

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

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

OSSE
Office of Dispute Resolution
July 28, 2016

<i>Student</i> , ¹)	Date Issued: 7/28/16
through her <i>Parent</i> ,)	
<i>Petitioner</i>)	Case No.: 2016-0150
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 7/13/16 & 7/14/16
("DCPS"),)	Hearing Location: ODR Room 2006
Respondent)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued 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 she was not provided appropriate Individualized Education Programs (“IEPs”), her educational placements were not appropriate and were unilaterally changed, and a Manifestation Determination Review (“MDR”) meeting reached an incorrect determination, among other issues. DCPS responded that Student’s IEPs were appropriate when developed and she was appropriately placed in a self-contained program, 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; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 6/8/16, the case was assigned to the undersigned on 6/9/16. Respondent filed an untimely response on 6/22/16 and did not

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

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challenge jurisdiction. The resolution session meeting was waived by the parties. Pursuant to 34 C.F.R. 300.532(c), the due process hearing on disciplinary matters must be completed within 20 school days from filing, which required the hearing to be completed by 7/14/16.² Based on the hearing dates and the requirement in 34 C.F.R. 300.532(c) that a determination must be made within 10 school days after the hearing, the Hearing Officer Determination (“HOD”) is due no later than 7/28/16.

The due process hearing took place on 7/13/16 and 7/14/16, and was closed to the public, although each side did have observers with leave of the undersigned. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present during virtually the entire hearing.

Petitioner’s Disclosures, submitted on 7/6/16, contained documents P1 through P56, which were admitted into evidence without objection.

Respondent’s Disclosures and Supplemental Disclosures, both submitted on 6/30/16, contained documents R1 through R59, which were admitted into evidence without objection.

Petitioner’s counsel presented 5 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Attorney*
2. *Director of Admissions at Nonpublic School* (“Director”)
3. *Founder of Compensatory Education Provider* (“Founder”)
4. Parent
5. *Educational Advocate* (qualified without objection as an expert in Special Education Programming and Placement for Students with Disabilities)

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see* Appendix A):

1. *Student Support Liaison*
2. *LEA Representative*

² While all issues in the due process complaint did not involve disciplinary matters, all issues were addressed on an expedited timeline in a single hearing at the time the non-expedited issues would have been heard in 2016-0121, an identical complaint which was refiled by Petitioner as 2016-0150 in order to streamline the proceeding with all issues heard at once.

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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 IEP on 2/5/15 where (a) the hours of specialized instruction were insufficient, (b) Student's educational placement was not set forth in the IEP, and (c) more than 120 minutes/month of behavioral support services ("BSS") outside general education were needed.

Issue 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement from 2/5/15 to the present.

Issue 3: Whether DCPS denied Student a FAPE by failing to base Behavior Intervention Plans ("BIPs") between 1/8/15 and December 2015 on a Functional Behavioral Assessment ("FBA") or any assessment, making the 2/5/15 and 1/8/16 IEPs inappropriate.

Issue 4: Whether DCPS denied Student a FAPE in the Manifestation Determination Review ("MDR") meeting on 1/8/16 by (a) making an incorrect MDR determination, and/or (b) failing to implement Student's IEP or to provide an interim alternative placement.

Issue 5: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 1/8/16 where (a) the hours of specialized instruction were insufficient, (b) Student's educational placement was not set forth in the IEP, and (c) more than 180 minutes/month of BSS outside general education were needed.

Issue 6: Whether DCPS denied Student a FAPE by unilaterally changing her placement by issuing a Prior Written Notice ("PWN") to the BES program on 2/29/16, when (a) Parent and the rest of the IEP team should have been involved, (b) the BES program could not implement her IEP and was inappropriate, and/or (c) the change was made as a form of compensatory education/missed services.

Issue 7: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 3/23/16, where (a) the hours of specialized instruction were insufficient and were based on providing compensatory education/missed services during the regular school day, (b) Student's educational placement was not set forth in the IEP and needed to be more restrictive, (c) more than 180 minutes/month of BSS outside general education were needed, (d) it was created to conform to a change in placement DCPS had already made, and (e) Parent was not involved in the determination of hours or placement.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Within 15 business days, DCPS shall fund tuition and transportation for Student at Nonpublic School.
3. Within 15 school days, DCPS shall convene an IEP meeting and revise Student's IEP to (a) provide specialized instruction of at least 31 hours/week outside general education, (b) provide 1 hour/week of behavioral support services outside general education, (c) revise the LRE section to require

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placement in a separate special education school for Students with academic challenges along with Emotional Disturbance and Attention Deficit Hyperactivity Disorder (“ADHD”). In the alternative, Student’s IEP shall be revised to align with the HOD issued in this case.

4. Within 15 business days, DCPS shall reverse its 1/8/16 MDR determination and revise all documentation in the SEDS database to indicate that Student’s behavior on 1/4/16 was a manifestation of her disability.
5. DCPS shall fund compensatory education for any denial of FAPE, from 1/8/15 to the present.³
6. Any other just and appropriate relief.

The parties were permitted to submit legal citations after the hearing, which neither party did.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student’s Parent.⁵ Student is *Age* and has completed *Grade* at Public School.⁶

2. Student is classified as having Multiple Disabilities (“MD”), with both Emotional Disturbance (“ED”) and Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”) with both distractibility and impulsivity.⁷ Student’s IEP

³ Petitioner’s counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was similarly encouraged to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ 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.

⁵ Parent.

⁶ *Id.*

⁷ Educational Advocate; P49-11.

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team agreed that she also had a Specific Learning Disability (“SLD”) as found in a 2/22/16 Psychological Reevaluation, but the DCPS portion of the IEP team declined to add it as a third disability.⁸

3. Student’s first comprehensive psychological evaluation, dated 10/23/10, found that her social-emotional and behavioral functioning are the areas of most prominent concern, as she is frequently involved in physical altercations with her peers and is unable to build and maintain satisfactory interpersonal relationships with peers and teachers and displays inappropriate types of behavior and feelings, thus meeting the criteria for Emotional Disturbance.⁹ Student’s cognitive functioning is Average to Low Average based on WISC results in 2012.¹⁰

4. Student was first determined to be eligible for special education and related services in 2011 at *Prior Public School*.¹¹ On her 5/22/12 IEP, Student received 5 hours/week of specialized instruction outside general education and 7.5 hour inside general education, along with 180 minutes/month of BSS (of which 30 minutes was consultation).¹² On her 3/27/13 IEP, 2/26/14 IEP and 3/20/14 Amended IEP, Student received 5 hours/week of specialized instruction outside general education and 7.5 hour inside general education, along with 150 minutes/month of BSS (of which 30 minutes was consultation).¹³

5. At Public School, Student’s IEP was modified on 2/5/15 to 10 hours/week of specialized instruction outside general education and 120 minutes/week of BSS.¹⁴ In her 1/8/16 IEP, Student received 10 hours/week of specialized instruction outside general education and an increase to 180 minutes/month of BSS.¹⁵ Student’s 3/23/16 IEP increased to 20 hours/week of specialized instruction outside general education, along with 180 minutes/month of BSS.¹⁶ Public School’s Special Education Coordinator stated without team discussion at the 3/23/16 IEP meeting that Student would get 20 hours/week out of general education, which is considered a fulltime program, and that she would be in the BES Program at Public School.¹⁷

6. Student’s 2/5/15, 1/8/16 and 3/23/16 IEPs provided the number of service hours and each stated that she “requires specialized instruction outside [the] general education setting

⁸ P1-83; Educational Advocate; P49-10.

⁹ P36-12.

¹⁰ P49-10; Educational Advocate.

¹¹ P49-1; R8-1.

¹² P11-1,8.

¹³ P12-1,23; P13-1,8; P14-1,8.

¹⁴ P15-12,19.

¹⁵ P16-1,10.

¹⁶ P17-22.

¹⁷ P1-84; Educational Advocate.

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to accommodate her reading, math and written expression deficits,” but provided no other information about Student’s placement.¹⁸

7. The gap between Student and her peers is increasing; Student is now 3-1/2 to 4 years behind, which causes her increasing frustration.¹⁹ A 2013 Woodcock-Johnson III found that Student’s percentile ranking of standard scores by age was 49% in broad reading, 42% in broad written language, and 27% in broad mathematics.²⁰ In 2016, a Woodcock-Johnson IV found Student’s percentile ranking of academic skills by age to be 16% in reading, 3% in written language, and 14% in mathematics.²¹

8. In the reporting periods prior to the 2/5/15 IEP, Student’s IEP Progress Reports indicated that she was generally progressing in all areas.²² In the reporting period prior to the 1/8/16 IEP, Student’s IEP Progress Reports indicated that she had no progress on a math goal, a written expression goal, and both emotional/social goals.²³ In the reporting period prior to the 3/23/16 IEP, Student’s IEP Progress Reports indicated that she had no progress in a reading goal and both written expression goals.²⁴

9. As of 2/5/15, Student had “improved so much” in school and was participating and asking questions.²⁵ Student was not having behavior or emotional issues and was no longer getting frustrated and shutting down; she was “doing well considering” and just needed a little more push to get more out of her.²⁶ Student was “responsible” and asked for help when needed; her IEP goals were appropriate.²⁷ Student was a “cooperative learner” who came to class prepared to learn and was able to answer questions during class and to ask questions as needed.²⁸ ESY was not needed because there had been no relapse and Student was making progress.²⁹ While often angry, Student only received in-school suspensions and was being taught positive ways of gaining attention.³⁰ On 10/23/14, Student had 1-on-1 psycho-social counseling in BSS and reported on ways in which she was able to

¹⁸ P15-20; P16-11; P17-23; Educational Advocate.

¹⁹ Educational Advocate.

²⁰ P41-1,3.

²¹ P49-5,6,7.

²² P35.

²³ P35-25,27,29.

²⁴ P35-31,32,33; Educational Advocate.

²⁵ P18-2.

²⁶ P18-3,4.

²⁷ P18-2.

²⁸ P19-2.

²⁹ P18-3.

³⁰ P18-1,2.

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successfully resolve conflict.³¹ Student was receiving 30 minutes/week of BSS and sometimes longer if needed.³²

10. Student's grades were not good in the first two terms of 2014/15,³³ but she had only 1 "F" and ended up passing all her courses in 2014/15.³⁴ Student had 10 absences during 2014/15, of which only 1 was unexcused.³⁵ Student's grades were poor in the first two terms of 2015/16, with 2 "Fs."³⁶ In 2015/16, Student had 39 absences (by 2/5/16), of which 24 were unexcused.³⁷ Student's behavior worsened in 2015/16, with milder punishments (removal from classroom, detention, in-school suspension) turning into short out-of-school suspensions and then into a 45-day long term suspension proposed in January 2016.³⁸ The call logs and incident reports only reflect a portion of Student's problems and the calls to Parent from Public School.³⁹ Even when there were not official suspensions, there were unofficial suspensions when Public School called Parent to come pick up Student.⁴⁰ Parent was concerned about Student's behavior problems and requested a meeting with DCPS on 10/6/15.⁴¹

11. Student's 10/28/15 suspension was her first involving bullying and resulted in a 5-day suspension.⁴² Student's 11/12/15 suspension was her second for bullying and came after just 4 days back in school following her previous suspension, making a total of 10 days out of school.⁴³ Student's third suspension was on 12/8/15.⁴⁴ An LRE Classroom Observation on 3/14/16 noted that Student had missed a number of school days due to suspensions and had been the perpetrator in bullying incidents, one of which involved an Intellectually Disabled student in a self-contained classroom; Student had frequent verbal altercations with peers and a few assaults on her peers; she frequently asked to leave class or walked out without permission.⁴⁵

³¹ P34-3.

³² P18-3.

³³ All dates in the format "2014/15" refer to school years.

³⁴ P3-3,4,7,8.

³⁵ P3-7.

³⁶ P4-5,6.

³⁷ P4-5.

³⁸ P10 (in 2015/16, Student disciplined on 9/22/15, 9/30/15, 10/14/15, 10/22/15, 10/26/15, 10/28/15 (off-site suspension), 11/12/15, 12/8/15 (off-site suspension), 1/6/16, 2/23/16 (sent home), 2/24/16 (off-site suspension), 3/17/16, 3/17/16 (second time that day), 3/21/16); P9.

³⁹ Parent.

⁴⁰ Educational Advocate.

⁴¹ P1-9.

⁴² P6-1.

⁴³ P1-27.

⁴⁴ P1-37.

⁴⁵ P51-1.

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12. A short BIP was prepared for Student on 9/18/15; there is no evidence that it was based on a current FBA.⁴⁶ Among other things, the BIP intended to target Student's negative peer interactions, including physical aggression.⁴⁷ The BIP was not working or Student would have had less difficulty.⁴⁸ As of 10/19/15, Student had not received any rewards pursuant to the 9/18/15 BIP.⁴⁹ Educational Advocate asked more than once for a new FBA and more appropriate BIP.⁵⁰

13. A 12/15/15 FBA noted that Student had negative peer interactions, with physical aggression/threats on a few occasions in 2015/16; her negative behaviors occurred throughout the day in all her classes, during classroom transitions and in the lunchroom, and were moderate to severe.⁵¹ The 12/15/15 FBA also found that Student had skill deficits in socialization, which often led to gaining negative attention from others; her ADHD often included difficulties with emotional regulation, impulsivity and social relationships.⁵² Student's responses on the crime/violence subscale on the GAIN-Short Screener on 10/8/15 resulted in a recommendation that she be referred for a mental health evaluation.⁵³ Student was receiving school-based counseling services through First Home Care as of December 2015.⁵⁴

14. On 1/4/16, Student was involved in an incident in which she was accused of being part of a gang throwing rocks and sticks that broke another girl's glasses.⁵⁵ Student's peers asserted Student was part of the *Gang*, and provided each member's alias.⁵⁶ Student acknowledged that she was part of an "all girls gang" which physically assaulted a peer.⁵⁷ DCPS proposed a 45-day suspension, and an MDR meeting was added to the IEP meeting previously scheduled for 1/8/16.⁵⁸

15. At the MDR meeting on 1/8/16, Public School stated that the attack by Student with a group of other girls had nothing to do with Student's disability or IEP; Parent thought it was related.⁵⁹ The school psychologist said that the conduct was not a manifestation

⁴⁶ P45; Educational Advocate; P1-17; P1-27.

⁴⁷ P45-1.

⁴⁸ Educational Advocate.

⁴⁹ P1-17; P20-1; Educational Advocate.

⁵⁰ P1-37.

⁵¹ P47-1.

⁵² P47-3.

⁵³ P47-4.

⁵⁴ *Id.*

⁵⁵ Attorney; P8-2; P9-30; P1-45. Parent did not consider Student to be in a gang and talked to a police officer who said she was not. Attorney; Parent; Educational Advocate.

⁵⁶ P8-2.

⁵⁷ P52-16,22.

⁵⁸ P9-30; P1-43.

⁵⁹ Parent.

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because Student would not follow another child away from school to attack her.⁶⁰ Educational Advocate's professional opinion was that Student throwing sticks and rocks on 1/4/16, if such behavior occurred, was a manifestation of her disability, as it was impulsive and aggressive behavior.⁶¹ Aggression and impulsivity are part of Student's disability; reacting without thinking and threats are part of her emotional disability.⁶² DCPS's 1/8/16 meeting notes on "Review of Disability" indicate that Student's disability impacts her academics and causes off task behavior and this "often leads to confrontation with other students."⁶³ DCPS recognized on 11/16/15 the issue of Student bullying another student on the way home from school, but took the position that a BIP cannot prevent such conduct.⁶⁴

16. A detailed BIP Level II ("BIP-II") was prepared on 1/8/16 (and misdated 1/8/15), based on the 12/15/15 FBA.⁶⁵ The BIP-II found that Student "needs to be in an engaging, structured environment with minimal distractions," but this was never done.⁶⁶ The BIP-II stated that Student "needs frequent positive reinforcement – praise, rewards/incentives," and "should be encouraged to remain in class and to ask for help when needed."⁶⁷ The new BIP provided for weekly rewards, but Student needed to be rewarded for positive behavior much more frequently, on a daily or even hourly basis.⁶⁸

17. The specialized instruction provided in Student's IEP did not change on 1/8/16.⁶⁹ DCPS personnel had decided the outcome of the 1/8/16 meeting in advance, as they came into the IEP meeting and announced the result.⁷⁰ In Student's 1/8/16 IEP, Public School noted that she is failing most of her second term classes and has frequent difficulty getting along with her peers and engaged in physical threats and some actual physical altercations resulting in suspensions in 2015/16.⁷¹

18. Student was out of school from about 1/6/16 to 2/23/16, although the suspension for the 1/4/16 incident had been proposed to continue until 3/15/16.⁷² Student had been scheduled for a disciplinary hearing to determine whether the long-term suspension was

⁶⁰ Educational Advocate.

⁶¹ *Id.*

⁶² *Id.*

⁶³ P22-10.

⁶⁴ P1-30.

⁶⁵ P44; Educational Advocate.

⁶⁶ Educational Advocate; P44-3.

⁶⁷ P44-5.

⁶⁸ Educational Advocate.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ P16-7.

⁷² Educational Advocate; P1-51; P8-3; Attorney.

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appropriate, but the hearing was delayed and ultimately did not occur.⁷³ DCPS eventually decided not to uphold the long-term suspension in a 4/6/16 letter closing the matter.⁷⁴

19. DCPS sent one packet home for Student while she was out of school following the 1/4/16 incident, and provided no specialized instruction.⁷⁵ Parent's representatives reminded DCPS of the need to implement Student's IEP while she was awaiting an interim alternative placement and raised concerns about her IEP not being implemented.⁷⁶ DCPS told Parent to send Student to *Interim Alternative Placement*, but did not permit any IEP team discussion or input from Parent about Interim Alternative Placement.⁷⁷ Student could not be enrolled in Interim Alternative Placement because the disciplinary hearing never occurred to refer her, as was necessary for Student to enroll there.⁷⁸ Nor could Interim Alternative Placement have provided what is required on Student's IEP, as it is a total inclusion program, according to its principal.⁷⁹ Further, Educational Advocate asked about transportation to Interim Alternative Placement and was told that it would not be provided, so Student had no way physically to get there.⁸⁰

20. A 2/22/16 Psychological Reevaluation of Student explained that she was "exhibiting numerous significant behavior problems such as Anger, Aggression, Bullying, Conduct Problems, Social Problems, Defiant/Aggressive Behaviors, and Violence Potential Indicator" and thus continued to meet the criteria for a student with an Emotional Disturbance.⁸¹ Student "tends to be disruptive in class, often avoids work and has a tendency to instigate problems with her peers."⁸² Her behaviors are impacting her learning as well as her social relationships.⁸³ Student has particular problems with transitions and in unstructured settings such as lunch and recess.⁸⁴

21. Student agreed to a behavior contract when she returned to school on 2/23/16 on which there was a box highlighting the reward Student would receive if she adhered to the behavior contract, but it was blank and did not list any reward.⁸⁵ DCPS put Student in the In-School Suspension room when she came back to school on 2/23/16; there had been no discussion about the In-School Suspension room prior to that.⁸⁶ After Student returned to

⁷³ P1-49,51; Attorney.

⁷⁴ Attorney.

⁷⁵ Educational Advocate; Attorney.

⁷⁶ P1-44,49.

⁷⁷ Educational Advocate; Parent.

⁷⁸ Educational Advocate.

⁷⁹ Educational Advocate; Parent.

⁸⁰ Parent.

⁸¹ P49-10,11.

⁸² P49-7.

⁸³ *Id.*

⁸⁴ Educational Advocate.

⁸⁵ P9-37.

⁸⁶ Parent; P1-62.

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school, she was suspended twice in the first 1-1/2 days.⁸⁷ Student immediately got into trouble and was sent home with Parent before Parent had left the school building.⁸⁸ The next day, 2/24/16, Student was involved in another incident of which there was a video of her throwing an umbrella and she was again suspended.⁸⁹ The second suspension was rescinded on 2/26/16; Student was allowed back in school and no MDR was required.⁹⁰

22. Some discussions occurred between DCPS and Attorney about how to make up missed service hours for Student, as DCPS recognized that a significant number of hours had been missed.⁹¹ Requests by Parent's representative to make up missed services with about 60 hours of tutoring and some hours of behavioral support were suggested, but a meeting did not happen and no make up services were authorized.⁹²

23. In late February 2016, DCPS told Student that she was moving to the BES program, which would include students in the grade above and the grade below her.⁹³ Parent had never heard about the BES program nor that Student would be moved to any new program before it happened.⁹⁴ On 2/29/16, DCPS issued a revised Prior Written Notice giving "Notice of Change in Placement," which stated that the LEA was proposing a "change in location of services" to a BES class to make up missed instruction service hours, as the LEA estimated that at least 50 hours had been missed.⁹⁵ The change was effective immediately.⁹⁶

24. Student did well in the BES class her first week, but her behavior issues increased after that as she was walking out of class and "giving push-back."⁹⁷ Student did not do any better in the BES program than in general education; she disrupted class, walked out whenever she wanted, and her teachers were regularly calling Parent about Student's bad behavior.⁹⁸ The BES program is not therapeutic and Student continued to exhibit the same problematic behaviors.⁹⁹ If placement was appropriate, Student would quickly engage and there would be an immediate change.¹⁰⁰

⁸⁷ P1-62.

⁸⁸ Parent.

⁸⁹ Parent; P1-53.

⁹⁰ P1-67.

⁹¹ Attorney.

⁹² Student Support Liaison.

⁹³ Parent.

⁹⁴ Parent; Educational Advocate.

⁹⁵ P1-75,76. An erroneous PWN referring to safety concerns and Student's most appropriate LRE had been issued about an hour earlier. P1-73,74.

⁹⁶ Educational Advocate.

⁹⁷ P1-85.

⁹⁸ Parent.

⁹⁹ Educational Advocate.

¹⁰⁰ *Id.*

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25. An LRE Classroom Observation on 3/14/16 found that Student had been unsuccessful both academically and socio-emotionally in the general education setting and was failing many of her classes; she had a current FBA/BIP but all interventions attempted had been unsuccessful.¹⁰¹ The LRE Classroom Observation concluded in a 4/1/16 report that Student may benefit from a more restrictive school setting where her academic and behavioral needs could be addresses.¹⁰² Student was already in the self-contained BES program, so DCPS's conclusion was that she needed a more restrictive placement than the BES program.¹⁰³

26. There was no discussion about the BES program at all with Parent or her representatives until the 3/23/16 IEP meeting in which DCPS said that Student would continue in the BES program.¹⁰⁴ At that meeting there was no discussion about service hours or alternative placements; DCPS announced that Student would receive 20 hours/week outside general education which was "fulltime" and would match the hours required for the self-contained BES program in which Student was already placed.¹⁰⁵ Public School's Special Education Coordinator stated at the 3/23/16 IEP meeting that 2 hours of specialized instruction/day were to make up for missed services.¹⁰⁶ Educational Advocate asserted that time during the school day cannot make up missed services, as Student would be missing other instruction during those hours.¹⁰⁷ The 20 hours/week outside general education did not cover Student's time in general education for lunch, an elective and transitions, which were times when Student often had problems when around her nondisabled peers.¹⁰⁸ The BES class did not sit together at lunch nor did the class's behavior tech sit with the BES class at lunch.¹⁰⁹

27. By the 3/23/16 IEP meeting there had been sufficient time to know that the BES program was not sufficient for Student and that she needed a separate school with small, highly-structured classes.¹¹⁰ In April 2016, Parent was receiving phone calls 2-3 times a week from Public School about Student; the problems were worse than before, with Student being disruptive in class, walking out of class, and walking the halls.¹¹¹ Student being disruptive in class, walking out of class regularly and being sent home early causes her to

¹⁰¹ P51-1.

¹⁰² P51-6.

¹⁰³ Educational Advocate.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ P1-84; Educational Advocate.

¹⁰⁷ Educational Advocate.

¹⁰⁸ Educational Advocate; Parent.

¹⁰⁹ P1-85.

¹¹⁰ Educational Advocate.

¹¹¹ P1-89,90.

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miss academics and fall further behind.¹¹² In the absence of a separate school, Student's negative behaviors will continue to escalate and worsen.¹¹³

28. Student needs a therapeutic school, with access to a psychologist and social worker and a plan for all staff to approach her in the same way.¹¹⁴ Instead of being therapeutic, Public School is punitive, focusing on suspensions or other punishments.¹¹⁵ But when Student is trying to avoid work, a suspension can act as a reward; suspensions also cause her to lag further behind.¹¹⁶ When Student walks out of class, an adult should walk out with her to engage her, rather than suspending her, which allows her to avoid her work.¹¹⁷

29. Nonpublic School is a separate fulltime therapeutic day school for special education students.¹¹⁸ Most of Nonpublic School's students are classified ED, for whom Nonpublic School provides classes with a 3:1 student-teacher ratio and no more than 9 students; Student would be the 6th child in her class.¹¹⁹ Most Nonpublic School students also have ADHD, so physical exercises are built into the schedule in the morning, midday and afternoon.¹²⁰ Students never run loose at Nonpublic School and are escorted by adults whenever they leave the classroom, except for transitions when students typically go to adjacent or nearby classrooms.¹²¹ The hallways are constantly monitored by adults in the halls, as well as video cameras.¹²²

30. Nonpublic School's staff includes 7 clinical psychologists, 30 behavior crisis counselors, a social worker, a nurse, two art therapists, as well as speech/language and occupational therapy providers.¹²³ All behavior counselors at Nonpublic School are certified to deal with aggressive behavior.¹²⁴ Nonpublic School has a seclusion room and follows OSSE protocols for restraint and seclusion.¹²⁵ Nonpublic School's goal is to transition students back to DCPS (or other public schools from whence they came); it has about 10% of its students in a transition class with 10:2 student-teacher ratio in preparation for return to public school.¹²⁶

¹¹² Educational Advocate.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Director.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

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31. Student has been accepted at Nonpublic School; if she attends she will be placed in a small student-teacher ratio classroom.¹²⁷ Nonpublic School and its rates are approved by OSSE.¹²⁸ Nonpublic School can meet the goals on Student's IEP and can accommodate her related services.¹²⁹ Student visited Nonpublic School and was pushed a little while there, but was comfortable and willing to come back.¹³⁰ Parent feels that Nonpublic School is appropriate for Student due to the way it is set up, with small class sizes, hallways not being crowded, and managed transitions.¹³¹ Student's socialization needs with nondisabled peers can be met through interactions in Student's neighborhood, although for now Student's social skills are very immature and inappropriate, so a safe and structured setting is better for Student at this time.¹³²

32. Educational Advocate's professional opinion is that Student needs 150 hours of tutoring and 150 hours of mentoring or creative art services to make up for the denials of FAPE.¹³³ *Compensatory Education Provider*, a DCPS vendor, offers tutoring at \$65/hour, as well as mentoring and creative arts services at \$85/hour; the prices include transportation for Student.¹³⁴ The creative arts services are used therapeutically and fit well with Student's preference for art and dance.¹³⁵

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 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).

¹²⁷ P53-1; Director.

¹²⁸ Director; P55-2.

¹²⁹ Director.

¹³⁰ *Id.*

¹³¹ Parent.

¹³² Educational Advocate.

¹³³ *Id.*

¹³⁴ Founder.

¹³⁵ Founder; Parent.

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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).

As discussed below, 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, Respondent 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. 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 her disability. *See* 5-B D.C.M.R. § 2510.16. Otherwise, the burden of proof is 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).

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Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 2/5/15 where (a) the hours of specialized instruction were insufficient, (b) Student's educational placement was not set forth in the IEP, and (c) more than 120 minutes/month of behavioral support services outside general education were needed.*

Petitioner failed to meet her burden of proving a denial of FAPE on subparts (a) and (c) when Public School modified Student's specialized instruction from 12.5 hours/week (made up of 5 hours outside general education and 7.5 hours inside) to 10 hours/week outside general education on 2/5/15. At that time, Student's BSS was modified by omitting 30 minutes/month of consultation and continuing the BSS related services of 120 minutes/month. Petitioner placed great weight in her advocacy on a BIP that was misdated 1/8/15 to reveal Student's situation and DCPS's knowledge of its seriousness in 2015, but that BIP was in fact from 1/8/16. Numerous other facts in contemporaneous documents in the record demonstrate that Student was doing reasonably well on 2/5/15.

The applicable legal standard is whether the 10 hours/week in Student's IEP was "reasonably calculated to produce meaningful educational benefit" and permit her to access the general education curriculum so she could advance toward meeting her annual goals pursuant to 34 C.F.R. 300.320(a)(4). *See Damarcus S. v. Dist. of Columbia*, 2016 WL 2993158, at *12 (D.D.C. May 23, 2016); *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEP are to be determined as of 2/5/15, the time it was offered to Student. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The suitability of Student's IEP is analyzed by considering the concerns raised by Petitioner about the amount of specialized instruction and the BSS provided. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

Student's 2/5/15 IEP was her first at Public School, where she had begun the previous Fall. Unlike the facts set forth in the erroneously dated BIP, the information about Student as of 2/5/15 was quite positive. Student was reported by her teachers to have "improved so much" and was able to answer questions during class. Student was "responsible" and asked for help when needed; her IEP goals were viewed as appropriate by her teachers. Student was a "cooperative learner" who came to class prepared to learn. While Student's grades were not good in the first two terms of 2014/15, she had only 1 "F" and ended up passing all her courses in 2014/15. She was "doing well considering" and just needed a little encouragement to make more progress. ESY was not needed because there has been no relapse and Student was making progress. Indeed, her IEP Progress Reports indicate that she was generally progressing in all areas in the reporting periods prior to her 2/5/15 IEP.

As for the level of BSS on her 2/5/15 IEP, Student was reportedly not having behavior or emotional issues at that time and no longer getting frustrated and shutting down. Although often angry, Student received no more than in-school suspensions and was being taught positive ways of gaining attention. For example, on 10/23/14, Student had 1-on-1 counseling in BSS and reported on ways in which she was able to successfully resolve

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conflict. Student was receiving 30 minutes/week of BSS, and sometimes received a little extra, if needed. Student had 10 absences during 2014/15, of which only 1 was unexcused.

Based on these facts, this Hearing Officer concludes that specialized instruction of 10 hours/week outside general education and BSS of 120 minutes/week in Student's 2/5/15 IEP was reasonably calculated to produce meaningful educational benefit and was not a denial of a FAPE.

Nor did Petitioner meet her burden in subpart (b) by proving that DCPS failed to include the requisite detail about Student's placement in her IEP, thereby denying Student a FAPE. The legal standard is set forth in the Court's recent decision in *Brown v. Dist. of Columbia*, 2016 WL 1452330, at *9 (D.D.C. Apr. 13, 2016), which found a student's IEP legally deficient because it failed to include a discussion of student's LRE and type of placement needed along the continuum of alternative placements. *See also* 34 C.F.R. 320(a)(5),(7); *A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 159 (D.D.C. 2005). The insufficient IEP in *Brown*, 2016 WL 1452330, at *9, n.2, merely included the hours per week of specialized instruction and behavioral support, but omitted a sufficient description of student's LRE and placement. Here, Student's IEP listed her service hours and stated that Student "requires specialized instruction outside [the] general education setting to accommodate her reading, math and written expression deficits," but provided no other information about Student's placement. While this minimal statement does not meet the legal standard set forth in *Brown*, it is simply a procedural violation of the IDEA, *id.* at n.3, and not an automatic denial of a FAPE.

Thus, the issue is whether that failure amounted to a substantive violation under 34 C.F.R. 300.513(a) by significantly impeding Parent's opportunity to participate in decision-making regarding a FAPE, by impeding Student's right to a FAPE, or by depriving Student of educational benefit. *Brown*, 2016 WL 1452330, at *7, quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F.Supp.2d 57, 67 (D.D.C. 2010). Student's IEP team changed her specialized instruction on 2/5/15 from 12.5 hours/week (made up of 5 hours outside general education and 7.5 hours inside) to 10 hours/week outside general education, but there was no persuasive evidence that Petitioner or her representatives sought any opportunity to participate in decision-making that DCPS denied or refused, or that Petitioner even objected to Student's educational placement in the 2/5/15 IEP. Thus, this Hearing Officer concludes that the failure to include a more detailed description of Student's LRE or placement in the 2/5/15 IEP had no impact on Parent's participation in decision-making or Student's education and thus was not a substantive violation or a denial of FAPE.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement from 2/5/15 to the present.*

Petitioner did not meet her burden of proving a denial of FAPE on the issue of placement as of 2/5/15, as Student was making progress and Petitioner's claim was largely based on the erroneously dated BIP. However, Petitioner did meet her burden of proof on inappropriate educational placement from 1/8/16 to the present as both the 1/8/16 and the 3/23/16 IEPs contained insufficient levels of specialized instruction and thus needed more

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restrictive placements for the reasons discussed at length in Issue 5 (relating to 1/8/16 IEP), and Issue 7 (relating to 3/23/16 IEP) below. *See S.S. by & through St. v. Dist. of Columbia*, 68 F. Supp. 3d 1, 18 (D.D.C. 2014) (“student’s IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP,” *citing Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006)). In addition, placement was not proper during the period Student was out of school during January and February 2016, as discussed in Issue 4 below, nor when DCPS issued PWNs on 2/29/16 to move Student into the BES program as discussed in Issue 6 below.¹³⁶ This issue of placement thus largely overlaps with Issues 4, 5, 6 and 7, adding marginally to the compensatory education awarded below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to base Behavior Intervention Plans between 1/8/15 and December 2015 on a Functional Behavioral Assessment or any assessment, making the 2/5/15 and 1/8/16 IEPs inappropriate.*¹³⁷

Petitioner failed to meet her burden of proving a denial of FAPE on this issue. As Petitioner’s counsel conceded at the due process hearing, the BIP erroneously dated 1/8/15 should have been dated 1/8/16. That 1/8/16 BIP was properly based on the 12/15/15 FBA, so the 1/8/16 IEP was not improper for lack of an FBA/BIP. As for the 2/5/15 IEP, there was no BIP in place, but as discussed in detail in Issue 1, Student’s behavioral issues were not so serious at that point and the 2/5/15 IEP was appropriate without the need for an FBA or BIP, in the view of this Hearing Officer. *Cf. Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011).

Issue 4: *Whether DCPS denied Student a FAPE in the Manifestation Determination Review meeting on 1/8/16 by (a) making an incorrect MDR determination, and/or (b) failing to implement Student’s IEP or to provide an interim alternative placement.*

DCPS did not meet its burden of demonstrating that Student’s behavior in the 1/4/16 incident was not a manifestation of her disability.¹³⁸ In an MDR, if the behavior is found to

¹³⁶ Public School placing Student directly in the In-School Suspension room when she returned to school on 2/23/16 seems improper to the undersigned, but the issue is de minimis as her time there was extremely short due to two suspensions and then a shift to the BES program on 2/29/16.

¹³⁷ Petitioner’s counsel conceded during closing arguments that the BIP dated 1/8/15 should have been dated 1/8/16, so the 1/8/16 IEP was not improper for lack of a BIP. Respondent’s counsel objected to the late concession, arguing that the reliance by Petitioner’s counsel on the incorrect earlier date in the due process complaint and arguments should undermine her credibility.

¹³⁸ As noted above, DCPS has the burden of proving that Student’s behavior was not a manifestation of her disability, pursuant to District of Columbia regulations. *See* 5-B D.C.M.R. § 2510.16. In the alternative suggested by subpart (b), even if Student’s behavior was not a manifestation of her disability, DCPS would still face liability, for in such cases it would be obliged to provide services in an interim alternative setting determined by the IEP

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

Student was involved in an incident on 1/4/16 in which she was accused of being part of the *Gang* throwing rocks and sticks (after school and off school property) that broke another girl's glasses. DCPS proposed a 45-day suspension and added an MDR meeting to the IEP meeting already scheduled for 1/8/16. At that meeting, Public School stated that the attack by Student with a group of other girls had nothing to do with Student's IEP or disability, with the school psychologist stating that the conduct was not a manifestation because Student would not follow another child away from school to attack her. However, the undersigned is persuaded that the incident was a manifestation of Student's disability, finding Educational Advocate's testimony particularly credible when she stated in her professional opinion that throwing sticks and rocks – assuming that is what happened – was impulsive and aggressive behavior and that aggression and impulsivity are part of Student's disability, which was confirmed in Student's 12/15/15 FBA. Student's 9/18/15 BIP sought to address negative peer interactions, including physical aggression. Educational Advocate further testified that reacting without thinking and threats are part of Student's emotional disability. Even DCPS's 1/8/16 meeting notes on "Review of Disability" indicate that Student's disability causes off task behavior and this "often leads to confrontation with other students." DCPS recognized on 11/16/15, weeks before the 1/4/16 incident, the issue of Student bullying another student on the way home from school, which serves to refute the school psychologist's statement that Student wouldn't do such a thing.

Student is classified as having an Emotional Disturbance, which in 34 C.F.R. 300.8(b)(4) is defined as including an "inability to build or maintain satisfactory interpersonal relationships with peers..." and "[i]nappropriate types of behavior," both of which were exhibited in the 1/4/16 incident in the view of this Hearing Officer. Accordingly, DCPS is ordered below to reverse its 1/8/16 MDR determination and revise all documentation in the SEDS database to indicate that Student's behavior on 1/4/16 was a manifestation of her disability. In addition, the 6 weeks of missed education for much of both January and February 2016 counts significantly toward the compensatory education awarded below.

Issue 5: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 1/8/16 where (a) the hours of specialized instruction were insufficient,*

team. See 34 CFR 300.530(d)(2), 300.531. DCPS proposed Interim Alternative Placement without input from Student's IEP team, a discipline hearing did not refer Student to Interim Alternative Placement as required, the alternative setting could not provide the amount of specialized instruction required by Student's IEP, and DCPS refused to provide transportation to Interim Alternative Placement.

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(b) Student's educational placement was not set forth in the IEP, and (c) more than 180 minutes/month of BSS outside general education were needed.

Petitioner met her burden of proving a denial of FAPE on subparts (a) and (c) when Public School refused to modified Student's specialized instruction from 10 hours/week outside general education and simply increased Student's BSS from 120 to 180 minutes/month. At this point, Student's 12/15/15 FBA and 1/8/16 BIP revealed that Student's situation was more serious but DCPS did not act to address the situation beyond modestly stepping up her BSS.

As discussed above, the applicable legal standard is whether Student's IEP was "reasonably calculated to produce meaningful educational benefit" and permit her to access the general education curriculum so she could advance toward meeting her annual goals pursuant to 34 C.F.R. 300.320(a)(4), as of 1/8/16 when the IEP was offered to Student. As noted above, the suitability of Student's IEP is analyzed by considering the concerns raised by Petitioner about the amount of specialized instruction and the BSS provided. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

By 1/8/16, Student was doing notably worse. Student was struggling with her school work and was often walking out of class or otherwise refusing to participate in academics she could not understand. She had 39 absences in 2015/16 (by 2/5/16), of which 24 were unexcused. Student's grades were worse in the first two terms of 2015/16, with 2 "Fs." In the reporting period prior to the 1/8/16 IEP, Student's IEP Progress Reports indicate that she had no progress on a math goal, a written expression goal, and both emotional/social goals. Student's behavior worsened as well. A short BIP was prepared for Student on 9/18/15, seeking to target Student's negative peer interactions, including physical aggression. Public School took disciplinary action against Student on 9/22/15, 9/30/15, 10/14/15, 10/22/15, and 10/26/15. Student then received a 10/28/15 suspension, her first involving bullying, which resulted in a 5-day suspension. Student's next suspension on 11/12/15, her second for bullying, came after just 4 days back in school following her previous suspension, making a total of 10 days out of school. Student's third suspension on 12/8/15 resulted in a further off-site suspension, prior to the significant 1/4/16 incident resulting in a proposed 45-day suspension. Moreover, the call logs and incident reports reflect only a portion of Student's problems and the calls to Parent from Public School.

An FBA of Student was completed on 12/15/15, which noted that Student had negative peer interactions, with physical aggression/threats on a few occasions in 2015/16; her behaviors occurred throughout the day in all her classes, during classroom transitions and in the lunchroom, and were moderate to severe. The 12/15/15 FBA also found that Student had skill deficits in socialization, which often led to gaining negative attention from others. A detailed 1/8/16 BIP Level II, based on the 12/15/15 FBA, found that Student "needs to be in an engaging, structured environment with minimal distractions," but this was not achieved in her 1/8/16 IEP (or later). Student's 1/8/16 IEP itself noted that she was failing most of her second term classes.

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Based on the evidence above, this Hearing Officer concludes that specialized instruction of 10 hours/week outside general education and BSS of 180 minutes/week in Student's 1/8/16 IEP was not reasonably calculated to produce meaningful educational benefit and was a denial of a FAPE. In the view of this Hearing Officer, Student clearly needed more support to have a chance of succeeding academically and improving behaviorally. This denial of a FAPE from 1/8/16 to 3/23/16 contributes to the compensatory education discussed below.

Petitioner also meet her burden in subpart (b) by proving that DCPS failed to include the requisite detail about Student's placement in her IEP, thereby denying Student a FAPE. As discussed above, the legal standard is set forth in *Brown*, 2016 WL 1452330, at *9, which found a student's IEP legally deficient because it failed to include a discussion of student's LRE and the type of placement needed along the continuum of alternative placements. Merely stating the hours per week of specialized instruction and behavioral support in an IEP without providing a description of student's LRE and placement is not sufficient. Here, Student's 1/8/16 IEP merely listed her service hours and stated that Student "requires specialized instruction outside [the] general education setting to accommodate her reading, math and written expression deficits," but provided no other information about Student's placement. The undersigned concludes that this minimal statement does not meet the legal standard set forth in *Brown*, which is a procedural violation of the IDEA.

Here, that failure amounted to a substantive violation under 34 C.F.R. 300.513(a) by significantly impeding Parent's opportunity to participate in decision-making regarding a FAPE, as specialized instruction of more than 10 hours/week outside general education was needed and Parent and her representative should have been involved in discussions about Student's educational placement to be included in the 1/8/16 IEP. As the Court emphasized in *Brown*, 2016 WL 1452330, at *9, it is critical for Parent to be able to "engage in the collaborative process" to create an IEP tailored to Student's specific needs. Accordingly, just as the Court held in *Brown*, this Hearing Officer concludes that this failure rises to the level of a substantive violation by impeding Parent's ability to participate in decision-making relating to her child's placement and education. This denial of FAPE contributes modestly to the award of compensatory education discussed below.

Issue 6: *Whether DCPS denied Student a FAPE by unilaterally changing her placement by issuing a Prior Written Notice to the BES program on 2/29/16, when (a) Parent and the rest of the IEP team should have been involved, (b) the BES program could not implement her IEP and was inappropriate, and/or (c) the change was made as a form of compensatory education/missed services.*

Petitioner met her burden on this issue by proving that DCPS unilaterally changed Student's placement without input from the IEP team, without any change in her IEP, and without properly making up missed services.

The IDEA could not be clearer about requiring parental involvement in "decisions on the educational placement of [her] child." 34 C.F.R. 300.327; 34 C.F.R. 300.116(a)(1)

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(requiring public agency to ensure that the educational placement decision is made by a group that includes parents); 34 C.F.R. 300.501(c) (same); *Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013). Here, however, DCPS simply told Student that she was being moved to a new educational placement – the BES program – without any consultation with Parent or the rest of the IEP team. On 2/29/16, DCPS issued a Prior Written Notice giving Notice of Change in Placement, which stated that the LEA was placing Student in a BES class, purportedly to make up missed instruction service hours, as the LEA estimated that at least 50 hours had been missed. Excluding Parent from the placement decision is a procedural violation of the IDEA which “[s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child,” so is a substantive violation as well, and thus a denial of FAPE. 34 C.F.R. 300.513(a). Since DCPS simply informed Parent that Student was being placed in the BES program, she could not participate in decision-making for her child and participate in the collaboration that is a vital aspect of IEPs. *See Brown*, 2016 WL 1452330, at *9.

Moreover, at the time of the PWN, Student’s IEP only provided for 10 hours/week of specialized instruction, not the 20 hours into which Student was placed, which is clearly a violation of the IDEA, for a student’s IEP must determine the services provided. *See S.S.*, 68 F. Supp. 3d at 18 (“student’s IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP,” *citing Roark*, 460 F. Supp. 2d at 44); 34 C.F.R. 300.324(a)(6), 300.322. While DCPS had entered into discussions with counsel for Parent about how to make up missed services, it is not acceptable for DCPS to unilaterally put Student in an entirely different placement and seek to justify it as making up missed services. Moreover, the claimed make up time was entirely during the regular school day, so that any “make up” time was preventing Student from getting the time in the classroom she should have received, thus generating more loss. This denial of FAPE also contributes to the award of compensatory education discussed below.

Issue 7: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 3/23/16, where (a) the hours of specialized instruction were insufficient and were based on providing compensatory education/missed services during the regular school day, (b) Student’s educational placement was not set forth in the IEP and needed to be more restrictive, (c) more than 180 minutes/month of BSS outside general education were needed, (d) it was created to conform to a change in placement DCPS had already made, and (e) Parent was not involved in the determination of hours or placement.*

Petitioner met her burden of proving a denial of FAPE on subparts (a) and (c), when Public School modified Student’s specialized instruction from 10 to 20 hours/week outside general education in order to match the requirements of the BES program into which DCPS had already placed Student, and kept her BSS at 180 minutes/month. By this point Public School recognized that Student’s situation was quite serious and had moved her into the BES program in advance of a change in her IEP, but DCPS still failed to provide the “engaging, structured environment with minimal distractions” that her BIP-II had identified on 1/8/16.

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As discussed above, the applicable legal standard is whether the 20 hours/week in Student's IEP were "reasonably calculated to produce meaningful educational benefit" and permit her to access the general education curriculum so she could advance toward meeting her annual goals pursuant to 34 C.F.R. 300.320(a)(4), as of 3/23/16 when the IEP was offered to Student. As noted above, the suitability of Student's IEP is analyzed by considering the concerns raised by Petitioner about the amount of specialized instruction and the BSS provided. *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311.

The seriousness of Student's issues were highlighted by a Psychological Reevaluation of Student completed on 2/22/16, the day before she returned to school after her long absence following the 1/4/16 incident. The Psychological Reevaluation explained that Student was exhibiting numerous significant behavior problems such as Anger, Aggression, Bullying, Conduct Problems, Social Problems, Defiant/Aggressive Behaviors, and Violence Potential Indicator. The Reevaluation also noted that Student "tends to be disruptive in class, often avoids work and has a tendency to instigate problems with her peers." Academically, the Reevaluation included the results of a Woodcock-Johnson IV assessment which found the percentile rank of Student's academic skills to be 16% in reading, 3% in written language, and 14% in mathematics, significantly behind where she was in 2013, when a Woodcock-Johnson III assessment had found her percentile rank to be 49% in broad reading, 42% in broad written language, and 27% in broad mathematics.

When Student returned to school on 2/23/16 she was put directly into the In-School Suspension room, and was suspended twice in less than 2 days. On 2/29/16, DCPS issued a revised Prior Written Notice giving notice of a change in placement. Student was immediately moved to a BES program. Student did well in the BES class her first week, but then did not do any better in the BES program than in general education. Student disrupted class, walked out whenever she wanted, and teachers were regularly calling Parent about Student's bad behavior. The BES program is 20 hours/week, which does not cover Student's time in general education for lunch, an elective and transitions, times when Student has often had problems around her nondisabled peers.

An LRE Classroom Observation on 3/14/16 found that Student had been unsuccessful both academically and socio-emotionally in the general education setting and was failing many of her classes. She had a current FBA/BIP but all interventions attempted have been unsuccessful. The LRE report concluded that Student may benefit from a more restrictive school setting where her academic and behavioral needs can be addresses. Student was already in the highly-restrictive BES program, so a more restrictive placement indicates DCPS's recognition of the need for a nonpublic school.

By the 3/23/16 IEP meeting there had been sufficient time to know that the BES program was not sufficient for Student and to determine that she needed a separate school with small, highly-structured classes. Student was being disruptive in class, walking out of class regularly and being sent home early, which caused her to miss academics and fall ever further behind. In the absence of a separate school, the undersigned finds credible the expert opinion of Educational Advocate that Student's negative behaviors will continue to escalate and worsen. Student needs a therapeutic school, with access to a psychologist and social

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worker and a plan for all staff to approach Student in the same way. Instead of being therapeutic, Public School was punitive, focusing on suspensions and other punishments. But when Student is trying to avoid work, a suspension actually operates as a reward, causing her to lag further behind.

Based on this evidence, the undersigned concludes that specialized instruction of 20 hours/week outside general education and BSS of 180 minutes/week in Student's 3/23/16 IEP was not reasonably calculated to produce meaningful educational benefit and was a denial of a FAPE. In the view of this Hearing Officer, by this point Student needed a more restrictive setting, and qualifies for Nonpublic School as discussed below. This denial of a FAPE from 3/23/16 to the present also contributes to the compensatory education discussed below.

Petitioner also met her burden in subpart (b) by proving that DCPS failed to include the necessary detail about Student's placement in her IEP, thereby denying Student a FAPE. As discussed and applied above, the legal standard set forth in *Brown*, 2016 WL 1452330, at *9, holds that merely stating the hours per week of specialized instruction and behavioral support in an IEP without providing a description of student's LRE and placement is not sufficient. Student's 3/23/16 IEP listed her service hours and stated that Student "requires specialized instruction outside [the] general education setting to accommodate her reading, math and written expression deficits," but provided no other information about Student's placement, which does not meet the legal standard set forth in *Brown*, so is a procedural violation of the IDEA. Here, too, that failure amounted to a substantive violation under 34 C.F.R. 300.513(a) by significantly impeding Parent's opportunity to participate in decision-making regarding a FAPE. Specialized instruction of more than 20 hours/week outside general education was needed in a more restrictive setting and Parent and her representative should have been involved in discussions about Student's educational placement to be included in the 3/23/16 IEP. As the Court emphasized in *Brown*, 2016 WL 1452330, at *9, it is critical for Parent to be able to engage in the collaborative process to create an IEP tailored to Student's specific needs. Accordingly, as in *Brown*, this Hearing Officer concludes that this failure rises to the level of a substantive violation by impeding Parent's ability to participate in decision-making relating to her child's placement and education. This denial of FAPE contributes modestly to the award of compensatory education discussed below.

Finally, Petitioner also met her burden in subparts (d) and (e) by proving that DCPS denied Student a FAPE by failing to include Parent in the hours and placement decision, along with demonstrating that the outcome of the IEP meeting was predetermined to fit the program into which Student had already been placed. See *Schoenbach v. Dist. of Columbia*, 2006 WL 1663426, at *5 (D.D.C. 2006). As discussed above, the IDEA very clearly requires parental involvement in "decisions on the educational placement of [her] child." 34 C.F.R. 300.327; 34 C.F.R. 300.116(a)(1) (requiring public agency to ensure that the educational placement decision is made by a group that includes parents); 34 C.F.R. 300.501(c) (same); *Aikens*, 950 F. Supp. 2d at 190. But at the 3/23/16 meeting, there was no discussion about service hours or alternatives along the continuum of placements; DCPS simply announced that Student would receive 20 hours/week outside general education

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which was “fulltime” and would match the self-contained BES program in which Student had already been placed.

Excluding Parent from the placement decision and predetermination are both procedural violations of the IDEA and both “[s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child,” and are thus substantive violations and a denial of FAPE. 34 C.F.R. 300.513(a). DCPS had already predetermined the outcome of the 3/23/16 meeting by showing up at the IEP meeting and announcing the outcome, so Parent could not participate in decision-making for her child and could not provide input into the various programs that might have been considered for Student, without the collaboration that is a vital aspect of IEPs. *See Brown*, 2016 WL 1452330, at *9. This denial of FAPE – both for predetermination of the outcome and excluding Parent – also contributes to the award of compensatory education discussed below.

Nonpublic Placement

If an “appropriate” public school program were available for Student, *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 – and DCPS did not suggest any alternative school – DCPS must pay the costs of sending her to an appropriate nonpublic school. A nonpublic school placement is proper under the IDEA if the education provided there is reasonably calculated to enable Student to receive educational 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 from ED, OHI (due to ADHD) and has also been diagnosed with SLD. DCPS does not dispute the seriousness of Student’s disabilities.

(b) Student’s Specialized Educational Needs: The evidence is that Student needs fulltime support in a special education program away from nondisabled peers, with greater

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supervision by staff to keep her from walking out of class and to manage her behavior, which DCPS cannot provide at Public School. DCPS did not suggest any other placement for Student.

(c) **Link Between Student’s Needs and the Services Offered by Nonpublic School:** It is clear from Student’s visit to Nonpublic School, during which she was challenged, and from the admissions process overseen by Director, that Nonpublic School can work with her disabilities and is likely to be a suitable fit for her.

(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:** Student’s behavior had been steadily worsening at Public School during 2015/16, to the point where even the self-contained BES program was not adequate to address Student’s issues, particularly because the program did not remove Student from her nondisabled peers at lunch, in an elective and transitions, during which Student got in trouble. Shifting to a fulltime Nonpublic School should help Student’s behavioral issues and allow her to focus on achieving her IEP goals. A placement such as Nonpublic School, where Student has interaction with students like herself, but no interaction with nondisabled peers, is the least restrictive environment for Student at this time. *See Roark*, 460 F. Supp. 2d at 43 (“[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).

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.

Compensatory Education

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); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016). The proper amount of compensatory education, if any, depends on how much more progress Student might have shown if she had received the required special education services, and the type and amount of services that would place Student in the same position she 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. In short, “compensatory education aims to put a student . . . in the position [s]he would be in absent the FAPE denial.” *B.D.*, 817 F.3d at 798.

The Circuit Court for the District of Columbia recently made plain that “compensatory education awards require a ‘flexible approach’ tailored to the facts of each

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case, and, as we made clear in *Reid*, a mechanical award of services identical to those wrongly denied is inappropriate. *Reid*, 401 F.3d at 524.” *B.D.*, 817 F.3d at 799. While there is “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *id.*, that 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).

Based on careful consideration of the facts and circumstances resulting in the numerous denials of FAPE found above, this Hearing Officer concludes that the placement of Student in Nonpublic School is a significant element of compensatory education and will do the most to elevate Student to the academic level she would have attained had she not suffered the denials of FAPE discussed above. *See Brown*, 2016 WL 1452330, at *10; *Henry*, 750 F. Supp. 2d at 98-99. In addition, the undersigned awards 100 hours of services to Student from Compensatory Education Provider to be comprised of tutoring, mentoring, and/or therapeutic art services in the proportions determined best by Parent. This award of tutoring, mentoring, and/or art services is to be used within 18 months in order to ensure that the remedial services that Student needs are obtained without undue delay and to minimize any administrative burdens on Respondent that result from compensatory education awards stretching over excessively long timeframes.

ORDER

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

- (1) DCPS shall within 15 business days place Student at Nonpublic School and fund Student’s tuition, related services, and transportation for the 2016/17 school year.
- (2) DCPS shall within 15 school days amend Student’s IEP to include a sufficient description of her LRE and placement.
- (3) DCPS shall within 15 school days reverse its 1/8/16 MDR determination and revise all documentation in the SEDS database to indicate that Student’s behavior on 1/4/16 was a manifestation of her disability.
- (4) DCPS shall, within 10 business days after receiving a request from Petitioner, provide a letter or letters of funding for a total of 100 hours of services by Compensation Education Provider, divided between tutoring, mentoring, and/or art

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services, at Petitioner's option. All tutoring hours are to be used within 18 months from the date of this Order; any unused hours will be forfeited.

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)

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