OSSE
Student Hearing Office
July 24, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent,[1] on behalf of,
Student,*

Petitioner,

Date Issued: July 23, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a ten ( ) year old male, who is a rising grade student who attended School A for the 2012-2013 school year. The student's current individualized education program (IEP) lists Other Health Impairment (OHI) as his primary disability and provides for him to receive ten (10) hours per week of specialized instruction within the general education environment and one hundred twenty (120) minutes per month of behavioral support services outside of the general education environment.

On May 9, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to provide the student with an appropriate IEP, placement and/or location of services where the IEP could be implemented on or about December 2012; failing to include the parent or a special education teacher in the student's December 2012 IEP meeting; and failing to implement the student's IEP between February 13, 2013 and the present by failing to provide the 10 hours of specialized instruction and/or 120 minutes of behavioral supports as required by his December 2012 IEP.

On May 19, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that the student's December 11, 2012 IEP was appropriate for the student on the date that it was drafted; the student's December 11, 2012 IEP Team conducted all

[1] Personal identification information is provided in Appendix A.
*The student is a minor.

necessary discussions, evaluations, reviews and observations to draft the student's December 11, 2012 IEP; the placement determined by the student's December 11, 2012 IEP is appropriate and in the student's least restrictive environment; the student's areas of need are addressed in a small group or one-on-one setting; the student's parent was invited to the December 11, 2012 IEP Team meeting through three different modalities; the parent confirmed her attendance for the December 11, 2012 IEP Team meeting; and the specialized instruction and behavior support services prescribed by the student's December 11, 2012 IEP are being implemented.

On May 22, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on June 9, 2013, following the conclusion of the 30-day resolution period, and ends on July 23, 2013. The Hearing Officer Determination (HOD) is due on July 23, 2013.

On May 29, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on May 30, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.[2]

On July 8, 2013, Petitioner filed Disclosures including thirty-three (33) exhibits and seven (7) witnesses.[3] On July 8, 2013, Respondent filed Disclosures including six (6) exhibits and two (2) witnesses.

The due process hearing commenced at approximately 9:00 a.m. on July 11, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed however the parties agreed that the student's step-father would be permitted to attend the hearing.

Petitioner's Exhibits 5-7, 9-10, 12-13, 15-19, 23, 28, 30-33 were admitted without objection. Petitioner's Exhibit 1 was not admitted because it was written by Petitioner's counsel and did not provide an opportunity for Respondent to conduct cross examination. Petitioner's Exhibit 2 was not admitted because it was not relevant to the issues to be decided. Petitioner's Exhibit 3 was admitted, over Respondent's objection, because the author of the exhibit was available as a witness. Petitioner's Exhibit 4 was admitted, over Respondent's objection, because it was found to be relevant. Petitioner's Exhibit 8 was admitted, over Respondent's objection, because the author of the exhibit was available as a witness. Petitioner's Exhibit 11 was not admitted because it was not relevant to the issues to be decided. Petitioner's Exhibit 14 was admitted because it was found to be relevant. Petitioner's Exhibit's 20-22 were withdrawn by the Petitioner. Petitioner's Exhibit 24 was admitted, over Respondent's objection, as

[2] While neither party disputed the issues as outlined in the Prehearing Order, during the hearing the parties agreed that the alleged denial of FAPE for the implementation issue should have been February 13, 2013 rather than February 13, 2012.
[3] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

evaluative data that would have been available to Respondent. Petitioner's Exhibit 25 was not admitted. The Respondent argued that the exhibit was not relevant. The Petitioner argued that the exhibit demonstrated the student's lack of progress. The Hearing Officer reserved ruling on the admittance of the exhibit however was not subsequently prompted by Petitioner to admit the exhibit. Petitioner's Exhibit 26 was not admitted because it was not relevant to the issues to be decided. Petitioner's Exhibit 27 was admitted, over Respondent's objection, however the Hearing Officer noted that the exhibit would carry little weight. Petitioner's Exhibit 29 was admitted, over Respondent's objection, because the exhibit outlined Petitioner's request for relief. Respondent's Exhibits 1-5 were admitted without objection. Respondent's Exhibit 6 was admitted, over Petitioner's objection, because the exhibit was found to be relevant.

The hearing concluded at approximately 3:32 p.m. on July 11, 2013, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on December 11, 2012, specifically by failing to include specialized instruction outside of the general education environment in all academic areas, appropriate social/emotional and behavioral goals, an appropriate BIP, placement in a setting able to address the student's social/emotional and behavioral needs, and an appropriate location of services where the student's IEP could be implemented?
2. Whether DCPS failed to include all relevant IEP Team members for the student's December 11, 2012 IEP meeting, specifically by failing to include the student's parent and a special education teacher, and if so, whether this failure constitutes a denial of a FAPE?
3. Whether DCPS failed to implement the student's December 11, 2012 IEP from February 13, 2013[4] through present, specifically by failing to provide ten hours per week of specialized instruction within the general education environment and 120 minutes per month of behavioral support services?

[4] Although the Prehearing Order listed February 13, 2012 as the date as the beginning of the alleged denial of FAPE, the parties agreed that the proper date for the claim is February 13, 2013.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. School A is a Schoolwide Applications Model (SAM) school. (Special Education Coordinator's Testimony)
3. SAM schools encourage an "inclusion" model. (Special Education Coordinator's Testimony)
4. School A provided specialized instruction outside of the general education environment for the student. (Petitioner's Exhibit 15; Step-father's Testimony; Special Education Coordinator's Testimony)
5. The student has an average Intelligence Quotient (IQ). (Petitioner's Exhibit 19)
6. The student has very elevated scores for Attention Deficit Hyperactivity Disorder (ADHD) behaviors including inattention, lack of focus, distractibility and difficulty following directions. (Petitioner's Exhibits 5, 7, 10, 14, 19 and 23; Respondent's Exhibit 2 and 4; Advocate's Testimony; Mother's Testimony; Step-father's Testimony)
7. The student's July 20, 2011 Psychological Evaluation was used as a data source to determine the student's eligibility for special education and related services. (Petitioner's Exhibit 19)
8. The student's April 24, 2012 behavior intervention plan (BIP) addressed the student's difficulty remaining in his seat and asking for permission to leave his seat; raising his hand and waiting to be called on when he wants to speak in class during instructional time; listening to directions and following class rules and directions; and using appropriate language when interacting with peers and adults, keeping his hands to himself and using appropriate words to have his wants, feelings and needs met. (Petitioner's Exhibit 17)
9. The student's April 24, 2012 BIP lists interventions for the teacher to use to help the student practice desired behaviors, rewards for positive behaviors and consequences for undesired behaviors. One of the consequences listed in the BIP was a "phone call home." (Petitioner's Exhibit 17)
10. By the end of the summer of 2012, the student was "automatic" in his multiplication skills and was prepared to multiply double digits. (Advocate's Testimony)
11. During the first and second quarters of the 2012-2013 school year, the student was performing below basic in English Language Arts (ELA), science and social studies. (Petitioner's Exhibit 10)
12. During the 2012-2013 school year, the Step-father received frequent phone calls related to the student "not paying attention, not focused and talking back." (Step-father's Testimony)
13. Following the phone calls, the step-father frequently went to School A to encourage the student to stay focused. (Step-father's Testimony)
14. On September 12, 2012, the parent's advocate sent an e-mail to the special education coordinator requesting an IEP Team meeting to review the student's IEP and discuss

the level of service being provided to the student. (Petitioner's Exhibit 4; Advocate's Testimony; Mother's Testimony)

15. The Contact Log indicates that the Special Education Coordinator sent a letter via certified mail and another letter without a defined method of delivery on November 29, 2012 regarding the student's December 11, 2012 IEP Team meeting. (Respondent's Exhibit 5)
16. A phone call to the parent was not included in the Contact Log. (Respondent's Exhibit 5)
17. The Special Education Coordinator was unable to recall the date that she spoke with the mother or any details of the conversation she had with the mother. (Special Education Coordinator's Testimony)
18. During the first and second quarters of the 2012-2013 school year, the student was performing at the basic level in mathematics. (Petitioner's Exhibit 10)
19. On December 11, 2012, the student's most recent BIP was dated April 24, 2012. (Petitioner's Exhibit 17)
20. On December 11, 2012, the student showed a strength in mathematical computation and mental math. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
21. The student has the necessary skills to complete grade-level assignments in math. (Petitioner's Exhibits 5, 9, 10 and 15; Respondent's Exhibit 1 and 2)
22. On December 11, 2012, the student's weakness in math related to the student's difficulty in decoding word problems. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Advocate's Testimony)
23. On December 11, 2012, the student was reading at a kindergarten level. (Petitioner's Exhibits 3 and 5; Respondent's Exhibit 2; Mother's Testimony; Advocate's Testimony)
24. The student's level of reading on December 11, 2012 was substantially similar to the student's level of reading on July 20, 2011. (Petitioner's Exhibits 5 and 19; Respondent's Exhibit 2)
25. On December 11, 2012, since the student needed to take time to decode individual words, the student's processing and comprehension was hindered. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
26. On December 11, 2012, the student's IEP Team met to develop the student's IEP. (Petitioner's Exhibit 5; Respondent's Exhibits 2 and 3; Mother's Testimony; Special Education Coordinator's Testimony)
27. The student's tutor from the summer of 2012 was not present at the December 11, 2012 IEP Team meeting. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Advocate's Testimony)
28. The student's previous special education teacher attended the December 11, 2012 IEP Team meeting. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Special Education Coordinator's Testimony)
29. The special education teacher who attended the student's December 11, 2012 IEP Team meeting had conferred with the student's most recent special education teacher prior to the December 11, 2012 IEP Team meeting. (Special Education Coordinator's Testimony)

30. The student's December 11, 2012 IEP Team did not include a regular education teacher. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Special Education Coordinator's Testimony)
31. The student's math IEP goals, as drafted by the December 11, 2012 IEP Team, demonstrated progress from the student's October 20, 2011 IEP math goals. (Petitioner's Exhibits 5 and 14; Respondent's Exhibit 2)
32. The student's reading IEP goals, as drafted by the December 11, 2012 IEP Team, demonstrated little, if any, progress from the student's October 20, 2011 IEP reading goals. (Petitioner's Exhibits 5 and 14; Respondent's Exhibit 2)
33. In determining the level of services for the student, the December 11, 2012 IEP Team attempted to address the literacy and math blocks for the student. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Special Education Coordinator's Testimony)
34. The student's December 11, 2012 IEP Team acknowledged the student's need for pull-out services. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Mother's Testimony; Special Education Coordinator's Testimony)
35. The student's December 11, 2012 IEP includes an extensive statement of the student's social/emotional functioning on December 11, 2012 which includes the history of the student's behavioral concerns, the student's academic functioning, interventions and strategies that were used to address the student's behaviors, the student's attendance, evaluation results and the student's family history. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
36. The student's December 11, 2012 IEP includes five social/emotional short term objectives which address appropriate expression of the student's wants, feelings and needs; asking for help when the student feel anxious; identifying coping strategies for self-management; remaining on-task; and regulating impulses. (Petitioner's Exhibits 5 and 7; Respondent's Exhibits 2 and 4)
37. The student's December 11, 2012 IEP prescribed ten hours per week of specialized instruction within the general education environment and 120 minutes per month of behavioral support services outside of the general education environment. (Petitioner's Exhibits 5 and 7; Respondent's Exhibits 2, 3 and 4; Mother's Testimony; Special Education Coordinator's Testimony)
38. The specialized instruction on the student's December 11, 2012 IEP did not change from the specialized instruction on the student's October 20, 2011 IEP. (Petitioner's Exhibits 5 and 14)
39. The behavioral support services on the student's December 11, 2012 IEP increased from the behavioral support services provided in the student's October 20, 2011 IEP. (Petitioner's Exhibits 5 and 14)
40. The student's December 11, 2012 IEP includes the accommodation of "reading of test questions." (Petitioner's Exhibit 5; Respondent's Exhibit 2)
41. The December 12, 2012 IEP did not include information from the parent regarding her concerns with the student's educational program. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
42. The Prior Written Notice from the student's December 11, 2012 IEP Team meeting indicated that the IEP Team utilized the student's present levels of performance, progress reports, test scores and eligibility determination as data sources to make decisions during the December 11, 2012 meeting. (Respondent's Exhibit 3)

43. Mr. T, the special education teacher who provided services to the student at the beginning of the 2012-2013 school year went on leave in or around December 2012 and did not return to School A during the 2012-2013 school year. (Mother's Testimony; Step-father's Testimony; Special Education Coordinator's Testimony)
44. From December 2012 through February 2013, the student was without some level of specialized instruction. DCPS proactively offered compensatory education for the services missed from December 2012 through February 2013. (Petitioner's Exhibit 12; Respondent's Exhibit 6; Tutor's Testimony; Mother's Testimony; Special Education Coordinator's Testimony)
45. The student's behaviors increased after the special education left. (Step-father's Testimony)
46. During the month of February 2013, the student received 90 minutes of behavioral support services. (Petitioner's Exhibit 7; Respondent's Exhibit 4)
47. During the month of March 2013, the student received 30 minutes of behavioral support services. (Petitioner's Exhibit 7; Respondent's Exhibit 4)
48. During the month of April 2013, the student received 60 minutes of behavioral support services. (Petitioner's Exhibit 7; Respondent's Exhibit 4)
49. During the month of May 2013, the student received 120 minutes of behavioral support services. (Petitioner's Exhibit 7; Respondent's Exhibit 4)
50. During the month of June 2013, no behavioral support services were logged for the student. (Petitioner's Exhibit 7; Respondent's Exhibit 4)
51. The student was absent on two of the scheduled days for behavioral support services. (Petitioner's Exhibit 7; Respondent's Exhibit 4)
52. The student missed four scheduled sessions because of school-wide activities or vacation days. (Petitioner's Exhibit 7; Respondent's Exhibit 4)
53. The student is able to focus in math and demonstrated his strength in math. (Petitioner's Exhibit 10)
54. The student was able to participate in the regular education environment, with supplementary aids and services, in mathematics. (Petitioner's Exhibits 5, 9, 10 and 15; Respondent's Exhibits 1 and 2; Step-father's Testimony)
55. The student progressed, academically and behaviorally, when he received services from the special education teacher as prescribed by his IEP. (Petitioner's Exhibits 9 and 15; Respondent's Exhibit; Step-father's Testimony)
56. Mr. Y1 was the student's special education teacher during the 2011-2012 school year. (Special Education Coordinator's Testimony)
57. Mr. T was the student's special education teacher from August 2012 through December 2012. (Special Education Coordinator's Testimony)
58. Mr. Y2 was the student's special education teacher from approximately January 2013 through the end of the 2012-2013 school year. (Special Education Coordinator's Testimony)
59. The student's April 12, 2013 progress report was signed by Mr. Y2. (Petitioner's Exhibit 9)
60. The student's June 20, 2013 IEP Progress Report includes comments from Mr. Y2. (Respondent's Exhibit 1)
61. At the end of the 2012-2013 school year, the student was progressing toward all of his academic IEP goals. (Respondent's Exhibit 1)

62. During the 4th quarter of the 2012-2013 school year, the student regressed on his social/emotional IEP goal. (Respondent's Exhibit 1)
63. Multiplying a four digit number by a two digit number is a Common Core standard for the student's grade. (Petitioner's Exhibit 5; Respondent's Exhibit 2)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Issue #1

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

On December 11, 2012, the student's IEP Team met to develop the student's IEP. (Whether the team that met on December 12, 2012 constituted an "IEP Team" pursuant to 34 CFR §300.321(a) is discussed in Issue #2 however, for purposes for determining Issue #1, the team that met on December 11, 2012 will be referred to as the IEP Team.) The Petitioner alleged

that the IEP developed for the student on December 11, 2012 was inappropriate because it failed to include specialized instruction outside of the general education environment in all academic areas, appropriate social/emotional and behavioral goals, an appropriate BIP, placement in a setting able to address the student's social/emotional and behavioral needs, and an appropriate location of services where the student's IEP could be implemented.

Specialized Instruction

The Prior Written Notice from the student's December 11, 2012 IEP Team meeting indicated that the IEP Team utilized the student's present levels of performance, progress reports, test scores and eligibility determination as data sources to make decisions during the December 11, 2012 meeting. The student's report card, as a source available to the IEP Team, indicated that during the first and second quarters of the 2012-2013 school year, the student was performing below basic in ELA, science and social studies. The student was performing at the basic level in mathematics.

On December 11, 2012, the student showed a strength in mathematical computation and mental math. While the student's tutor for the summer of 2012 was not present at the December 11, 2012 meeting, the Tutor testified that the student was "automatic" in his multiplication skills by the end of the summer of 2012 and was prepared to multiply double digits. This particular skill aligned with a grade-level Common Core standard for the student's grade. The student's math IEP goals, as drafted by the December 11, 2012 IEP Team, demonstrated progress from the student's October 20, 2011 IEP math goals. The student's IEP Team noted that the student's weakness in math related to the student's difficulty in decoding word problems.

On December 11, 2012, the student was reading at a kindergarten level. Since the student needed to take time to decode individual words, the student's processing and comprehension was hindered. The student's tutor for the summer of 2012 expressed concern regarding the student's intensive needs in reading and like the student's December 11, 2012 IEP Team, noted that the student's weakness in math related to the student's difficulty in reading word problems. The student's low level of reading on December 11, 2012 was substantially similar to the student's low level of reading measured during the student's July 20, 2011 Psychological Evaluation used to determine the student's eligibility. Likewise, the student's reading IEP goals, as drafted by the December 11, 2012 IEP Team, demonstrated little, if any, progress from the student's October 20, 2011 IEP reading goals.

In determining the level of services for the student, the Special Education Coordinator testified that the December 11, 2012 IEP Team "tried to cover the literacy block and the math block" for the student. The Special Education Coordinator testified that School A is a SAM school therefore the student "would participate in the school's inclusion model with extra support." The Special Education Coordinator explained that the IEP Team utilized the school's philosophy that when a student is exposed to the grade-level curriculum, the student will "learn through osmosis" in determining the level of services for the student.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. Here, the student's extremely low reading skills

and high distractibility necessitated that the student be removed from the general education environment in ELA. The fact that School A was a SAM school did not override the student's need for a more restrictive setting in this academic area. The student was reading far below grade level and was unable to read with sufficient accuracy and fluency to support comprehension of grade-level material. While the student's December 11, 2012 IEP Team acknowledged the student's need for "extra support" in reading, School A did not ascribe to the idea of "pull-out" services, referring to that level of support as "extra support," but yet did not include specialized instruction outside of the general education environment on the student's December 11, 2012 IEP.

Likewise, there is no evidence that the student's December 11, 2012 IEP Team discussed how the student's extremely low reading skills and high distractibility affected the student's performance in social studies and science. While the student's December 11, 2012 IEP includes the accommodation of "reading of test questions" for every class, the IEP lacks necessary specialized instruction in social studies and science to address the student's inability to read grade-level material and need for frequent prompting to follow directions, complete classwork and remain focused. Although the student has an average IQ[5], on the Conners 3rd Edition, administered to the student in July 2011, the student had very elevated scores for ADHD behaviors, which indicated to the student's IEP Team that modifications and supports were necessary in all academic areas. The student's evaluation scores combined with the student's below basic functioning in social studies and science offered the necessary data to the student's December 11, 2012 IEP Team to support including additional specialized instruction on the student's December 11, 2012 IEP.

The Hearing Officer concludes that the student's December 11, 2012 IEP Team should have included specialized instruction outside of the general education environment for the student in ELA. Additionally, given the student's difficulty with attention and focus and the student's low level of reading, the student should have been given specialized instruction within and outside of the general education for social studies and science in order to ensure that the student was able to read and complete assignments. Although the December 11, 2012 IEP Team indicated that the student's progress reports and test scores were used as a basis to determine the level of services for the student, during the first and second quarters of the 2012-2013 school year, the student was performing below basic in ELA, science and social studies. DCPS denied the student a FAPE by failing to include specialized instruction outside of the general education in math and specialized instruction within and outside of the general education in social studies and science on the student's December 11, 2012 IEP.

The Hearing Officer also concludes that the five hours per week of specialized instruction within the general education environment for mathematics included on the student's December 11, 2012 IEP was appropriate for the student. The student demonstrated a strength in math and had the necessary skills to complete grade-level assignments in math. The student's third quarter report card indicated that the student was able to focus in math and demonstrated his strength in math. The evaluator who conducted the student's March 2012 Functional Behavioral

[5] Although the student's July 2013 Comprehensive Psychological Evaluation measures the student's IQ in the low range, this evaluation was not available to the student's December 2012 IEP Team and the evaluation measures the student's cognitive efficiency in the average range.

Assessment also noted that the student appropriately engaged in some math activities with the regular education class although required some assistance in order to understand directions.

Placement/Location of Services

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.114(a)(2). For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.*

There was no evidence presented which suggested that the student was unable to participate with regular education peers in non-academic activities in December 2012. While the student was reading far below grade level, the student has an average IQ and despite his below basic grades in social studies and science, there was no evidence presented which indicated that the student was unable to comprehend social studies and science concepts. The record supports the presumption that the student's below basic grades in social studies and science were likely a result of his low reading level. Additionally, while the student displayed inattentive, hyperactive and off-task behaviors, there was no evidence presented which suggested that the severity of the student's behaviors required the student to be segregated from non-disabled peers. Further, the record indicates that the student was able to participate in the regular education environment, with supplementary aids and services, in mathematics. In fact, while the student demonstrated inattentive and distractible behaviors in other areas, the student focused and appropriately participated in math in the general education environment. The record is clear that the severity of the student's disability in reading was such that education in regular ELA classes with the use of supplementary aids and services could not be achieved satisfactorily.

"Educational placement," as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) *(citing AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). The Comments to the Federal Regulations note that "placement" refers to points along the continuum of placement options available for a child with a disability and "location" refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (14 August 2006). The IDEA regulations at 34 CFR §300.115 requires public agencies to make available a continuum of alternative placements to meet the needs of children with disabilities for special education and related services. The continuum must include

instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. *Id.*

As discussed above, the student's December 11, 2012 IEP Team should have included specialized instruction in a special class, or outside of the general education environment, for the student in ELA and specialized instruction in a combination of in the regular class and in a special class for social studies and science. The student's December 11, 2012 IEP Team appropriately included specialized instruction in the regular class for the student. The Petitioner argued that the student's December 11, 2012 IEP Team should have developed a "full-time program" for the student, meaning specialized instruction in special classes for the entirety of the school day. This argument is not supported by the record. The student was able to participate in the regular education environment, with supplementary aids and services, in mathematics; there was no compelling evidence presented which suggested that the student was unable to participate in non-academic activities, such as lunch, assemblies and recess, with non-disabled peers; and the Step-father testified that the student progressed when he received services from the special education teacher as prescribed by his IEP.

The Hearing Officer concludes that to the extent that DCPS failed to provide specialized instruction outside of the general education environment for ELA, and specialized instruction within and outside of the general education environment for social studies and science on the student's December 11, 2012 IEP, DCPS denied the student a FAPE in the student's "placement." To the extent that the Petitioner argued that the student required a "full-time" IEP, DCPS did not deny the student a FAPE by failing to provide a "full-time" placement for the student on December 11, 2012.

The Special Education Coordinator testified that School A was a SAM school and therefore provided an "inclusion model with extra support." Although School A did not use the term "pull-out" for specialized instruction delivered outside of the general education environment, the school did provide "extra support" outside of the general education environment. Notwithstanding the semantics utilized by School A, School A was able to, and did in fact, offer and provide specialized instruction outside of the general education environment. The Special Education Coordinator also testified that although the student's IEP prescribed specialized instruction within the general education environment, the student's special education teacher would provide services to the student outside of the general education environment. During an observation in March 2012, the evaluator also noted that the special education teacher requested to work with the student outside of the general education environment. The Step-father also testified that the general education teacher would "send the student to the special education room."

Although School A chose not to describe services outside of the general education environment in the local vernacular, there was no evidence presented which supported the contention that School A, as a location of services, was unable to implement the specialized instruction and related services that should have been included on the student's December 11, 2012 IEP. A special education teacher was available to provide services within the general education environment and outside of the general education environment in the "special education room." The Hearing Officer concludes that DCPS did not deny the student a FAPE by

failing to include an appropriate location of services where the student's IEP could be implemented on the student's December 11, 2012 IEP.

Appropriate Goals

The Petitioner alleged that the social/emotional goals on the student's December 12, 2012 IEP were inappropriate for the student. The student's December 11, 2012 IEP includes an extensive statement of the student's social/emotional functioning on December 11, 2012. The statement addresses the history of the student's behavioral concerns, the student's academic functioning, interventions and strategies that were used to address the student's behaviors, the student's attendance, evaluation results and the student's family history. The student's social/emotional "baseline" indicated that the student "demonstrates avoidance behaviors by walking away, becoming defiant, and king object [sic] when directed to do classwork. [The student] does not consistently complete class and home work. [The student] requires behavioral support services to increase his coping strategies when faced with challenging academic class work." The Petitioner did not challenge the accuracy of the social/emotional baseline and present level of performance on the student's December 11, 2012. Likewise, the Step-father testified that he received frequent phone calls related to the student "not paying attention, not focused and talking back."

While the IEP appears to include only one social/emotional goal, there five social/emotional short term objectives on the student's December 11, 2012 IEP which address appropriate expression of the student's wants, feelings and needs; asking for help when the student feel anxious; identifying coping strategies for self-management; remaining on-task; and regulating impulses.

The student's IEP needed to accurately reflect the results of evaluations to identify the student's needs and establish annual goals related to those needs. *See* 34 CFR 300.320(a). The Petitioner presented no evidence to support the allegation that the social/emotional goal on the student's December 11, 2012 IEP was inappropriate for the student. Likewise, the Petitioner did not offer testimony or exhibits indicating social/emotional goals which would have been appropriate on December 11, 2012. The social/emotional goals align with the present level of performance outlined in the December 11, 2012 IEP, the behaviors described in the student's July 20, 2011 Psychological Evaluation and the behaviors noted by the student's Mother and Step-father. While additional behaviors of concern were listed in the student's July 20, 2011 Psychological Evaluation, there was no evidence presented which indicated that the student continued to exhibit those behaviors on December 11, 2012.

The Hearing Officer concludes that the student's December 11, 2012 IEP reflected the results of evaluations which identified the student's social/emotional needs on December 11, 2012 and established goals related to those needs. Therefore, DCPS did not deny the student a FAPE by failing to include appropriate social/emotional and behavioral goals on the student's December 11, 2012 IEP.

Appropriate BIP

On December 11, 2012, the student's most recent BIP was dated April 24, 2012. There was no evidence presented which indicated that the student's December 11, 2012 IEP Team

made changes to the April 24, 2012 IEP therefore the April 24, 2012 BIP remained the current BIP on December 11, 2012. The April 24, 2012 BIP addressed the student's difficulty remaining in his seat and asking for permission to leave his seat; raising his hand and waiting to be called on when he wants to speak in class during instructional time; listening to directions and following class rules and directions; and using appropriate language when interacting with peers and adults, keeping his hands to himself and using appropriate words to have his wants, feelings and needs met. The BIP lists interventions for the teacher to use to help the student practice desired behaviors, rewards for positive behaviors and consequences for undesired behaviors. One of the consequences listed in the BIP was a "phone call home."

The Mother testified that student's behaviors included lack of focus, distraction and classroom disruptions. The Step-father testified that he received frequent phone calls during the 2012-2013 school year because the student was "not paying attention" "not focused" and "talking back." Following the phone calls, the step-father frequently went to School A to encourage the student to stay focused. The Step-father also testified that the student's behavior was better during the time that the student was receiving special education.

Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041. On December 11, 2012 the targeted behaviors on the student's BIP aligned with the behaviors in the student's social/emotional present level of performance and the behaviors listed by the Mother and Step-father. Although School A frequently used one of the listed consequences as an intervention rather than a consequence, there was no compelling evidence presented that the interventions included in the April 24, 2012 BIP were ineffective for the student. Likewise, there was no compelling evidence presented that supported that contention that the student's April 24, 2012 BIP was inappropriate on December 11, 2012. The Step-father testified that the student's behaviors increased after the departure of the student's special education teacher, namely after December 2012. The Hearing Officer concludes that the Petitioner did not meet its burden in proving that the student's April 24, 2012 BIP was inappropriate on December 11, 2012.

The Petitioner met its burden with respect to Issue #1, relative to the appropriateness of the specialized instruction included on the student's December 11, 2012 IEP.

<u>Issue #2</u>

Pursuant to the IDEA regulations at 34 CFR §300.321(a), a public agency must ensure that the IEP Team for each child includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; (4) a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities and is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results; (6) at the discretion of the parent or the agency,

other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) whenever appropriate, the child with a disability.

A member of the IEP Team is not required to attend an IEP meeting, in whole or in part, if the parent of the child with a disability and the public agency 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. A member of the IEP Team may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services if the parent, in writing, and the public agency consent to the excusal and the member submits, in writing to the parent and IEP Team, input into the development of the IEP prior to the meeting. 34 CFR §300.321(e).

The Petitioner alleged that DCPS denied the student a FAPE by failing to include the student's parent and the student's special education teacher in the student's December 11, 2012 IEP Team meeting.

On September 12, 2012, the parent's advocate sent an e-mail to the special education coordinator requesting an IEP Team meeting to review the student's IEP and discuss the level of service being provided to the student. The Mother testified that she did not receive notice of the student's December 11, 2012 IEP Team meeting. The Mother further testified that School A had her work telephone number, her e-mail address, and had been previously informed to place letters in the student's sister's bookbag rather than the student's bookbag. Additionally, the student's Step-father testified that although he was contacted on at least a weekly basis regarding the student's lack of focus in the classrooom, the step-father was not notified of the December 11, 2012 IEP meeting either by phone or while at School A.

The Special Education Coordinator testified that she spoke with the mother and confirmed the IEP Team meeting date. She further testified that after she spoke with the mother, she sent three copies of the invitation letter to the mother- one via certified mail, one in the student's bookbag and the third in the student's sister's bookbag. The Contact Log indicates that the Special Education Coordinator sent a letter via certified mail and another letter without a defined method of delivery. The record contains neither a copy of the letter nor a copy of the return receipt of the certified mail. Additionally, the Special Education Coordinator was unable to recall the date that she spoke with the mother or any details of the conversation she had with the mother and the phone call to the mother was not included in the Contact Log.

The Hearing Officer concludes that it is more likely than not that the parent was not invited to the student's December 11, 2012 IEP Team meeting. The record does not contain a copy of the invitation letter allegedly sent by School A nor does it contain compelling evidence of the alleged phone call to the parent.

The IDEA regulations at 34 CFR §300.513(a)(2) state that 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 a

FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. Here, the parent clearly had a concern regarding the level of service being provided to the student. While the record indicates that an IEP was developed for the student on March 19, 2012, the record does not contain a copy of this IEP. On September 12, 2012 the parent's advocate requested a meeting to review the student's IEP outlining the parent's concerns. The December 11, 2012 IEP Team increased the student's behavioral support services from the services provided in the student's October 20, 2011 IEP however did not increase or change the student's specialized instruction and did not include information from the parent regarding her concerns with the student's educational program. The parent was not given the opportunity to discuss her concerns with the other members of the student's IEP Team and was not given the opportunity to request additional services for the student during the December 11, 2012 IEP Team meeting. Therefore, DCPS significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child.

The Petitioner also alleged that DCPS denied the student a FAPE by failing to include a special education teacher in the student's December 11, 2012 IEP Team meeting. The allegation that a special education teacher was not present at the December 11, 2012 IEP Team meeting is not supported by the record. The student's December 11, 2012 IEP signature page includes the signature of a special education teacher. While the special education teacher who participated in the meeting was not the student's current special education teacher, the special education teacher was the special education teacher of the student during the previous year, had conferred with the student's most recent special education teacher, and the student's current special education teacher had recently left School A and was therefore unavailable.

The Hearing Officer notes that, while not alleged by the Petitioner, the student's December 11, 2012 IEP Team did not include a regular education teacher. Given that the IEP Team determined that the student's specialized instruction would be delivered in the regular education environment and given the student's low level of functioning in the regular education environment, especially in reading, the lack of a general education teacher at the student's December 11, 2012 IEP Team meeting impeded the child's right to a FAPE by not having an appropriate person to discuss the student's functioning related to the general education curriculum. There is no evidence which suggests that the parent agreed, in writing, that the attendance of the general education teacher was not necessary because the member's area of the curriculum was not being modified or discussed in the meeting and the general education teacher did not submit, in writing, input into the development of the IEP prior to the meeting. Although the Special Education Coordinator testified that the special education teacher conferred with the general education teacher prior to the December 11, 2012 IEP Team meeting, a conference between the teachers does not meet the requirements of 34 CFR §300.321(e).

The Petitioner met its burden with respect to Issue #2.

Issue #3

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a

student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia,* 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.,* 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000), the Firth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia,* 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.,* 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia,* 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, Mr. T, the special education teacher who provided services to the student at the beginning of the 2012-2013 school year went on leave in or around December 2012 and did not return to School A during the 2012-2013 school year. From December 2012 through February 2013, the student was without some level of specialized instruction. DCPS proactively offered compensatory education for the services missed from December 2012 through February 2013. The Petitioner alleged that following DCPS' offer of compensatory education for December 2012 through February 2013, School A continued to fail to implement the specialized instruction on the student's December 11, 2012 IEP.

The Mother testified that School A "never started implementing [the student's] IEP" after the departure of the student's initial special education teacher however acknowledged that Mr. Y2, whom she believed to be an aide, was in the student's classroom. The Step-father testified that while Mr. Y1 was involved with the student, the Step-father received few phone calls however after "he" left in or about December 2012, the general education teacher called him two to three times per week because of the student's attention issues. The Step-father indicated that the phone calls continued throughout the remainder of the 2012-2013 school year.

Although both parents believed that Mr. Y1 was the student's special education teacher at the beginning of the 2012-2013 school year, the Special Education Coordinator testified that Mr. Y1 was the student's special education teacher during the 2011-2012 school year; Mr. T was the student's special education teacher from August 2012 through December 2012; and Mr. Y2 was the student's special education teacher from approximately January 2013 through the end of the 2012-2013 school year. The student's April 12, 2013 progress report was signed by Mr. Y2. Additionally, the student's June 20, 2013 IEP Progress Report includes comments from Mr. Y2 and indicates that the student was progressing toward all of his academic IEP goals. The Special

Education Coordinator testified that the student received specialized instruction as prescribed by his December 11, 2012 IEP but was unable to describe when and how the services were delivered.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), affd, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. It is possible that the student received ten hours per week of specialized instruction within the general education environment, even though DCPS' evidence was not compelling on this point. It is also possible that the student did not receive ten hours per week of specialized instruction within the general education environment however the Petitioner's evidence was equally not compelling. The Hearing Officer concludes that the Petitioner did not prove by a preponderance of the evidence that the student did not receive ten hours per week of specialized instruction within the general education environment from February 2013 through the end of the 2012-2013 school year.

The Petitioner also alleged that DCPS failed to implement the student's December 11, 2012 IEP from February 13, 2013 through present, specifically by failing to provide 120 minutes per month of behavioral support services to the student. The record includes the Service Trackers for the student's behavioral support services during this time period.

During the month of February 2013, the student received 90 minutes of behavioral support services. The record indicates that the student did not receive services on February 14, 2013 because the provider was on leave. During the month of March 2013, the student received 30 minutes of behavioral support services. The record indicates that the student did not receive services on March 7, 2013 because the provider was unavailable; did not receive services on March 15, 2013 because the student was absent; and did not received services on March 29, 2013 because students were dismissed early from school. During the month of April 2013, the student received 60 minutes of behavioral support services. The record indicates that the student did not receive services on April 4, 2013 because it was Spring Break; did not receive services on April 23, 2013 because of DC-CAS testing; did not receive services on April 26, 2013, as a make-up day for April 23, 2013, because the student was absent; and did not receive services on April 30, 2013 because of DC-CAS testing. During the month of May 2013, the student received 120

minutes of behavioral support services. During the month of June 2013, no behavioral support services were logged for the student.

From February 2013 through June 2013, DCPS provided the behavioral support services prescribed on the student's December 12, 2012 IEP for only one month. While the student was absent on two of the scheduled days for behavioral support services, the student's IEP does not indicate daily services for the student but monthly services for the student. Likewise, while the student missed four scheduled sessions because of school-wide activities or vacation days, the student's IEP does not limit the student's monthly behavioral support services to the schedule set by the provider. The Hearing Officer acknowledges the practical aspect of scheduling students for services but also highlights the IDEA's mandate to make special education and related services available to a child in accordance with the child's IEP. *See* 34 CFR §300.323(c)(2).

A material failure to implement a student's IEP occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and [those] required by the child's IEP. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007). The Hearing Officer concludes that DCPS' failure to provide behavioral support services for 120 minutes per month for February 2013, March 2013, April 2013 and June 2013 constitutes a material failure to implement the student's IEP. Thus, DCPS denied the student a FAPE by failing to provide behavioral support services from February 13, 2013 through the end of the 2012-2013 school year, pursuant to the student's December 11, 2012 IEP.

The Petitioner met its burden with respect to Issue #3, relative to implementation of the student's behavioral support services.

Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4 h Cir. 2003). In this case, the denial of FAPE is DCPS' failure to include appropriate supports on the student's January 30, 2013 IEP to address her ADHD behaviors in all subject areas.

As relief, the Petitioner requested independent counseling for one hour per week for one year, five hours per week of tutoring for one year and placement in a private special education day school with transportation.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

Here, the Petitioner's request for compensatory education counseling services goes well beyond the identified denial of FAPE for DCPS' failure to implement the behavioral support services on the student's December 11, 2012 IEP. DCPS failed to provide 300 minutes (five hours) of behavioral support services from February 2013 through June 2013. It is equitable, in this case, for the student to receive the behavioral support services that were not provided by DCPS and some additional services for the student's regression during the 4th reporting period. The Step-father indicated that he was called at least weekly regarding the student's inability to focus and "talking back." Both of these behaviors were addressed in the student's social/emotional goal on his December 11, 2012 IEP. By failing to provide the prescribed support, the student continued to demonstrate the inappropriate behaviors. In fact, although the student was progressing toward mastering his social/emotional goals during the 2nd and 3rd reporting periods, the student was regressing during the 4th reporting period.

DCPS also denied the student a FAPE by failing to include five hours per week of specialized instruction outside of the general education environment for ELA and five hours per week of specialized instruction in a combination of within and outside of the general education environment for social studies and science. Had DCPS provided this level of service, the student would have likely progressed more quickly in the mastery of his ELA IEP goals and performed at, at least, a basic level in social studies and science. The record does not include the student's final grades for the 2012-2013 school year, but does indicate that the student is advancing to the next grade. It is unclear of the extent of harm the student has suffered as a result of not receiving specialized instruction in social studies and science. Based on these factors, it is equitable for the student to receive compensatory education one-on-one tutoring, with an emphasis on reading, and inclusive of grade-level social studies and science concepts.

For the request for the prospective placement for the 2013-2014 school year, the Hearing Officer must consider the factors in *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). These considerations include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the LRE. The nature and severity of the student's disability is not such that requires placement in a private special education school. The student has an average IQ and is able participate in the general education curriculum, with supplementary aids and services, in math and partially in social studies and science. While the student has a need for specialized instruction in ELA, math, social studies and science, his specialized educational needs can be met in a general education setting with some services delivered outside of the general education environment. School B is not able to offer specialized instruction within the general education environment for math, social studies and science. Additionally, School B does not offer the opportunity for the student to interact with non-disabled peers in non-academic areas. The yearly tuition for School B is $273.39 per day, for a total of $49,210.20[6] per year. The cost for behavioral support services is, at least, $140.00 per hour, for a total of approximately $2800.00 per year. While this cost is considerable, the Hearing Officer is unable to compare the costs of School B and the program offered by DCPS based on the disparate nature of the two programs. Finally, as

[6] Assuming a 180 day school year.

B is $273.39 per day, for a total of $49,210.20[6] per year. The cost for behavioral support services is, at least, $140.00 per hour, for a total of approximately $2800.00 per year. While this cost is considerable, the Hearing Officer is unable to compare the costs of School B and the program offered by DCPS based on the disparate nature of the two programs. Finally, as discussed in Issue #1, School B is not the LRE for the student. Therefore, the Hearing Officer concludes that placement in School B is inappropriate for the student.

ORDER

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

1. DCPS shall provide the student with 10 hours of independent counseling services, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be completed by November 1, 2013.
2. DCPS shall provide the student with 75 hours of independent one-on-one tutoring in reading, at a rate not to exceed OSSE's established rate for this service, to be completed by January 24, 2014.
3. DCPS shall provide the student with a total of 20 hours of independent one-on-one tutoring in social studies and science, at a rate not to exceed OSSE's established rate for this service, to be completed by January 24, 2014.
4. Within 15 business days of the date of this Order, DCPS shall revise the student's IEP to provide five hours per week of specialized instruction outside of the general education environment for ELA; five hours per week of specialized instruction within the general education environment for math; and five hours per week of specialized instruction in a combination of within and outside of the general education environment for social studies and science.
5. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: July 23, 2013

Melanie Byd Chisholm
Hearing Officer

[6] Assuming a 180 day school year.