

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on July 27, 2016, and July 28, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age ___ and in grade ___.² He resides with his parent (“Petitioner”) in the District of Columbia. The student is a special education student at a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School A”). On May 20, 2016, Petitioner filed the due process complaint that is the subject of this decision. At the time the complaint was filed the student had a disability classification of other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”).

In the complaint Petitioner alleges that DCPS, the local education agency (“LEA”), denied the student a free appropriate public education (“FAPE”) by: (1) failing to review and revise the student’s IEP to be appropriate and/or failing to provide an appropriate IEP on April 18, 2016; (2) failing to implement an appropriate functional behavior assessment (“FBA”) during SY 2015-2016 by failing to update and revise the student’s FBA and behavior intervention plan (“BIP”), and (3) failing to implement the student’s individualized educational program (“IEP”) during school year (“SY”) 2015-2016.

Petitioners seek as relief that the Hearing Officer find that the DCPS denied the student a FAPE, order DCPS to place and fund the student at a non-public, full-time, special education placement and award compensatory education. In the due process complaint, filed prior to a meeting in which the student’s individualized educational program (“IEP”) was amended and his services increased, Petitioner sought assessments and that the student’s IEP be amended. In the alternative, to a non-public placement, Petitioner requested DCPS designate an appropriate DCPS Behavior Education Support (“BES”) program for the student and review that placement with Petitioner and develop an accurate FBA and BIP.

On May 26, 2016, the LEA filed a timely response to Petitioner’s complaint in which it denies that it failed to provide the student with a FAPE. The LEA asserts that on October 5, 2015, the multidisciplinary team (“MDT”) convened a meeting to review and revise the student’s IEP and Petitioner participated in the meeting and did not disagree with the IEP. The LEA asserts the student’s BIP was updated on March 15, 2015, and was implemented throughout SY 2015-2016. The LEA contends that on April 18, 2016, the MDT reconvened to review and revise the student’s IEP and agreed to maintain the student at the same level of service contained in the student’s October 5, 2015, IEP and agreed to update the student’s FBA and then to reconvene

² The student’s current age and grade are noted in Appendix B.

and revise the student's BIP and to discuss increasing the student's specialized instruction before the end of the school year. Petitioner signed a form consenting to the evaluation and on May 13, 2016, the LEA sent a letter of invitation to convene a meeting on May 27, 2016.

The LEA asserts that the student was provided the services outlined in his IEP, including the speech and language pathology. The LEA contends that DCPS was prepared to convene a meeting on May 27, 2016, to review the FBA and appropriately update the student's BIP and IEP. After the complaint was filed DCPS convened an IEP meeting, on June 5, 2016, at which the student's IEP was amended to prescribe 24 hours of specialized instruction outside general education to be implemented in a BES program. However, DCPS is asserting that the student's prior IEPs were appropriate.

The parties participated in a resolution meeting on June 3, 2016. The parties did not resolve the complaint and did not mutually agree to proceed directly to hearing. The 45-day period began on June 20, 2016, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on August 3, 2016. At the conclusion of the hearing Petitioner requested an extension of the HOD due date to allow for written closing arguments and filed an unopposed motion to that effect. The motion was granted and the HOD is now due on August 7, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on June 27, 2016, and issued a pre-hearing order ("PHO") on June 30, 2016, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to review and revise the student's IEP to be appropriate and/or failed to provide an appropriate IEP on April 18, 2016, during SY 2015-2016.⁴
2. Whether the LEA denied the student a FAPE by failing to implement an appropriate FBA during SY 2015-2016 due to failing to update and revise the student's FBA and the BIP.
3. Whether the LEA denied the student a FAPE by failing to implement the student's IEP during SY 2015-2016 by failing to provide the student all prescribed speech/language services.

³ The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

⁴ Petitioner asserts the student's IEP was inappropriate because it had insufficient behavioral supports, no current and updated FBA/BIP, insufficient hours of instruction outside general education and a least restrictive environment ("LRE") that was not sufficiently restrictive. Petitioner alleges the student was and is in need of a full-time therapeutic placement.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 75 and Respondent's Exhibits 1 through 13) that were admitted into the record and are listed in Appendix A.⁵ Witnesses' identifying information is listed in Appendix B.⁶ The record in this matter was closed with the filing of written closing arguments by both parties on August 1, 2016.

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence on two of the three issues adjudicated. As relief for the denials of FAPE determined, the Hearing Officer grants Petitioner the requested compensatory education as relief with modification.

FINDINGS OF FACT:⁷

1. The student is a special education student at School A, a DCPS [REDACTED] school. He resides with Petitioner in the District of Columbia. (Father's testimony)
2. The student began attending School A in [REDACTED] and had an IEP developed on April 10, 2014. The student has had behavior difficulties at School A since [REDACTED]. School A referred to student to the DCPS least restrictive environment ("LRE") team for a more restrictive placement while he was in [REDACTED] but there was no follow up by DCPS. (Grandparent's testimony, Petitioner's Exhibits 7-1, 10-5)
3. In response to the student's behavioral difficulties, during his [REDACTED] year, on March 11, 2015, DCPS developed a BIP for the student. The BIP sought to address the following targeted behaviors: (1) respond to adult directives or redirection within 10 seconds, with prompting and positive narration; (2) the student will stay in his seat or designated area during whole class and group activities, including transition times; (3) the student will keep his hands, feet and objects to himself to ensure the safety of those around him. The BIP directed that a behavior tracker sheet be maintained, the student have a "cool down" space in the class and gain rewards for positive behaviors. The

⁵ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁶ Petitioner presented eight witnesses: Petitioner, the student's grandmother and uncle, a witness from the non-public school where Petitioner is seeking placement for the student, an independent psychologist on the issue compensatory education, Petitioner's co-counsel who did not participate in the hearing other than as a witness, and two educational advocates employed by Petitioner's counsel's law firm. Respondent presented two witnesses, a DCPS speech language pathologist who serviced the student and a special education teacher at the program DCPS is proposing for the student for SY 2016-2017.

⁷ The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

student's behaviors were to be communicated to the student's parent weekly. (Petitioner's Exhibit 12)

4. On March 16, 2015, School A conducted an annual review of the student's IEP. The student's disability classification was OHI due to ADHD. (Petitioner's Exhibit 7-1)
5. The student's IEP prescribed the following services: eight (8) hours of specialized instruction inside general education; one hundred twenty (120) minutes per month of behavior support services inside general education; thirty (30) minutes per month of speech language services outside general education, and thirty (30) minutes per month of occupational therapy ("OT") consultation services. (Petitioner's Exhibit 7-11)
6. The March 16, 2015, IEP included academic goals in the areas of math, reading, written expression, communication/speech language, emotional, social and behavioral development, motor skills and physical development. (Petitioner's Exhibit 7-3, 7-4, 7-5, 7-6, 7-7, 7-8, 7-9, 7-10)
7. During SY 2014-2015 the student's report card reflect that he was proficient and operating on grade level in the vast majority of academic areas. (Petitioner's Exhibit 25-1)
8. On July 15, 2015, DCPS also conducted a speech and language re-evaluation of the student and an occupational therapy evaluation. (Petitioner's Exhibits 9, 11)
9. On July 29, 2015, DCPS conducted a psychological re-evaluation of the student. The evaluator reported that the student's cognitive and academic functioning were in the average range. According to the re-evaluation report, teachers stated that the student had been threatening and menacing to other students and had threatened to harm himself. (Petitioner's Exhibit 10-5, 10-13)
10. In the July 29, 2015 evaluation report, the evaluator noted the student's extreme problematic behaviors in school and that the student had missed a good deal of school because of suspensions. As a part of the evaluation the student's teacher responded to a questionnaire regarding the student's behavior. The behaviors she noted were typical of children classified with emotional disturbance ("ED"). However, because the student's problematic behaviors were not noted in the questionnaire provided to the student's family and did not indicate the student displayed the same behaviors at home, the evaluator concluded the student did not meet the criteria for an ED classification and recommended the student's OHI classification be continued. The evaluator recommended, however, that the student receive assistance from a psychologist or psychiatrist to address his impulsive, explosive and hyperactive behaviors, and help him develop social cues and coping skills to make better behavioral choices. (Petitioner's Exhibit 10-13, 10-14, P-10-15)
11. During the first advisory of SY 2015-2016 the student's report card reflects that he was operating below basic in all academic areas except science where he was at basic:

approaching grade level. He was also operating at basic in art, music, and physical education (“PE”). He was operating proficiently, on grade level, in “speaking and listening”. (Respondent’s Exhibit 6)

12. On October 5, 2015, DCPS convened an IEP meeting for the student. The student’s IEP progress reports reflect that there was an IEP developed for the student on October 5, 2015, and that the student made progress relative to his IEP goals in reporting period 1 and 2 of SY 2015-2016. (Respondent’s Exhibit 7-18 through 7-32)
13. Prior to October 5, 2015, the student’s IEP prescribed 30 minutes of speech language services per week. After October 5, 2015, the student’s IEP services were reduced to 30 minutes per month. (Witness 5’s testimony, Petitioner’s Exhibit 6-1)
14. Since November 2015, the student has had little desire to attend school. He says that no one likes him at school and he has issues with one particular student most of the time. (Father’s testimony)
15. School A staff have often called the student’s father about the student’s behaviors that included using profanity, roaming the hallways, leaving the school building and destroying property at the school. (Father’s testimony)
16. During the second advisory the student’s reading and social studies performance improved, approaching expectations for his grade level. However, his math performance remained below basic. (Respondent’s Exhibit 6)
17. Since January 2016 when the student’s father was less available because of work, School A staff called the student’s grandparent several times a day about the student’s behavior to either talk to the student over the phone in attempt to change his behavior, or she was asked to come and take the student home because of his behavior. The student’s behavior issues included walking out of class, hitting other students, and refusing to go to class. (Grandparent’s testimony, Father’s testimony)
18. On January 27, 2016, the student had suicidal ideations at school and DCPS involved the Child and Adolescent Mobile Psychiatric Service (“CHAMPS”). CHAMPS called the student’s grandparent and informed her they saw the student and he said he wanted to kill himself. The student was taken to Children’s National Medical Center (“CNMC”) twice because of suicidal ideations. He was hospitalized 2 or 3 days the first time in January 2016 and then for a week in February 2016. (Grandparent’s testimony, Respondent’s Exhibit 11-7)
19. The student’s disciplinary report demonstrates that the student had approximately one behavioral referral per school day in starting in October 2015. The student’s behavioral incidents increased in November 2015 but decreased in December 2015. After January 2016 the student’s behavior incidents increased markedly to four behavior referrals per day by March and April 2016. The majority of these referrals were for the student

displaying physical aggression, being in an unassigned location or destroying property. (Petitioner's Exhibit 16-1)

20. On April 18, 2015, DCPS convened an IEP meeting for the student at School A. The student's level of specialized instruction and related services and the setting in which they were provided remained the same as his previous IEP. The April 18, 2016, IEP mentions the student's psychiatric hospitalizations. (Petitioner's Exhibit 6-1, 6-2, 6-11)
21. At the April 18, 2016 IEP meeting, Petitioner signed a form consenting to DCPS evaluating the student. On April 26, 2016, DCPS issued a prior written notice ("PWN") notifying Petitioner that DCPS intended to conduct a FBA and BIP due to a spike in inappropriate behaviors that had led to hospitalizations and a series of behavioral infractions where the student had become a danger to himself and others, including adults. (Respondent's Exhibits, 4, 5, 6-1)
22. In the third advisory the student's report card reflected his academic performance was about the same as the second advisory. His reading and social studies performance were basic, still approaching expectations for his grade level. However, his math performance remained below basic. (Respondent's Exhibit 6)
23. The student's uncle had to pick the student up early from school on three occasions because of the student's behavior. On one occasion in May 2016 the student's uncle had a discussion with the School A principal regarding the student's behavior and academic performance. The principal notified the student's uncle that the student had 40 to 45 behavioral incidents during SY 2014-2015. The School A principal told the student's uncle that student did not know how to control his behavior and the principal would often chaperon the student around the school or get a staff member to babysit him. (Student's Uncle's testimony, Petitioner's Exhibit 16, Respondent's Exhibit 11-6)
24. The student's report card for the fourth and final advisory of SY 2015-2016 showed a marked improvement in the student's performance all areas except math, PE and Spanish. (Respondent's Exhibit 6)
25. However, the student's behavior became markedly worse and during the last sixty days of 2015-2016 the student was out of control. (Witness 4's testimony)
26. During IEP reporting periods 3 and 4 of SY 2015-2016, the student was progressing in IEP academic goals but regressed in his behavioral support goals in the 4th reporting period. (Respondent's Exhibit 7-4, 7-5, 7-6, 7-7, 7-8, 7-9 7-10 through 7-17 on academic goals)
27. The student's March 16, 2015 IEP, October 5, 2015 IEP and April 18, 2016 IEP prescribed that the student be provided speech language services. The School A speech language pathologist ("SLP") has been working with the student for all [REDACTED] years he attended School A. (Witness 5's testimony, Petitioner's Exhibits 4-7, 6-7, 6-8, 7-7)

28. The student's March 16, 2015, IEP include three communication/speech language goals: (1) following 2 to 3 step directions with temporal concepts inclusion/ exclusion concerns with 80% accuracy over 3 consecutive sessions, (2) demonstrating understanding of "wh" interrogatives, modification and negatives with 80% accuracy over 3 consecutive sessions, and (3) identifying and utilizing curriculum based vocabulary with 80% accuracy over 3 consecutive sessions. (Petitioner's Exhibit 7-7)
29. Since October 5, 2015, the School A SLP provided the student's 30 minutes of speech language services per month to address two goals: following directions and completing sentences. The student mastered the third goal that had been in his previous IEP. (Witness 5's testimony)
30. By June 2016 the student mastered another of his second speech and language goals. (Witness 5's testimony, Respondent's Exhibit 7-7)
31. The School A SLP has provided the student group or individual therapy for 30 minutes per month since October 5, 2015. However, the student missed services due to absences and suspensions. The student experienced no regression with regard to speech language skills due to the missed services. DCPS has a policy that provides that the services do not have to be made up if the services are missed because of a student's absence or unavailability. Any services that were not provided because of the related service provider absences are to be made up. (Witness 5's testimony, Respondent's Exhibit 8)
32. By the end of SY 2015-2016 the School A SLP made up all speech and language services the student missed during SY 2015-2016 due to her unavailability except two thirty-minute sessions, or a total of 60 minutes of speech language services. (Witness 5's testimony, Petitioner's Exhibit 8)
33. On May 18, 2016, a DCPS social worker conducted a FBA for the student. The FBA notes reveal that the student refuses to comply with directives, blatantly defies rules/expectations, exhibits academic disengagement by refusing to attend classes, runs through the halls, walks out class, displays disruptive behaviors, verbalizes thoughts of self-harm, threatens to harm others, and exhibits aggression towards peers and adults. (Petitioner's Exhibit 8-1)
34. On June 3, 2016, after the due process complaint was filed, DCPS convened a resolution meeting at which an updated FBA was reviewed by the DCPS social worker and she recounted the student's behaviors of aggression toward peers and staff and self-injurious behaviors. The social worker reported that the student's response to interventions had not been successful. DCPS provided Petitioner with a draft IEP and scheduled an IEP meeting for the following week. (Petitioner's Exhibit 15, Witness 3's testimony)
35. On June 5, 2016, a MDT was convened during which the team, among other things, changed the student's disability classification to ED and concluded the student required placement in a full time program to address his dire behavioral concerns. Petitioner requested the student be placed in a specific non-public special education program and

Petitioner's advocate requested compensatory education. DCPS declined the request for compensatory education stating that the student still made academic progress during SY 2015-2016 and could attend summer school to make up any lack of progress. The student's specialized instruction was increased to 24 hours per week outside general education. DCPS did not provide an immediate location where the student's IEP could be implemented. DCPS informed Petitioner that a location of services ("LOS") would be issued indicating where the student's IEP would be implemented. Petitioner expressed at the meeting that he just wanted a placement that would meet the student's needs. (Petitioner's Exhibit 4-1, 4-11, Respondent's Exhibit 2, Witness 4's testimony)

36. On June 5, 2016, DCPS issued a PWN indicating the student needs a more restrictive placement than could be provided at School A. (Petitioner's Exhibit 18-1)
37. On July 15, 2016, DCPS issued a letter to Petitioner informing him that the student's IEP would be implemented in a BES program located at a DCPS [REDACTED] school ("School C") for SY 2016-2017. (Respondent's Exhibit 1, Father's testimony)
31. The student has interviewed at and been accepted to private a full time special education school program ("School B") that is housed in a DCPS school. School B staff has met with the student's family and the student individually and can implement his IEP. School B has a low teacher to staff ratio of 7 students to 5 adults. School B is a therapeutic setting that offers specialized instruction and related services. School B serves various disability categories. (Witness 1's testimony)
32. School B rents space from DCPS and has a program located in two DCPS schools. The student has been accepted to the program located in a DCPS [REDACTED] school. School B has OSSE certificate of approval ("C of A") and employs certified special education teachers and certified related services providers. The cost of the school is \$ 245 per day. Related services are billed at hourly rate. OT and speech language services are billed at \$101 and \$109 per hour respectively. (Witness 1's testimony)
33. At School B behavior supports are provided as a push-in service to the classroom and space is available for individual counseling. At School B the student would have an individual daily plan and an individual behavior support plan. IPAD assignments are available as an alternative to paper based assignments. Each student has an individual computer in the classroom. School B has a token economy behavior system. School B has a crisis plan and access to CHAMPS for any student who displays suicidal or homicidal ideations. School B has had success with student with similar behavior issues as the student and can meet his social emotional and behavioral needs. (Witness 1's testimony)
34. With direct supervision from School B staff, School B students are able to interact with regular education students in the DCPS schools and are able to eat in the cafeteria accompanied by School B staff. School B would conduct a 30-day review and administer the Woodcock Johnson IV as a baseline for academic areas to help determine his current academic functioning. School B has a DCPS progress who

monitors the DCPS student placed there. School B staff and the progress monitor meet monthly to discuss progress of students. (Witness 1's testimony)

35. The BES program DCPS has proposed for the student to attend for SY 2016-2017 has a classroom with a maximum of ten students and is a self-contained program. It is lead by a certified special education teacher with an assistant teacher and a behavior technician. Student's ages range from [REDACTED] and are in [REDACTED] grades. (Witness 6's testimony)
36. The BES program staff has trained in safety care and professional development for behavior intervention. A DCPS social worker comes into the classroom to assist students. There are OT and SLP and other related services providers including a psychologist to support students. The program also has the support of a BES administrator from DCPS who visits the program once or twice weekly to assist and make suggestions to effectively address student's needs. (Witness 6's testimony)
37. The BES program uses specialized academic programs such as System 44 and Read 180 to assist students with low academic performance improve. The students also have access to computers and computer programs. Behavior systems and interventions include collecting data using behavior charts and analyze and discuss to improve the effectiveness of the program in meeting student's needs. (Witness 6's testimony)
38. School C BES students have interactions with non-disabled peers during recess time and in the cafeteria with BES staff supervision. All instruction for students including non-academic subjects is provided only with special education students. (Witness 6's testimony)
39. Petitioner engaged a psychologist to develop a compensatory education plan. The psychologist recommended that the student be provided the following services: 300 hours of direct specialized instruction in broad academic areas as well as 100 hours of counseling and 20 hours of mentoring to redress the alleged denials of FAPE. The psychologist based the plan on the student's having not had a updated BIP during SY 2015-2016 and the student been without what she believed were appropriate services for two school years. In addition, the recommendation of services she made was designed to make up for deficits she believed the student might carry into the next school year. (Witness 2's testimony, Petitioner's Exhibit 57-5)
40. The psychologist concluded based on a review of the student's records that the student was manifesting increased negative behaviors that impacted him academically and she opined that by mid fall 2015 DCPS should have been put on notice that the student required a more restrictive setting. In addition, she speculated the student missed significant hours of direct instruction speech language and behavioral supports when he was unavailable for specialized instruction and related services due to being removed to the principal's officer due to behavioral disturbances. However, she did not know what services the student missed, had not met the student, and had not talked with the student's parents, nor his teachers or anyone who knew the student. She based her

recommendation solely on her review of the student's educational records. (Witness 2's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to review and revise the student's IEP to be appropriate and/or failed to provide an appropriate IEP on April 18, 2016, during SY 2015-2016.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS was on notice by the date the student's April 18, 2016, was reviewed and updated that the student was in need a more restrictive IEP and placement. Although DCPS took steps at that point to determine whether the student was in need of more restrictive placement, the evidence was available by that time to DCPS that the student was in need of a more restrictive placement. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue as to the April 18, 2016, IEP.

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010).

The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 206-07

"[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student. Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *S.S. ex rel. Schank v. Howard Road Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)). An IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204. "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). *District of Columbia v. Walker*, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) ("the adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire "more

services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep’t of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011)

IDEA requires that children with disabilities be placed in the least restrictive environment (“LRE”) so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5)(A). Removing a child with disabilities “from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily.” See 20 USC 1412(a)(5), 34 CFR 300.114(a)(2)(i)-(ii) (emphasis added); 34 C.F.R. § 300.550; *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (“The IDEA requires school districts to place disabled children in the least restrictive environment possible.”) Further, an appropriate location of services under the IDEA is one that is capable of “substantially implementing” a Student’s IEP. *Johnson v. District of Columbia*, 962 F. Supp. 2d 263 (D.D.C., 2013).

The IDEA requires school districts to place disabled children in the least restrictive environment possible. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006). Although placement decisions must be made "in conformity" with the least restrictive environment provisions, federal and D.C. regulations require placements to be "based on the child's IEP" and "as close as possible to the child's home." 34 C.F.R. § 300.552; D.C. Mun. Regs. tit. 5, § 3013 (2006). Moreover, in determining the least restrictive environment, consideration is given to the types of services that the child requires. 34 C.F.R. § 300.552(d). Still, "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a requirement of the Act." *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). 46 IDELR 249 106 LRP 64029 *Melissa ROARK, a minor, by her parents and next friends, Robert ROARK and Abigail ARNOLD, et al., Plaintiffs, v. DISTRICT OF COLUMBIA, et al., Defendants* 460 F. Supp. 2d 32 U.S. District Court, District of Columbia 05-2383 (JDB) October 25, 2006

34 C.F.R. § 300.324 (b) (2) provides: Each public agency must ensure that, the IEP Team Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address-- (A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under Sec. 300.303; (C) Information about the child provided to, or by, the parents, as described under Sec. 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

34 C.F.R. § 300.324 (b) (2) provides: In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section: (i) 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;

The evidence in the case demonstrates that the student had behavioral difficulties as early as [REDACTED] at School A and DCPS conducted a FBA and put a BIP in place to track and address the student’s behaviors during SY 2014-2015. By the end of SY 2015-2016 DCPS

conducted a psychological reevaluation that concluded that because the student's behavioral difficulties were being displayed at school, he did not meet the criteria for ED classification. Nonetheless, because of his behavioral difficulties the DCPS psychologist recommended the student be provided the assistance of a psychologist or psychiatrist to address the student's concerns. The student's academic performance during SY 2014-2015 demonstrated that he was proficient academically, despite his behavioral difficulties.

By the first advisory of SY 2014-2015 the student's academic performance, as reflected in his first advisory report card, began to slip. According to his behavior tracking reports the student was receiving behavioral referrals on average once per day. In the second advisory of SY 2015-2016, the student's behavioral referrals continued at the same rate. However, his academic performance improved as reflected in his second advisory report card.

There was clearly a marked change in both the student's behavior by the third advisory. In January and February the student was hospitalized for suicidal ideations and the student's behavior tracking during this period indicated the student's behavioral referrals had increased to four to five per day.

Although DCPS met on April 18, 2016, to review the student's behavior and had the student's parent provide grant consent for an updated FBA, the evidence, in the Hearing Officer opinion, was already clear that the student's behavior had deteriorated to such a degree that that DCPS was on notice without conducting a new FBA that the student's behaviors were not and could not be managed in the School A setting and that his IEP and placement was at that point inappropriate.

The evidence reflects that that student's academic performance during SY 2015-2016 as reflected in his report cards declined from his performance in the previous school year. He had a slow start but improved some by the second advisory, but still the student's academic performance was mostly below grade expectations. Clearly by the third advisory of SY 2015-2016, with the increase in behaviors and no marked improvement in his academic performance as reflected in his third advisory report card, the evidence was clear the student needed a more restrictive placement.

After Petitioner granted DCPS consent to conduct an updated FBA DCPS did so by May 18, 2015. It appears that the due process complaint was filed prior to the that FBA being reviewed by a MDT and when it was reviewed the details of the student's behavioral difficulties, outlined therein, but clearly known to School A in April 2016, was the basis for the change in the student's IEP and placement to provide 24 hours of specialized instruction per week outside of general education and for the team to conclude that the student's needs could not be met at School A.

The Hearing Officer concludes that with the student's lack luster academic performance as reflected in his report card and the student's suicidal and homicidal ideations that happened in the January and February 2016, along with the marked increased in behavioral referrals by the third advisory of SY 2015-2016, there was sufficient basis as of the April 18, 2016, IEP meeting to amend the student's IEP and placement at that time. Although the student's end of year report

card indicates his academic performance improved in the final advisory, the evidence demonstrates that for the last 60 days of the school year the student's behavior was out of control. Consequently, the Hearing Officer concludes that the student's April 18, 2016, IEP in which the student's level of services remained unchanged, was not reasonably calculated to provide the student educational benefit and the student's thus denied a FAPE as a result.

Petitioner asserts that DCPS should have reviewed and revised the student's IEP even sooner in SY 2015-2016 than April 18, 2016. However, the evidence reflects that DCPS conducted an IEP meeting for the student on October 5, 2016. Although the evidence does not reflect changes made to the IEP other than a reduction in his speech and language services, there was nonetheless evidence that DCPS did review the student's IEP at that juncture. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to review and revised the student's IEP prior to the April 18, 2016, IEP meeting.

ISSUE 2: Whether the LEA denied the student a FAPE by failing to implement an appropriate FBA during SY 2015-2016 due to failing to update and revise the student's FBA and the BIP.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

As pointed out above, 34 C.F.R. § 300.324 (b) (b) (2) provides: In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section: (i) 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;

The evidence in this case demonstrates that DCPS conducted a FBA for the student and developed and BIP in March 2015 to address the behaviors that student was displaying. Consequently, the Hearing Officer concludes that DCPS met the mandates expressed in the provision above with regard to this student.

Petitioner asserts, however, that despite DCPS having conducted a FBA and developed a BIP during SY 2014-2015 DCPS should have taken these actions again during SY 2014-2015 sooner than when DCPS initiated a FBA in April 2016.

IDEA mandates that a FBA and BIP be developed only pursuant to disciplinary and school removal provisions of 34 C.F.R. 300.530(f). There is no evidence that the student was every subject to removal from School A pursuant to these provisions. Thus, School A was under no specific mandate to conduct another FBA and update the student's BIP.

The evidence demonstrates that the student's had behavioral referrals in SY 2015-2016 that rose to a level of one per day by October 2015 and to two per day in November 2015. These referrals declined in December 2015 and took a marked increase to three to four referrals per day in February 2016. The majority of these referrals were for the student displaying physical aggression, being in an unassigned location or destroying property. These behaviors were

similar to the behaviors that had already been identified in the student existing FBA and BIP. Although Petitioner asserts that DCPS should have conducted another FBA and updated the student's IEP during the school year, and presented expert witnesses to attest to this, the Hearing Office did not find the expert witnesses testimony convincing in this regard.

Neither of the witnesses had ever met the student, ever spoken to his family members or School A staff as a basis for their opinions about either the appropriateness of the student's IEP prior to and on April 18, 2016, or as to whether a FBA should have been conducted or the student's BIP updated. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue. However, because DCPS has conducted a recent and extensive FBA for the student the Hearing Officer in the order below will direct that DCPS update the student's BIP.

ISSUE 3: Whether the LEA denied the student a FAPE by failing to implement the student's IEP during SY 2015-2016 by failing to provide the student all prescribed speech/language services.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that the student was provided 30 minutes of speech and language services per week prior the student's IEP being amended on October 5, 2015. Thereafter, the student was provided 30 minutes of speech language services per month. The DCPS SLP credibly testified that she recommended the student's services be reduced at that point because the student had mastered one of three communications goals and the student had sufficiently progressed enough to warrant a reduction in services. The evidence indicates that the SLP continued to report the student's services on a weekly basis and that during SY 2015-2016 the student missed services on some occasions when the student was not available and on occasions

when the SLP was not available, but by the end of SY 2015-2016 the SLP made up all but one hour of services that the student was due. An hour of services to this student represented two months worth of services.

Although there was only testimony from the SLP regarding the student's services and progress, the student's IEP progress report notes that the student had mastered one of his remaining two communications goals. He was making progress on the last goal but had still not mastered it. Consequently, based on this evidence, the Hearing Officer concludes that the student missing even an hour of speech and language services was not de minimus and the loss of these services was a denial of FAPE.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

Petitioner asked as remedy in the due process complaint that assessments be conducted, that the student's IEP be amended, that the Hearing Officer place and fund the student at a non-public, full-time, special education placement or in the alternative that DCPS designate an appropriate DCPS BES program for the student and review that placement with Petitioner, develop an accurate FBA and BIP and award compensatory education.

Beyond the request for a FBA there was no indication by Petitioner of other desired assessments. The student's IEP has now been amended by DCPS at the June 5, 2016, IEP meeting to prescribe that the student be provided twenty-four hours of instruction outside general education. Although there was testimony by Petitioner's expert witness employed by Petitioner's law firm that the student is in need of even more specialized instruction she could not articulate the difference these recommended services would make to the student in relation to the amount of services in the student's June 10, 2016, IEP. Therefore, based on the evidence the Hearing Officer concludes that the student's current IEP is designed to meet the student's current needs and therefore there is no basis for the Hearing Officer to grant any relief directing DCPS to alter the student's IEP.

Petitioner has also requested as relief that the student be placed at School B. Although the evidence demonstrates that School B meets the requirements that the Hearing Officer should consider in determining a placement for the student⁸, the evidence also demonstrates that the

⁸ The Hearing Officer has determined based on the evidence presented about School A that it meets the Branham factors. "for determining whether a particular private school placement is appropriate[.]""[C]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including 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 least restrictive educational environment." *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005)

BES program DCPS has proposed similarly meets those requirements, except that the DCPS program would not entail an additional cost to the LEA as would School B.

Consequently, the Hearing Officer will not grant Petitioner's requested relief of placement and funding for the student to attend School B. However, the Hearing Officer will direct in the order below that DCPS conduct a ninety day review of the student's progress at School C, if the student's does attend School C, and to make a determination of the whether the student should remain at that school placement or consider some other placement for the student.

Compensatory Education

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. 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." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Petitioner's expert witness testified the student should be provided the tutoring, counseling and mentoring services. There was sufficient testimony for the Hearing Officer to conclude that the student would benefit from tutoring, counseling and mentoring services. However, the basis for the amount of services that were recommended highly overstated the nature of the denials of FAPE that have been determined herein. Consequently, the Hearing Officer will grant in the order below an amount of compensatory services that in the Hearing Officer's opinion, based on the evidence presented, corresponds to the student having not been provided the level of out of general education services that his current IEP prescribes for approximately two months from April 18, 2016, to the end of SY 2015-2016 and for the 1 hour of speech and language services the student was not provided.

ORDER:⁹

- 1) DCPS shall, within ninety (90) days of the student's attendance at his new school placement for SY 2016-2017 convene a MDT and conduct a review of the student's academic and behavioral progress for SY 2016-2017 and make a determination of the whether the student should remain at that school placement for the remainder of SY 2016-2017 or consider some other placement for the student.
- 2) DCPS shall, within ten (10) business days of the issuance of this order, fund and provide to Petitioner, at the OSSE prescribed rate, authorization for 100 hours independent

⁹ Any delay in Respondent DCPS in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

tutoring and 25 hours of independent counseling and/or mentoring.

- 3) DCPS shall, within thirty (30) calendar days after the start of SY 2016-2017, develop a new BIP for the student.
- 4) DCPS shall, within forty-five calendar days of the issuance of this order provide the student one-hour of speech language services to be provided to the student in addition to the services the student is currently receiving in his IEP. This provision is not intended to increase the ongoing speech language services to the student in his IEP, but is a one-time provision of one hour of service.
- 5) All other requested relief is denied

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: August 7, 2016

Copies to: Petitioner(s)' Representative: Joy Freeman-Coulbary, Esq.
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