DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Bruce Ryan, Hearing Officer** **Issued: June 22, 2012**

OSSE
STUDENT HEARING OFFICE
2012 JUN 22 AM 11:01

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed April 10, 2012, on behalf of a ten-year old student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends his neighborhood DCPS elementary school (the "Elementary School"). Petitioner is the Student's parent.

Petitioner claims that that DCPS has denied the Student a free appropriate public education ("FAPE") by: (1) failing to conduct a functional behavioral assessment ("FBA") as allegedly agreed upon at a December 1, 2011 MDT meeting; (2) failing to provide the Student with a dedicated aide during the 2011-12 school year, in accordance with the March 31, 2011 individualized education program ("IEP") developed by his previous local educational agency ("LEA"); and (2) failing to develop an appropriate IEP on or about March 1, 2012.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On April 23, 2012, DCPS filed a Response to the Complaint, denying the allegations and asserting that DCPS had not denied the Student a FAPE. DCPS further responded, *inter alia*, that there is no statutory requirement that DCPS adopt the IEP from the previous LEA, a D.C. public charter school ("Charter School").

On May 10, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues; and a Prehearing Order was issued the same date. *See Prehearing Order* (May 10, 2012). As of the date of the PHC, a resolution meeting had not been held in this matter. Petitioner's counsel cited scheduling problems. The parties also did not agree to end the 30-day resolution period early. Accordingly, the resolution period ended on May 10, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") is scheduled to expire on June 24, 2012. [2]

On May 16, 2012, DCPS filed an Amended Response, which asserted that the Student's IEP from the previous LEA required a dedicated aide, but had expressed an end date of March 9, 2011 for this service.

Also on May 16, 2012, an Amended Prehearing Order was issued rescheduling the Due Process Hearing from June 7 to May 30, 2012, pursuant to agreement of the parties. Both parties thereafter filed their five-day disclosures, and the Due Process Hearing was held on May 30, 2012, in Hearing Room 2004. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioner's Exhibits: P-1 through P-16. [3]

Respondent's Exhibits: R-1 through R-13. [4]

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; and (2) Educational Advocate ("EA").

Respondent's Witnesses: (1) General Education Teacher; (2) Special Education Teacher/Case Manager; and (3) Social Worker. All three DCPS witnesses were from the Elementary School.

Both parties presented oral closing arguments at the conclusion of the evidence. Petitioner was also permitted to present a brief reply argument.

---

[2] Neither party filed a motion or other request for hearing officer action pursuant to 34 C.F.R §300.510 (b).

[3] Exhibit P-16 was admitted over Petitioner's objection for the reasons stated on the record.

[4] Petitioner withdrew Exhibit R-14 of its five-day disclosures.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is June 24, 2012.

III. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

> **(1) Failure to Conduct FBA** – Did DCPS deny the Student a FAPE by failing to conduct an FBA, as agreed upon at a 12/01/2011 MDT meeting?
>
> **(2) Failure to Provide a Dedicated Aide (2011-12 School Year)** – Did DCPS deny the Student a FAPE by failing to provide the Student with a dedicated aide during the 2011-12 school year, consistent with the terms of the 03/31/2011 IEP developed by his former LEA, the Charter School?
>
> **(3) Failure to Develop Appropriate IEP (March 1, 2012)** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP (*i.e.*, one that is reasonably calculated to confer educational benefit), on or about March 1, 2012, in that the IEP: (a) does not provide a ***dedicated aide***; (b) does not contain a ***behavior intervention plan ("BIP")***; and (c) allegedly reduced the ***hours of specialized instruction to be delivered in an outside general education setting***?

As relief, Petitioner requests Petitioner requests that the Hearing Officer make appropriate findings and order DCPS to: (a) complete an FBA or fund an independent FBA; (b) provide the Student with a dedicated aide in all general education courses until such time as the BIP is completed and the team meets and determines that an aide is no longer necessary; (c) revise the IEP to provide the Student with 15 hours of specialized instruction in an Outside General Education setting; and (d) provide the Student with compensatory education for the denials of FAPE found to have occurred during the 2011-12 school year to date.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education, in accordance with the standards of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

IV. FINDINGS OF FACT

Based upon the evidence presented at the Due Process Hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a ten-year old student who is a resident of the District of Columbia. Petitioner is the Student's parent. *See Parent Test.*
2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. His primary disability is Other Health Impairment ("OHI"), based on symptoms associated with Attention Deficit/Hyperactivity Disorder ("ADHD"). *See R-3; P-8; Parent Test.*
3. During the 2010-11 school year, the Student attended Charter School, where he received special education and related services. Charter School served as its own LEA.
4. On or about March 31, 2011, Charter School convened an MDT/IEP Team meeting and developed an IEP for the Student. *See R-5; P-7; Parent Test.* The evidence is unclear regarding the exact terms of the 03/31/2011 IEP, [5] but it is undisputed that it provided 15 hours per week of Specialized Instruction, along with one hour per week of each of the following related services: Speech-Language Pathology; Behavioral Support Services; and Occupational Therapy. *See R-5; P-7.*
5. The 03/31/2011 IEP also provided for the part-time support of a dedicated aide in the General Education setting. *R-5, p. 38; P-7, p. 44.* However, the scope and duration of such requirement is somewhat unclear in light of the discrepancies in the IEP documents regarding (a) whether specialized instruction was to be provided in the general education or outside-general education setting, and (b) the end date for this requirement.
6. At some point during the Fall of 2011, Petitioner decided to enroll the Student at Elementary School. At the PHC, Petitioner did not dispute the assertion in DCPS' Response that the Student enrolled at Elementary School in November 2011. However, the evidence at hearing indicated that the Student likely enrolled sometime during

[5] Petitioner's Exhibit P-7, which has signatures on its cover page but includes pages labeled "DRAFT" that are also out of order, states that the specialized instruction is to be provided in an Outside General Education setting. In contrast, DCPS' Exhibit R-5, which appears to be a complete and final copy but without signatures, provides for specialized instruction in a General Education setting. *Compare* Petitioner's Exhibits, p. 44 *with* DCPS' Exhibits, p. 38. There are also other differences regarding transportation services, compensatory education, and ESY goals that are not relevant here. *See R-7, pp. 40-42; P-7, pp. 46-48.*

September 2011, after the Student had been wait listed at Charter School and could not enroll there for the 2011-12 school year. *See Gen. Ed. Teacher Test.; Parent Test.; P-14; P-15.* Petitioner provided a copy of the Charter School IEP to DCPS. *Parent Test.*

7. On or about December 1, 2011, DCPS convened an MDT/IEP Team meeting to review IEP goals and objectives. *R-6* (12/01/2011 MDT meeting notes). At this meeting, teachers reported (*inter alia*) that the Student exhibited strength in reading fluency, but weakness in reading comprehension; that he performed as an average student in math; and that behaviorally he required constant redirection, but could be easily redirected. *Id., p. 2. See also Gen. Ed. Teacher Test.*
8. At the 12/01/2011 meeting, the MDT/IEP team also specifically discussed whether the Student needed a part-time dedicated aide. In the observation of team members, the Student did not require a dedicated aide. *R-6, p. 2 (*DCPS Exhs., p. 45). The Elementary School staff working with the Student stated that he was "not a behavior problem" and had not warranted parental contact for off-task behavior as at his previous school. *Id.* The school social worker also indicated that the Student was "able to self regulate and a dedicated aide may embarrass him." *Id.* While Petitioner continued to request a dedicated aide for the Student, the Student's educational advocate "agreed to obtain further information from the regular education teacher before a final determination is made." *Id.* At the same time, the social worker stated that he "will complete an FBA in order to determine if a behavior intervention plan is warranted." *Id.*
9. On or about March 1, 2012, DCPS convened an MDT/IEP Team meeting to conduct an annual IEP review for the Student. *See P-2.* At this meeting, DCPS developed its own IEP to replace the IEP developed by Charter School. *P-1; R-11.* The 03/01/2012 IEP provides 15 hours per week of Specialized Instruction, consisting of five (5) hours per week in a General Education setting and 10 hours per week in an Outside General Education setting, in addition to related services. *P-1, p. 10.* The IEP also provides extended school year ("ESY") services, but does not provide the support of a dedicated aide. *Id., pp. 10, 14.*
10. As of the date of hearing, DCPS had not conducted an FBA for the Student.

V. DISCUSSION AND CONCLUSIONS OF LAW

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proving by a preponderance of the evidence that DCPS has denied the Student a FAPE [6] under Issue 1, but Petitioner has not met her burden of proof under Issues 2 and 3.

A. Issues/Alleged Denials of FAPE

1. Failure to Conduct FBA

Petitioner claims that DCPS denied the Student a FAPE by failing to conduct a functional behavioral assessment ("FBA") to address the Student's behavioral difficulties during the 2011-12 school year. As the courts have recognized, "[t]he FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of the IEP." *Harris v. DC,* 561 F. Supp. 2d 63, 68 (D.D.C. 2008). *See also* 34 C.F.R. 300.324 (a)(2)(i) ("The IEP Team must – in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.").

As noted above, the MDT/IEP team agreed in December 2011 that the Student would benefit from an FBA to address behavioral issues that may be impeding his learning or that of others. The Elementary School Social Worker indicated that he would complete an FBA in order to determine if a behavior intervention plan is warranted for inclusion in the Student's IEP. *See R-6, p. 2 (*DCPS Exhs., p. 45). However, DCPS took no action to complete an FBA over the following six months.

The Hearing Officer concludes that DCPS' failure to initiate an FBA for such unreasonably long period of time constitutes a procedural violation which has affected the student's substantive rights. *See Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006); 34 C.F.R. §300.513 (a) (2). Such procedural inadequacy has impeded the Student's right to a

[6] Under the IDEA, FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

FAPE by delaying collection of critical information from which a BIP could be developed to provide a consistent set of behavioral supports. It also has significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child. 34 C.F.R. §300.513 (a) (2) (i), (ii). Accordingly, Petitioner has met her burden of proof on Issue 1, and appropriate relief will be granted.

2. Failure to Provide a Dedicated Aide

Petitioner claims that DCPS denied the Student a FAPE by failing to provide the Student with a dedicated aide during the 2011-12 school year, in accordance with the March 31, 2011 IEP developed by Charter School. Petitioner argues that, pursuant to 34 C.F.R. 300.323(e), DCPS was required to provide services at least "comparable to those described" in the 3/31/2011 IEP after the Student enrolled at Elementary School until a new IEP was adopted in March 2012.

The IDEA regulations provide, in relevant part:

> "If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) ***transfers to a new public agency in the same State, and enrolls in a new school within the same school year***, the new public agency (in consultation with the parents) ***must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency)***, until the new public agency either –
> (1) Adopts the child's IEP from the previous public agency; or
> (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324."

34 C.F.R. §300.323(e) (emphasis added). Under this provision, "comparable" services has been interpreted by the U.S. Department of Education to mean "services that are 'similar' or 'equivalent' to those that were described in the child's IEP from the previous public agency, as determined by the child's newly-designated IEP team in the new public agency." 71 Fed. Reg. 46,681 (Aug. 14, 2006).

The Office of the State Superintendent of Education ("OSSE") has also promulgated rules designed to implement the above IDEA requirements with regard to its LEAs, as follows:

> "Pursuant to 34 C.F.R. §300.323(e), if a child with an IEP in effect transfers between an LEA Charter, a District Charter, or DCPS, the receiving LEA shall be ***responsible upon enrollment*** for ensuring that the child receives special education and related services according to the IEP, either by

adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA."

DCMR 5-E3019.5 (d) (emphasis added).[7] However, neither the IDEA nor OSSE regulations establishes a specific timeframe for the new public agency to take one of these actions. Thus, DCPS was only required to act within a reasonable period of time, in order to avoid any undue interruption in the provision of services. [8]

In this case, the evidence shows that the Student enrolled at Elementary School during the fall semester of the 2010-11 school year, at which point DCPS became responsible for providing special education and related services under his IEP. The evidence further shows that DCPS did act reasonably promptly under the circumstances by convening an MDT meeting on December 1, 2011, to review the prior IEP goals and objectives against the Student's early performance and progress at Elementary School. With the exception of the dedicated aide, there is no dispute that DCPS provided specialized instruction and related services comparable to those described in the 03/31/2011 IEP developed by Charter School during this initial period. *See Case Mgr Test.*

With respect to the dedicated aide, the evidence shows that the MDT/IEP Team carefully considered the Student's needs in this area as of December 2011, and determined that the Student did not require a dedicated aide to access the general education program at Elementary School. The MDT reviewed teacher reports indicating improved behavior, the Student's ability to self-regulate, their ability to redirect the Student, and potential negative impacts of providing a dedicated aide for the Student. *See R-6, p. 2 (*DCPS Exhs., p. 45); *Findings,* ¶ 7. Moreover, in light of the ambiguities and discrepancies in the 03/31/2011 IEP document noted above, the intended scope and duration of the Charter School's dedicated-aide requirement appears somewhat unclear.

---

[7] *See also* vol. 56 D.C. Register (Oct. 16, 2009) (proposing permanent final rule under DCMR 5-3019.5, to clarify that receiving LEA under 34 CFR 300.323(e) is "responsible upon enrollment for ensuring that the child receives special education and related services according to the IEP").

[8] *See Marshall v. Monrovia Unified School Dist.,* 627 F.3d 773 (9th Cir. 2010) ("providing services in accordance with the previously implemented IEP effectuates the statute's purpose of minimizing disruption to the student while the parents and the receiving school resolve disagreements about proper placement"); *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 54 IDELR 297 (OSERS 2010); 71 Fed. Reg. 46,639 (2006) ("The completion of evaluations for children who transfer to another school are subject to multiple factors and we decline to regulate on a specific timeframe.").

Even assuming *arguendo* that the absence of a dedicated aide resulted in DCPS' failure to provide "comparable services" – and hence a procedural violation of 34 CFR 300.323 (e) – Petitioner's IDEA claim would be viable only if such procedural violation affected the Student's substantive rights. *See, e.g., Lesesne v. District of Columbia,* 447 F.3d 828 (D.C. Cir. 2006); *Kruvant v. District of Columbia,* 99 Fed. Appx. 232 (D.C. Cir. 2004); 34 C.F.R. 300.513 (a) (2) ("In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.").

In this case, Petitioner has not demonstrated that the Student suffered any educational harm as a result of not receiving part-time support of a dedicated aide for several months prior to the March 1, 2012 IEP. In fact, the February 2012 educational evaluation reveals that the Student's academic skills are within the high average range of others at his grade level. *P-4, p. 2. See also EA Test.* (conceding that Woodcock-Johnson testing showed significant growth); *R-7* (2/7/2012 IEP progress reports); *Case Mgr. Test.* [9] Nor has Petitioner shown that such failure significantly impeded her own opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, especially where Petitioner and the Student's educational advocate agreed to obtain further information on this subject between December 2011 and the March 2012 annual review. *See Findings,* ¶ 8.

3. Failure to Develop Appropriate IEP

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "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)). *See also* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the

[9] Petitioner's reliance on work samples contained at *P-12* is largely misplaced, as they appear to have been created at the ***beginning*** of the Student's tenure at Elementary School. *See P-12* (dated Nov. 2011). The same is true with respect to the beginning of the year (BOY) DIBELS scores. *See P-13; EA Test.* Neither can be used to measure any harm resulting from DCPS actions or inactions between November 2011 and March 2012. While the later Middle of Year (MOY) DIBELS scores show a decline in reading comprehension (*P-13, p. 4; Gen. Ed. Teacher Test.*), no evidence was presented to link such decline to the absence of a dedicated aide.

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,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176, 200, 207 (1982); *see also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988).

Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed "as a snapshot, not a retrospective"). An LEA also must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities."*Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6; *see* 34 C.F.R. 300.324.

In this case, Petitioner alleges that the March 2012 IEP is not appropriate in that the IEP: (a) does not provide a dedicated aide; (b) does not contain a behavior intervention plan (BIP); and (c) reduced the hours of specialized instruction to be delivered in an outside general education setting. None of these claims bears scrutiny.

(a) Dedicated aide

Petitioner first claims that the March 2012 IEP should have included a dedicated-aide requirement similar to the March 2011 IEP. She contends that the previous dedicated aide was instrumental in helping the Student to maintain focus on his class work and redirect problematic behaviors at Charter School. *See Parent Test.; P-16.*

However, Petitioner fails to show the Student's current educational circumstances – as opposed to his previous IEP and behaviors at his previous school (*EA Test.*) – demand this highly restrictive level of support. As the MDT discussed at the December 2011 meeting, teachers and staff working with the Student reported that he was not a significant behavior problem at Elementary School and could be easily redirected. *See P-5; R-6; Findings, ¶¶ 7-8.* "In the observation of team members such as [Special Ed. Teacher], [Speech/Language Pathologist], and [Social Worker], [Student] does not require a dedicated aide." *P-5, p. 2.* The MDT's review at the March 2012 meeting, based on further experience in his current school placement, confirmed this initial judgment. "Many team members state[d] that [Student] does not

need an Aide." *P-2* (advocate meeting notes), *p. 2. See also Gen. Ed. Teacher Test.* (Student responds well to redirection and does not disrupt other students in her classroom); *Case Mgr. Test.* (dedicated aide may handicap Student by interfering with independent work); *Social Worker Test.* (no disruptive behaviors have required his classroom support to Student, and no aggressive behaviors of types described in Feb. 2010 FBA have been witnessed).

Petitioner has not shown that these judgments were wrong. Moreover, at the March 2012 meeting, the Student's advocate once again asked "to table the conversations about whether an Aide is needed until we can get more information from [General Education Teacher]." *Id., p. 3. See also EA Test.* (cross examination) (agreeing that dedicated aide is a "highly restrictive service" with potential for negative impacts). Accordingly, the Hearing Officer concludes that Petitioner failed to prove that the March 2012 IEP cannot be reasonably calculated to confer educational benefit on the Student without requiring the support of a dedicated aide.

(b) BIP

Petitioner next claims that the March 2012 IEP was inappropriate because it "fails to include a behavior intervention plan and/or adequate interventions in the classroom to address his off-task behaviors and limited coping skills." *Administrative Due Process Complaint Notice, p. 10.* However, Petitioner never presented evidence as to what particular behavioral interventions were needed and missing from the IEP. In fact, the IEP contains a number of goals and strategies in this area. *See, e.g., P-1, p. 4* (use of various self-regulatory behaviors, coping skills, and strategies to regain focus). Moreover, Petitioner's closing argument effectively conceded that an FBA first needs to be conducted before an appropriate BIP can be developed. Once Petitioner completes her independent FBA, DCPS will be required to consider its findings in order to determine if a behavior intervention plan is warranted for inclusion in the Student's IEP at that time.

(c) Hours and setting of specialized instruction

Petitioner claims that while the March 2012 IEP continues to provide the same 15 hours of specialized instruction as the March 2011 IEP, it improperly reduces the amount provided in an Outside General Education setting by allowing five of these hours to be delivered in a General Education (inclusion) setting. *See Administrative Due Process Complaint Notice, p. 10.* There are at least three problems with this argument.

First, it is unclear whether this even reflects any reduction in pull-out instruction since the March 2011 IEP documents are unclear as to what, if any, portion of specialized instruction was required to be provided in such setting. *See Findings,* ¶ 4 & note 5. Petitioner did not present any witness from Charter School to clarify this issue; and the meeting notes included in *P-7* also do not explain the discrepancies.

Second, Petitioner fails to present any evidence sufficient to show that the hours and settings determined by DCPS are not reasonably calculated to confer educational benefit on the Student ***within the present Elementary School placement as of March 2012,*** which is the only relevant inquiry. The 10 hours per week of specialized instruction outside a general education setting is designed to provide extra support to address the Student's deficits in reading comprehension (P-1, p. 11- IEP's LRE discussion), which all agree is currently his greatest academic challenge. *See EA Test.; P-2* (EA meeting notes), *p. 1; P-4* (02/28/2012 educational evaluation); *Gen. Ed. Teacher Test.* (discussing small group and other interventions used for reading comprehension); *Case Mgr. Test.* (discussing development of goals).

Finally, Petitioner's argument ignores the statutory directive to DCPS to educate the Student in the least restrictive environment. DCPS "must ensure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled." 34 C.F.R. §300.114 (a) (2). This generally means a preference for specialized instruction in a general education (inclusion) setting, all else being equal. *See also Gen. Ed. Teacher Test.* (discussing benefits to Student of general education setting); *Case Mgr. Test.* (same).

B. <u>Appropriate Equitable Relief</u>

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-23 (D.C. Cir. 2005). The appropriate relief for Petitioner's prevailing under Issue 1 is to require an FBA to address the Student's behavioral difficulties and determine if a BIP is warranted for inclusion in the Student's IEP. Because DCPS already declined to take any action to complete an FBA for over six months, the Hearing Officer concludes that an independent FBA would be equitable under the circumstances.

Petitioner has failed to support her proposed remedy of compensatory education (*P-16*) through any qualitative fact-specific analysis.[10] She has not proved the denials of FAPE under Issues 2 or 3 on which her compensatory education proposal principally rests; and she has not attempted to link to link any asserted need for independent tutoring, mentoring or counseling to any harm allegedly suffered as a result of DCPS' failure timely to complete an FBA. Indeed, the advocate who developed and testified in support of the proposal has never observed the Student at school or talked with any of his teachers. *EA Test.* (cross examination).

VI. ORDER

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

1. Petitioner shall be authorized to obtain a **Functional Behavioral Assessment** of the Student independently, at the expense of DCPS and consistent with DCPS' publicly announced criteria for independent educational evaluations ("IEEs"). Upon completion of the assessment, Petitioner shall submit a copy of the final written report to DCPS. The independent FBA shall be completed no later than **October 1, 2012**.

2. Within **30 calendar days** of its receipt of the independent FBA report specified in Paragraph 1 above, DCPS shall convene a meeting of the Student's MDT/IEP Team to (a) review the report, and (b) review and revise, as appropriate, the Student's then current IEP, including development of an appropriate behavior intervention plan ("BIP").

3. All other requests for relief in Petitioner's Due Process Complaint filed April 10, 2012 are hereby **DENIED;** and

4. The case shall be, and hereby is, **CLOSED.**

IT IS SO ORDERED.

Dated: June 22, 2012

Impartial Hearing Officer

[10] "Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services ... to be provided prospectively to compensate for a past deficient program.'" *Reid v. District of Columbia,* 401 F. 3d at 521 (quotations omitted). "In every case, however, 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." 401 F. 3d at 524.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).