

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, D.C. 20002

OSSE  
Office of Dispute Resolution  
January 12, 2016

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<i>Student</i> , <sup>1</sup>	)	Date Issued: 1/11/16
through his <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Case No.: 2015-0374 ( <b>Expedited</b> )
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates: 12/29/15 & 12/30/15
("DCPS"),	)	Hearing Location: ODR Room 2006
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s mother, filed a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because DCPS did not provide a placement that was sufficiently restrictive and did not conclude that Student’s inappropriate behaviors were manifestations of his disabilities, along with other concerns. DCPS responded that it had not denied Student a FAPE because he made some progress in school when he attended classes and that he knowingly misbehaved, among other defenses.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

**Procedural History**

Following the filing of the due process complaint on 11/18/15, which involved disciplinary as well as other issues, the case was assigned to the undersigned on 11/19/15. Petitioner amended her due process complaint on 11/23/15, adding a new disciplinary issue

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<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially stated in italics.

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(Issue “(E) a.” at pp. 46-48) and amending non-disciplinary issues. DCPS’s response to the complaint/amended complaint was filed on 12/1/15 and did not challenge jurisdiction.

The resolution session meeting took place on 12/16/15, but the parties did not resolve the case or shorten the timeline. Pursuant to 34 C.F.R. 300.532(c), the due process hearing on the disciplinary issues must be completed within 20 school days from their filing, which is 1/4/16 for the expedited issues in the initial complaint, and 1/7/16 for the additional expedited issue in the amended complaint. After amendment of the non-expedited issues and the restarting of the timeline on 11/23/15, the Hearing Officer Determination (“HOD”) for these issues is due 45 days after the 30-day resolution period, which would require an HOD by 2/6/16. The due process hearing was completed on 12/30/15, so an HOD on all expedited issues is required by 1/15/16.

The due process hearing took place on 12/29/15 and 12/30/15. The hearing was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Counsel declined to discuss settlement at beginning of the hearing. Petitioner was present for the entire hearing.

Neither party objected to the testimony of witnesses by telephone. The parties agreed on no stipulations.

Petitioner’s Disclosure statement, submitted on 12/21/15, consisted of a witness list of 7 witnesses and documents P1 through P58, which were admitted into evidence without objection.

Respondent’s Disclosure statement, submitted on 12/21/15, consisted of a witness list of 6 witnesses and documents R1 through R12, which were admitted into evidence without objection. Petitioner filed an Objection to Respondent’s Disclosures on 12/23/15, objecting to three potential DCPS witnesses, but the listed witnesses were not called at the hearing, so the objections were moot and not substantively addressed.

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *President of Compensatory Education Provider* (“Comp Ed President”), who was qualified without objection as an expert in the Creation and Implementation of Compensatory Education Plans for Special Education Students
2. *Special Education Coordinator at Nonpublic School* (“Nonpublic SEC”),
3. Parent
4. *Educational Advocate*, who was qualified without objection as an expert in Special Education Programming for Students with Disabilities

Respondent’s counsel presented *Dean of Students* from *Public School* (“Dean”) as the only witness in Respondent’s case (*see* Appendix A):

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Petitioner's counsel presented Parent as the sole rebuttal witnesses.

The issues to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement from October 2014 to present, when Student needed a more restrictive placement than a Behavior Education Support ("BES") program.

**Issue 2:** Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on 5/13/14 when there was a reduction in Behavior Support Services from 360 to 120 minutes per month, although Student's behavior was as bad as or worse than before.

**Issue 3:** Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student in October 2014 because placement was not specified and should have required a separate day school.

**Issue 4:** Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student in March 2015 because (a) placement was not specified and should have required a separate day school; (b) it contained outdated information; (c) it reduced specialized instruction outside general education; (d) it failed to provide adequate Behavioral Support Services; (e) it removed most accommodations without data to support removal; and (f) it failed to provide for Extended School Year ("ESY"), which was previously provided.

**Issue 5:** Whether DCPS denied Student a FAPE in Manifestation Determination Review ("MDR") meetings on (a) 6/3/14 by making an incorrect MDR determination, failing to review and revise Student's Behavioral Intervention Plan ("BIP"), and failing to provide an interim alternative placement; (b) 10/23/15 by failing to review and revise Student's BIP, and failing to provide educational services between the suspension on 10/14/15 and the 10/23/15 meeting; and (c) 11/6/15 by making an incorrect MDR determination, failing to review and revise Student's BIP, failing to provide services between the suspension on 10/28/15 and 11/5/15 and thereafter, and failing to provide an appropriate interim alternative placement.

**Issue 6:** Whether DCPS denied Student a FAPE by failing to implement his IEP since October 2015 as (a) his BIP was not being implemented; and (b) Student was not receiving direct instruction from 11/5/15 through 11/19/15, and no instruction from 11/20/15 on.

**Issue 7:** Whether DCPS denied Student a FAPE by failing to permit his educational advocate to conduct an observation of Student in his interim alternative setting on 11/17/15, even though Parent signed a consent form and no other documentation was requested by school.

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Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. DCPS shall convene an IEP team meeting within 15 school days to develop an appropriate IEP for Student to provide (a) a full time separate special education day school equipped to deal with severe Emotional Disturbance (“ED”) and Other Health Impairment (“OHI”), (b) 60 minutes per week of Behavioral Support Services outside general education, (c) a return of the accommodations removed from Student’s IEP in March 2015, and (d) updated present levels of performance, baselines, needs and goals.
3. DCPS within 15 calendar days shall fund tuition and transportation for Nonpublic School.
4. DCPS within 15 calendar days shall reverse its earlier MDR determinations and issue documentation indicating that Student’s behaviors on 5/28/14 and 10/28/15 were a manifestation of Student’s disabilities and correct all of Student’s educational records accordingly.
5. Compensatory education for any denial of FAPE.
6. Any other relief that is just and reasonable.

Oral opening statements and closing statement were made by Petitioner’s counsel and Respondent’s counsel.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>2</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student’s Parent.<sup>3</sup> Student is *Age* and in *Grade*, which he is repeating this year.<sup>4</sup>
2. Student is classified as having Multiple Disabilities, with both ED and OHI (specifically Attention Deficit Hyperactivity Disorder (“ADHD”)).<sup>5</sup> Student’s most recent

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<sup>2</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>3</sup> Parent.

<sup>4</sup> *Id.*

<sup>5</sup> P38-1; P39-1.

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Comprehensive Psychological Evaluation on 5/27/13 confirmed ED and OHI and also diagnosed him with Oppositional Defiant Disorder and as Learning Disabled with Reading Disorder, Written Expression Disorder and Mathematics Disorder.<sup>6</sup>

3. Student's overall cognitive ability is in the Low Average range, as evaluated by the WISC-IV.<sup>7</sup> Student's academic achievement is very low and he is well below grade level.<sup>8</sup> Student's Scholastic Reading Inventory ("SRI") lexile level is 5 grades below his current grade.<sup>9</sup> Student's 5/13/14 IEP stated that he was 3 grade levels behind in math, 4.5 grade levels behind in reading, and 5.5 grade levels behind in written expression.<sup>10</sup> At home, Student struggles to read the books of a much younger relative.<sup>11</sup>

4. Student has had full-time IEPs for many years.<sup>12</sup> Student has been in BES programs in 3 schools beginning in 2013/14,<sup>13</sup> which is the most restrictive program available from DCPS, but the BES programs did not keep him from wandering the halls in the large public schools.<sup>14</sup>

5. Student has had behavioral problems as long as he has been in school, and his problems have worsened over time.<sup>15</sup> Student's 5/27/13 Psychological Evaluation noted the problem of Student wandering the halls at school and stated that Student "would benefit from a smaller-sized placement where there is a greater degree of supervision by staff."<sup>16</sup> The Evaluation stated that a therapeutic placement would be most appropriate and that Student needed small classes to receive a high level of individualized attention.<sup>17</sup> A DCPS observation of Student on 5/31/13 noted that his acting out behaviors had increased, as he assaulted several peers and staff and had been suspended for fighting several times.<sup>18</sup> As a result there was concern that Student's placement was not appropriate.<sup>19</sup>

6. Student began the BES program in Public School in October 2014 after a "safety transfer" from *Prior Public School A*,<sup>20</sup> where he had been in the BES program only since

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<sup>6</sup> P21-10.

<sup>7</sup> P21-9.

<sup>8</sup> P46-4.

<sup>9</sup> R1-5.

<sup>10</sup> P30-3,4,5.

<sup>11</sup> Parent.

<sup>12</sup> P12-5; P13-5; P14-6; P16-7; P25-7; P29-9; P30-8; P35-8; P49-1; Educational Advocate.

<sup>13</sup> All dates in the format "2014/15" refer to school years.

<sup>14</sup> Educational Advocate.

<sup>15</sup> P11; P49-1; Educational Advocate.

<sup>16</sup> P21-10.

<sup>17</sup> *Id.*

<sup>18</sup> P22-1.

<sup>19</sup> *Id.*

<sup>20</sup> On 10/29/14, DCPS proposed to amend Student's IEP to make a "safety transfer" of Student from *Prior Public School A* to Public School. P35-15.

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the beginning of 2014/15.<sup>21</sup> No other changes were put in place to address Student's behavioral problems beyond moving him to the new location.<sup>22</sup>

7. Student was previously at *Prior Public School B* for 2013/14, where he had been in the BES program, after being transferred from *Prior Public School C*, where he had completed 2012/13.<sup>23</sup> Student has been transferred from one BES program to another because of ongoing and worsening behavioral problems that DCPS has not addressed.<sup>24</sup>

8. Student completed an Ohio Youth Problem, Functioning and Satisfaction Scale ("Ohio Youth Scale") on 2/13/15 which found that he may "face challenges with self-control, arguing with others, judgment, mood regulation and adhering to authority and rules."<sup>25</sup> The Ohio Youth Scale was never reviewed or discussed with Parent or her advocates.<sup>26</sup>

9. Student has had multiple FBAs and BIPs in an effort to address his ongoing behavioral problems.<sup>27</sup> The FBAs consistently report Student's rage, anger, impulsivity and inability to regulate his emotions.<sup>28</sup> Student's BIPs target that behavior and provide that Student should not be confronted, but talked down, de-escalated and provided an area to which he can go.<sup>29</sup>

10. An FBA was developed on 6/11/13 in which it was found that Student has "poor anger management," is "unresponsive to redirection when he is reprimanded for inappropriate behavior" and "has become increasingly aggressive to students and staff alike," initiating a melee in the auditorium resulting in his arrest.<sup>30</sup> The FBA suggested that negative stimuli be reduced and that "structure should be consistently provided throughout the day."<sup>31</sup>

11. In his 5/13/14 IEP, one of Student's goals was to respond appropriately to authority figures and to receive not "more than one behavioral infraction per week," but Student "demonstrated regression" due to "frequent incidents of verbal aggression," behavioral infractions for making threats, and "defiant behaviors, such as walking out of class, running

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<sup>21</sup> On 6/20/14, DCPS sent an LOS letter moving Student to Prior Public School A, without any IEP change. P34-1.

<sup>22</sup> Parent; Educational Advocate; P35-15.

<sup>23</sup> On 7/12/13, DCPS sent an LOS letter moving Student to Prior Public School B, without any IEP change. P27-1.

<sup>24</sup> Parent; Educational Advocate.

<sup>25</sup> P38-4; P39-6.

<sup>26</sup> Educational Advocate.

<sup>27</sup> Cf. P32; P23; P37; P19; P15.

<sup>28</sup> Educational Advocate.

<sup>29</sup> *Id.*

<sup>30</sup> P23-1.

<sup>31</sup> P23-3.

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the hallways, and going into other classrooms without permission.”<sup>32</sup> Student’s 3/31/15 IEP repeats this language.<sup>33</sup>

12. Student’s most recent FBA, dated 6/1/15, lists the following problems, which Student experiences on a daily basis in all situations, including social settings (lunch and hallways) and especially when he is around his peers<sup>34</sup>:

- a. “difficulty with controlling and managing emotions”
- b. “anger and frustration with others”
- c. “lashing out verbally”
- d. “disrespect to adults and peers”
- e. “not following directions and ignoring directives”
- f. “demonstration of defiant behaviors”
- g. “lack of respect towards peers and adults”
- h. “frequently argues with adults and peers”
- i. “often loses temper”
- j. “disregard[s] directives from adults”
- k. “very angry and physically aggressive”
- l. “being defiant when an authority figure attempts to redirect him.”

Student’s 6/1/15 FBA states that “structure should be provided throughout the day.”<sup>35</sup> Student’s FBA also states that he would “benefit from behavioral supportive services in an academic setting.”<sup>36</sup>

13. Student’s 10/7/15 BIP makes clear that those implementing the BIP should<sup>37</sup>:

- a. Give instructions “using a lowered voice”

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<sup>32</sup> P30-6,7; P35-7.

<sup>33</sup> P39-7.

<sup>34</sup> P32-1,2,3.

<sup>35</sup> P32-3.

<sup>36</sup> *Id.*

<sup>37</sup> P37-1,2.

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- b. “[D]eliver directives in a step-by-step sequence”
- c. “Avoid power struggles as they reinforce aggressive and angry behavior”
- d. “Use positive and effective teacher commands, i.e. . . . ‘could you please...’”
- e. Provide “[c]risis management” as needed.

14. 2013/14 Issue. An incident on 5/28/14 involving Student fighting resulted in an MDR meeting held by DCPS on 6/3/14 which concluded that Student’s conduct was not a manifestation of his disabilities, nor the direct result of not implementing his IEP.<sup>38</sup> There was no indication that Student’s BIP was reviewed or updated.<sup>39</sup> Parent was not present at the MDR meeting and was not asked to weigh in.<sup>40</sup> Student was to be suspended from 6/5/14 through 6/18/14, but Parent credibly testified that the assistant principal refused to let Student return for the final days of 2013/14, so he was unable to participate in significant end of year activities with his peers.<sup>41</sup>

15. 2014/15 Issues. When Parent enrolled Student in Public School in October 2014 she explained that Student has issues with roaming the hallways and needed help to stay in class, but was told by Public School staff that due to his grade level there would be no one to “babysit” Student.<sup>42</sup> The rest of 2014/15 was “terrible” with frequent calls from Public School to Parent, and Student often ending up in his social worker’s office.<sup>43</sup> Student’s social worker told Parent that Public School was not a good fit for Student.<sup>44</sup>

16. Student was suspended for the remainder of 2014/15 on or about 6/3/15 without any paperwork, just a phone call saying Student was not allowed back for the rest of 2014/15.<sup>45</sup> Student’s DCPS Service Tracker noted that Student reported on 6/3/15 to his service provider that he had an altercation with another student and “has to be removed,” while the 6/15/15 and 6/17/15 entries on the same page reflect that Student was absent due to suspension “for the remainder of the school year.”<sup>46</sup>

17. 2015/16 Issues Generally. Student was involved in numerous incidents from the beginning of 2015/16: Student was in the dean’s office on 9/10/15 following an altercation

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<sup>38</sup> P33-1.

<sup>39</sup> P33.

<sup>40</sup> Parent.

<sup>41</sup> P33-2; Parent.

<sup>42</sup> Parent.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> P9-11.

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with a peer.<sup>47</sup> On 9/17/15 Student was suspended for 5 days for fighting with another student.<sup>48</sup> On 10/1/15 Student reported that he got into another altercation. P9-14. On 10/8/15, Student reported another altercation.<sup>49</sup> In addition, CAASS reports additional behavioral issues of various sorts on 8/28/15, 9/1/15, 9/3/15, 9/8/15, 9/11/15 (twice), and 10/14/15.<sup>50</sup>

18. Student often roamed the hallways of Public School without supervision, missing classes even when he was in the school building.<sup>51</sup> Student was sometimes put out of his classes by his teachers without supervision in the hallways.<sup>52</sup> For instance, on 10/1/15, after saying he “should hit” his teacher, Student “was asked to leave class”<sup>53</sup>; on 10/6/15 after trying several interventions, Student “was asked to leave class”<sup>54</sup>; and on 10/8/15, Student was disrupting class, so “was asked to leave” and got into a confrontation in the hallway.<sup>55</sup>

19. Student being sent into the hallway was not part of his plan and the opposite of what Student needed to eliminate problematic behaviors and stay on task in the classroom.<sup>56</sup> If Student became upset and left the classroom, he needed someone to walk with him and talk with him calmly to de-escalate him, not simply order him back to the classroom.<sup>57</sup> Nor was there a de-escalation room to which Student could go when upset; Student did not know of such a room, while Public School asserted that it was in the dean’s office.<sup>58</sup>

20. 10/23/15 MDR Meeting. On 9/17/15, Student began arguing with another student over supplies, tried to attack the student with a chair and later took a swing at the student.<sup>59</sup> Student was given a 5-day suspension.<sup>60</sup> This incident was covered by the 10/23/15 MDR meeting.<sup>61</sup>

21. Another serious incident occurred on 10/14/15 during an In-School Suspension (“ISS”), when Student threw a desk at a peer who said something offensive about Student’s father (who had died many years before).<sup>62</sup> The Public School principal proposed a 10-day

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<sup>47</sup> P9-13.

<sup>48</sup> *Id.*

<sup>49</sup> P9-14.

<sup>50</sup> P42-2,3.

<sup>51</sup> *E.g.*, P42-7 (Student out of class for 3 weeks or more).

<sup>52</sup> Educational Advocate; Parent.

<sup>53</sup> P42-10.

<sup>54</sup> P42-9.

<sup>55</sup> P42-8.

<sup>56</sup> Educational Advocate; Parent.

<sup>57</sup> Educational Advocate.

<sup>58</sup> *Id.*

<sup>59</sup> P40-3; P42-11.

<sup>60</sup> P40-1.

<sup>61</sup> Parent.

<sup>62</sup> P41-3; Parent.

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suspension and did not permit Student to attend school for 6-7 days until the 10/23/15 MDR meeting, due to safety concerns.<sup>63</sup> No work packets were provided.<sup>64</sup>

22. The 10/23/15 MDR meeting focused mostly on the 10/14/15 incident, and concluded that the incident was a manifestation of Student's disability because he was provoked by the other student.<sup>65</sup> The 10/23/15 MDR meeting did not review and revise Student's BIP.<sup>66</sup> Parent's advocate raised concerns about why Student was in ISS with general education students, since he has a full-time IEP.<sup>67</sup>

23. 10/28/15 Incident. A very serious incident began about 9:00 a.m. on 10/28/15 when Dean saw Student walking toward the cafeteria on the 1<sup>st</sup> floor of Public School, although Student's class is on the 2<sup>nd</sup> floor; Student didn't have a pass to be in the hallway.<sup>68</sup> Dean spoke calmly to Student that it was time to go to class; Student responded that he was going to the cafeteria, but never attempted to explain why.<sup>69</sup> Dean told Student that breakfast was over at 8:40 a.m., but Student turned to the cafeteria. Dean – who is 6'7" tall and agreed during his telephone testimony that he is a big man – walked ahead to block the door, again telling Student to go to class and pointing his finger in the proper direction.<sup>70</sup> Student "pushed through" Dean, saying with profanity you "can't suspend me so I will do what I want."<sup>71</sup> Dean "replied to [Student] that your information is not accurate and I will deal with you later."<sup>72</sup> Student went into the cafeteria and Dean went on his rounds.<sup>73</sup> About 20 minutes later, Dean was checking on the class across from Student's classroom when Student came to the door and yelled outrageous things at Dean.<sup>74</sup> Dean didn't respond to Student, but went to the door of Student's class and leaned into the room to ask Student's teacher to document Student's offensive statements, with Student cursing him the entire time.<sup>75</sup>

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<sup>63</sup> Educational Advocate; P41-1.

<sup>64</sup> Educational Advocate.

<sup>65</sup> Dean; Educational Advocate; P2-81.

<sup>66</sup> Educational Advocate.

<sup>67</sup> Educational Advocate; P2-81.

<sup>68</sup> Dean.

<sup>69</sup> *Id.*

<sup>70</sup> Dean; R9-4 (11/18/15 decision of the Office of Administrative Hearings ("OAH") reviewed the 10/28/15 incident and confirmed a Tier V infraction, with binding factual determinations (based entirely on information provided by DCPS) finding that Dean "walked ahead of [Student] and blocked the entrance to the cafeteria door and attempted to re-direct" Student).

<sup>71</sup> Dean; P45-7. Student's venomous language and specific profanities are not quoted as the details are not relevant to the analysis herein.

<sup>72</sup> P45-7,8 (Dean testified that he agreed with this statement).

<sup>73</sup> Dean.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

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24. Dean then went to speak with Student's social worker about how Student's behavior is getting worse and returned to his office when about 15-20 minutes later a female security officer called for immediate assistance.<sup>76</sup> Dean went back upstairs to find Student threatening, cursing and aggressively advancing on the security officer.<sup>77</sup> A short male assistant principal arrived and stood in front of the security officer; ■ jogged down the long hallway to get in front of the assistant principal and shield him from Student.<sup>78</sup> Student shifted his threats to Dean, who told him to go back to class.<sup>79</sup> Student's mild-mannered teacher calmly encouraged Student to go back to class, as did 2 behavior technicians who arrived on the scene, saying "come with me" and "don't do this."<sup>80</sup> Student threatened to throw juice on Dean, then took out a juice bottle and doused Dean with juice all over his face and then threw juice on him a second time, but Dean never said anything even after the juice.<sup>81</sup> A behavior technician grabbed Student at that point, but Student managed to throw the juice bottle at Dean.<sup>82</sup> Student was "walked off" by the behavior technician and taken downstairs; Student then ran from the building.<sup>83</sup>

25. 11/5/15 MDR Meeting. An 11/5/15 MDR meeting was held on the 10/28/15 incident.<sup>84</sup> Student declined to present his perspective; DCPS reviewed the facts from the various Public School personnel involved.<sup>85</sup> The statement of Student's social worker was read, including Student's explanation to her that he had been sent to the cafeteria by another teacher to get the teacher some cheese.<sup>86</sup> Following the encounter between Student and Dean outside the cafeteria, the further events that occurred a little later near Student's classroom, and after that in the hallway, were an outgrowth of the confrontation by the cafeteria.<sup>87</sup>

26. The DCPS MDR form states that as "Step 1" the IEP team is to consider the current IEP and BIP, among other things.<sup>88</sup> At the MDR meeting, Parent sought to review parts of Student's IEP, but was cut off; Parent's advocate asked to review Student's BIP and was

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> P46.

<sup>85</sup> P46-3.

<sup>86</sup> P46-4.

<sup>87</sup> P2-125.

<sup>88</sup> R11-1.

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also cut off.<sup>89</sup> Student's BIP, FBA and IEP were not reviewed prior to the decision on whether the incident was a manifestation of Student's disabilities.<sup>90</sup>

27. At the MDR meeting, each of the Public School participants concluded that Student's conduct on 10/28/15 was not caused by and did not have a direct and substantial relationship to Student's disability.<sup>91</sup> Nor did the Public School participants believe that the conduct directly resulted from a failure to implement Student's IEP.<sup>92</sup> The Public School participants felt that the incident was not a manifestation because Student was not provoked, unlike the MDR the previous week, and that he had several opportunities to make the right decision but did not.<sup>93</sup>

28. Parent and her advocate believed that Student's conduct was a manifestation of his disabilities and the result of his IEP – specifically his BIP – not being implemented, but did not sway the others at the MDR meeting.<sup>94</sup> Parent believes that Dean should have avoided a power struggle with Student, and that Dean was not calm but went “word-for-word” with Student.<sup>95</sup> Talking harshly to Student makes him defensive, and Parent believes Student felt Dean was speaking harshly to him, in addition to physically blocking the cafeteria door.<sup>96</sup>

29. There was no discussion at the 11/5/15 MDR meeting about alternative interim placements for Student.<sup>97</sup> Dean believed that there needed to be consequences and that Student should be suspended and not come back because the safety of Public School students and staff were at stake.<sup>98</sup> Student's behaviors were escalating and someone might get hurt.<sup>99</sup> DCPS asserted that there was an “emergency” condition which justified not permitting Student back in the building at Public School, but never explained what the emergency was.<sup>100</sup> Student did not come within any of the 34 C.F.R. 300.530(d) conditions of carrying a weapon, possessing drugs, or inflicting serious bodily injury.<sup>101</sup>

30. Out-of-School Issues. Parent and her advocates sought to obtain educational services for Student while he was suspended: On the day of the 10/28/15 incident, Parent's counsel emailed Public School noting that Student needed to return to school and stating

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<sup>89</sup> Educational Advocate; P2-126; Parent.

<sup>90</sup> Dean.

<sup>91</sup> P46-5; Parent.

<sup>92</sup> P46-5,6.

<sup>93</sup> Dean.

<sup>94</sup> Educational Advocate; Parent; P46-5,6; P46-8.

<sup>95</sup> Parent; P37-2.

<sup>96</sup> Parent.

<sup>97</sup> Educational Advocate.

<sup>98</sup> Dean.

<sup>99</sup> *Id.*

<sup>100</sup> Educational Advocate; P2-34.

<sup>101</sup> Educational Advocate.

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that Alternative Placement could not implement Student's IEP.<sup>102</sup> The DCPS notes of the 11/5/15 meeting record that Parent was concerned about Student "being out of school with no school work and just sitting at home."<sup>103</sup> This was reiterated in contacts with Alternative Placement.<sup>104</sup>

31. DCPS directed Parent on 11/3/15 to take Student to Alternative Placement on 11/4/15, and again directed her on 11/19/15 to take Student to Alternative Placement on 11/20/15, stating on 11/19/15 that Alternative Placement could implement Student's IEP.<sup>105</sup> Each contact by Parent or her advocates with Alternative Placement resulted in clear responses that Alternative Placement was not prepared to admit Student as the necessary paperwork had not been completed.<sup>106</sup> Parent's advocates reminded DCPS that the IEP team should be determining the interim alternative placement, but the team was not making that determination.<sup>107</sup>

32. Educational Advocate went to Alternative Placement and met with the principal in person on 12/3/15, but was told it was premature for Student to attend Alternative Placement.<sup>108</sup> Counsel for Parent inquired with the principal about the status of Alternative Placement on 12/15/15, but never heard back.<sup>109</sup>

33. Educational Advocate had concerns that Alternative Placement could not implement Student's full-time IEP in a therapeutic setting, based on prior experience with Alternative Placement.<sup>110</sup> Alternative Placement only has 2 special education teachers to cover 6 grades.<sup>111</sup> Parent would have sent Student to Alternative Placement if he had been accepted there, preferring some education over none.<sup>112</sup>

34. DCPS permitted Student to return to Public School on 11/5/15; he went back to the ISS room he was sometimes playing on the computer with behavior technicians and sometimes was given worksheets; other times Student was with the special education coordinator.<sup>113</sup> When Student went back to Public School, Parent was told there would be a special room for Student and someone to help him with his work, but that was not the

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<sup>102</sup> P2-23.

<sup>103</sup> P46-3.

<sup>104</sup> P2-239 (Student's Parent is "very concerned because he is out of school").

<sup>105</sup> P2-104; P2-203; P2-205.

<sup>106</sup> Educational Advocate; P2-226; P2-233 (Alternative Placement principal stated that they would call when ready to accept Student).

<sup>107</sup> P2-107; P2-214; Educational Advocate.

<sup>108</sup> Educational Advocate; P2-242.

<sup>109</sup> Educational Advocate; P2-259.

<sup>110</sup> Educational Advocate.

<sup>111</sup> P2-204; P2-242; Educational Advocate.

<sup>112</sup> Parent; Educational Advocate.

<sup>113</sup> Educational Advocate; P2-117.

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case.<sup>114</sup> There were no special education educators in Student's interim setting at Public School.<sup>115</sup>

35. Notwithstanding Parent's efforts, Student was completely out of school from 10/28/15 to 11/5/15 and from 11/18/15 until the due process hearing.<sup>116</sup> On 11/19/15 the D.C. Office of the Attorney General sent Parent a truancy letter informing her that Public School had reported excessive unexcused absences and noting that jail time could result if she did not get Student back in school.<sup>117</sup>

36. Observation. Educational Advocate sought to observe Student in his interim placement at Public School; she provided a parental consent form, signed by Parent, when Public School failed to provide a form, but was still rejected when she went to school to observe Student.<sup>118</sup> Educational Advocate repeatedly sought to determine what documents would be required to observe Student and when she might come to school for an observation.<sup>119</sup> DCPS proposed that Educational Advocate come only before or after school, and provided a 2013 DCPS policy.<sup>120</sup> Parent's advocates explained that the 2013 policy was no longer valid in light of new District of Columbia legislation and encouraged Public School personnel to obtain advice from their legal counsel.<sup>121</sup> On 11/17/15, Educational Advocate went to Public School to observe Student and was refused; DCPS stated that more documents were required, although none were or had been provided.<sup>122</sup>

37. Other IEP Issues. Student's Behavior Support Services ("BSS") increased in his 6/13/13 IEP to 360 minutes per month, up from 240 in 2011/12.<sup>123</sup> On 10/12/13, a DCPS Student Service Alignment Plan concluded that Student's needs could be met with less BSS, even though the document stated that he had regressed in behavioral development.<sup>124</sup> Student's BSS dropped to 120 minutes per month in his 5/13/14 IEP without further explanation.<sup>125</sup> DCPS did not discuss the reduction in BSS with Parent, who would have opposed the change since Student was continuing to have serious behavioral problems.<sup>126</sup>

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<sup>114</sup> Parent.

<sup>115</sup> Educational Advocate.

<sup>116</sup> *Id.*

<sup>117</sup> P53-1; P2-261; Educational Advocate.

<sup>118</sup> Educational Advocate; P50-1.

<sup>119</sup> Educational Advocate; P2-171; P2-157; P2-156; P2-133,134; P2-127; P2-123; P2-122.

<sup>120</sup> Educational Advocate; P2-158.

<sup>121</sup> Educational Advocate; P2-168.

<sup>122</sup> P2-180; Educational Advocate.

<sup>123</sup> P25-7; P16-7.

<sup>124</sup> P28-1,2.

<sup>125</sup> P29-9; P30-8.

<sup>126</sup> Parent.

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38. Most of the accommodations listed for Student in his 10/29/14 IEP were removed from his 3/31/15 IEP without explanation or discussion with Parent.<sup>127</sup> Parent would not have agreed to removal of the accommodations, believing that Student needed all the help he could get.<sup>128</sup>

39. Student's 3/31/15 IEP stated that he could not be assessed on 3/16/15, 3/19/15, 3/23/15 and 3/24/15 due to his attendance and truancy issues, but Student was suspended on those days and not allowed in school.<sup>129</sup> Parent was not contacted by Public School saying that Student was needed for assessment but was absent.<sup>130</sup>

40. ESY was eliminated from Student's 3/31/15 IEP without explanation.<sup>131</sup> Student attended summer school during 2015 rather than ESY.<sup>132</sup>

41. DCPS conducted an LRE Classroom Observation of Student on 11/12/15, "due to the number of behavioral infractions and suspensions that he has received in the 2015/2016 school year," noting that "he is a safety concern to himself and staff" at Public School and his "behaviors are becoming increasingly oppositional and violent with each incident/behavioral infraction."<sup>133</sup>

42. Nonpublic School. DCPS's LRE report concluded with an advisory recommendation that based on Student's "numerous" BES classroom placements, documents reviewed, and school staff interviews, Student "may require a more restrictive education setting where his behavioral and academic needs can be more appropriately addressed."<sup>134</sup>

43. Nonpublic School reviewed Student's IEP, academic assessments and disability and has accepted Student and has space available for him.<sup>135</sup> Student toured Nonpublic School and liked it.<sup>136</sup>

44. Nonpublic School is a therapeutic special education day school that focuses on children with ED and OHI (among other disabilities) and contains a vocational component that Parent and her advocates believe is very important for Student at this point.<sup>137</sup> Nonpublic School covers the grades Student needs now and in coming years and provides

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<sup>127</sup> P35-10; P39-10.

<sup>128</sup> Parent.

<sup>129</sup> Parent; P39-3 (IEP); P42-4 (suspension was for 5 days, according to Parent).

<sup>130</sup> Parent.

<sup>131</sup> P39-11; Parent.

<sup>132</sup> Parent.

<sup>133</sup> P49-1.

<sup>134</sup> P49-6.

<sup>135</sup> P3-1; Nonpublic SEC.

<sup>136</sup> Parent.

<sup>137</sup> Nonpublic SEC; P55-1,3,9; P56-6; P2-243; Parent.

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courses aligned with DCPS.<sup>138</sup> Nonpublic School has 32 enrolled students, with a maximum of 7 children in each class.<sup>139</sup> Nonpublic School is on OSSE's list of approved nonpublic day schools and its rates are approved by OSSE.<sup>140</sup>

45. All staff at Nonpublic School are trained in how to make successful interventions when confronted with difficult behavior from students; Nonpublic School has a psychologist, behavior technicians, a behavior coordinator, a social worker, and dedicated aides on staff, as well as a quiet room.<sup>141</sup>

46. Nonpublic School does not permit students to roam the hallways and always maintains "eyes on" each student; if a student bolts from a classroom the teacher lets a behavior technician in the hallway know by walkie-talkie, who can work to de-escalate the situation.<sup>142</sup> Parent observed that there were no children in the hallways during class periods.<sup>143</sup> With a small student population, each student is known by staff, called by name and assisted appropriately.<sup>144</sup>

47. Nonpublic School does encourage credit recovery to permit Student to make up lost classes.<sup>145</sup> An outside credit recovery provider could come to assist Student at Nonpublic School.<sup>146</sup> Nonpublic School is a year-round school, so Student could not participate in ESY.<sup>147</sup>

48. Compensatory Education. Student is repeating Grade and failing all his classes the second time through.<sup>148</sup> Academically, he is many years behind in reading, written expression and math.<sup>149</sup> Credit recovery of up to 6 credits spread out over time would permit Student to make up for shortcomings in his special education services.<sup>150</sup> Student needs credit recovery in order to make up for lost time; tutoring is not enough to help him catch up.<sup>151</sup>

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<sup>138</sup> Nonpublic SEC.

<sup>139</sup> *Id.*

<sup>140</sup> Nonpublic SEC; P56-6.

<sup>141</sup> Nonpublic SEC.

<sup>142</sup> *Id.*

<sup>143</sup> Parent.

<sup>144</sup> Nonpublic SEC.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> P7-2; Parent; P1-2.

<sup>149</sup> Educational Advocate.

<sup>150</sup> Educational Advocate; P1-1.

<sup>151</sup> Comp Ed President.

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49. Credit recovery and mentoring services, among other things, are available through Comp Ed Provider.<sup>152</sup> Comp Ed Provider works with an online accredited vendor which is approved by DCPS, while providing a special education teacher in person on-site.<sup>153</sup> The cost for the online class is \$375-\$400 per 1/2 credit, plus the in-person learning coach who Comp Ed Provider recommends be used 50-75 hours per 1/2 credit.<sup>154</sup> For tutoring and mentoring, Comp Ed Provider accepts the DCPS rates of \$55 per hour.<sup>155</sup> Tutoring sessions may be 1-2 hours after school and 5-6 hours a day when school is not in session.<sup>156</sup> More tutoring may be needed initially, but may be tapered off over time, so that 300 hours of tutoring for 6 credit hours may be sufficient.<sup>157</sup> All billing is done after services are provided, so if Student does not progress through the credit recovery courses or use all hours provided, DCPS will not be billed for them.<sup>158</sup>

50. Mentoring is needed to make up the harm Student has suffered, including missing BSS, and is important to bring everything together.<sup>159</sup> A mentor from Comp Ed Provider can help Student overcome his bad experiences in school, get him more engaged in a new school, and work with Nonpublic School staff.<sup>160</sup> A mentor can also assist with credit recovery.<sup>161</sup> Mentoring needs to be sufficiently intense and cover a long enough period for Student to benefit, such as 200 hours over a year.<sup>162</sup> Mentoring can be helpful, as DCPS agrees, and can help teach Student how to be a man.<sup>163</sup>

51. Comp Ed Provider has a computer lab in Southwest, D.C., not far from a Metro station; some students are brought by bus.<sup>164</sup> Comp Ed Provider often has 8-10 students at a time working in its computer lab with 2-3 adults, including one special education educator.<sup>165</sup> Comp Ed Provider provides socio-emotional and behavioral support for students who have not been successful elsewhere.<sup>166</sup> Comp Ed Provider can also provide services at school and has provided services on-site for students at Nonpublic School.<sup>167</sup>

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<sup>152</sup> Comp Ed President; P54.

<sup>153</sup> Comp Ed President.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Educational Advocate; P1-3.

<sup>158</sup> Comp Ed President.

<sup>159</sup> Educational Advocate; P1-3.

<sup>160</sup> Educational Advocate; Comp Ed President.

<sup>161</sup> Comp Ed President.

<sup>162</sup> Educational Advocate; P1-3; Comp Ed President.

<sup>163</sup> Parent.

<sup>164</sup> Comp Ed President.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Comp Ed President; Educational Advocate.

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52. Student should take only 1 course at a time for credit recovery in order to meet the strict deadlines for completing each course within the allotted time.<sup>168</sup> Working around summer school or ESY, Student might earn up to 1-1/2 credits during a summer and 2 credits during a school year.<sup>169</sup> Students participating in credit recovery at Comp Ed Provider can qualify to receive payment through the Mayor's Youth Employment Program.<sup>170</sup>

53. A student's motivation is critical to achieving success in credit recovery.<sup>171</sup> Student expressed interest in obtaining additional academic assistance in reading and spelling in his most recent IEP.<sup>172</sup> Student is motivated because he was upset at having to repeat Grade.<sup>173</sup> Parent believes Student can succeed with credit recovery.<sup>174</sup>

### Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, 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); *Sch. Comm. of Town of Burlington, Mass. v. Dep't 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); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

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<sup>168</sup> Comp Ed President.

<sup>169</sup> *Id.*

<sup>170</sup> Comp Ed President; Educational Advocate.

<sup>171</sup> Comp Ed President.

<sup>172</sup> P39-12.

<sup>173</sup> Parent; Educational Advocate.

<sup>174</sup> Parent.

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The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. 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 IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] 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).

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3. The burden of proof is normally on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). Under District of Columbia regulations, in reviewing a decision with respect to a manifestation determination, the Hearing Officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of his disability. See 5-B D.C.M.R. § 2510.16.

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement from October 2014 to present, when Student needed a more restrictive placement than a Behavior Education Support program.*

**Issue 3:** *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student in October 2014 because placement was not specified and should have required a separate day school.*

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Petitioner has met her burden of proving a denial of FAPE on Issues 1 and 3,<sup>175</sup> which assert that as of October 2014, when Student was transferred to a third BES program at Public School, DCPS should have given him a more restrictive placement. As discussed below, this Hearing Officer concludes that simply moving Student from location to location into new BES programs without any better plan for addressing Student's needs and achieving a better result was not sufficient. While Student has had a "full-time" IEP for many years, with 26.5 or 27.5 hour per week out of general education, the issue is whether his IEP was sufficient to enable him to advance appropriately toward attaining his annual goals pursuant to 34 C.F.R. 300.320(4) or whether his IEP needed to be modified to be more restrictive.

To determine whether a FAPE has been provided through an IEP, a hearing officer must determine, "First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures 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." *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Here, Petitioner has not alleged that DCPS failed to comply with the IDEA's administrative procedures on Issues 1 and 3, so the analysis begins with the second part of the inquiry, where the measure and adequacy of the IEPs are determined as of the time they were offered to Student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

The suitability Student's IEP and the adequacy of his ongoing placement in a BES program in an attempt to enable him to receive educational benefits is analyzed by considering his (i) behavior, (ii) academic performance, and (iii) 2013 Psychiatric Evaluation.

First, Student has had behavioral problems as long as he has been in school, and his problems have only worsened over time. In his 5/13/14 IEP, one of Student's behavioral goals was to respond appropriately to authority figures and to receive no more than one behavioral infraction per week, but his baseline indicated that Student had frequent incidents of verbal aggression, behavioral infractions for making threats, and defiant behaviors, such as walking out of class, running the hallways, and going into other classrooms without permission. Not long after that that IEP was finalized, Student was suspended from his BES program in Prior Public School B for the rest of 2013/14. Student was transferred to another BES program in Prior Public School A for 2014/15, where he remained only about 2 months before receiving a safety transfer to the BES program at Public School. DCPS had clear

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<sup>175</sup> Issues 1 and 3 are considered together, for a "student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP." *S.S. by & through St. v. Dist. of Columbia*, 68 F. Supp. 3d 1, 18 (D.D.C. 2014), *citing Roark*, 460 F. Supp. 2d at 44.

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notice that the BES program was not working for Student when he was transferred to his third BES program at Public School in October 2014.

Second, when considering Student's academic situation in October 2014, he had not yet failed Grade in 2014/15 and then failed all the classes he has taken the second time through in 2015/16. However, as of October 2014 he was not doing well and making little, if any, progress. His 5/13/14 IEP stated that he was 3 grade levels behind in math, 4.5 grade levels behind in reading, and 5.5 grade levels behind in written expression.

Third, as early as May 2013, Student's Psychological Evaluation noted the problem of Student wandering the halls at school and noted that Student would benefit from a smaller-sized placement and greater supervision by staff. The Evaluation also stated that a therapeutic placement would be most appropriate as well as small classes to be able to receive a great deal of individualized attention.

Thus, this Hearing Officer concludes that based on Student's Evaluation, his lack of academic progress and 2 unsuccessful BES programs at Prior Public School B and Prior Public School A, by the time DCPS was making a safety transfer to a third BES program at Public School, it was a denial of FAPE for DCPS not to give Student a more restrictive placement where he could receive educational benefits. The remedy looking forward is discussed next, while the remedy for the past is an appropriate award of compensatory education, which is discussed following the analysis of all issues.

If an "appropriate" public school program is available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," DCPS need not consider nonpublic placement, even though a nonpublic school might be more appropriate or better able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (*citing Rowley*, 458 U.S. at 207). However, if no suitable public school is available to fulfill Student's IEP needs, DCPS must pay the costs of sending him to an appropriate nonpublic school. DCPS apparently does not itself have any more restrictive setting to offer Student than its BES programs, and satisfies the IDEA requirement of providing a continuum of alternative placements, including "special schools," by relying on nonpublic schools. *See* 34 C.F.R. 300.115.<sup>176</sup> A nonpublic school placement is proper under the IDEA if the education provided there is reasonably calculated to enable Student to receive educational

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<sup>176</sup> 34 C.F.R. 300.115 provides:

Continuum of Alternative Placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) . . . .

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benefits. *Wirta v. Dist. of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994). *See also, e.g., N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008).

An award of nonpublic school placement is “prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA.” *Branham v. Dist. of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (citations omitted). Placement awards must be tailored to meet the child’s specific needs. *Id.* To inform this individualized assessment, courts have identified a set of relevant considerations to determine 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 nonpublic school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Each of these considerations is addressed below.

(a) Nature and Severity of Student’s Disability: The evidence unambiguously establishes that Student suffers multiple disabilities, with both ED and OHI. DCPS does not dispute the seriousness of Student’s disabilities.

(b) Student’s Specialized Educational Needs: The evidence is that Student needs a full-time therapeutic special education program in a smaller-sized placement, along with small classes and greater supervision by staff, which DCPS cannot provide at Public School.

(c) Link Between Student’s Needs and the Services Offered by Nonpublic School: It is clear from Student’s visit to Nonpublic School that it can work with his disabilities and is likely to be a good fit for him. Nonpublic School is very small overall, preventing students from wander the halls and getting in trouble. In addition, Public School can assist with credit recovery and has vocational options that are desirable for Student.

(d) Cost of Placement at Nonpublic School: Nonpublic School is on OSSE’s list of approved nonpublic day schools and its rates are approved by OSSE. DCPS did not question Nonpublic School’s rates and offered no evidence that the cost of placement at Nonpublic School would be higher than at other local nonpublic schools serving students with similar disabilities.

(e) Least Restrictive Environment: While Student has behavioral challenges in all situations, he often is out of control and has serious behavioral incidents when interacting with general education peers in the hallways, cafeteria and ISS room of his large public school. Shifting to a full-time Nonpublic School should help his behavioral issues and allow him to focus on achieving his IEP goals. A placement such as Nonpublic School, where Student has interaction with students like himself, but no interaction with nondisabled peers, is the least restrictive environment for Student at this time. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) (“[i]n determining the least restrictive environment, consideration is given to the types of services that the child requires,” *citing* 34 C.F.R. 300.552(d)); *N.T. v. Dist. of Columbia*, 839 F. Supp. 2d 29, 35 n.3 (D.D.C. 2012) (Hearing Officer could consider whether nonpublic school was the least restrictive environment in evaluating whether nonpublic placement was the proper remedy).

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Considering all of the above factors, it is the conclusion of this Hearing Officer that Nonpublic School is a proper and appropriate placement for Student.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on 5/13/14 when there was a reduction in Behavior Support Services from 360 to 120 minutes per month, although Student's behavior was as bad as or worse than before.*

Petitioner has met her burden of proving a denial of FAPE on the issue of whether Student's 5/13/14 IEP was sufficient to enable him to advance toward attaining his annual goals pursuant to 34 C.F.R. 300.320(4) when DCPS reduced his BSS from 360 to 120 minutes per month. Applying the test from Issues 1 and 3 above to analyze whether the 5/13/14 IEP was reasonably calculated to enable Student to receive educational benefits, *A.M.*, 933 F. Supp. 2d at 204, it is clear that Student was in great need of behavioral support and that his frequent incidents seriously impeded his education.

Student's BSS increased in his 6/13/13 IEP to 360 minutes per month, up from 240 minutes in 2011/12. However, on 10/12/13, a DCPS Student Service Alignment Plan concluded that Student's needs could be met with less BSS, even though the document also noted that Student had regressed in behavioral development. Student's BSS was then dropped to 120 minutes per month in his 5/13/14 IEP without further explanation. DCPS did not discuss the reduction in BSS with Parent, who would have opposed the change since Student was continuing to have serious behavioral problems. After a year at the lower level, Student's 6/1/15 FBA noted that he would benefit from behavioral supportive services in an academic setting.

This Hearing Officer concludes that this evidence is sufficient to find that Petitioner met her burden of proof; DCPS presented no countervailing evidence in support of the lower level of BSS at the due process hearing. This is a violation of IDEA and denial of FAPE as it impacted Student's ability to receive educational benefit pursuant to 34 C.F.R. 300.513(a)(iii). Thus, this violation will contribute to the award of compensatory education below.

**Issue 4:** *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student in March 2015 because (a) placement was not specified and should have required a separate day school; (b) it contained outdated information; (c) it reduced specialized instruction outside general education; (d) it failed to provide adequate Behavioral Support Services; (e) it removed most accommodations without data to support removal; and (f) it failed to provide for Extended School Year, which was previously provided.*

Petitioner has met her burden of proving a denial of FAPE on a portion of these remaining IEP issues, for which the relevant standard is, as stated above, whether Student's 3/31/15 IEP was sufficient to enable him to advance toward attaining his annual goals pursuant to 34 C.F.R. 300.320(4) and was reasonably calculated to enable Student to receive educational benefits, *A.M.*, 933 F. Supp. 2d at 204.

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(a) Considering the 3/31/15 IEP based on the situation at that time, it is the view of this Hearing Officer that Student should have had a more restrictive placement by October 2014, as fully discussed in Issues 1 and 3 above. However, this was fully remedied above and double recovery is not permitted.

(b) Student's 3/31/15 IEP does contain much outdated information, in violation of 34 C.F.R. 300.320(a)(1), with repetition of language from Student's previous IEPs. The 3/31/15 IEP stated that Student could not be assessed on 3/16/15, 3/19/15, 3/23/15 and 3/24/15 due to his attendance and truancy issues, but in fact Student was suspended on those days and not allowed to attend school. Nor was Parent contacted by Public School saying that Student was needed for assessment but was absent. Certainly Public School could have begun assessing Student sooner than 2 weeks before his IEP was to be updated, or having failed to reassess him, could still have included updated information from his teachers and those who worked with him. While this is a procedural violation of 300.320(a)(1), a proper IEP is vital under the IDEA and this Hearing Officer concludes that this violation is a denial of FAPE pursuant to 300.513(a)(ii) by impeding Parent's ability to participate in decision-making relating to the IEP and provision of FAPE to Student. Thus, Student's IEP team shall include updated present levels of performance, baselines, needs and goals as ordered below. In addition, this violation will contribute to the award of compensatory education below.

(c) The specialized instruction hours outside general education were reduced from 27.5 to 26.5 per week in the 3/31/15 IEP, but Petitioner did not carry her burden of showing that there was any change or impact on Student at all, much less a denial of FAPE, in the view of this Hearing Officer. Student's earlier full-time IEPs were also inconsistent, with some showing 27.5 and others 26.5.

(d) Based on all the evidence in this case, it is the view of this Hearing Officer that Student needed BSS as much – or more – in 2015 as he did in 2014, as discussed in Issue 2 above relating to the reduction in his 5/13/14 IEP, where the issue was remedied; double recovery is not permitted.

(e) Most of the accommodations listed for Student in his 10/29/14 IEP were removed from his 3/31/15 IEP without explanation or discussion with Parent. Parent would not have agreed to removal of the accommodations, believing that Student needed all the help he could get. While Parent may well be correct, there was not proof sufficient to convince this Hearing Officer that the change in accommodations was a violation of 34 C.F.R. 300.320(6) or other provision of IDEA, nor that there was an impact on Student. Nonetheless, in the future, Student's IEP team should carefully consider all accommodations needed by Student.

(f) Finally, ESY was eliminated from Student's 3/31/15 IEP without explanation, and as a result Student attended summer school during 2015 rather than ESY. This Hearing Officer concludes, based on the evidence, that Student needed ESY pursuant to 34 C.F.R. 300.320(4). But Petitioner failed to demonstrate that there was any educational impact on Student from being in summer school rather than ESY, so this Hearing Officer concludes

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that there was no denial of FAPE due to the loss of ESY in 2015. Further, Nonpublic School is a year-round school so ESY is not needed in Student's new IEP.

**Issue 5:** *Whether DCPS denied Student a FAPE in Manifestation Determination Review meetings on (a) 6/3/14 by making an incorrect MDR determination, failing to review and revise Student's Behavioral Intervention Plan, and failing to provide an interim alternative placement; (b) 10/23/15 by failing to review and revise Student's BIP, and failing to provide educational services between the suspension on 10/14/15 and the 10/23/15 meeting; and (c) 11/6/15 by making an incorrect MDR determination, failing to review and revise Student's BIP, failing to provide services between the suspension on 10/28/15 and 11/5/15 and thereafter, and failing to provide an appropriate interim alternative placement.*

Importantly, the burden of proof is on DCPS on the manifestation issues, as noted above, so the Hearing Officer must determine whether DCPS has demonstrated that the child's behaviors were **not** a manifestation of his disabilities. *See* 5-B D.C.M.R. § 2510.16. For the reasons discussed below, DCPS has not carried its burden that Student's behaviors, which were considered at the 6/3/14 and 11/5/15 MDR meetings were not a manifestation of his disabilities. Petitioner has carried her burden on tangential issues related to the MDR process, as discussed below.

The IDEA requires that, within 10 school days of any decision to change the placement of a child with a disability for a violation of a code of student conduct, an MDR must be conducted. 34 C.F.R. 300.530(e)(1). To conduct the MDR, DCPS, the parent, and relevant members of the child's IEP team must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent to determine (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of DCPS's failure to implement the IEP. 34 C.F.R. 300.530(e)(1).

If the behavior **was** a manifestation of the child's disability, the child's BIP (if already developed, as here) must be reviewed and modified as necessary to address the behavior, pursuant to 34 C.F.R. 300.530(f)(1)(ii), and the child must be returned to his placement, pursuant to 34 C.F.R. 300.530(f)(2), unless certain exceptions are met which are not applicable here.

On the other hand, if the behavior was **not** a manifestation of the child's disability, DCPS may apply normal disciplinary procedures for up to 10 days, 34 C.F.R. 300.530(c), after which time the child must continue to receive educational services, and an FBA and BIP as appropriate to address the behavior violation, 34 C.F.R. 300.530(d)(1). These educational services may be provided in an interim alternative educational setting. 34 C.F.R. 300.530(d)(2).

(a) Turning first to the 6/3/14 MDR process, DCPS presented no evidence at the due process hearing that Student's behavior was not a manifestation of his disabilities, so failed to meet its burden of proof on this manifestation determination. This Hearing Officer

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concludes that this is a FAPE violation, as DCPS's finding of no manifestation resulted in Student not receiving instruction for the remainder of 2014/15, which was a deprivation of educational benefit pursuant to 34 C.F.R. 300.513(a)(iii). Accordingly, DCPS will be ordered to reverse its 6/3/14 MDR determination and issue documentation indicating that Student's behavior on 5/28/14 was a manifestation of Student's disabilities and correct Student's educational records. Beyond that, DCPS's failure to review and update Student's BIP pursuant to 34 C.F.R. 300.530(f)(1)(ii), and to return Student to his placement pursuant to 34 C.F.R. 300.530(f)(2), will contribute to the award of compensatory education below.

(b) Turning next to the 10/23/15 MDR meeting, the team did find that the incidents under review were a manifestation of Student's disabilities, but DCPS failed to carry the process through to conclusion by reviewing and, if needed, revising Student's BIP on the grounds that it had just been developed on 10/7/15. However, the serious incident on 10/14/15 during which Student threw a desk at a peer had not yet occurred when the BIP was developed and needed to be taken into account in the BIP. Moreover, 34 C.F.R. 300.530(f)(1)(ii) contains no exception for recently-developed BIPs. This is more than a technical procedural violation, as focusing on Student's BIP might have resulted in tweaks that would have made a difference in the very serious 10/28/15 incident just a few days later. *See Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011) (BIP/FBA essential because "the quality of a child's education is inextricably linked to that child's behavior"). This Hearing Officer concludes that this is a substantive violation pursuant to 34 C.F.R. 300.513(a)(i), as it impeded Student's right to a FAPE.

Further, Petitioner has demonstrated without contradiction that DCPS did not provide educational services for Student between the incident on 10/14/15 and the MDR meeting on 10/23/15, which amounted to 6 school days. Pursuant to 34 C.F.R. 300.530(b)(2), after 10 days of removal in 2015/16, DCPS must provide services during any other days of removal. The 9/17/15 incident resulted in a 5-day suspension, which apparently was Student's first off-site removal for the year. Thus, DCPS did not need to provide services for the first 5 days after the 10/14/15 incident, but was required to provide services for the 6<sup>th</sup> day, as these removals did constitute a pattern pursuant to 34 C.F.R. 300.536(a)(2). Not receiving instruction on the 6<sup>th</sup> day is a deprivation of educational benefit pursuant to 34 C.F.R. 300.513(a)(iii). Accordingly, DCPS's failure to review and update Student's BIP pursuant to 34 C.F.R. 300.530(f)(1)(ii) and to provide 1 day of educational services will contribute to the award of compensatory education below.

(c) Much of the advocacy in this case has focused on whether the very serious 10/28/15 incident was a manifestation of Student's disabilities. For the reasons discussed below, this Hearing Officer concludes that DCPS made an incorrect MDR determination at the 11/5/15 MDR meeting, as Student's inappropriate behaviors on 10/28/15, ugly as they were, are very sort of problems that are described by Student's FBA, BIP and IEP and had a direct and substantial relationship to his Emotional Disturbance, as well as being the direct result of a failure to implement Student's IEP/BIP.

Student's most recent 6/1/15 FBA (P32) lists the following problems, which Student experiences on a daily basis in all situations: "difficulty with controlling and managing

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emotions”; “anger and frustration with others”; “lashing out verbally”; “demonstration of defiant behaviors”; “lack of respect towards peers and adults”; “frequently argues with adults and peers”; “often loses temper”; “disregard[s] directives from adults”; “very angry and physically aggressive”; and “defiant when an authority figure attempts to redirect him.” Student’s Ohio Youth Scale, incorporated in his 3/31/15 IEP, found that Student may “face challenges with self-control, arguing with others, judgment, mood regulation and adhering to authority and rules.” Student’s 10/7/15 BIP emphasizes avoiding “power struggles as they reinforce aggressive and angry behavior.”

The undersigned found Dean to be credible on the facts of the 10/28/15 incident, but concludes that the incident was a manifestation of Student’s disabilities based on Dean’s explanation, along with other corroborating evidence. As Dean described the stages of the incident, Student first refused to be redirected away from the cafeteria, then spewed anger and verbal abuse at Dean before becoming physically aggressive and being physically removed. As Dean explained, Student was not controlling himself, was experiencing anger and frustration, lashing out, demonstrating defiant behavior, becoming very angry and physically aggressive, and was very defiant when an authority figure tried to redirect him.

This Hearing Officer’s conclusion that Student’s behavior had a direct and substantial relationship to his Emotional Disturbance is bolstered by the explanation of the U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS) of the intent of the manifestation provisions in its 2006 guidance to the IDEA regulations. OSERS notes that the conduct in question must be caused by or have a direct and substantial relationship to the child’s disability, rather than “an attenuated association, such as low self-esteem.” Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46720 (August 14, 2006) (*quoting* Conf. Rpt., p. 225). Here, there can be no doubt that much more than self-esteem was involved.

Based on Dean’s facts and confirmed by the OAH decision, this Hearing Officer also finds that Student’s unfortunate behaviors were the direct result of Student’s BIP not being adequately implemented, specifically by not avoiding power struggles with Student, which were known to reinforce his aggressive and angry behavior. Thus, when Dean moved to physically block the cafeteria door with his body and pointed his finger, Student pushed past him. Student taunted Dean as he went into the cafeteria, saying that he could not be suspended as he is a special ed student; according to the binding OAH findings, Dean then “replied to [Student] that your information is not accurate and I will deal with you later.” Regardless of how calmly delivered, that response from Dean apparently impacted Student, who believed he was trying to be of assistance to a teacher in going to the cafeteria in the first place.

In the next stage of the incident on the second floor a few minutes later, Student unfortunately reengaged by going to the door of his classroom and saying venomous and taunting things to Dean who was nearby. Dean then escalated the power struggle by going to the door of Student’s classroom, leaning in and asking Student’s teacher to document Student’s offensive statements. This Hearing Officer concludes that Dean’s confrontation and power struggle with Student was a failure to implement his IEP/BIP and that Student’s

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conduct was the direct result of that failure, in addition to having a direct and substantial relationship with Student's disabilities.

DCPS's finding of no manifestation was a denial of FAPE as it resulted in Student not returning to his placement (or to an agreed upon change of placement) and not receiving adequate services from 11/5/15 to the due process hearing, which is a deprivation of educational benefit pursuant to 34 C.F.R. 300.513(a)(iii). In addition, DCPS failed to provide adequate educational services to Student between 10/28/15 and the MDR hearing on 11/5/15. As noted in (b) above, pursuant to 34 C.F.R. 300.530(b)(2), after 10 days of removal in 2015/16, DCPS must provide services during any other days of removal. By the 10/28/15 incident, Student had been removed 5 days for the 9/17/15 incident and 6 days for the 10/14/15 incident, so educational services were required from 10/28/15 on.

Much advocacy was directed to the issue of whether Student should have gone to Alternative Placement. DCPS unilaterally directed Parent on 11/3/15 to take Student to Alternative Placement on 11/4/15, and again directed her on 11/19/15 to take Student to Alternative Placement on 11/20/15. However, contacts by Parent or her advocates with Alternative Placement resulted in clear responses that Alternative Placement was not prepared to admit Student as his paperwork was not yet in place. Educational Advocate went to Alternative Placement in person on 12/3/15 and met with the Alternative Placement principal, but was told it was premature for Student to attend Alternative Placement. Counsel for Parent inquired with the principal about the status of Alternative Placement on 12/15/15, but never heard back. At no time did Alternative Placement ever indicate that Student would be permitted to attend. In addition, Petitioner's advocates raised legitimate – and unanswered – questions about how Alternative Placement could implement Student's full-time IEP in a therapeutic setting, as they were familiar with Alternative Placement; among other things, the school only had two special education teachers to cover 6 grades. Notwithstanding these concerns, Parent credibly testified that she would have sent Student to Alternative Placement if he had been permitted to attend, preferring some education over none.

There was no discussion at the 11/5/15 MDR meeting about an alternative interim placements for Student after DCPS determined that the incident was not a manifestation. Instead, DCPS on 11/19/15 unilaterally directed Student to attend Alternative Placement despite the clear requirement of 34 C.F.R. 300.530(d)(5) that the IEP team should determine appropriate services. This was a violation, even if DCPS was correct in its manifestation determination. However, with the reversal of DCPS's MDR decision and the 10/28/15 incident being a manifestation of Student's disabilities, he should have been returned to his placement after the MDR meeting on 11/5/15, or to an agreed upon change of placement, with no need to consider Alternative Placement.

Similarly, DCPS permitted Student to return to Public School from 11/5/15 to 11/18/15 but did not properly implement his IEP, as he simply returned to the ISS room where he sometimes played on the computer with behavior technicians, sometimes was given worksheets, and other times was with the special education coordinator. But based on the 10/28/15 incident being a manifestation of Student's disabilities, he should have been

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returned to his placement, or to an agreed upon change of placement, after the MDR meeting on 11/5/15.

Based on all of the above, DCPS is ordered below to reverse its 11/5/15 MDR determination and issue documentation indicating that Student's behavior on 10/28/15 was a manifestation of Student's disabilities, and correct Student's educational records accordingly. Beyond that, DCPS's failure (i) to review and update Student's BIP at the MDR meeting pursuant to 34 C.F.R. 300.530(f)(1)(ii), (ii) to provide educational services for Student from the incident until the MDR meeting, and (iii) to return Student to his placement, or to an agreed upon change of placement, after the MDR Meeting pursuant to 34 C.F.R. 300.530(f)(2) will contribute significantly to the award of compensatory education below.

**Issue 6:** *Whether DCPS denied Student a FAPE by failing to implement his IEP since October 2015 as (a) his BIP was not being implemented; and (b) Student was not receiving direct instruction from 11/5/15 through 11/19/15, and no instruction from 11/20/15 on.*

Petitioner next asserts that DCPS failed to adequately implement Student's IEP, including his BIP. As discussed in Issue 5 relating to the MDR, above, Public School did not adequately implement Student's BIP, which might have prevented the worst of the 10/28/15 incident.

Petitioner further asserts that DCPS did not adequately implement Student's IEP by failing to provide appropriate instruction during specified times since the 10/28/15 incident. Specifically, the claim is that (i) DCPS did not provide direct educational instruction from 11/5/15 through 11/19/15 when Student was at Public School, but required to be in the ISS room with a behavior technician or with the special education coordinator, rather than receiving instruction from a special education teacher, and (ii) DCPS did not provide any instruction after 11/19/15 when Student was told by DCPS to go to Alternative Placement, which would be a violation of 34 C.F.R. 300.530(d)(1)(i) had DCPS been correct about the 10/28/15 incident not being a manifestation of Students disabilities.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "*de minimis* failure to implement all elements of [the student's] IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007).

Courts are clear that it is "the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). While it is not possible to make mathematical comparison on the failure to implement Student's BIP, the

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intensity of the 10/28/15 incident shows how important implementation of the BIP is and how serious the risks when it is not implemented.

As for the failure to provide educational instruction, the proportion of services was certainly material, as Student was getting no services after 11/19/15 and no direct services from special education teachers in the earlier period.

However, both the failure to implement Student's BIP and the lack of instruction following the MDR meeting are remedied in Issue 5 above, so no additional remedy is awarded based on an additional claim covering the same harms.

**Issue 7:** *Whether DCPS denied Student a FAPE by failing to permit his educational advocate to conduct an observation of Student in his interim alternative setting on 11/17/15, even though Parent signed a consent form and no other documentation was requested by school.*

The law is now clear in the District of Columbia that parents and their designees have the right to observe students in their educational settings. D.C. Code §38-2571.03<sup>177</sup>; 34 C.F.R. 300.121. In this case, Parent's Educational Advocate diligently sought to arrange to observe Student, to no avail. Educational Advocate even provided a signed parental consent form when Public School failed to provide the form, but was still rejected when she went to school to observe Student. Educational Advocate asked in advance and at school whether any other forms were needed, but Public School did not ever specify what was needed or provide any forms.

This Hearing Officer concludes that Petitioner has proved that DCPS improperly prevented her designee from observing Student's educational program as permitted by

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<sup>177</sup> D.C. Code § 38-2571.03, which took effect on 3/10/15, provides:

(5)(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational program:

(i) The parent of a child with a disability; or

(ii) A designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

This right of observation by Parent or designee is tantamount to a regulation clarifying what is required to provide Parent the right to participate meaningfully in determining Student's IEP or placement. *See Cano-Angeles v. Puerto Rico (Dept. of Educ.)*, 2015 WL 6133130, at \*4 (D.P.R. Oct. 14, 2015) ("hearing officers [are to] consider both state and federal law to ensure that the [IDEA] is properly being implemented").

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statute. While not being able to observe Student in his school setting is a procedural violation, in this case it significantly impeded Parent's ability to participate in decision-making relating to a proper interim alternative placement for Student and thus was a denial of FAPE pursuant to 34 C.F.R. 300.513(a)(2)(ii). Observation of Student in his school setting conceivably could have revealed that the situation was not as bad as Petitioner believed and might have eased the conflict and scope of litigation. On the other hand, observation might have helped Petitioner articulate her concerns to DCPS to more readily obtain a suitable placement both for the interim period and long term. Thus, this violation will contribute to the award of compensatory education below.

### Compensatory Education Request

Petitioner seeks an award of compensatory education to compensate for the denials of FAPE discussed above. The IDEA gives Hearing Officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir.2005). The proper amount of compensatory education, if any, depends on how much more progress a student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he would have occupied but for DCPS's violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid*, 401 F.3d 516.

The challenge of determining what additional educational benefits would have accrued, if DCPS had provided all the special education and related services appropriate for Student does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *See Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Educational Advocate, who prepared the Compensatory Education Plan and testified as an expert for Petitioner, suggested in the Plan and testified that if Student had received an appropriate IEP and educational supports he would not have failed Grade and be in danger of failing Grade for the second time, among other harms. In order to recoup the loss of services and harm, in addition to full-time out of general education placement in a separate therapeutic day school, Educational Advocate proposed 6 credit hours of credit recovery at Comp Ed Provider; an average of 50 hours of tutoring per credit hour (totaling 300 hours of tutoring) from Comp Ed Provider; 200 hours of mentoring from Comp Ed Provider; and transportation to Comp Ed Provider. During the due process hearing, persuasive testimony was offered that Student should not attempt credit recovery for more than 1 class at a time and that it may take years to complete an appropriate number of credits. It was also clear in the testimony that Nonpublic School and Comp Ed Provider could work cooperatively to assist Student.

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Considering the equities in an exercise of broad discretion, this Hearing Officer concludes that it is appropriate for DCPS to fund the following 3 categories as compensatory education for (i) an insufficiently restrictive placement from October 2014, (ii) failure to provide an appropriate level of BSS from 5/13/14, (iii) failure to provide an appropriate IEP on 3/31/15, (iv) an incorrect MDR determination on 6/3/14 and failure to return Student to his placement, (v) failure to review and update Student's BIP at the 10/23/15 MDR meeting and provide a day of educational services, (vi) an incorrect MDR determination on 11/5/15, failure to review and update Student's BIP, failure to provide educational services before the MDR meeting and failure to return Student to his placement (or an agreed upon change of placement) after the MDR meeting, and (vii) failure to allow Student to be observed at Public School. DCPS is ordered below to fund:

1. Credit recovery for up to 6 credits through Comp Ed Provider, at a cost of no more than \$400 per 1/2-credit for the online courses, along with up to 300 hours of tutoring from Comp Ed Provider to support credit recovery, no more than 50 hours of which will be used for any 1/2-credit class (with less tutoring being used over time to stay within the limit). All credit recovery is to be completed no later than the end of 2018/19 (which is approximately 7 semesters). Credit recovery will be deemed to have lapsed, with no further payments required from DCPS, if no credit is earned by Student within any 1 year period, with the first year measured from the date of this HOD. Among other things, credit recovery is intended to make up for a year and a half of classes which Student did not pass and did not receive credit for.

2. A total of 150 hours of mentoring services for Student provided by Comp Ed Provider, to be allocated over time as determined by Parent in consultation with Comp Ed Provider and completed no later than the end of 2016/17. Mentoring is important to assist with Student's transition to Nonpublic School and make up the harm Student suffered from the denial of FAPE since October 2014, including missing BSS.

3. Transportation as needed for Student to get to Comp Ed Provider. Comp Ed Provider testified that it can provide services at Nonpublic School for Student and is encouraged to do so, although there may be times and circumstances in which it works best for Student to go to Comp Ed Provider.

### **ORDER**

Petitioner has met her burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS shall within 10 school days place Student at Nonpublic School and fund Student's tuition, related services, and transportation for the remainder of the 2015/16 school year.
- (2) DCPS shall convene an IEP team meeting within 15 school days to develop an appropriate IEP for Student to provide (a) a full time separate special education day school equipped to deal with ED and OHI, (b) Behavioral Support Services outside

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general education as needed in light of Student’s new placement, (c) restoration of accommodations removed from Student’s IEP in March 2015 to the extent needed in light of Student’s new placement, and (d) updated present levels of performance, baselines, needs and goals.

- (3) DCPS within 15 school days shall reverse its MDR determinations made on 6/3/14 and 11/5/15 and issue documentation indicating that Student’s behaviors on 5/28/14 and 10/28/15 were manifestations of Student’s disabilities and correct all of Student’s educational records accordingly.
- (4) Compensatory education for the denial of FAPE found herein shall consist of DCPS funding, and providing a letter of authorization within 10 school days, for:
  - a. Credit recovery of up to 6 credits through Comp Ed Provider, at a cost of no more than \$400 per 1/2-credit for the online courses, along with a total of up to 300 hours of tutoring from Comp Ed Provider to support credit recovery, of which no more than 50 hours will used for any 1/2-credit class. All credit recovery is to be completed no later than the end of the 2018/19 school year. Credit recovery will be deemed to have lapsed, with no further payments required from DCPS, if no credit is earned within any 1 year period.
  - b. Mentoring of Student through Comp Ed Provider for a total of 150 hours to be allocated as determined appropriate by Parent in consultation with Comp Ed Provider and completed no later than the end of the 2016/17 school year.
  - c. Transportation to Comp Ed Provider as needed.

Any and all other claims and requests for relief are **dismissed with prejudice**.

**IT IS SO ORDERED.**

Dated in Caption

*/s/ Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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

Copies to:

Counsel of Record (Appendix A, by email)

**Hearing Officer Determination**

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OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

Contact.resolution@dc.gov

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