Advocate knew he could not send his email to any of the attendees at the December 19, 2013 IEP Team meeting because they would recall that no FBA had been agreed to. With regard to his assertion that the Student had continuing behavior difficulties, on cross examination, Educational Advocate testified that he knew this because Petitioner told him she was getting calls from the school. However, Petitioner testified that she never received calls from the school. All of these inconsistencies, along with Educational Advocate's defensive posture and tone on cross examination, lead the undersigned to conclude that he deliberately fabricated his testimony; accordingly, the undersigned has assigned no weight to Educational Advocate's testimony.

Social Worker was credible. Petitioner's counsel attempted to discredit her because she testified that he (Petitioner's counsel) had accompanied Petitioner at the December 19, 2013 IEP Team meeting and had made the request for the FBA and BIP. However, when asked on cross-examination whether it could have been Educational Advocate (who works at the same law firm) rather than Petitioner's counsel who accompanied Petitioner, Social Worker immediately stated that she may have been

mistaken. No advantage to Respondent would have accrued from a misrepresentation of who from Petitioner's counsel's law firm accompanied Petitioner to the meeting and made the request for an FBA and a BIP. Accordingly, the mistake does not suggest in any way that Social Worker was prevaricating.

## **VII. FINDINGS OF FACT**

### Facts Related to Jurisdiction

1. The Student is a male of Current Age. P-2-1.
2. The Student resides in the District of Columbia. *Id.*
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with OHI. *Id.*

### The Student's November 2010 Evaluation

4. In November 2010, Respondent conducted a psychological evaluation of the Student. P-5. The evaluator, a school psychologist, found that the Student had average overall intellectual ability (P-5-8); Low Average academic achievement in broad written language, broad reading and broad math (P-5-11); and Average academic achievement in other areas (P-5-11 and -12). The evaluator found that the Student exhibited signs of Attention Deficit Hyperactivity Disorder ("ADHD"), *i.e.*, inattention and hyperactivity, and might fit the criteria of OHI if the Multidisciplinary Team ("MDT") determined that his behavior had a significant impact on his educational performance. P-5-13 and -14.

#### The January 31, 2011 MDT Meeting

5. On January 31, 2011, the Student's MDT<sup>4</sup> determined that he was not eligible under the IDEA. P-6-9.

#### The Student's June 2012 Evaluation

6. In June 2012, Petitioner obtained an independent psychological evaluation of the Student. P-4. The evaluator<sup>5</sup> found that the Student's intellectual abilities ranged from Low Average to Average (P-4-8) while his academic skill performance and application were below grade level (P-4-9). The evaluator noted that the Student's prior and present social-emotional testing pointed to a diagnosis of ADHD, Combined Type, and that his resulting impulsivity and lack of attention span interfered with his ability to seek out and maintain relationships with teachers and peers. P-4-14. The evaluator noted that the Student's self-isolation through defensive and self-protective behaviors had been interpreted as defiance and being oppositional. *Id.*

#### The November 20, 2012 MDT Meeting

7. On November 20, 2012, the Student's MDT determined that he was not eligible under the IDEA. P-6-3.

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<sup>4</sup> The parties sometimes refer to the MDT as an IEP Team. The distinction is not material to determination of the issues in this case.

<sup>5</sup> In a prior DPC proceeding involving these same parties, the undersigned found the evaluator not credible. P-6-21.

#### The June 27, 2013 HOD

8. On June 27, 2013, the undersigned issued the HOD in Case No. 2013-0269, finding, *inter alia*, that the Student's ADHD (i) caused him to have heightened alertness to environmental stimuli that resulted in limited alertness with respect to the educational environment, (ii) adversely affected his educational performance and (iii) required adaptations to the methodology and delivery of his instruction as well as behavioral support services to address his unique needs and to ensure his access to the general curriculum so that he could meet Respondent's educational standards that apply to all children. P-6-20.

#### The Student's July 2013 Eligibility Determination and IEP

9. Based upon the June 27, 2013 HOD, on July 17, 2013 the Student was determined to be eligible for special education and related services with a primary disability classification of OHI. P-3-1.

10. On or about July 31, 2013, an initial IEP was developed for the Student with academic goals in Mathematics; Reading; Written Expression; and Emotional, Social, and Behavioral Development. P-3-1 through -9.

11. The IEP prescribed 10 hours per week of specialized instruction in the general education setting, six hours per week of specialized instruction in the outside of general education setting and 120 minutes per month of behavioral support services. P-3-10.

12. As of July 31, 2013, the Student was easily frustrated, volatile, aggressive, easily agitated and angered when academic demands were placed on him; avoided work when frustrated; exhibited anger and aggression toward peers and adults; was highly

impulsive, had poor emotional regulation, and could be volatile and reactive; engaged in behaviors that were disruptive and had a significant impact on his ability to access his educational curriculum successfully; and was a loner unable to sustain positive peer relations due to his volatile and aggressive behaviors. P-3-8 and -9.

#### The Student's Academic Performance During Term 1 of School Year 2013-2014

13. During Term 1 of School Year ("SY") 2013-2014, the Student performed at the lowest level ("Below Basic") in Reading; at the second-lowest level ("Basic") in Writing & Language, Speaking & Listening, Math, Social Studies, Science, and World Language; and at the second-highest level ("Proficient") in Music, Art, and Health & Physical Education. R-3-1.

14. During Term 1 of SY 2013-2014, the Student's skills in English Language Arts (comprising Reading, Writing & Language, and Speaking & Listening), Math, Art, World Language, and two aspects of Music were "Beginning." R-3-2 and -3.

15. During Term 1 of SY 2013-2014, the Student's skills in Social Studies, Science, Health & Physical Education, and one aspect of Music were "Developing" (which is the level above "Beginning"). *Id.*

#### The Student's Work Habits, Personal and Social Skills During Term 1 of SY 2013-2014

16. The Student was suspended for one day on September 5, 2013. R-4. There is no evidence of any other suspensions during Term 1 of SY 2013-2014, and his attendance calendar shows no other suspensions. *Id.*

17. During Term 1 of SY 2013-2014, the Student independently followed classroom rules, playground rules, and school rules; independently respected the rights and property of others; independently listened while others spoke; and independently practiced self-control. R-3-1.

18. During Term 1 of SY 2013-2014, with limited prompting the Student followed directions, completed class work on time, worked well with others, used time wisely, returned completed homework, participated in class discussion, and made an effort. *Id.*

19. Petitioner testified that the Student's behavior throughout SY 2013-2014 has been "okay." Testimony of Petitioner.

#### The Student's Academic Performance During Term 2 of School Year 2013-2014

20. During Term 2 of SY 2013-2014, the Student's grades were the same as during Term 1, except that his grade in Science fell from Basic to Below Basic, and he did not receive grades in Art, Health & Physical Education or World Language. R-2-1.

21. The fact that a student's grade on the first page of the report card remains the same from one term to the next does not mean that the student is not making any educational progress because the material taught changes each term;<sup>6</sup> rather, the detailed descriptions of the student's achievement of skills on the second and third pages of the report card (*e.g.*, R-2-2 and -3) demonstrate the student's academic progress.

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<sup>6</sup> If earning the same numerical grade in a subject from term to term meant the student was making no progress, then a student who earned all 3s ("Proficient") or 4s ("Advanced") every term would be making no progress either.

22. From Term 1 to Term 2, the Student progressed from “Beginning” to “Developing” in 14 of 18 aspects of English Language Arts and in all aspects of Math that had been introduced in Term 1; in Social Studies he progressed from “Developing” to “Secure” on the one aspect that had been introduced in Term 1; and his skills remained at the same levels in the other subjects. R-2-2 and -3.

23. Based upon all of the record evidence, the undersigned finds that the Student made substantial academic progress during Term 2 of SY 2013-2014.

The Student’s Work Habits, Personal and Social Skills During Term 2 of SY 2013-2014

24. During Term 2 of SY 2013-2014, the Student’s work habits, personal and social skills remained the same as during Term 1, with the following exceptions: (i) he required frequent rather than limited prompting to complete class work on time and return completed homework and (ii) he no longer required prompting to participate in class discussion or make an effort. R-2-1.

25. There is no evidence that the Student was suspended during Term 2 of SY 2013-2014, and his attendance calendar shows no suspensions. R-4.

The Student’s IEP Progress From August 26 through November 1, 2013

26. During Reporting Period 1 of the Student’s IEP (August 26 through November 1, 2013), the Student was progressing on the one Math goal that had been introduced (R-5-8), the one Reading goal that had been introduced (R-5-9) and the two Written Expression goals that had been introduced (R-5-10 and -11).

27. During IEP Reporting Period 1, the Student was progressing on all three of his emotional, social and behavioral development goals. R-5-12.

The December 19, 2013 IEP Team Meeting

28. On December 19, 2013, the Student's IEP Team, including Petitioner, Special Education Coordinator ("SEC") and Social Worker, met to review and revise the Student's IEP (P-2-1); Educational Advocate also attended (Testimony of Educational Advocate).

29. The Student's hours of specialized instruction in the outside of general education setting were increased to 16 hours per week (P-2-9), which was consistent with the request made by Educational Advocate on behalf of Petitioner (Testimony of Educational Advocate, testimony of Social Worker).

30. The wording in the IEP regarding the Student's emotional, social and behavioral development remained unchanged from the July 31, 2013 IEP. *Compare* P-3-8 and -9 *with* P-2-6 through -8.

31. Educational Advocate requested an FBA to address the Student's behavior issues but SEC and Social Worker stated that an FBA was not appropriate or necessary. *Id.* Social Worker, who was providing behavioral support services to the Student, already knew that his inappropriate behaviors were triggered by his feeling that he was being treated unfairly, and she was working with him effectively to identify alternative ways of reacting in such situations. Testimony of Social Worker. She believed that the increased hours of specialized instruction, together with the services she was providing, would address the Student's behavior problems. *Id.*

32. Petitioner agreed with the IEP. P-11-4.

33. Petitioner introduced no evidence that the revised IEP was not reasonably calculated to provide the Student educational benefit. During the first two terms of SY 2013-2014 the Student was making substantial academic progress in the general education curriculum as well as progress toward his IEP goals, and his only suspension had been at the beginning of the year. Accordingly, the undersigned finds that the IEP as revised December 19, 2013, was reasonably calculated to provide the Student educational benefit.

The Student's Academic Performance During Term 3 of School Year 2013-2014

34. During Term 3 of SY 2013-2014, the Student's grades were the same as during Term 2, except that his grade in Writing & Language fell from Basic to Below Basic, and his grade in Science rose from Below Basic to Basic. R-2-1.

35. During Term 3 of SY 2013-2014, the Student's grades in Art and World Language were the same as during Term 1. R-2-1.

36. From Term 1 to Term 3 of SY 2013-2014, the Student's grade in Health & Physical Education fell from Proficient to Basic. *Id.*

37. On the Paced Interim Assessment ("PIA") for English Language Arts ("ELA"), the Student's score for Unit 3 was 45%, which was above the class average of 39% and above the Student's own scores for Unit 1 (25%) and Unit 2 (21%). R-6-1 through -3.

38. The Student's PIA scores for Math rose from Unit 1 (35%) to Unit 2 (50%) but fell by Unit 3 (35%). R-6-4 through -7.

39. From Term 2 to Term 3, the Student progressed from “Beginning” to “Developing” in the remaining four aspects of English Language Arts and in all aspects of Math that had been introduced in Term 2; in Music, he progressed from “Beginning” to “Developing” in one aspect, and from “Beginning” to “Secure” (the level above “Developing” in two aspects; in World Language he progressed from “Beginning” to “Developing”; in Social Studies he progressed from “Developing” to “Secure” on the one aspect that had been introduced in Term 1; and his skills remained at the same levels in the other subjects. R-2-2 and -3.

40. As of February 4, 2014, the Student was reading at “level K” on the Text Reading and Comprehension (TRC) assessment. R-3-4. Although this is below the goal for students in Current Grade, it was an improvement from the Student’s previous assessment at “level J.” R-3-1.

41. The Student’s reading fluency level increased from 39 words per minute to 58 words per minute. R-2-4. Although below the expectation for Current Grade, this constitutes academic progress.

42. Based upon all of the record evidence, the undersigned finds that the Student made substantial academic progress during Term 3 of SY 2013-2014.

The Student’s Work Habits, Personal and Social Skills During Term 3 of SY 2013-2014

43. During Term 3 of SY 2013-2014, the Student’s work habits, personal and social skills remained the same as during Term 2, with the following exceptions: (i) he rarely completed homework on time, and (ii) he required limited prompting to practice self-control. R-2-1.

44. There is no evidence that the Student was suspended during Term 3 of SY 2013-2014, and his attendance calendar shows no suspensions. R-4.

45. The Student's frequency of walking out of class declined. Testimony of Social Worker.

46. The frequency with which the Student "withdrew" due to frustration over perceived unfairness declined and he did not withdraw for the month prior to the DPH. *Id.*

47. Social Worker no longer observes the Student engaging in aggression or volatile behaviors. *Id.*

48. The Student's teachers have not expressed concerns about the Student's behavior to Social Worker, who is the provider of the Student's behavioral support services. *Id.*

#### The Student's IEP Progress From November 4, 2013 through January 24, 2014

49. During IEP Reporting Period 2 (November 4, 2013 through January 24, 2014), the Student was progressing on all of his IEP goals. R-5-1 through -6.

50. As of January 26, 2014, the Student had a decreased frequency of walking out of class and had no incidents of peer altercations. R-5-6.

#### The Student's Attendance

51. During SY 2013-2014 through May 20, 2014, the Student had been absent eight days (of which five were unexcused) and had been late 36 times. R-4.

## Petitioner's Compensatory Education Plan<sup>7</sup>

52. Petitioner's Compensatory Education Plan (the "Plan"), developed by Educational Advocate and Independent Consultant, is based upon the assumption that the Student's December 19, 2013 IEP was inappropriate because he should have had all of his instruction in the outside of general education setting. P-11-1.

53. The Plan requests 50 hours of independent tutoring services and a laptop computer or an iPad with educational software. P-11-5.

54. The Plan does not describe the specific educational deficits resulting from the Student's alleged loss of FAPE. P-11.

55. The Plan does not state how the tutoring and computer or iPad would correct the Student's educational deficits. P-11. Educational Advocate testified that the "new generation of students" works well with such electronic equipment. Testimony of Educational Advocate. There is no evidence in the record that the Student, as an individual, would learn better with a computer or iPad than through other methods.

## **VIII. 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).

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<sup>7</sup> The last paragraph on P-11-4 and most of P-11-5 relate to another child, suggesting that these plans are cut-and-pasted and not based upon the individualized harm suffered by a child or the specific compensatory education required to remediate that harm.

## IX. CONCLUSIONS OF LAW

### Purpose of the IDEA

1. 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.

### Adequacy of IEP

3. 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, supra* at 65

(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).

4. 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.

5. 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).

6. Because the Student’s December 19, 2013 IEP was reasonably calculated to provide educational benefit (Finding of Fact 33), it was sufficient under IDEA at the time it was developed.

#### When an IEP Must be Revised

7. In specified circumstances, IEPs must be reviewed and revised:

*Review and revision of IEPs*—(1) *General*. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

34 C.F.R. §300.324(b).

8. Because the Student was making expected progress toward his annual IEP goals (Findings of Fact 26, 27, 49 and 50) and in the general education curriculum (Findings of Fact 22 and 37 through 41) and there is no evidence in the record that any of the other factors in 34 C.F.R. §300.324(b)(1)(ii) had occurred, there was no need to revise the Student's IEP prior to its anniversary in December 2015.

#### When Behavioral Interventions are Required

9. 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).

10. In the instant case, Respondent has not suspended the Student for more than 10 days during SY 2013-2014, so he was not “removed from his educational placement”; accordingly, the provisions cited in the immediately preceding paragraph requiring an FBA and a BIP were not triggered.

11. Apart from the specific provisions of IDEA regarding FBAs and BIPs when a Student has been removed from his educational placement, 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.” 20 U.S.C. §1414(d)(3)(B)(i).

12. In the instant case, the Student’s behavior significantly impeded his learning (Findings of Fact 12 and 30); accordingly, the IEP Team was required to consider behavioral interventions and supports or other strategies to address his behavior.

13. At its December 19, 2013 meeting, in response to Educational Advocate’s request for an FBA and a BIP, the IEP Team discussed and rejected that request as unnecessary because the increased hours of specialized instruction and the continuing behavior support services were viewed as adequate to address the Student’s behavior problems. Finding of Fact 31.

14. IDEA does not require an IEP Team to *adopt* any particular behavioral interventions, supports or other strategies to address a child’s problem behaviors, only to *consider* those approaches, which the Student’s IEP Team did.

## Compensatory Education

15. 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.

16. 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.*

17. 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.*

18. 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).

19. 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.*

20. 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.*

21. 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 even if a denial of FAPE is established. *Gill v. District of Columbia*, 751 F. Supp. 3d 104 (D.D.C. 2010) ("*Gill*").

22. 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*.

23. In these circumstances, even if Petitioner had established a denial of FAPE, which Petitioner has not, the undersigned would be unable to grant compensatory education. *Phillips v. District of Columbia*, 736 F. Supp. 2d 240 (D.D.C. 2010).

### Summary

24. Respondent did not deny the Student a FAPE by failing to revise his December 2013 IEP to address his lack of expected progress and ongoing needs because he has made expected progress and has no ongoing needs that are not being met by his December 2013 IEP.

25. Respondent has not violated IDEA's procedural requirements or denied the Student a FAPE by failing timely to complete an FBA, because no FBA was or is required.

26. Respondent has not violated IDEA's procedural requirements or denied the Student a FAPE by failing to convene an IEP Team meeting with Petitioner to develop a BIP for the Student, because no BIP was or is required.

**X. ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby  
ORDERED:  
Petitioner's DPC dated April 4, 2014, is dismissed in its entirety, with prejudice.

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



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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).