

**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 23, 2014

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer:</p> <p>Charles M. Carron</p> <p>Date Issued:</p> <p>June 20, 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 May 12, 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”).

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

On May 13, 2014, the undersigned was appointed as the Impartial Hearing Officer.

A Resolution Meeting was held on May 27, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on June 11, 2014.

On May 28, 2014, six days after the deadline, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on June 12, 2014 and will conclude on July 26, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on May 30, 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 6, 2014 and that the Due Process Hearing (“DPH”) would be held on June 13 and 16, 2014. The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on May 30, 2014.

No prehearing motions were filed by either party and the DPH was held at the Student Hearing Office, 810 First Street, NE, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, Petitioner’s exhibits P-1 through P-23 were admitted into evidence without objection. After the direct testimony of Executive Director of Non-Public School (“Executive Director”), Respondent moved to strike his testimony and the related exhibit (P-23) due to Petitioner’s failure to comply with the requirements of the PHO, specifically the provision requiring Petitioner’s counsel to notify Respondent’s counsel and the undersigned of the Student’s acceptance at the Non-Public School within one business day of the acceptance. The undersigned granted Respondent’s oral motion, as explained in detail on the record at the DPH. Accordingly, the undersigned struck the testimony of Executive Director and Exhibit P-23 from the record.

All of Respondent's proposed exhibits were excluded by the undersigned because their disclosure did not follow the numbering and pagination requirements of the PHO, as explained in detail on the record at the DPH.

The following witnesses testified on behalf of Petitioner at the DPH: General Education Teacher #1, DCPS Psychologist, and Executive Director. The testimony of the first two witnesses was compelled via Notices to Appear issued by the Chief Hearing Officer.

As discussed *supra*, the undersigned struck the testimony of Executive Director from the record. Petitioner's counsel took exception to the striking of Executive Director's testimony, and after a break in the proceedings,² she declined to present additional witnesses. In colloquy between the undersigned and Petitioner's counsel, on the record, the undersigned stated that the documentary evidence and testimony of witnesses at that point in the proceedings³ did not support placement of the Student in a separate private school, as there had been no evidence that the Student could not be educated, even in part, with non-disabled peers as required by IDEA's Least Restrictive Environment ("LRE") provisions. Petitioner's counsel asserted that the documents in evidence supported "more services" for the Student⁴ and that it was not necessary for Petitioner to demonstrate that the Student needed to be completely segregated from

² During the break, Petitioner attempted to initiate a conversation alone with the undersigned. The undersigned declined to speak with Petitioner and referred her to her counsel.

³ Although the undersigned did not so state on the record, the testimony of Executive Director did not address the Student's need for a separate school, so even if his testimony had not been struck, it would not have supported such a restrictive placement.

⁴ As discussed in Section IV, *infra*, insufficiency of hours of specialized instruction or related services was not raised as an issue in the DPC, at the PHC, or in the PHO, and therefore is not within the scope of this DPC proceeding. Moreover, as discussed in Section VIII, *infra*, the documentary evidence does *not* support a need for more services for the Student.

non-disabled peers to be awarded prospective placement in a private school where he would be so segregated. On the record, the undersigned disagreed with Petitioner's counsel's interpretation of the IDEA, because even if a child is denied a FAPE, a hearing officer cannot award a prospective placement that violates IDEA's LRE provisions. The undersigned repeatedly asked Petitioner's counsel to identify the documents or testimony that supported a more restrictive placement for the Student, but she was unable to do so. Petitioner's counsel then stated that the witnesses she had not yet called would have testified in support of the need for a separate school. The undersigned encouraged Petitioner's counsel to proceed to present those witnesses, because if the evidence supported the need for such a restrictive setting, the undersigned could order a full time outside of general education placement for the Student, albeit not specifically at Non-Public School. The undersigned stated that by presenting these witnesses, Petitioner's counsel would complete the record, thereby allowing Petitioner to challenge the exclusion of the testimony of Executive Director by appealing the HOD. Petitioner's counsel declined to present additional witnesses, stating that she could tell from the undersigned's body language that the undersigned would not award a full time outside of special education placement. The undersigned stated on the record that Petitioner's counsel thereby was waiving Petitioner's ability to complete the record.

Respondent's counsel made no opening argument and presented no witnesses. Instead, Respondent's counsel made an oral motion for summary decision, which the undersigned denied, stating the need to review the evidence in the record before deciding the case.

The parties waived 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 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, Other Health Impairment ("OHI"), under the IDEA.

Petitioner claims that Respondent has denied Student a FAPE by failing to locate, identify and evaluate him between August 2012 and October 2013, by failing to conduct a Functional Behavioral Assessment ("FBA"), by failing to reschedule his eligibility meeting to allow Petitioner to attend, by failing to include all required participants in the meeting where his initial Individualized Education Program ("IEP") was developed, and by failing to place him in a full time outside of general education program in a private special education school, all as set forth in detail in Section IV *infra*.

IV. ISSUES

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

(a) Between August 2012 and October 2013, did Respondent violate IDEA's "Child Find" provisions by failing to locate, identify and evaluate the Student?

(b) Did Respondent deny the Student a FAPE by failing to comprehensively evaluate him by failing to conduct an FBA?

(c) In February 2014, did Respondent deny the Student a FAPE and/or violate IDEA's procedural requirements by failing to reschedule the Student's eligibility meeting to accommodate a schedule conflict, thereby depriving Petitioner of the ability to participate in that meeting?⁵

(d) On or about April 1, 2014, by failing to include the Student's general education teacher on the IEP Team, did Respondent violate IDEA's procedural requirements, significantly impair Petitioner's ability to participate meaningfully and make educational decisions, and/or deny the Student a FAPE?

⁵ In the DPC, Petitioner stated that Respondent had failed to provide advance notice of the eligibility meeting. At the PHC, Petitioner's counsel acknowledged that Petitioner had been provided advance notice; however, Petitioner's counsel asserted that on the day of the meeting the Attending School called Petitioner to instruct her to pick up the Student and remove him from the school, creating a schedule conflict for her to attend the eligibility meeting. Respondent's counsel stated at the PHC that this revision required an amendment to the DPC. The undersigned disagreed, noting that the DPC stated, *inter alia*, at p. 11, that "DCPS denied the student a FAPE by failing ... to include the parent in the initial eligibility meeting...." The undersigned considered that statement in the DPC to be broad enough to encompass issue (c) above. A major purpose of a PHC is to clarify the issues.

(e) Did Respondent deny the Student a FAPE because the IEP developed on or about April 1, 2014 is inappropriate because the Student requires a full time separate special education day school with a more restrictive and highly structured setting to address his severe Attention Deficit Hyperactivity Disorder (“ADHD”)?

(f) Did Respondent deny the Student a FAPE because the goals in the IEP developed on or about April 1, 2014 are based upon Common Core Standards and are not individualized and do not address the Student’s deficits?

(g) Did Respondent deny the Student a FAPE because the IEP developed on or about April 1, 2014 fails to provide a Behavior Intervention Plan (“BIP”), and/or fails to provide sufficient behavioral support services from a school social worker?

V. RELIEF REQUESTED

Petitioner requests the following relief:

- (a) findings in Petitioner’s favor on all issues;
- (b) an Order that Respondent convene an IEP Team meeting within 10 days of the HOD to (i) revise the Student’s LRE to a placement meeting his needs and (ii) include appropriate academic baselines and individualized goals;
- (c) an Order that Respondent place or fund the Student’s attendance, with transportation, at a school capable of meeting his needs, *i.e.*, a non-public school if no public school is identified that can meet his needs; and
- (d) an Order of compensatory education.

VI. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the 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).

VII. CREDIBILITY

The undersigned found all of the witnesses to be credible, to the extent of their firsthand knowledge or professional expertise.

VIII. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male of Current Age. P-9-1.⁶
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 Other Health Impairment (“OHI”) based upon his Attention Deficit Disorder (“ADD”) or Attention Deficit Hyperactivity Disorder (“ADHD”). *Id.*

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

School Year 2011-2012

4. The Student's report card for SY 2011-2012 rated him 1 ("Does not Meet the Standard (Below Basic)") overall in English Language Arts, Mathematics, Social Studies and Science, except that he was rated 2 ("Approaches the Standard (Basic)") in Science for Term 2. P-15-3 and -4.

5. The Student was rated 2 in Music overall. P-15-4.

6. In Art, the Student was rated 2 for Term 1, 4 ("Exceeds the Standard (Advanced)") for Term 2, and 3 ("Meets the Standard (Proficient)") for Terms 3 and 4.

Id.

7. During Term 1, the Student "made great strides behaviorally (and academically)." P-15-5. However, he struggled with staying focused and controlling his impulses in class, shouted out in class, was disrespectful of others and often did not complete his work. *Id.*

8. During Term 2, the Student showed "incredible progress in his classroom behavior" but continued to struggle academically. *Id.*

9. During Term 3, the Student continued to make progress in classroom behavior and "made much growth in both literacy and math, but is still far below grade level standards." *Id.*

10. At the end Term 4, the Student was behind grade level in reading, writing and mathematics (*Id.*) and required frequent prompting to follow directions and limited prompting for other work habits. P-15-4. No adverse comments regarding classroom behavior were noted on his report card. P-15.

School Year 2012-2013⁷

11. The Student's report card for the first two terms of SY 2012-2013 rated him 1 overall in English Language Arts, Mathematics, Science and Social Studies. P-15-6 and -7.

12. In Term 3, the Student's overall grade in English Language Arts remained a 1, and his grades in Mathematics, Science and Social Studies improved to a 2. *Id.*

13. In Art, the Student was rated 2 for Term 1 and 3 for Term 2. P-15-7.

14. In Health and Physical Education overall, the Student was rated 2 for the first three terms. *Id.*

15. During Term 1, the Student suffered as a result of his behavioral outbursts, demonstrated an inability to focus on tasks, and often became upset with school work "to the point of violent outburst[s] to himself and the rest of the class." P-15-8. The Student's teacher was "very concerned about the current school climate" for the Student. *Id.*

16. During Term 2, the Student showed "a lot of growth ... and that is in large part [due] to finding a balance for classroom behavior." *Id.*

17. During Term 3, the Student "lost momentum in the final weeks." *Id.* His teacher expected to see much more growth "when we can find a balance for classroom behavior." *Id.*

18. Throughout Terms 1 through 3, the Student required limited or frequent prompting on all work habits. P-15-7.

⁷ The Student's report card for Term 4 of SY 2012-2013 was not introduced into evidence.

19. There is no evidence in the record that the Student was suspended or had any disciplinary referrals during SY 2012-2013.⁸

20. There is no evidence in the record that Respondent was aware during SY 2012-2013 that the Student had been diagnosed with ADD or ADHD.

21. Based upon all of the record evidence, the undersigned finds that Petitioner has not met her burden of proof that Respondent was on notice at any time during SY 2012-2013 that the Student had a disability affecting his ability to access the general education curriculum or interfering with his social-emotional development.

The Beginning of SY 2013-2014

22. The Student began attending Attending School at the beginning of SY 2013-2014. Testimony of General Education Teacher #1.

23. On the first day of SY 2013-2014, Petitioner informed General Education Teacher #1 that the Student sometimes was teased about his teeth and sometimes was hyperactive, but she did not raise any academic concerns. *Id.*

24. During the first week of SY 2013-2014, General Education Teacher #1 saw that the Student was having difficulties with academics and she asked Attending School's office whether the Student had an IEP at his previous school. *Id.*

25. Attending School's office determined that there was no information from the Student's previous school about an IEP. *Id.*

⁸ See, Findings of Fact 24 and 25, *infra*.

26. Sometime in September 2013, at the Request of General Education Teacher #1, Attending School began the Student Support Team (“SST”) process for the Student, comprising behavioral interventions and an intensive reading program.⁹ *Id.*, testimony of DCPS Psychologist.

27. In September 2013, General Education Teacher #1 raised a concern with Petitioner about the Student’s academic difficulties, including the Student’s low reading level and fluency, and the fact that he often reversed numbers. Testimony of General Education Teacher #1.

28. During September 2013, the Student was a “model student” and displayed no aggressive behavior. *Id.*

29. In October 2013, the Student began displaying aggressive behaviors, making sounds, blurting out, throwing things, running around, fighting and yelling. *Id.*

30. When the Student engaged in inappropriate behavior, General Education Teacher #1 sent him to the behavior specialist, who kept the Student typically 15 to 20 minutes, and then returned him to the classroom, although sometimes the Student repeated the inappropriate behavior and was sent back to the behavior specialist. *Id.*

31. The Student received no academic instruction while he was out of the classroom with the behavior specialist. *Id.*

32. There is no record evidence of any suspensions or disciplinary referrals of the Student in August or September 2013.

⁹ The reading program was not successful for the Student because the Student could only “attend” (*i.e.*, apply himself) for 20 minutes of each one-hour session. Testimony of DCPS Psychologist.

33. Based upon all of the record evidence, the undersigned finds that Petitioner has not met her burden of proof that Respondent was on notice from the beginning of SY 2013-2014 through September 2013 that the Student had a disability affecting his ability to access the general education curriculum or interfering with his social-emotional development.

Petitioner's October 2013 Referral of the Student for Evaluation

34. In October 2013,¹⁰ Petitioner referred the Student to Respondent to be evaluated for eligibility for special education. P-1-1.

The Student's Behavior and Suspensions from October 2013 through June 13, 2014

35. There is no record of any out-of-school suspensions of the Student from October 2013 through December 18, 2013.

36. The Student was suspended on December 19 and 20, 2013 (P-13-1) for making verbal and physical threats (P-18-3).

37. The Student was suspended on February 5, 6 and 7, 2014 (P-13-1) for fighting (P-18-3).

¹⁰ There is no evidence in the record as to what date in October 2013 this referral was made. Due to Petitioner's burden of proof, the undersigned has deemed (a) that for purposes of Respondent's "Child Find" obligations, Petitioner's referral was made on October 1, 2013, and (b) that for purposes of Respondent's deadline for evaluating the Student, Petitioner's referral was made on October 31, 2013. Had Petitioner testified, she could have specified the date of the referral; however, Petitioner's counsel chose not to present Petitioner's testimony.

38. The Student was suspended on February 25, 26 and 27, 2014 (P-13-1) for causing a disruption on school property, refusing to adhere to reasonable instruction, and unauthorized presence in the hallway (P-14-1).

39. The Student's behavior throughout SY 2013-2014 was "inconsistent."
Testimony of General Education Teacher #1.

The Student's Academic Progress From the Beginning to the Middle of SY 2013-2014

40. At the beginning of SY 2013-2014, when the Student exhibited no behavior problems, he nevertheless was having academic difficulty. Testimony of General Education Teacher #1.

41. The Student's DIBELS [Dynamic Indicator of Basic Early Literacy Skills] scores indicated that the Student began the year with a reading fluency of four words per minute when the goal was 52 and increased his fluency to seven words per minute mid-year when the goal was 72.¹¹ P-16-1.

42. The Student's DIBELS scores also indicated that his reading ability was at the lowest level ("Reading Behaviors," *e.g.*, being able to identify the cover of a book) at the beginning and middle of the year. *Id.*

43. On the Paced Interim Assessment ("PIA") for Mathematics for Unit 1, the Student scored 22% as compared with the class average of 44%, the school average of 45% and the district average of 53%. P-17-3.

¹¹ The Student's DIBELS scores at the end of SY 2013-2014, which were included in this exhibit, are not relevant to the appropriateness of his placement as of April 1, 2014, as discussed in Section IX, *infra*.

44. On the PIA for Mathematics for Unit 2,¹² the Student scored 6% as compared with the class average of 62%, the school average of 61% and the district average of 72%. P-17-2.

45. On the PIA for English Language Arts for Unit 1, the Student scored 19% as compared with the class average of 38%, the school average of 34% and the district average of 50%. P-17-4.

46. On the PIA for English Language Arts for Unit 2, the Student scored 17% as compared with the class and school average of 31% and the district average of 49%. P-17-5.

47. The Student's work samples (P-12) demonstrate that he has "mechanics" difficulties, *e.g.*, writing to the edges of the page, which may indicate a need for occupational therapy. Testimony of General Education Teacher #1.

48. Based upon the Student's PIA and DIBELS scores, the undersigned finds that the Student made little to no academic progress during the first two terms/units of SY 2013-2014—the period before his initial IEP was developed and implemented.

The Student's Comprehensive Psychological Evaluation

49. On January 28, 2014, DCPS Psychologist observed the Student in the classroom. P-18-5. The Student

intermittently attended but he did not actively participate in the class discussion. He was off-task throughout the observation as he engaged in conversation with another [student] seated within close proximity. He engaged the student to play with some putty that both of them had in the

¹² The Student's PIA scores for Unit 3, which were included in this exhibit, are not relevant to the appropriateness of his placement as of April 1, 2014, as discussed in Section IX, *infra*.

desks. [The Student] continued to be off-task not attending to the instruction....

Id.

50. On February 11 and 18, 2014, DCPS Psychologist conducted a comprehensive psychological evaluation of the Student based upon Petitioner’s concerns regarding his behavioral difficulties and his poor academic functioning in Reading, Mathematics, and Written Expression. P-18-1. The Student had been exhibiting the following behaviors at school:

difficulty engaging appropriately with his peers (i.e. he will tease and be verbally aggressive towards them), he will negatively seek out attention from his teacher, while expecting one-on-one attention, difficulty following directions and class rules, walking out of class without teacher’s permission, verbal and physical aggression towards peers and school staff ... impulsivity, difficulty remaining seated when the expectation is to sit, he is easily distracted, he requires attention at all times, constantly off-task requiring redirection from teacher and/or school staff throughout the school day, destruction of property, noncompliance, inability to focus or attend to tasks in classroom, and distractibility.

P-18-1.

51. Due to these behaviors, the Student had difficulty accessing the Current Grade curriculum, did not engage or participate during classroom instruction and did not complete his in-class work or return assigned homework. *Id.*

52. General Education Teacher #1 often had the Student removed from the classroom “as his behavior escalates to being disrupted (*sic* disruptive) to other students who are on-task and ready for learning.” *Id.*

53. The Student had made minimal progress in Reading despite an intensive reading intervention program in SY 2013-2014 to date. P-18-3. The teacher conducting the reading intervention reported that the Student’s behaviors—distractibility,

noncompliance, refusal to participate, yelling out in class, being out of his seat and walking around, lying and stealing—significantly disrupted the learning environment for other students. P-18-3.

54. During SY 2013-2014, the Student repeatedly was sent to the In-School Suspension (“ISS”) room to discuss the consequences of his behavior with a behavior technician, then returned to the classroom; “however he quickly returns to the ISS room.” *Id.*

55. The Student was receiving weekly therapy from a social worker. P-18-3 and -4.

56. Both Petitioner and General Education Teacher #1 stated that his hyperactivity was triggered by interactions with other students. P-18-4.

57. DCPS Psychologist tested the Student using a wide array of instruments, with the following results: (a) The Student’s Full Scale Intelligence Quotient (“IQ”) is 73, which is in the Borderline Range. P-18-8. (b) The Student scored in the Borderline or Low Average Range on all of the IQ indices. P-18-9. (c) Based upon information obtained from Petitioner and General Education Teacher #1, DCPS Psychologist determined that the Student exhibited symptoms of ADHD at home and at school, “impacting his ability to learn in both settings.”¹³ P-18-16. (d) The Student’s academic skills and fluency were in the Low to Very Low range. P-18-21.

¹³ General Education Teacher #1 reported more significant social-emotional problems than did Petitioner. P-18-14 through -19. Based upon a comparison of the Student’s testing results and the teacher reporting forms completed by General Education Teacher #1, DCPS Psychologist concluded that General Education Teacher #1 “over-inflated” her responses. Testimony of DCPS Psychologist. General Education Teacher #1 referred a larger proportion of her Students to SST than did other teachers. *Id.*

58. DCPS Psychologist reached the following conclusions:

[The Student]’s ability to learn, school records indicate problems with attention, concentration, difficulty remaining still or being seated, impulsivity, inability to focus, distractibility, low frustration level, his inability to self-regulate, following directions and completing his work.

[The Student] has been impacted by social-emotional difficulties with his ability to learn since [SY 2012-2013], where he frequently walked the hallways at school instead of accessing the ... curriculum. On a daily basis [the Student] continues to exhibit an inability to tolerate frustration when academic demands are placed on him. He becomes upset, kicking and throwing objects, refusals to follow directions, cooperate with the teacher and peers. The significant incident ... when he bit another student in retaliation to another student messing with him.

[The Student]’s academic performance is far below grade level as indicated in his DIBELS and TRC scores. He has made minimal progress in reading and he continues to score below expectations in this area as indicated by the low scores on the PIA testing. He has a hard time with completing his class work and homework. [The Student] has a difficult time understanding the multiple-step of math operations.... His frequent disruptive, impulsive, and anger behaviors continue to have a significant and adverse impact on academic learning.

He does meet the educational criteria as a student with Other Health Impairment (ADHD Combined Type)....

P-18-23.

59. DCPS Psychologist recommended, *inter alia*, behavior support services and small classroom size. *Id.* The small classroom size was recommended only for the Student’s specialized instruction. Testimony of DCPS Psychologist.

60. DCPS Psychologist does not believe the Student should attend a full time outside of general education school. *Id.*

The February 21, 2014 Eligibility Meeting

61. On February 21, 2014, a meeting was held to determine whether the Student was eligible for special education and related services. P-3-1.

62. Neither Petitioner nor Parent #2 attended the meeting. P-3-2.

63. There is no evidence in the record as to why Petitioner and Parent #2 failed to attend the meeting.¹⁴

64. General Education Teacher #1 attended the meeting and stated her point of view that the Student had a disability in addition to ADHD and required additional assessments. Testimony of General Education Teacher #1.

65. General Education Teacher #1 explained the basis for her point of view, which was that even when the Student was behaving, he had difficulty receiving instruction. *Id.*

66. The other representatives of Respondent at the meeting disagreed with General Education Teacher #1 and stated that the Student's disability classification would be OHI, based upon his ADHD. *Id.*

67. General Education Teacher #1 considered this rejection of her input to put her in an awkward professional position. *Id.*

¹⁴ Petitioner's counsel asserted in her opening statement that Petitioner had planned to attend but was called by Attending School that day to pick up the Student because he was suspended; that Petitioner came to the school and informed school staff that if she had to take the Student home she would not be able to attend the scheduled meeting; and that Attending School refused to reschedule the meeting. However, no witness testified to these asserted facts and no document in evidence supports these assertions. To the contrary, the documentary evidence introduced by Petitioner (P-13) shows no suspension on February 21, 2014. By deciding not to present the testimony of Petitioner or Parent #2, Petitioner's counsel made it impossible for the undersigned to find that Respondent was responsible for Petitioner or Parent #2 being unable to attend the eligibility meeting or to find that Respondent failed or refused to reschedule the meeting.

68. The Student was determined to be eligible for special education with the disability classification of OHI due to his ADHD diagnosis and the conclusions in the psychological and educational evaluations that the Student's ADHD adversely affected his educational performance. P-3-1, -7 and -8.

69. Because the purpose of the eligibility meeting was only to determine whether the Student was eligible for special education and related services, and because the Student was determined to be eligible, the undersigned finds that the absence of Petitioner and Parent #2 did not impede the Student's right to a FAPE, significantly impede the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to the Student, or cause a deprivation of education benefits to the Student.¹⁵

Scheduling the April 1, 2014 IEP Team Meeting

70. On March 12, 2014, Special Education Coordinator at Attending School ("SEC") emailed Paralegal, stating that she wanted to schedule an IEP Team meeting for the following week and asking available dates and times. P-2-10.

71. On March 14, 2014, Paralegal emailed SEC, proposing several dates for an IEP Team meeting. P-2-7.

¹⁵ In her opening statement, Petitioner's counsel stated that Petitioner's absence from the February 21, 2014 eligibility meeting deprived Petitioner of the ability to hear DCPS Psychologist present and explain her evaluation report, which subsequently impaired Petitioner's ability to participate in the April 1, 2014 meeting where the Student's initial IEP was developed. However, there was no testimony or documentary evidence supporting this assertion. Again, the lack of such evidence is a direct result of Petitioner's counsel's decision not to present the testimony of Petitioner or Parent #2. Moreover, DCPS Psychologist testified that the evaluation she conducted *was* discussed at the April 1, 2014 meeting, with Petitioner in attendance, so Petitioner *did* have the opportunity to consider the evaluation when participating in developing the Student's IEP.

72. On March 17, 2014, Paralegal emailed SEC stating that because she had not heard back, she assumed the meeting would not take place March 18, 2014, and Paralegal proposed March 19, 2014. P-2-9.

73. On March 18, 2014, Paralegal emailed SEC stating as follows:

I just got off the phone with mom. She stated that you did not call her back. I also informed mom that you did not call me at 4PM as planned. Being that it is already past COB, I told mom that our tentative meeting scheduled for tomorrow at 9:30AM is not going forward. It has since been removed from my calendar. I will give DCPS until COB tomorrow. If we do not receive a letter of invitation with some proposed dates to meet, the parent will take administrative action as needed. Failing to timely convene this meeting is a denial of FAPE. I have been more than patient with DCPS regarding meeting dates. We need to meet as soon as possible.

P-2-11.

74. On March 25, 2014, SEC emailed Paralegal stating, *inter alia*, “Your points are well taken and understood. We have had a few challenges on our end.” P-2-14. The email forwarded a copy of the Student’s psychological evaluation and draft IEP and proposed dates and times for the IEP Team meeting. *Id.*

75. The draft IEP provided one hour per day of specialized instruction in the outside of general education setting in each of Reading and Mathematics, and an unspecified amount of behavioral support services in the general education setting. P-5-7.

76. Later on March 25, 2014, Paralegal emailed SEC accepting April 1, 2014 at 1:30 p.m. for the IEP Team meeting. P-2-17.

77. Later on March 25, 2014, Respondent sent Petitioner a Letter of Invitation to the meeting on April 1, 2014 to develop the Student’s initial IEP. P-6-1.

The April 1, 2014 IEP Team Meeting¹⁶ and the Student's Initial IEP

78. On April 1, 2014, an IEP Team meeting was held, with the following individuals in attendance: Petitioner, Parent #2, Paralegal, Special Education Teacher, DCPS Psychologist, Department of Behavioral Health ("DBH") Clinician, SEC and General Education Teacher #2. P-9-1.

79. General Education Teacher #1 had asked to be excused, and did not attend, because her opinion about the Student's disability had been rejected at the February 21, 2014 evaluation meeting and this put her in an "awkward professional position." *Id.* She believes that her views and expertise are not taken into account and that when she "comes to the table" she does not have any input that the other Team members will take into account. *Id.* She considers IEP Team meetings for the Student to be a "hostile work environment" for her because every time she tries, she is ostracized. *Id.* She does not attend IEP team meetings for any of her students because she cannot "stomach" those meetings. *Id.*

80. General Education Teacher #2 did not have any information specific to the Student. P-7-2.

81. Paralegal asserted that the attendance of General Education Teacher #1, who was the Student's general education teacher, was required. P-7-3.

¹⁶ On April 3, 2014, Paralegal emailed a letter to SEC summarizing the April 1, 2014 meeting and Petitioner's disagreement with decisions made by the Team at the meeting. P-8. Paralegal concluded with the following paragraph: "If you do not agree with the contents of this letter please contact me within 48 hours of receipt. If I do not receive a response, I will assume that you agree with the contents of this letter." There is no evidence that SEC responded. However, the undersigned does *not* infer that SEC tacitly agreed to the contents of the letter. No provision of the IDEA or its implementing regulations gives a parent's representative the ability to create such an obligation to respond to correspondence.

82. DCPS Psychologist summarized the results of her evaluation. Testimony of DCPS Psychologist.

83. The Team discussed conducting an FBA and developing a BIP for the Student. P-7-4.

84. The Team discussed the Student's academic goals. P-8-1. Paralegal disagreed with the inclusion of District of Columbia Common Core Standards ("DCCCS"). *Id.* SEC explained that the *standards* were the DCCCS standards, but the Student's *goals* were developed for him individually. P-8-1.

85. The Team discussed behavioral support services. *Id.* Because the Student was scheduled to receive counseling through an outside agency, Respondent's representatives wanted to remove social/emotional/behavioral goals from the draft IEP, subject to reconsidering such goals after the FBA. *Id.* Paralegal disagreed, stating that the goals needed to be in the IEP and the services needed to be provided by Respondent's social worker. *Id.* After discussion, the Team agreed with Paralegal and proposed 120 minutes per month of behavioral support services. *Id.*

86. The Team proposed that the Student receive one hour per day of specialized instruction in Mathematics in the outside of general education setting, two hours per day¹⁷ of specialized instruction in Reading in the outside of general education setting, and one hour per day of "inclusion" on a "consultation basis." P-2-26, P-7-4, -5.

87. DCPS Psychologist agreed with the programming that was decided for the Student. Testimony of DCPS Psychologist.

¹⁷ This was an increase from the one hour proposed in the draft IEP. *See*, Finding of Fact 75, *supra*. It is unclear whether the additional hour actually was added to the Student's IEP. In any event, sufficiency of hours of specialized instruction is not an issue in the instant case. *See*, Section IV, *infra*.

88. Paralegal asserted that the Student needed a “small setting and full-time support”(*Id.*), meaning that all of his instruction would be in the outside of general education setting. Respondent’s representatives disagreed. P-7-5.

89. The Student’s IEP developed at the April 1, 2014 meeting established goals in the areas of Mathematics (P-9-3 and -4), Reading (P-9-4 and -5), Written Expression (P-9-6), and Emotional, Social and Behavioral Development (P-9-8).

90. The goals were specific to the Student, *e.g.*, “Given 10 problems, [the Student] will add/subtract 2 to 3-digit numbers with regrouping with 80% accuracy.” P-9-3.

91. After the statement of each goal, the IEP stated the DCCCS, *e.g.*, “Fluently add and subtract within 20 using mental strategies [and] by end of [Current Grade], know from memory all sums of two one-digit numbers.” *Id.*

92. Based upon the entire record, the undersigned finds that the Student’s goals were appropriate given his needs and abilities, and that the references in the IEP to DCCCS did not render the Student’s goals inappropriate for him.

93. The Student’s social/emotional/behavioral goal was as follows:

to demonstrate improved ability to self-regulate as measured by mastery of the following short term objectives in a ten month period.

1. [The Student] will identify and verbalize his feelings in 4 out of 5 request[s].
2. [The Student] will identify those things he does well in 4 out of 5 request[s].
3. [The Student] will engage in group activities to increase self confidence when given 4 of 5 opportunities.
4. [The Student] will identify coping strategies to apply when he feels anxiety given one of three prompts.
5. [The Student] will identify problem solving strategies when given 4 of 5 trials[.]
6. [The Student] will engage in a task for twenty minutes when given two ten minute intervals.

P-9-8.

94. The IEP specified that the Student would receive one hour per day of specialized instruction in the outside of general education setting in each of Reading and Mathematics, and 120 minutes per month of behavioral support services. P-9-9.

95. The IEP provided for Extended School Year (“ESY”) services from July 7 through August 2, 2014, with specific goals in Mathematics and Reading, one hour per day of specialized instruction outside the general education setting in each of those areas, and 30 minutes of behavioral support services per week. P-9-12 and -13.

96. Although General Education Teacher #1 did not attend the April 1, 2014 IEP Team meeting, she believes that if the Student were reassessed and found to have only ADHD, the services provided in his IEP would be appropriate. Testimony of General Education Teacher #1.

97. General Education Teacher #1 believes that the Student needs a combination of small-group and large-group settings, the latter because he has difficulties with social interaction that he needs to remediate. *Id.*

98. General Education Teacher #1 does not believe that the Student requires a highly structured environment, because structure can be overwhelming for him due to his ADHD. *Id.*

99. General Education Teacher #1 believes the Student should be “mainstreamed,” *i.e.*, receive instruction in the general education classroom with some specialized instruction in the outside of general education setting. *Id.*

100. General Education Teacher #1 believes the Student could “flourish” if he had “proper pullout hours” *i.e.*, if he received the specialized instruction prescribed in his IEP on a consistent basis. *Id.*

101. Based upon the testimony of General Education Teacher #1, the undersigned finds that if General Education Teacher #1 had attended the April 1, 2014 meeting, she would have recommended additional assessments of the Student. Although General Education Teacher #1 agreed with the contents of the IEP developed on April 1, 2014 (Findings of Fact 97 through 100 *supra*), if she had expressed her position on the need for additional assessments to determine whether the Student had a disability other than ADHD, Petitioner and her representatives might have disagreed with Respondent's evaluation and requested an Independent Educational Evaluation ("IEE"). The results of such an IEE might have justified another IEP Team meeting to review and revise the Student's IEP. Thus, the undersigned finds that the absence of General Education Teacher #1 from the April 1, 2014 meeting did not impede the Student's right to a FAPE, significantly impede the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to the Student, or cause a deprivation of education benefits to the Student; however, her absence may have an adverse prospective effect upon the Student's educational programming because the IEP Team did not discuss the need for additional assessments.

102. Based upon the entire record, the undersigned finds that Petitioner has failed to meet her burden of proving that the Student's April 1, 2014 IEP was not reasonably calculated to provide educational benefit to the Student as of that date or that a BIP was required as of that date. The undersigned finds, to the contrary, that developing a BIP for the Student prior to completing the FBA would have been counterproductive, and that Respondent properly and timely discussed the need for an FBA and a BIP at the April 1, 2014 meeting where the Student's initial IEP was developed.

Corrections to the Student's April 1, 2014 IEP

103. On May 5, 2014, Paralegal emailed SEC, stating, *inter alia*, that the Student's IEP did not include all of the services that Respondent had offered at the April 1, 2014 IEP Team meeting. P-2-26.

104. On May 13, 2014, SEC emailed Paralegal stating, *inter alia*, that Paralegal was correct and that the Student's IEP should have included "1 hour of in class special education support." P-2-27. SEC offered to amend the IEP and discuss compensatory education for the month during which that support had not been provided. *Id.*

105. Later on May 13, 2014, Special Education Teacher issued a Letter of Invitation to Petitioner to attend a meeting on May 27, 2014 to discuss a proposed amendment to the Student's IEP. P-10-1.

The Student's FBA

106. On April 8, 9, 25 and 30, and May 1 and 8, 2014, Social Worker observed the Student in the classroom. P-19-7.

107. On May 23, 2014, Social Worker prepared an FBA for the Student to address his difficulties staying on-task, his verbal and physical aggressiveness toward other students, his defiance, his throwing of items, his running around the classroom and his fighting. P-19-1.

108. Social Worker noted that academic intervention outside the general education classroom and a change in medication had resulted in improved behavior for the Student. P-19-2.

109. During Social Worker's observations, the Student was actively engaged and compliant 88% of the time. *Id.*

110. Social Worker did not observe any physical or verbal aggression by the Student. *Id.*

111. Social Worker noted that the problem behaviors were reported to occur most often in the general education classroom. *Id.*

112. Social Worker recommended, *inter alia*, that a Multidisciplinary Team ("MDT") be convened to consider the evaluation results and findings of the FBA and to develop and implement a BIP. P-19-3.

The May 27, 2014 Meeting

113. On May 13, 2014, SEC emailed Paralegal to inform her that Special Education Teacher would contact her regarding a meeting to discuss the FBA and the need for a BIP for the Student. P-9-14 and -15. Later on May 13, 2014, Special Education Teacher emailed a Letter of Invitation to Paralegal, inviting Petitioner to a meeting on May 27, 2014. P-9-14.

114. An MDT or IEP Team¹⁸ meeting was held to review the Student's FBA and develop a BIP. P-10-2. After that meeting, the same participants conducted the Resolution Session Meeting regarding the instant DPC. P-11-3; P-10-5, -8 and -9.¹⁹

¹⁸ The parties use the terms MDT and IEP Team interchangeably. The distinction is not material to deciding the issues in the instant case.

¹⁹ P-10-5 through -9 are Paralegal's typed notes of the meeting. The notes indicate that the meeting was held May 26, 2014, which apparently was a typographical error. In any event, the discrepancy in dates is not material to determination of the issues in the instant case.

115. The following individuals attended: Petitioner, Parent #2, Petitioner's Counsel, Paralegal, Senior Educational Advocate, SEC, DCPS Psychologist, Special Education Teacher, Social Worker and Resolution Specialist. P-10-2, P-11-2.

116. General Education Teacher #1 was not in attendance at the beginning of the meeting because she preferred not to be; however, she joined the meeting in progress. P-10-2, -3 and -6.

117. The Student was reported to be disruptive in the general education classroom, even when put in a small group. P-10-5.

118. Petitioner's counsel stated that the Student should have a different, more restrictive placement. Testimony of General Education Teacher #1.

119. General Education Teacher #1 responded that if the Student has [only] ADHD, he would not get another placement; only if he had further assessments that identified additional disabilities might he need additional services. *Id.*

120. General Education Teacher #1 stated that there had been a "big difference from the beginning but it's not consistent," that the Student had difficulty getting back on task, and that he could not self-regulate his behavior even after speaking to someone about it. P-10-3, -4 and -7.²⁰

²⁰ At the DPH, General Education Teacher #1 testified that the Student had not been on his initial IEP long enough, and receiving services under that IEP long enough, to determine how he will respond. Testimony of General Education Teacher #1. She also testified that the Student had not been receiving his "pull out" specialized instruction in Reading consistently in the morning (although he did receive his "pull out" specialized instruction in Math consistently in the afternoon). *Id.* In her opinion, consistent delivery of the services specified in the Student's IEP should be tried before amending the IEP because "it's a great starting place" and "allows him to be with his peers and also get the services he needs." *Id.* In any event, implementation of the Student's April 1, 2014 IEP is not an issue in the instant case.

121. General Education Teacher #1 described her approach of pairing the Student with a higher-functioning student.²¹ P-10-7.

122. Social Worker stated that she had developed a draft BIP (P-20) and would send a copy to Petitioner's representative (P-10-3 and -4).

The Student's Behavior Since April 1, 2014

123. Since April 1, 2014, the Student has been able to attend to his specialized reading instruction for the full hour. Testimony of DCPS Psychologist.

124. In mid-May, 2014, the Student was observed to be working with the other students in his general education classroom, engaged and attending to his work. *Id.*

125. Since April 1, 2014, the Student has been found in the hallway less frequently, and is less resistant to going to his special education sessions than before. *Id.*

Compensatory Education

126. On June 4, 2014, Senior Educational Advocate developed a Compensatory Education Plan (the "Plan") to "address the harm that [the Student] suffered by not being identified as a child with a disability in a timely fashion and not receiving an appropriate IEP or placement to address his individual needs." P-1-1 and -2.

127. The Plan states that the Student should:

- Receive 150 hours of tutoring ... to make-up for the missed services during the 13-14 school year;

²¹ At the DPH, General Education Teacher #1 testified that even before a BIP was developed for the Student, based upon her five years of experience as a special education teacher at another school, she applied similar interventions with the Student and she "differentiated" his instruction. Testimony of General Education Teacher #1.

- Receive 50 hours of mentoring services ... to address the harm that [he] experienced by not receiving the needed services and an appropriate placement to address his ADHD and related behaviors. The mentoring will also help with modeling and learning more appropriate ways to interact with other students.

P-1-2.

128. The Plan does not identify the Student’s specific educational deficits resulting from his alleged loss of FAPE.

129. The Plan does not state how the hours of tutoring and mentoring would correct any educational deficits resulting from the Student’s alleged loss of FAPE.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “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)(A); *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.

Child Find

3. The IDEA imposes an affirmative obligation on the states that receive federal funding (including the District of Columbia, which is a state for these purposes) to ensure that “all children with disabilities residing in the State, including ... children with disabilities attending private schools ... and who are in need of special education and related services, are identified, located, and evaluated ...” 20 U.S.C. §1412(a)(3)(a). *See also*, 34 C.F.R. §300.111(a)(1)(i) and DCMR §5-E3002.3(a).

4. Between August 2012 the end of SY 2012-2013, Respondent was not on notice of substantial evidence that the Student may have qualified for special education such that he should have been evaluated. Finding of Fact 21.

5. During August and September 2013, despite some concerns expressed by Petitioner and General Education Teacher #1 about the Student’s academic ability, there were no behavior concerns and Respondent was not on notice that the Student had a disability requiring specialized instruction. Finding of Fact 19.

6. There is no evidence in the record that between August 2012 and October 2013, the Student was failing academically, had attempted suicide, had been hospitalized, had been disciplined, or had a pattern of refusing to turn in homework or classroom

assignments. In these circumstances, Respondent's Child Find obligations were not triggered from August 2012 through September 2013. *C.f.*, *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008), and *Clay T. v. Walton County Sch. District*, 952 F. Supp. 817 (M.D. Ga. 1997).

7. Petitioner referred the Student for evaluation in October 2013. Finding of Fact 34. The undersigned has deemed this referral to have been made on October 1, 2013 for purposes of Respondent's "Child Find" obligations. Finding of Fact 34 n.10. Petitioner's referral, which triggered Respondent's obligation to evaluate the Student, rendered moot any alleged Child Find violation on or after October 1, 2013.

Evaluation

8. An initial evaluation must be conducted within 60 days of receiving parental consent for evaluation unless the State establishes a different timeframe within which the evaluation must be conducted. 34 C.F.R. § 300.301(c)(1).

9. The District of Columbia, which is a State for purposes of IDEA (20 U.S.C. §1401(31)), has established its own timeframe. Under DC ST §38-2561.02(a), "DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment." The 120 days runs from referral, not consent.

10. In the instant case, for purposes of Respondent's deadline to evaluate the Student, the undersigned deemed Petitioner's referral to have been made on October 31, 2013. Finding of Fact 34 n.10. The 120 days for evaluation therefore expired on February 28, 2014.

11. DCPS Psychologist completed the evaluation on February 21, 2014 (Finding of Fact 50), which was timely.

Eligibility Determination

12. Once a child has been evaluated,

a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (c) of this section and the educational needs of the child

34 C.F.R. §300.306(a)(1).

13. Although neither of the Student’s parents attended the February 21, 2014 eligibility meeting (Finding of Fact 62), there is no evidence in the record as to why they were absent (Finding of Fact 63); accordingly, Respondent did not violate IDEA or its implementing regulations by conducting the meeting without the parents. In any event, the parents’ absence caused no harm to the Student. Finding of Fact 69.

14. There is no statutory or regulatory time limit on a Local Educational Agency (“LEA”) making an eligibility determination. However, the U.S. District Court for the District of Columbia has interpreted the 120-day period for evaluation as the period for evaluation and determination of eligibility. *D.L. v. District of Columbia*, 845 F. Supp. 2d 1 (D.D.C. 2011). In the instant case, the 120-day period was deemed to have ended February 28, 2014, and Respondent made its eligibility determination on February 21, 2014, which was timely.

15. If General Education Teacher #1’s referral of the Student to SST were considered to be a referral for special education evaluation, then the referral was made in September 2014; because no date is in the record, based upon Petitioner’s burden of

proof, for purposes of the deadline for Respondent to determine the Student's eligibility, the undersigned deems that referral to have been made September 30, 2013. In that event, the deadline for the eligibility determination would have been January 27, 2014, three weeks before the Student was found eligible. The undersigned concludes that a three-week delay was not material, particularly as the Student was receiving behavior and reading interventions under SST (Finding of Fact 26) and General Education Teacher was differentiating his instruction in the classroom and applying the principles of a BIP even before an IEP was developed (Finding of Fact 121 n.20).

Functional Behavioral Assessment

16. 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).

17. In the instant case, there is no evidence that the Student ever was removed from his educational placement;²² accordingly, the IDEA provisions requiring an FBA and a BIP were not triggered.

18. An FBA is an "evaluation" under IDEA, so if a parent requests an FBA, that constitutes a request for evaluation. *Harris v. District of Columbia*, 561 F. Supp. 2d 63

²² The Student had no out-of-school suspensions or disciplinary referrals in SY 2012-2013 (Finding of Fact 19) and his out-of-school suspensions in SY 2013-2014 totaled eight days (Findings of Fact 35-38), which was short of the threshold constituting removal from an educational placement (*i.e.* more than ten days of suspension in a school year when those days are consecutive or the reasons for the suspensions are sufficiently related). *See*, 34 C.F.R. §300.530.

(D.D.C. 2008). In the instant case, there is no evidence that Petitioner requested an FBA prior to the IEP Team meeting on April 1, 2014, after which an FBA was completed timely (Findings of Fact 83 and 106-112).

Behavior Intervention Plan

19. 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.” 20 U.S.C. §1414(d)(3)(B)(i).

20. In the instant case, the Student’s behavior impeded his learning (Finding of Fact 49-51 and 58) and that of others (Finding of Fact 53); accordingly, the IEP team was required to consider behavioral interventions and supports or other strategies to address his behavior, which, in fact, the Team timely discussed and drafted (Findings of Fact 83, 85, 114 and 120-122).

Contents of the IEP

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

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

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

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

(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).

22. 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.

23. 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.”²³ 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

²³ Because IEPs are judged prospectively, the Student’s academic performance and behavior between April 1, 2014 and the DPH (June 13, 2014) are not relevant to determining the appropriateness of the placement in his IEP as of April 1, 2014. Nor are the Student’s post-April 1, 2014 behavior or academic performance relevant to any of the other issues in this case. *See*, section IV, *supra*. However, the Student’s ongoing behavior and academic performance may give rise to a need to revise his IEP. *See*, 34 C.F.R. §300.324(b). If Respondent fails to monitor the Student’s progress under his IEP and to review and revise his IEP if and when needed, Petitioner may file a new DPC.

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 (2013).

When an IEP is Required

24. The requirement of an IEP applies once “a determination is made that a child has a disability and needs special education and related services” 34 C.F.R.

§300.306(c)(2). *See also*, DCMR §5-E3007.1 (“The IEP team shall meet and develop an

IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.”)

25. In the instant case, on February 21, 2014, the Student was determined to need special education and related services. Findings of Fact 61 and 68. Accordingly, the IEP Team should have met and developed an IEP for the Student within 30 days, *i.e.*, by March 23, 2014. The IEP Team met and developed the Student’s initial IEP on April 1, 2014. The undersigned does not find the delay of one week to be material.

IEP Team

26. The LEA must ensure that the IEP Team for a child with a disability includes not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment). 34 C.F.R. §300.321(a).

27. A member of the IEP Team is not required to attend an IEP Team meeting, in whole or in part, if the child’s parent and the LEA “agree, in writing, that the attendance of the member is not necessary because the member’s area of the curriculum or related services is not being modified or discussed in the meeting.” 34 C.F.R. §300.321(e)(1).

28. If the IEP Team member’s area of the curriculum or related services is being modified or discussed in the meeting, the member may still be excused if the parent, in writing, and the LEA consent to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. 34 C.F.R. §300.321(e)(2).

29. There is no evidence in the record that the parent consented to the excusal of General Education Teacher #1 from the April 1, 2014 IEP Team meeting.

30. General Education Teacher #2, who attended the April 1, 2014 IEP Team meeting, was not a regular education teacher *of the child* (*i.e.*, the Student). Findings of Fact 80 and 81.

31. No provision of IDEA or its implementing regulations permits an LEA to excuse an IEP Team member unilaterally; rather, the LEA has the obligation to ensure the attendance of the IEP Team members unless they are excused as provided in the regulations.

32. Respondent's practice of allowing General Education Teacher #1 to absent herself from the IEP Team meetings of the Student (and, according to her testimony, her other students who are eligible for special education) violates IDEA. The possibility that Respondent's members of the IEP Team might disagree at the IEP Team meeting is not a reason to excuse the dissenting member; excusing her potentially deprives the Student's parents and representatives of input essential to development of the Student's IEP.

33. Based upon the specific criteria for excusing an IEP Team member (*see*, Conclusions of Law 27 and 28, *supra*), the undersigned concludes that (a) a child's teacher's desire to avoid an environment that she perceives as awkward or even hostile is not a reason to excuse her from IEP Team meetings; (b) participating in IEP Team meetings is an essential job function for the teacher of a child whose IEP is being developed or revised; and (c) as the teacher's employer, Respondent must require the teacher's attendance at IEP Team meetings.²⁴

²⁴ Although this legal analysis applies to the required attendance of IEP Team members generally, this hearing officer does not have authority to order changes in Respondent's policies or practices beyond remediation of violations encompassed in the instant DPC.

Procedural Violations

34. A parent may file a DPC over an LEA's procedural violations of IDEA.

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

(ii) Procedural issues

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

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

(iii) Rule of construction

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

20 U.S.C. §1414(f)(3)(E)(ii). *See also*, 34 C.F.R. §300.513(a). *Accord*, *Lesesne v.*

District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006); *but see*, *G.G. v.*

District of Columbia, 924 F. Supp. 2d 273 (D.D.C. 2013) ("GG").

35. Because the absence of Petitioner and Parent #2 from the February 19, 2014 eligibility meeting did not impede the Student's right to a FAPE, significantly impede the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to the Student, or cause a deprivation of education benefits (Finding of Fact 69), the undersigned concludes that Respondent did not deny the Student a FAPE even if Respondent was responsible for scheduling the meeting at a day and time that neither parent could attend and failed or refused to reschedule the meeting (neither of which has been established by the evidence in the record). Even if Respondent were responsible for

the inability of Petitioner and Parent #1 to attend the eligibility meeting, this would have been only a procedural violation of IDEA based upon what occurred at the meeting.

36. Because the absence of General Education Teacher #1 from the April 1, 2014 IEP Team meeting did not impede the Student's right to a FAPE, significantly impede the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to the Student, or cause a deprivation of education benefits (Finding of Fact 101), the undersigned concludes that Respondent did not deny the Student a FAPE by failing to require General Education Teacher #1 to attend that meeting.²⁵ Accordingly, the failure to require the attendance of General Education Teacher #1 was only a procedural violation of IDEA based upon what occurred at the meeting.

Least Restrictive Environment

37. IDEA requires that, to the maximum extent appropriate, children with disabilities are education with children who are not disabled. 34 C.F.R. §300.114(a)(2)(i).

[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A); *accord*, 34 C.F.R. §300.114(a)(2)(ii) and DCMR §5-E3011.

²⁵ The absence of General Education Teacher #1 at the April 1, 2014 meeting may cause a *future* denial of FAPE due to the failure to discuss additional assessments that could affect future educational programming for the Student (Finding of Fact 101); however, the only issue in the instant case related to assessment is Petitioner's assertion that Respondent should have conducted an FBA at an earlier date. Accordingly, *for purposes of the instant case*, the failure to require General Education Teacher #1 to attend the April 1, 2014 IEP Team meeting was only a procedural violation of IDEA.

38. In the instant case, there is no evidence that the Student's disability is of such a nature or severity that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

39. Parental choice does not supersede the LRE requirement. *See* 71 Fed. Reg. 46541 (August 14, 2006).

40. In the instant case there is no evidence that the Student cannot be educated, at least part of the school day, in a classroom with non-disabled peers. Nor is there evidence that the Student needs to be segregated from non-disabled peers during non-instructional time such as lunch or recess. To the contrary, DCPS Psychologist and General Education Teacher #1 credibly testified that the Student *should* be in the general education environment other than when he is "pulled out" for specialized instruction. Findings of Fact 60 and 90, respectfully. Accordingly, the undersigned concludes that a separate special school such as Non-Public School is not the Student's LRE and it would violate IDEA to place him in such a setting.²⁶

Compensatory Education

41. 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.

²⁶ The procedural posture of this case is different from a case where a child has been denied a FAPE and a parent unilaterally placed the child in a non-public school. In that procedural posture, the unilateral parental placement need not be the child's LRE; it need only be a school that provides the child some educational benefit. *See, e.g., N.T. v. District of Columbia*, 839 F. Supp. 2d 29 (D.D.C. 2012), *citing*, *Warren G. v. Cumberland Count Sch. Dist.*, 190 F.3d 80, 83-84 (3d Cir. 1999) and *Knable v. Bexley City Sch. Dist.*, 238 F.3d 775, 770 (6th Cir. 2001).

42. 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.

43. 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.*

44. 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.

45. 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).

46. 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.*

47. 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.*

48. 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. 2d 104 (D.D.C. 2010) ("*Gill*").

49. In the instant case, at the PHC and in the PHO, the undersigned advised Petitioner of the need to introduce specific evidence supporting the requested compensatory education. However, in large part due to the decision by Petitioner's counsel not to present the testimony of Petitioner's compensatory education expert, 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 IDEA." *Gill*.

50. 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

51. Between August 2012 and October 2013, Respondent did not violate IDEA's "Child Find" provisions because Respondent was not on notice that the Student was suspected of having a disability requiring special education and related services prior to Petitioner's referral in October 2013.

52. Respondent did not deny the Student a FAPE by failing to conduct an FBA prior to the April 1, 2014 IEP Team meeting because Petitioner did not request an FBA and the Student had not been removed from his educational placement; Respondent promptly conducted an FBA after that meeting.

53. There is no evidence in the record supporting Petitioner's assertion that Respondent was responsible for Petitioner's failure to attend the Student's February 21, 2014 eligibility meeting or that Respondent failed or refused to reschedule the meeting, and in any event the Student suffered no harm as a result of the absence of Petitioner from this particular meeting.

54. On or about April 1, 2014, by failing to include the Student's general education teacher on the IEP Team, Respondent violated IDEA's procedural requirements but did not deny the Student a FAPE.

55. The Student's placement in the IEP developed on or about April 1, 2014 is appropriate and there is no evidence that he required a full time separate special

education day school with a more restrictive and highly structured setting at that time; in fact, all of the record evidence is to the contrary.

56. The goals in the IEP developed on or about April 1, 2014, although based upon Common Core Standards, were sufficiently individualized to address the Student's deficits.

57. There is no evidence that the behavioral support services in the Student's IEP developed on or about April 1, 2014 were insufficient and that a BIP was required at that time, and in any event, an FBA has been completed and a BIP has been developed for the Student.

X. ORDER

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

1. No later than September 12, 2014, Petitioner shall convene a meeting of the Student's IEP Team with all necessary participants. Respondent shall also require the attendance of General Education Teacher #1 (*i.e.*, the Student's assigned general education teacher during SY 2013-2014).

2. At the IEP Team meeting, the Team shall (a) determine whether any additional assessments or evaluations are required; (b) review the assessments or evaluations (if any) that were obtained subsequent to the April 1, 2014 IEP Team meeting; (c) review information (if any) submitted by the Student's parents, the parents' representatives, Attending School teachers, and/or Attending School staff subsequent to April 1, 2014; (d) review the Student's academic performance and behavior since April 1, 2014, including his academic performance and behavior during Extended School Year 2014;

review the Student's IEP and BIP; and revise the Student's IEP and/or BIP as appropriate.

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

4. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

5. Petitioner's other requests for relief are DENIED.

Dated this 20th 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).