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Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0375</p> <p>Date Issued: February 21, 2016</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Dates: February 3, 2016 February 12, 2016</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Roberta Gambale, Esq. James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for Respondent: Maya Washington, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 February 3, 2016, and concluded on February 12, 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:

On November 18, 2015, Petitioner filed a due process complaint alleging DCPS denied the student a free appropriate public education (“FAPE”) by: (1) failing to fully implement the student’s individualized educational program (“IEP”) during school year (“SY”) 2014-2015 because it did not provide the student with the full amount of counseling services; (2) failing to provide the student with an appropriate IEP on December 18, 2013, &/or December 8, 2014, &/or May 20, 2015; (3) failing to comprehensively evaluate the student because DCPS did not perform a functional behavior assessment (“FBA”) as recommended by the multidisciplinary team (“MDT”) in May 2015 and/or did not conduct re-evaluations requested by the parent on or about September 11, 2015.

Petitioner seeks as relief that the Hearing Officer order DCPS to conduct or fund the following evaluations: occupational therapy (“OT”) evaluation, an audiology evaluation, and FBA and reconvene the MDT within fifteen (15) calendar days to review the results. Petitioner requests DCPS amend the student’s IEP to provide for placement in a full-time therapeutic setting and DCPS provide and fund that placement.

On November 25, 2015, DCPS filed a timely response to Petitioner’s complaint in which it denied that it failed to provide the student with a FAPE.

A resolution meeting occurred on December 1, 2015. However, the parties did not reach any agreement on the issues. The parties also did not agree to proceed directly to hearing. The 45-day period began on December 19, 2015, and originally ended [and the Hearing Officer’s Determination (“HOD”) was due] on February 1, 2016. On January 28, 2016, the parties filed a joint motion to extend the HOD due date to allow for their requested hearing date. That motion was granted. On the agreed upon hearing date Respondent’s counsel had an emergency and the parties filed a second joint motion to extend the HOD due date to accommodate a new hearing date. With the granting of that motion the HOD due date was extended to February 21, 2016.

The Hearing Officer convened a pre-hearing conference (“PHC”) on the complaint on December 7, 2015, and issued a pre-hearing order (“PHO”) on December 11, 2015, outlining, inter alia, the issues to be adjudicated.

ISSUES: 3

The issue(s) to be adjudicated are:

1. Whether DCPS denied the student FAPE by failing to fully implement the student's IEP during SY 2014-2015 because the student was not provided all the counseling services that the IEP prescribed.²
2. Whether DCPS denied the student a FAPE by failing to provide the student with appropriate IEP(s) on December 18, 2013, and/or December 8, 2014, and/or May 20, 2015, because the IEP(s) did not include a behavior intervention plan ("BIP") and/or the hours of specialized instruction in the IEP(s) were insufficient and in the inappropriate setting, to wit: 5 hours per week inside general education rather than 15 hours per week or more outside general education.³
3. Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student by failing to perform a FBA as recommended by the MDT in May 2015 and/or by failing to conduct re-evaluations (FBA, OT, Audiology) requested by the parent on or about September 11, 2015.

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 42 and Respondent's Exhibits 1 through 20) that were admitted into the record and are listed in Appendix A).⁴ Witnesses are listed in Appendix B.

FINDINGS OF FACT: 5

1. The student is age ____ and in grade _____⁵ and currently attends a District of Columbia Public Schools ("DCPS") [REDACTED] school ("School A") where he has attended since the start of SY 2014-2015. (Petitioner's Exhibits 39-1)
2. The student is currently eligible to receive special education and related services with a disability classification of emotional disturbance ("ED") (Petitioner's Exhibit 12-1)⁶

² Petitioner alleged the student missed approximately 15.5 hours of this related services during SY 2014-2015.

³ Petitioner's alleged that back to December 18, 2013, the student should have had an IEP that prescribed all services outside general education. However, because the complaint stated that the hours were inappropriately reduced from 15 hours the issue is expressed as alleging the IEP should have required 15 hours or more outside general education.

⁴ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

⁵ See Appendix B for student's age and current grade.

⁶ The Hearing Officer notes that the IEP disclosed by Petitioner and in the record identified as the May 20, 2015, was only the signature page and the rest of Petitioner's Exhibit 12 (pages 12-2 through 12-10) were pages from the student's January 30, 2013, IEP from School B.

3. The student's most recent IEP was developed on May 20, 2015, and requires that the student be provided 5 hours per week of specialized instruction in general education and 240 minutes per month of behavioral support outside general education. (Petitioner's Exhibit 12-1, Witness 8's testimony)
4. Prior to attending School A the student attended a DCPS [REDACTED] school ("School B"). Prior to attending School B the student attended a District of Columbia public charter school ("School C"). The student's initial IEP was developed while he was attending School C on June 21, 2011, and prescribed 15 hours per week of specialized instruction and 1.5 hours per week of behavioral support both outside general education with goals in math, reading, written expression and social emotional and behavioral development. (Petitioner's Exhibits 35-1, 35-8, 38-1)
5. After the student began attending School B his IEP was updated at an annual review meeting on March 9, 2012. The student's services were changed to prescribe 5 hours per week inside general education and 1 hour per week of behavioral support outside general education. The IEP included goals in math and social emotional and behavioral development. The student attended School B for three school years and his IEP was updated at School B on January 30, 2013, and December 18, 2013. The amount and the setting for specialized instruction prescribed in the IEPs remained the same while he attended School B. However, during his final year at School B his behavioral support services were changed from 1 hour per week outside general education to 240 minutes per month outside general education. (Petitioner's Exhibits 36-1, 36-5, 37-1, 37-6, 38-1, 38-7, Respondent's Exhibit 5)
6. While the student attended School B he was often put out class and missed field trips because of his disruptive behaviors. The student's parent often received calls from school staff due to the student's behaviors. There was an incident of the student expressing suicide ideations at school for which he was hospitalized. (Parent's testimony)
7. In June 2014 School B conducted a FBA for the student and developed a BIP to address the student's targeted behaviors of mood instability: yelling and loud outbursts, emotional instability: crying, physical and verbal aggression, and oppositional defiance: leaving the classroom without permission and refusing to follow directions. (Respondent's Exhibits 10, 11)
8. During the student's first year at School A the student's behavioral difficulties that he displayed in School B continued. The student was suspended within his first months at School A due to his behaviors. The student's parent communicated with school staff through texts, call and visits about the student's problem behaviors. (Parent's testimony)
9. The student has been receiving outside counseling for two years and also sees a psychiatrist monthly for medication management for Attention Deficit Hyperactivity Disorder ("ADHD"). The student has a community support worker working with him who meets with the student one hour per week and assists the student in developing

coping skills, anger management. She has also participated in his IEP meetings at School A. (Parent's testimony, Witness 3's testimony)

10. At School A the student has had recurrent behavior difficulties. During SY 2014-2015 he was often pulled out of class because of behavior and had difficulty transitioning between classes. The School A staff would request that the student's parent come pick him up from school due to his behavior 2 to 3 times per week usually in the afternoons. Almost daily the student had difficulty with peers and sometimes displayed aggressive behaviors of yelling at the teachers and being disrespectful. (Parent's testimony, Witness 3's testimony)
11. The student's IEP was updated during his initial year at School A on December 8, 2014. The same level and setting of specialized instruction and behavioral support services were prescribed for the student that had been prescribed in his most recent IEP: 5 hours per week inside general education to 240 minutes per month outside general education respectively. The parent has expressed her concern to School A that the student's services in his IEP have remained the same over his time at School B and since he came to School A despite his continued behavioral difficulties. (Parent's testimony, Petitioner's Exhibit 39-1, 39-6)
12. Because the student was capable of doing grade level work and assignments and he continued to do well academically his IEP team at December 8, 2014, meeting concluded the "push-in" specialized instruction in math was still appropriate. The student continued to do well academically but his behavior was a concern. However, the team determined there was no indication that his behavior prevented him from being in the general education setting.⁷ (Witness 8's testimony, Respondent's Exhibit 4)
13. On March 3, 2015, School A convened a multidisciplinary team ("MDT") meeting to address the parent's concerns about the student's behaviors. The student's parent attended and her attorney at the time participated by telephone. The parent requested a dedicated aide to assist the student with his behavior. DCPS did not agree to the aide. There was no discussion about a FBA or BIP during that meeting. (Parent's testimony, Witness 8's testimony, Petitioner's Exhibit 5-1, 5-2)
14. On March 31, 2015, School A convened a MDT meeting with the student's parent to consider the parent's request that DCPS conduct a comprehensive psychological evaluation. The parent signed a form consenting the evaluation being conducted. (Petitioner's Exhibits 6-1, 7-1)

⁷ The Hearing Officer notes, however, that the student's December 8, 2014, IEP under the social emotional and behavior development section included the following statement describing how the student's disability affects his access to the general education curriculum: "[the student] needs a classroom setting that maximizes personal attention and a school setting that provides a high degree of structure and close supervision at all times, including during transitions. He needs instruction that is hands-on and engaging, and that can accommodate his emotional volatility and pick up where he left off in instances when he has to leave the classroom to receive behavioral support. [The student] will continue to need behavior support services to enhance social/emotional progress in the classroom to include counseling, parent/teacher consultation, and behavioral management. (Petitioner's Exhibit 39-5)

15. On April 7, 2015 DCPS completed an Analysis of Existing Data (“AED”) and issued a prior written notice (“PWN”) that indicated that DCPS intended to conduct a comprehensive psychological evaluation. The AED included, inter alia, a statement that noted a FBA had been ordered in June 2014 when the student was attending School B. (Petitioner’s Exhibits 8-1, 8-2, 9-1, Witness 6’s testimony)
16. On May 11, 2015, DCPS finalized the report from the comprehensive psychological evaluation. The evaluator accessed the student’s cognitive, academic and social emotional functioning. The student’s cognitive functioning was solidly average at the 63rd percentile. His academic functioning was also solidly average on the vast majority of the subtests. Based upon the student’s assessed social emotional functioning the evaluator concluded that the student met four of the five criteria for the ED classification.⁸ (Petitioner’s Exhibit 23-1, 23-12, 23-13, 23-14, 23-21)
17. On May 20, 2015, School A convened an IEP meeting for the student at which the team determined that the student continued to be eligible with the ED classification. The student’s psychological evaluation results were shared during the meeting. He had a full scale IQ of 105 and he earned average scores in reading, math and written language. The meeting notes indicate, inter alia, that the student sometimes made inappropriate comments and became aggressive toward his peers. The notes also mentioned that on a questionnaire his teacher rated him as having high level of emotional distress, behavior difficulties, hyperactivity, attention difficulties and his disability prevented him from accessing the general education curriculum. It was also noted that the student missed a significant amount of instruction because of his behaviors. (Petitioner’s Exhibit 11-2, 11-3)
18. School A prepared an evaluation summary report on May 20, 2015, that included, inter alia, the entry regarding the FBA that had been ordered and completed while the student attended School B. The report did not indicate that School A intended to conduct a new FBA or determined that that a new FBA was warranted. (Petitioner’s Exhibit 10-1, testimony, Witness 6’s testimony, Witness 8’s testimony)
19. Although the student’s behaviors were discussed at the IEP meetings the student’s parent did not believe sufficient action was taken to address his behaviors. She has received truancy notices as a result of the student missing classes. At the IEP meeting the student’s

⁸ The evaluator concluded that: (1) the student displayed an inability to make educational progress that could not be explained by intellectual sensory or hearing factors in that school can serve as a source of anxiety for the student and he has difficulties at times being able to stay within the classroom setting due to having emotional concerns or crisis which cause him to be unable to attend and concentrate on classroom tasks; (2) the student demonstrated difficulty with initiating and maintaining peer relationships with both home and school settings; (3) the student demonstrated changes within his moods throughout the instructional school setting as well as excessive affect or rage within his school setting when frustrated such that he displays inappropriate types of behavior or feeling under normal circumstance; (4) the student did not display a general pervasive mood of unhappiness or depression; and (5) the student demonstrated a tendency to develop physical symptoms or fears with personal or school problems because he demonstrated behaviors of being anxious and avoidance of classroom tasks. (Petitioner’s Exhibit 23-20, 23-21)

parent asked for the student to be placed in a setting with fewer students. She was told that he did not qualify for such a setting because of the level of specialized instruction he is prescribed and he should not be placed in classes with disruptive students. The student's parent does not think the student's current IEP meets his needs and she is concerned that the student's grades are suspect because of how many classes he misses because of his behavior. (Parent's testimony)

20. The student's School A social worker during SY 2014-2015 acknowledged that the student is capable academically and capable of accessing the general education curriculum. However, his behavior often caused him to not put forth his best efforts. He is very emotional and seems to experience his emotions "full on." His behavior was more problematic during the first part of SY 2014-2015 and the first few months of 2015, which may have been related to the anniversary of his father's death. However, the student made more progress during the later part of the school year: in April and May 2015 his behaviors improved. (Witness 6's testimony)
21. The student's IEP progress notes for January 26, 2015, through April 3, 2015, indicate the following: "...[the student] continues to struggle with group work in his classroom. He often ends up in conflict with other students. His teacher reports that it is difficult to predict when [the student] will be productive in a group setting. Additionally, his teacher endorsed the following areas of concern on the Ohio Scales: Causing trouble for no reason, Arguing with others, Yelling, swearing, or screaming at others. Sessions will continue to focus on appropriate peer interactions." (Witness 6's testimony, Respondent's Exhibit 16-8)
22. During SY 2014-2015 the student was provided 240 minutes of behavior support services per month by his assigned social worker. However, the social worker often spent more time with student than prescribed because sometimes he needed a "reset" to get his day back on track. The social worker also conducted check-ins with the student for 5 minutes every day. After being in a less structured setting like lunch the student often needed help to get back on track and to transition to the more structured classroom setting. When things are not going his way he will curse and threaten and do what he wants to do regardless of the directions being given. The student required behavioral interventions at least 3 times per week. The student generally responded well to the intervention but occasionally he would fixate and not be able to calm down. (Witness 6's testimony)
23. The student's behavioral support service trackers that were provided to the student's parent by School A do not reflect any behavioral support services in January 2015, February 2015 and April 2015.⁹ The social worker did not specifically recall generating service trackers for these three months but is certain she delivered the services to the student and input the services into the DCPS/OSSE database for January, February and April 2015. During these months the School A social worker worked with the student on coping skills for stress-evoking situations. The social worker logged the service hours

⁹ As result the student's parent believed that the student missed 3 months of behavioral support services. (Witness 2's testimony)

into the Easy IEP wizard. The social worker does not know why these services are not reflected in the services trackers. The student's IEP progress reports reflect that services were provided during the period covering these months. (Witness 6's testimony, Respondent's Exhibits 14, 17, 16-7)

24. The School A social worker was aware of the student's FBA and BIP from School B and saw no need to conduct another FBA. Because the student's problem behaviors identified in that FBA had not changed there was no need to conduct another FBA. A FBA has to be generated every three years but as long as a student's behaviors have not altered there is no need to conduct another prior to three years. A student's BIP can be updated without conducting another FBA in order to change strategies to address a student's behaviors. The School A social worker assigned to the student in SY 2015-2016 developed a new BIP for the student on September 16, 2015. (Witness 6's testimony, Respondent's Exhibits 8, 10 11)¹⁰
25. All the student's teachers agreed he could do grade level work but the concern came when he got upset or he was asked to do something he did not want to do or if he got upset prior to coming to school and did not want to participate in class. His behavior concerns were frequent but not daily. (Witness 5's testimony)
26. The student's special education case manager during SY 2014-2015 was able to establish a good rapport with the student and although she did not provide the student specialized instruction she serviced other students in his general education English class. As a result, she was able to observe the student's academic and behavioral performance in that class. The student did well in English and was able to complete assignments timely and participate in discussion with other students and made academic gains per his report card. (Witness 5's testimony, Petitioner's Exhibit 17)
27. However, the student's case manager observed that during SY 2014-2015 the student had difficulty regulating his emotions at school. He displayed disruptive behaviors on occasion and had to be removed from the class at least once per week. He occasionally got in altercations with his peers but more often got upset rather than having conflicts with other students. He was often able to go to his case manger and she could assist in calming him when he had emotional upsets during the school day. He would be given time to cool down until he could re-enter the classroom. Upon re-entry the student might sit at the back of the classroom or work alone until he fully reintegrated to the class activity. (Witness 5's testimony)
28. The student's special education case manager participated in the student's IEP meetings during SY 2014-2015. During the meetings the team, based upon feedback from the student's teachers about the student's academic performance, determined that the student

¹⁰ The targeted behaviors in the document reflect the student's actual behavior. She participated in the meeting and there was request for a new BIP but she stated there was no need. She does not remember a request for FBA/BIP at this March meeting. She did not state to the parent that the student needed a level 5 school and did not believe the student does not to be in a school for behavior. (Witness 6's testimony, Respondent's Exhibits 2, 3)

only needed specialized instruction in math and that this service could be provided to him in the general education setting. The team did not believe the student needs a special education teacher in each class as he made academic gains based on teacher observations and his grades. The team concluded based on the student's academic achievement that 5 hours of special instruction inside general education was sufficient. However, the team also concluded the student needed help regulating his behavior. (Witness 5's testimony, Respondent's Exhibits 2, 4, Petitioner's Exhibits 12-1, 39-1, 39-6)

29. During SY 2014-2015 the student was able to access the [redacted] grade curriculum with direct support in math and was able to work well when his was clam and not angry. The student required specialized instruction inside the general education setting to accommodate his difficulties with complying to rules and following instructions. He would check in with his case manager on mornings when he arrived at school in bad mood. When be became upset the student either required a verbal warning or was allowed to walk out the classroom briefly to cool down or when he was extremely upset he would be allowed to leave and see the school social worker. He was able to use these strategies and was aware of the resources that were available to him. (Witness 5's testimony)
30. The student's progress reports relative to his social emotional and math goals for SY 2014-2015 indicate that he was progressing in all goals. There is no indication the student mastered any of these goals. (Petitioner's Exhibit 31)
31. The student earned the following grades for each quarter in the following subjects during SY 2014-2015 at School A:

<u>Subjects</u>	<u>Adv.1</u>	<u>Adv. 2</u>	<u>Adv. 3</u>	<u>Adv. 4</u>	<u>Final Grade</u>
World Geography	D	D	C -	C	C
Language Arts 6	D	D+	B -	C -	C -
Science Grade 6	B	B	C	C	B
Mathematics 6	D	C	D	B	C
Dance MS	B	B			B
Intro Digital Arts Tech	B -	B			B
Academic Enrichment		P			P
Reading Support			S	S	S
Music 6			B	C	B
Academic Enrichment MS				U	U

32. The teacher comments on the student’s 2014-2015 report card in Language Arts, Music and Academic Enrichment noted the student had poor behavior. However, teacher comments in other classes including math noted the student showed excellent initiative and good participation and was a pleasure to have in class. During the school year the student had the following absences in the following classes: 37 absences in World Geography and Cultures, 7 absences in Language Skills, 20 absences in Science, 18 absences in Mathematics, 13 absences in Dance, 10 absences in Intro to Digital Arts, 3 absences in Academic Enrichment, and 2 in Academic Enrichment, 4 absences in Reading Support, 1 absence in Music, and 2 absences on Academic Enrichment. (Petitioner’s Exhibits 17-1, 17-2)
33. During SY 2015-2016 the student has continued to display behavioral difficulties and has received two out school suspensions for behavioral difficulties. During SY 2015-2016 the student’s parent has not received any behavior progress reports from the student’s teacher(s) or school staff. (Parent’s testimony, Petitioner’s Exhibit 26-1, 27-1, 28-1, 29-1)
34. The student earned the following grades for the first quarter in the following subjects during SY 2015-2016 at School A:

<u>Subjects</u>	<u>Adv.1</u>	<u>Absences</u>	
7 th Grade Math	C -	4	
English 7	B -	9	
Math Concepts	C -	0	
World Hist./Geog.	A -	6	
Health/Physical Ed.	D	11	
Music 7	C-	1	(Petitioner’s Exhibits 16-1, 16-2)

35. On September 11, 2015, the parent’s attorney’s office requested records and evaluations of the student from School A by faxing requests to the school and DCPS central office. However, the attorney’s office personnel did not check to ensure that the faxes were received by anyone at School A or DCPS. The letter requested that DCPS conduct the following evaluations: an audiology evaluation, a FBA and an occupational therapy evaluation. (Petitioner’s Exhibit 2-4, 2-5, 2-8, 2-9, Witness 4’s testimony)
36. The parent desires the audiology evaluation based upon her concerns whether the student understands everything he hears and based upon a recommendation in a 2012 independent speech and language to assess for hearing loss. She wanted the OT evaluation based on her concerns regarding the student’s handwriting. (Parent’s testimony, Petitioner’s Exhibit 24-1, 24-5)

37. On September 14, 2015, the parent's attorney sent an email to the School A special education coordinator (SEC) stating, inter alia, that her office had submitted a request for the student's records and a request for DCPS to conduct evaluations of the student. After the SEC received the email he emailed the attorney immediately to state that the parent could sign a consent form for the evaluations at the upcoming parent teacher conference. There was no response from the parent's attorney about the need for the parent to sign a consent form. The records were obtained from School A; however, the attorney's office did not respond to the request that the parent sign consent for the requested evaluations. (Petitioner's Exhibits 1, 3, Witness 8's testimony)
38. On November 18, 2015, Petitioner filed the due process complaint. At the resolution meeting for the due process complaint convened on December 1, 2015, DCPS agreed to conduct a hearing screening and the FBA and OT evaluation. The student's parent signed an evaluation consent form on December 1, 2015. (Witness 8's testimony, Respondent's Exhibit 1)
39. DCPS has provided Petitioner an authorization for Petitioner to obtain an independent OT evaluation. (Respondent's Exhibit 19)
40. A DCPS audiologist participated in the resolution meeting on December 1, 2015 at which it was requested that he conduct an audiology evaluation to rule out hearing loss. The audiologist recommended that instead he conduct a hearing screening at the student's school to rule out hearing loss and if hearing loss was not ruled out then an audiology evaluation could be conducted which would have to be conducted at a location outside the student's school. The audiologist conducted a hearing screening of the student and was able to rule out a hearing loss thus no further testing was necessary. No request was made regarding an audio processing evaluation. The audiologist can conduct the audio processing evaluation and he has provided surveys to the student's teachers to help determine if they are observing any audio processing concerns. (Witness 7's testimony, Petitioner's Exhibit 24-2, Respondent's Exhibits 7)
41. A FBA was completed for the student in January 2016 and a new BIP has been developed but no meeting to review these documents has been held. A meeting can be scheduled at a time agreeable to the parent and school to review the FBA, BIP and the recent hearing screening. (Witness 8's testimony, Respondent's Exhibit 6)
42. The parent's educational advocate provided expert testimony regarding the student's IEPs. She pointed out that the verbiage in the goals for academics and behavior were the same for multiple IEPs. She did not agree that the 5 hours of specialized instruction was sufficient. She opined that the student's IEP at School B did not provide sufficient level of support and he was in need of more specialized instruction particularly because of his behavior difficulties¹¹ and he requires a more therapeutic setting where he is not moving

¹¹ As a basis for this witness' opinion that the student needs a outside general education setting she pointed out that the student's IEP states that following: "Opposition, defiance, and aggression occur on a daily basis and are interfering not only with learning, but with developing healthy relationships at school." "He needs these supports to

class to class but is in self-contained classroom with behavioral supports throughout the school day. She also opined that he needs a BIP to allow him better access to the general education curriculum by addressing undesirable behaviors and replacing them with desirable behaviors. (Witness 2's testimony, Petitioner's Exhibits 38-3, 38-5, 22)

43. Petitioner's educational advocate also opined on the compensatory education the student would be due if a denial of FAPE is determined for failure to conduct evaluations and missed hours of behavior support and missed specialized instruction she believed the student's IEP should have prescribed. She asserted that the student should be provided 66 hours of independent tutoring at 2 hours twice weekly for 33 weeks and 43 hours of counseling 1 hour per week for 43 weeks, and 50 hours of mentoring to address self esteem and life skills for 2 hour per week for 25 weekends. The numbers were based on missed services to support the student for approximately one school year. (Witness 2's testimony, Petitioner's Exhibit 41)
44. The student has been accepted to a private therapeutic separate school ("School C"). The student interviewed at School C in January 2016. The student to teacher ratio at School C is: four students to one teacher. School C has three teachers and two therapists who provide students individual and group therapy once each per week. The group therapy focuses on helping students with self-regulation, improving relationships and anger management role-playing. School C also has a behavior intervention specialist on staff available to the student and the school uses a behavior management system with points and privileges and group rewards for student(s) desired behavior. The school's has licensed social workers and other related services providers. (Witness 1's testimony, Petitioner's Exhibit 40)
45. The cost of the School C is \$54,405 per year for its ten-month program. Extended school year ("ESY") costs just under \$4000. The student's academic needs will be met with a variation of methodologies to address his learning differences. He will be able to take breaks and has use a breakout room to assist him with calming down when needed. School C only has students with full time IEPs and no non-disabled peers. School C staff did not review the student's School A report card and did not talk to his teachers. (Witness 1's testimony, Petitioner's Exhibit 40)

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").

be available to him throughout his school day on an as-needed basis, as well as in scheduled sessions to build frustration management and coping skills. He needs a classroom setting that maximizes personal attention and a school setting that provides a high degree of structure and close supervision at all times, including during transitions." (Petitioner's Exhibit 39-5)

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 DCPS denied the student a FAPE by failing to fully implement the student's IEP during SY 2014-2015 because the student was not provided all the counseling services that the IEP prescribed.

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

5E DCMR 3002.3 provides that:

- (c) The LEA shall ensure that an IEP is developed and implemented for each eligible 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 in this case indicates that School A provided Petitioner service tracker forms that did not reflect any services for January 2015, February 2015 or April 2015. There was no other credible evidence Petitioner presented that the student was not provided all his related services during SY 2014-2015.

On the other hand, DCPS presented the student's service provider who credibly testified that she not only provided the student the services for January, February and April 2015, but also provided additional services to the student when he needed interventions that were not logged into the DCPS database system.¹² Although the service provider did not have an explanation as to why the service trackers for those months were not available the student's progress reports reflect that services were provided for the period that included these months.¹³ Based upon this witness' credible testimony, and the notations in the student's progress reports for these months the Hearing Officer concludes the services were provided to the student and he did not miss any behavioral support services during SY 2014-2015. Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the student with appropriate IEP(s) on December 18, 2013, and/or December 8, 2014, and/or May 20, 2015, because the IEP(s) did not include and BIP and/or the hours of specialized instruction in the IEP(s) were insufficient and in the inappropriate setting, to wit: 5 hours per week inside general education rather than 15 hours per week or more outside general education.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child. "The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 470

¹² The Hearing Officer found this witness' testimony calm, unhesitant and convincing; she clearly articulated the degree of the student's behavioral difficulties and how she consistently helped address them and that she logged the monthly services she delivered to the student.

¹³ FOF #s 22, 23

(U.S. App. 2009).

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. *Blackmon v. Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999)

34 C.F.R. § 300.324 requires that “each agency must ensure that... the IEP team... revises the IEP, as appropriate, to address... the results of any reevaluation conducted under § 300.303.” The IEP must also be revised to address any lack of expected progress toward annual goals and in the general education curriculum, information about the child provided to, or by, the parents, the child’s anticipated needs, and other matters. 34 C.F.R. § 300.324(b)(1)(ii)

The evidence demonstrates that during the student’s time at School B his IEP prescribed specialized instruction in math inside general education and behavioral support outside general education.¹⁴ Although the student’s IEP prior to attending School B prescribed more specialized instruction in math, reading and written expression and outside general education, the evidence demonstrates that the student was progressing grade to grade and in his last year at School B he received passing grades and was promoted to ██████ school.¹⁵ The student had a BIP that was developed at School B.¹⁶ Although the student’s parent testified that the student had significant behavioral difficulties while at School B, based upon the evidence of the student’s academic performance while School B, these difficulties did not prevent the student from gaining educational benefit. Consequently, the Hearing Officer concludes that the preponderance of the evidence demonstrates that the student’s December 18, 2013, IEP was reasonably calculated to provide him educational benefit and Petitioner did not sustain the burden of proof as to the alleged inappropriateness of this IEP.

When the student arrived at School A the behaviors he displayed at School B continued. School A conducted an IEP meeting for the student on December 8, 2014. The student had been suspended soon after he began attending School A and he was displaying behaviors that were causing the School A staff to frequently call his parent to request that the student be taken home from school mostly during the afternoons. The School A staff including the student’s case manager and social worker testified that they provided the student interventions to assist him with his behavioral difficulties. The student’s report card for SY 2014-2015 indicates that in the first advisory and second advisories at School A the student’s grades suffered. However, in the second semester following the December 8, 2014, IEP meeting the student grades improved slightly.¹⁷ This in the Hearing Officer’s opinion is sufficient indication that at least at the first IEP meeting at School A it was reasonable for the IEP team to continue the level of services in the setting that had been prescribed for the student up to that point. Thus, the Hearing Officer concludes that at least as the December 8, 2014, IEP meeting the student’s IEP remained

¹⁴ FOF #3

¹⁵ FOF #s, 4, 31

¹⁶ FOF # 7

¹⁷ FOF #31

reasonably calculated to provide him educational benefit. Thus, the Hearing Officer concludes that there was insufficient evidence presented as to the alleged inappropriateness of the December 8, 2014, IEP.

The evidence demonstrates that in March 2015 the student's parent requested a meeting to address the student's continued behavior difficulties and in April 2015 requested that a comprehensive psychological be conducted. Based upon this evaluation the student IEP was updated on May 20, 2015. At that time the team reviewed the comprehensive psychological that clearly indicated the student's average cognitive abilities and average academic achievement and concluded, except for the parent, that the student's existing services would be continued. However, based the testimony of the student's case manager and his social worker describing the student's in school behavior it appears that despite their interventions the student behaviors have not significantly improved.

The student's School A social worker during SY 2014-2015 acknowledged that the student is capable academically and capable of accessing the general education curriculum. However, his behavior often causes him to not put forth his best efforts.

The student's IEP progress notes for January 26, 2015, through April 3, 2015, indicate the following: "...[the student] continues to struggle with group work in his classroom. He often ends up in conflict with other students. His teacher reports that it is difficult to predict when [the student] will be productive in a group setting. Additionally, his teacher endorsed the following areas of concern on the Ohio Scales: Causing trouble for no reason, Arguing with others, Yelling, swearing, or screaming at others. Sessions will continue to focus on appropriate peer interactions."

These two DCPS witnesses also noted that when things are not going the student's way he will curse and threaten and do what he wants to do regardless of the directions being given and he has behavioral interventions at least 3 times per week. Although it appears that the student was able to access grade curriculum he can only do so when his is not angry and he seems to get angry and have outbursts often. In addition, the student's behaviors have continued during the current school year and he has been suspended on more than one occasion.

Consequently, based upon the testimony of the School A staff in particular describing the student's outrageous in-school behaviors that have continued unabated despite the services and interventions he has been provided, the Hearing Officer concludes that as of May 20, 2015, the student's IEP was not reasonably calculated to provide educational benefit and that he should have by that time been moved to a placement consistent with what was described in the emotional and behavioral section of his IEP: "[the student] needs a classroom setting that maximizes personal attention and a school setting that provides a high degree of structure and close supervision at all times, including during transitions. He needs instruction that is hands-on and engaging, and that can accommodate his emotional volatility and pick up where he left off in instances when he has to leave the classroom to receive behavioral support. [The student] will continue to need behavior support services to enhance social/emotional progress in the classroom to include counseling, parent/teacher consultation, and behavioral management."

The Hearing Officer concludes the student's May 20, 2015, IEP was not reasonably calculated to provide him educational benefit and Petitioner presented a preponderance of the evidence that this IEP was inappropriate.

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

ISSUE 3: Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student by failing to perform a FBA as recommended by the MDT in May 2015 and/or by failing to conduct re-evaluations requested by the parent on or about September 11, 2015.

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

34 C.F.R. § 300.303(a) makes clear that, "A local education agency ("LEA") shall ensure that a re-evaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

The evidence demonstrates that the parent requested at the March 2013 IEP meeting DCPS provide the student with a dedicated aide. There was no request during that meeting that a FBA be conducted. In April 2015 the parent requested a comprehensive psychological evaluation that was conducted and reviewed by a team in May 2015. There was no evidence that a FBA was requested at that meeting either. Although the AED Report and the Evaluation Summary Report indicate that a FBA was to be conducted there was a reasonable explanation as to why the notation was in the record and that it actually related to the FBA that had already been conducted by School B in June 2014.

In addition, the credible testimony of the DCPS social worker supported the conclusion that the student was exhibiting behaviors at School A that were the same as those identified in the June 2014 FBA and a new FBA was not necessary.¹⁸ Based upon this evidence the Hearing Officer concludes there was insufficient evidence that a new FBA or BIP for the student was requested or warranted prior to the request made by the parent's attorney in September 2015.

As to the evaluations requested by the parent's attorney in September 2015, the evidence demonstrates that the attorney's office staff never confirmed that the faxes sent to School A and DCPS central office were received and although education records were provided, the School A SEC credibly testified that he emailed the parent's attorney indicating the parent should provide written consent for the requested evaluations and that consent was not provided until after the complaint was filed. The Hearing Officer concludes that absent the written consent from the parent to evaluate the student there was no unreasonable delay in DCPS complying with the requests for evaluations prior to the due process complaint being filed.

¹⁸ FOF #s 13, 15, 18

The evidence demonstrates that DCPS has now conducted a new FBA, conducted a hearing screening and is willing to conduct an audiology evaluation and authorized an independent OT evaluation.¹⁹ The Hearing Officer concludes that there has been no denial of a FAPE to the student with regard to the requested evaluations and Petitioner did not sustain the burden of proof by a preponderance of evidence on this issue.

Remedy:

"[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, 427 F.3d at 12 (citations omitted). Based upon the evidence presented the Hearing Officer concludes that the school proposed by the parent meets the considerations that the Hearing Officer is to consider in determining a prospective placement for the student and will grant his placement at School C for the remainder of SY 2015-2016 as the remedy and compensatory education for the student being without a appropriate school placement since May 20, 2015.²⁰

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.

The Hearing Officer has concluded that the compensatory education proposal submitted by Petitioner did not accurately reflect and overstated the denial of FAPE determined by this decision and that is appropriate that the non-public placement ordered herein will also serve as his compensatory education for the denial of FAPE.

ORDER:

1. DCPS shall, within ten (10) school days of issuance of this order place and fund the student at School C ([REDACTED]) for the remainder of SY 2015-2016 and provide transportation services.

¹⁹ FOF #s 37, 39, 40, 41

²⁰ FOF #s 44, 45

2. 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: February 21, 2016

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