

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
June 30, 2015

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
)	
<i>Petitioner,</i>)	
)	Case Nos: 2015-0154 & 2015-0168
v.)	
)	Date Issued: June 29, 2015
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Sections 1400 *et seq.*; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. Sections 1400-1482.

The Due Process Complaint (“DPC”) in Case No. 2015-0154 was filed on April 28, 2015. Respondent’s Response to the DPC was due on May 8, 2015 and filed May 8, 2015. The DPC in Case No: 2015-0168 was filed on May 11, 2015. Case No. 2015-0154 and Case No: 2015-0168 were consolidated on May 13, 2015. The parties mutually agreed that Respondent’s May 8, 2015 Response to Case No. 2015-0154 would be deemed as a Response to Case No. 2015-0168 as well. While not required to file an additional Response, on May 28, 2015, Respondent filed the Response originally filed under case number 2015-0154 under Case No. 2015-0168.

The parties convened a Resolution Session Meeting (“RSM”) on May 13, 2015 for the two consolidated cases. The parties did not reach an agreement during the RSM, but agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the 45-day timeline for issues 4(a)-4(c) and 4(e) set out below (the non-expedited issues) began to run on

May 29, 2015, and the Hearing Officer's Determination ("HOD") for the non-expedited issues is due on July 12, 2015. Issue 4(d) set out below is a discipline-related allegation that falls under an expedited timeline. As such, the DPC for Issue 4(e) must have occurred by June 10, 2015 (20 school days after the DPC was filed), and the HOD must be issued within 10 school days of the DPH concluding (by June 29, 2015).

The undersigned Impartial Hearing Officer ("IHO" or "hearing officer") held a Pre-hearing Conference ("PHC") on May 15, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that witnesses and exhibits would be disclosed by May 29, 2015 and that the DPH would be held on June 5, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the "PHO") issued on May 18, 2015.

The DPH was held on June 5, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by Kimberly Glassman, Esq. and Respondent was represented by William Jaffe, Esq.

Petitioner's and Respondent's disclosures of witnesses and exhibits were timely filed. At the DPH, Petitioner's exhibits P-1 through P-31 were admitted without objection. Respondent's exhibits R-1 through R-12 were admitted without objection. During the DPH, the hearing officer became aware that Petitioner's exhibit P-20 is a document pertaining to a different student – not Student, who is the subject of the instant DPC. Petitioner had redacted P-20 to some extent; however, it still contained some of the other student's identifying information. Counsel for the Respondent argued that the document should be stricken from the record. Counsel for the Petitioner argued that the document should not be stricken, and counsel for the Petitioner provided a further redacted version of the document to the hearing officer and opposing counsel, filed with the Office of Dispute Resolution, shortly after the DPH concluded. The hearing officer did not immediately strike the document from the record, but reserved final judgment on whether the document would be stricken.

On further reflection, the hearing officer hereby strikes P-20 from the record, as it is a document pertaining exclusively to a student who is not in any way connected to the instant dispute, and it would not be appropriate pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232 for the document to be a part of Student's DPH without written consent from the other student's parent. The hearing officer does not, however, strike testimony pertaining to the document, because the testimony related to the witness' awareness that such a document exists, and does not describe or relate to the other student directly.

Petitioner called the following witnesses at the DPH:

- (a) Petitioner/Parent
- (b) Educational Advocate²
- (c) Compensatory Education Specialist³

² Qualified, without objection, as an expert in special education programming and determining placements for students with disabilities.

- (d) Administrative Head, Nonpublic School (“Nonpublic Director”)

Respondent called the following witness at the DPH:

- (a) Special Education Department Chair (“Department Chair”)

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) **Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs for Student, as required by 34 C.F.R. § 300.324, by failing to provide sufficient levels of specialized instruction to address Student’s lack of progress, failing to include appropriate LRE, failing to include appropriate goals, and failing to include a behavior intervention plan in the May 2013, March 2014 and February 2015 IEPs.**
- (b) **Whether DCPS denied Student a FAPE by failing to complete comprehensive triennial re-evaluations in February 2015, specifically due to the failure to obtain updated evaluations to determine the cause of Student’s lack of progress and failure to complete a functional behavior assessment, pursuant to 34 C.F.R. §300.303 and 34 C.F.R. §300.304.**
- (c) **Whether DCPS denied Student a FAPE from the May 2013 IEP to present by failing to provide an appropriate educational placement in a setting that could address the full scope of Student’s special education needs in a fully self-contained special education setting and/or school, pursuant to 34 C.F.R. §300.115, 300.116, 300.17 and 300.324.**
- (d) **Whether DCPS denied Student a FAPE by erroneously concluding that the behaviors resulting in a suspension of 25 days were not a manifestation of Student’s disability.**
- (e) **Whether DCPS denied Student a FAPE by failing to implement Student’s IEP during his suspension from January 30, 2015 through March 9, 2015.**

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding in Petitioner’s favor on all issues in the DPC;
- (b) an Order that DCPS reverse the manifestation determination made in February 2015 and amend Student’s educational records to reflect that the behaviors were a manifestation of his disability;

³ Qualified, over Respondent’s objection, as an expert in compensatory education plan development and implementation for students with disabilities.

- (c) an Order that DCPS reimburse Parent and/or provider selected by Parent to complete any needed educational evaluations to develop an appropriate IEP for Student;
- (d) an Order that DCPS fund an independent functional behavioral assessment, upon placement in an appropriate school setting, and any additional evaluations that are recommend by the provider identified by Parent to complete updated educational evaluations;
- (e) an Order that DCPS fund an appropriate placement, namely Nonpublic School;
- (f) an Order that DCPS convene a complete IEP team within 10 school days of receiving all independent evaluations in order to revise Student's IEP;
- (g) an Order that DCPS fund Student's proposed compensatory education plan, including 150 hours of compensatory education in a multi-sensory reading, spelling/writing and mathematics program, and a laptop equipped with text to speech software (namely Kurzweil 3000) and speech to text software (namely Dragon Naturally Speaking).

FINDINGS OF FACT

1. Student is ■ years old, and resides with his mother ("Parent"/"Petitioner") in Washington, D.C.⁴ Student is a 6th grader at District Middle School.⁵
2. Student was diagnosed with Attention Deficit Hyperactivity Disorder in March 2012, by way of a comprehensive psychoeducational evaluation Children's Health Project of DC completed for Student.⁶
3. Student was determined eligible for special education and related services on October 3, 2012 under the disability classification "Other Health Impairment"⁷
4. As of March 2012, Student's full-scale I.Q. fell in the low average range, his processing speed fell in the low average range, and his working memory fell in the borderline range; however, Student scored higher in the areas of verbal comprehension and perceptual reasoning.⁸
5. Student's reading difficulties are a central factor in his other academic difficulties, as well as his behavioral difficulties.⁹

Stipulated Facts

⁴ Testimony of Parent.

⁵ Testimony of Parent.

⁶ P-6-1.

⁷ P-1-1.

⁸ P-6-3.

⁹ Testimony of Educational Advocate;

6. The behavioral intervention plan found at Petitioner's exhibit P-19 and Respondent's exhibit R-2 was developed on April 30, 2015.¹⁰ The functional behavioral assessment found at Respondent's exhibit R-10 is dated after the BIP,¹¹ (May 26, 2015).¹²

7. District Middle School has provided 20 hours of specialized instruction for Student throughout 2014-2015 school year. At an April 20, 2015 IEP meeting, Student's father and the remainder of the team agreed that District Middle School was implementing the 20 hours of specialized instruction.¹³

Student's IEPs

October 2012 IEP

8. Student has an IEP dated October 3, 2012 (the "October 2012 IEP") from when he was in fourth grade, which provides 5 hours of specialized instruction outside of the general education setting in each of the following areas: reading, written expression and mathematics. It also provides 120 minutes per month of behavioral support services outside the general education setting,¹⁴ which the IEP describes as Student's least restrictive environment ("LRE").¹⁵

9. **Behavior.** The October 2012 IEP indicates that Student "will benefit from behavioral interventions to address feelings of anxiety, low self-esteem and improve social skills in the areas of expressing feelings of anger/frustration appropriately," and the October 2012 IEP includes emotional, social and behavioral development goals. However, the October 2012 IEP does not include a behavioral intervention plan.¹⁶

10. **Mathematics.** As of the October 2012 IEP, Student could add and subtract one and some two digit numbers without regrouping, and scored in the low range in mathematics on the Woodcock Johnson III.¹⁷ The IEP contains five mathematics goals, including: (1) to read and write multi-digit whole numbers, (2) solve multi-step word problems, (3) recognize equivalent fractions, (4) apply the area and perimeter formulas for rectangles and (5) recognize/classify parallel/perpendicular line and angles.¹⁸

11. **Reading.** As of the October 2012 IEP, Student scored below average in reading on the Woodcock Johnson III. He had difficulty decoding sight and nonsense words, and with phonemic awareness and comprehension. The IEP contains four reading goals, including: (1) applying grade level phonics and word analysis in decoding, (2) read and comprehend

¹⁰ Stipulation by the parties.

¹¹ *Id.*

¹² R-10.

¹³ Stipulation of the parties.

¹⁴ P-1-8.

¹⁵ P-1-9.

¹⁶ P-1-6.

¹⁷ P-1-2.

¹⁸ P-1-2 through P-1-3.

informational texts, (3) identifying and referring details and examples in a text, and (4) reading with sufficient accuracy and fluency to comprehension.¹⁹

12. **Written Expression.** As of the October 2012 IEP, Student scored in the low range in written expression on the Woodcock Johnson III. He had difficulty writing complex sentences, and with size consistency when writing letters. The IEP contains four goals in written expression, including: (1) producing clear/coherent writing, (2) developing and strengthening his writing, using a graphic organizer and other supports, (3) writing narratives, and (4) conducting short research projects, using a graphic organizer and other supports.²⁰

*May 2013 IEP*²¹

13. Student has an IEP dated May 15, 2013, which provides 5 hours of specialized instruction outside of the general education setting in each of the following areas: reading, written expression and mathematics. It also provides 120 minutes per month of behavioral support services outside of the general education setting,²² which the IEP describes as Student's LRE.²³

14. **Behavior.** The May 2013 IEP indicates that Student "will benefit from behavioral interventions to address feelings of anxiety, low self-esteem and improve social skills in the areas of expressing feelings of anger/frustration appropriately," and the May 2013 IEP includes emotional, social and behavioral development goals. However, the May 2013 IEP does not include a behavioral intervention plan.²⁴

15. **Mathematics.** As of the May 2013 IEP, Student could add and subtract one and some two digit numbers without regrouping, and had scored in the low range in mathematics on the Woodcock Johnson III (from 2012), and had scored below basic and basic on his Paced Interim Assessment ("PIA") in mathematics.²⁵ The IEP contains four mathematics goals, including: (1) recognizing the relative value of numerals in a multi-digit number, (2) adding and subtracting fractions, (3) converting like measurements, and (4) classifying two dimensional shapes into their categories based on their properties.²⁶

16. **Reading.** As of the May 2013 IEP, Student scored below average in reading on the Woodcock Johnson III (from 2012). He had shown some improvement in decoding and fluency; however, and based on his report card he was reading at the equivalent of a first grade level.²⁷ The IEP contains four reading goals, including: (1) identifying and determining two or

¹⁹ P-1-3 through P-1-4.

²⁰ P-1-4 through P-1-5.

²¹ P-2.

²² P-2-9.

²³ P-2-10.

²⁴ P-2-6.

²⁵ P-2-2.

²⁶ P-2-3.

²⁷ P-27-2.

more main ideas, (2) improving comprehension, (3) improving phonics and word analysis skills in decoding, and (4) determining the meaning and area of academic relevance of a given text.²⁸

17. **Written Expression.** As of the May 2013 IEP, Student scored in the low range in written expression on the Woodcock Johnson III. He had difficulty writing complex sentences, and with size consistency when writing letters. The IEP contains three goals in written expression, including: (1) writing narratives, (2) writing opinion pieces and (3) producing clear and coherent writing.²⁹

*March 2014 IEP*³⁰

18. Student has an IEP dated March 19, 2014, which provides 5 hours of specialized instruction outside of the general education setting in each of the following areas: reading, written expression and mathematics. It also provides 120 minutes per month of behavioral support services outside of the general education setting,³¹ which the IEP describes as Student's LRE.³²

19. **Behavior.** The March 2014 IEP indicates that, based on a "Strength and Difficulties Questionnaire Assessment" Student "is at high risk for behavioral disorder and at medium risk for hyperactivity or concentration [challenges]." However, the March 2014 IEP does not include a behavioral intervention plan.³³

20. **Mathematics.** As of the March 2014 IEP, Student had scored in the low range in mathematics on the Woodcock Johnson III (from 2012), and had scored below basic and basic on his PIA in mathematics during the 2012-2013 school year. Student could add multi-digit numbers, divide single digit numbers, and add and subtract fractions with like denominators; however, he was having trouble with multi-step problems, and in understanding word problems.³⁴ The IEP contains four mathematics goals that were essentially the same as in his previous IEP, including: (1) recognizing the relative value of numerals in a multi-digit number, (2) adding and subtracting fractions with unlike denominators, (3) converting like measurements, and (4) classifying two dimensional shapes into their categories based on their properties.³⁵

21. **Reading.** As of the March 2014 IEP, Student scored below average in reading on the Woodcock Johnson III (from 2012). He had shown some improvement on his latest PIA in reading, but still scored below basic. He showed some improvement in decoding and fluency, and had gone from a "K" reading level to an "M" (beginning of 3rd grade reading level), was largely able to read level 1 and level 2 sight words. The IEP contains four reading goals that were essentially the same as in his previous IEP, including: (1) identifying and determining two

²⁸ P-2-4 through P-2-5.

²⁹ P-2-5 through P-2-6.

³⁰ P-3.

³¹ P-3-11.

³² P-3-13.

³³ P-3-10.

³⁴ P-3-3.

³⁵ P-3-4 through P-3-5.

or more main ideas, (2) improving comprehension, (3) improving phonics and word analysis skills in decoding, and (4) determining the meaning and area of academic relevance of a given text.³⁶

22. **Written Expression.** As of the March 2014 IEP, Student scored in the low range in written expression on the Woodcock Johnson III. He had difficulty writing complex sentences. The IEP contains three goals in written expression that were essentially the same as in his previous IEP, including: (1) writing narratives, (2) writing opinion pieces and (3) producing clear and coherent writing.³⁷

*February 2015 IEP*³⁸

23. Student has an IEP dated February 24, 2015, which provides 5 hours of specialized instruction outside of the general education setting in each of the following areas: reading, written expression and mathematics. It also provides 120 minutes per month of behavioral support services outside of the general education setting,³⁹ which the IEP describes as Student's LRE.⁴⁰

24. **Behavior.** The February 2015 IEP indicates that Student "has a history of defiant and uncontrollable anger . . . [h]e attends school most days but has issues remaining in his classes, . . . [he] has been suspended a few times this school year and continues to find himself in the middle of controversy, [and] [w]ith constant attempts to redirect [Student's] behavior, it appears to have gotten worst since the beginning of the school year. [Student's] behaviors are preventing him from successfully accessing the general education curriculum."⁴¹ However, the February 2015 IEP does not include a behavioral intervention plan.⁴²

25. **Mathematics.** As of the February 2015 IEP, Student had scored below basic on the DC CAS standardized test (from 2014), and at level 2 on the i-Ready math test administered to him on January 29, 2015. Student could add and multiply 2 digits by 2 digits, and add and subtract fractions with like denominators; however, he was having trouble with multi-step problems, and in understanding word problems.⁴³ The IEP contains three mathematics goals, including: (1) solving math problems involving rates and ratios, (2) writing, reading and evaluating algebraic expressions, (3) finding the area of geometrical objects.⁴⁴

26. **Reading.** As of the February 2015 IEP, Student had scored below basic on the DC CAS standardized test (from 2014), and below first grade level on the SRI test in reading, administered to him in January 2015, which would indicate regression. The IEP contains two

³⁶ P-3-7.

³⁷ P-2-5 through P-2-6.

³⁸ P-4.

³⁹ P-4-8.

⁴⁰ P-4-9.

⁴¹ P-4-6.

⁴² P-4-5.

⁴³ P-3-3.

⁴⁴ P-4-3 through P-4-4.

reading goals, including: (1) identifying and determining the main idea and one supporting detail, (2) improving comprehension.⁴⁵

27. **Written Expression.** As of the February 2015 IEP, Student had difficulty writing complex sentences, and found it difficult to write, even with prompts. The IEP contains three goals in written expression, including: (1) writing 3-4 simple and correct sentences (a more simplified goal than previous IEPs, (2) writing clear and coherent writing in which the development, organization and style are appropriate to the task, purpose and audience.⁴⁶

Educational Setting

28. Student requires a small group setting to be academically successful.⁴⁷

29. During the 2014-2015 school year, Student has received all instruction for his academic course (non-specials) outside the general education setting.⁴⁸

30. As of February 5, 2015, Student had received several mathematics interventions, including small group instruction, one-on-one instruction, and peer tutoring; yet, he continued to struggle in mathematics,⁴⁹ though mathematics is a relative strength for him, and he gets more excited about mathematics instruction.⁵⁰

31. As of February 5, 2015, Student had received several reading interventions, including small group instruction, online intervention, intervention through a program called "Read 180;" yet, Student was still struggling in reading.⁵¹

32. As of February 5, 2015, Student had received several written expression interventions, including small group instruction, peer tutoring and one-on-one instruction. Student had made moderate improvement in written instruction, but continued to struggle in class.⁵²

Academic Progress

33. By some measures, Student has made limited academic progress however, it has been uneven, and overall he has shown stagnation and regression.⁵³

34. New mathematics goals were introduced for Student as of his April 10, 2015 IEP Progress Report.⁵⁴ Generally, the inclusion of new goals on an IEP progress report indicates that a student has made some progress in that academic area.⁵⁵

⁴⁵ P-4-4.

⁴⁶ P-4-6.

⁴⁷ P-1-2; P-1-3; P-2-2; P-2-4; P-3-3; P-3-6.

⁴⁸ P-25-4.

⁴⁹ P-8-2.

⁵⁰ Testimony of Educational Advocate.

⁵¹ P-8-3.

⁵² P-8-3.

⁵³ Testimony of Parent; testimony of Literacy Specialist.

35. From September 2014 to February 2015, Student regressed in the area of reading comprehension based on his SRI Assessment,⁵⁶ and his Lexile scores during this same time period show his reading comprehension to be “far below grade level.”⁵⁷

36. From the 2012-2013 to 2014-2015 school years, Student’s report card grades have generally been low – “Ds” and “Fs” (or “Beginning” and “Developing” in earlier school years).⁵⁸

Behavior/January 2015 Suspension/Manifestation Determination

37. Student is easily distracted by his peers. “He is a follower, who does not stand on his own principles.” He is easily distracted, and tends to pay attention to what his peers are doing, rather than focusing on his own work. While he can be helpful at times, he is also disrespectful and defiant at times.⁵⁹

38. “Student tends to have difficulty controlling his temper, displaying disruptive behavior, and controlling his impulses. When he is off task, it takes some time for him to be redirected back on task.”⁶⁰

39. Student has a history dating back at least to his initial IEP in 2012⁶¹ of manifesting adverse behaviors as a result of, and/or to distract from, academic difficulty. As stated in his March 19, 2014 IEP, Student “is constantly out of seat or requesting to leave the class for some reason. When being instructed in the general education classroom, he spends much time in the hallway with peers.”⁶²

40. Student has had a number of negative behavioral incidents at school, including vandalism/destruction of property, striking/kicking peers, cursing at/disrespecting teachers and staff, and being out of his assigned area in the building.⁶³

41. Student has been suspended multiple times, and is often in the school building but avoiding class, at least in part due to his frustration from being so far behind academically, and feeling he cannot do the work expected of him.⁶⁴

42. An independent comprehensive psychological evaluation Student received from Children’s National Medical Center, which is summarized in a March 21, 2012 report,

⁵⁴ P-15-2.

⁵⁵ Testimony of Educational Advocate.

⁵⁶ P-11-1.

⁵⁷ P-11-2.

⁵⁸ P-12 through P-15.

⁵⁹ P-8-3.

⁶⁰ P-8-4.

⁶¹ P-1-2.

⁶² P-3-2.

⁶³ P-21.

⁶⁴ P-21; P-23; testimony of Parent; testimony of Educational Advocate.

recommended that “positive reinforcement should be used to encourage appropriate behaviors [from Student] in class.”⁶⁵

43. Student received his first BIP on April 30, 2015, which identifies skipping class as one of his problem behaviors, but includes only strategies to address Student’s behavior when he is in class, not any strategies to decrease his tendency to avoid class when academically frustrated.⁶⁶

44. On May 26, 2015, after Student’s BIP was already in place, Student received a functional behavioral assessment, which identifies his problematic behavior as not remaining in the classroom, being disruptive, frustrating other students, not sitting down to complete his assignments, disrespecting his teacher and other staff members, and states that this behavior occurs all over the school (including in the classrooms, hallways and cafeteria), each school day, and that the negative behaviors allow him to avoid completing assignments.⁶⁷

45. In January 2015, there was an incident in which Student was running around the classroom, not following directions, jumping over tables and pushing chairs. When the teacher attempted to get him to stop the behavior, he did not do so. When the teacher attempted to call the parent from her mobile phone, Student knocked the phone out of her hand.⁶⁸

46. The school proposed a 25 day suspension for Student; however, Parent appealed, and the suspension was reduced to 10 days. The suspension was for repeated tier 3 behaviors throughout the school year, not just for the January 2015 incident.⁶⁹

47. Because the 25 day suspension was under appeal, District Middle School informed Parent that she should continue to bring Student to school during the suspension, though Parent received some mixed information about whether Student would be allowed in the building during the suspension. Parent unsuccessfully attempted to get Student into an alternative school during the suspension period, and did not immediately bring Student back to District Middle School.⁷⁰

48. Student’s team convened a manifestation determination (“MDT”) meeting in early February. Though Student’s IEP indicates that he has trouble with impulse control, the MDT determined that Student’s act of knocking the phone out of his teacher’s hand was oppositional, and not a manifestation of his disability.⁷¹

⁶⁵ P-7-5.

⁶⁶ P-19.

⁶⁷ R-10.

⁶⁸ Testimony of Department Chair.

⁶⁹ *Id.*

⁷⁰ Testimony of Parent; testimony of Department Chair.

⁷¹ Testimony of Department Chair.

49. Student did not receive homework packets or other academic services during the suspension, outside of the time period when District Middle School instructed Parent to continue bringing him to school pending the resolution of the appeal.⁷²

Nonpublic School

50. Nonpublic School is a full-time special education day school with certified special education teachers.⁷³

51. Nonpublic School serves approximately 70 students, most of whom are learning disabled, and some who have other health impairment, emotional disturbance and other disabilities.⁷⁴

52. Nonpublic School has worked with students with behavioral problems in the past, and has a school-wide behavioral support system with rewards and expectations. If a student requires more behavioral support than the school-wide behavioral support system, the student's team meets to determine what that individual student needs.⁷⁵

53. Nonpublic School has 7-10 students and three teachers assigned to each class. Students receive a great deal of one-on-one instruction, and are escorted throughout the building 100% of the time throughout the school day.⁷⁶

54. Student has visited Nonpublic School, including sitting in on a class and participating in a group session with the social worker, and Student responded well. Nonpublic School is aware of the behavior problems he has had to date.⁷⁷

55. Student has been accepted at Nonpublic School, it could implement his current IEP, and would further assess him to determine how best to serve his needs using its three tier intervention approach.⁷⁸

56. Nonpublic School's costs have been approved by the Office of State Superintendent of Education ("OSSE").⁷⁹

Triennial Evaluation/Independent

57. As of the filing of the DPC, the most recent (and only) psychoeducational evaluation Student has received was the March 21, 2012 psychoeducational evaluation Student received from Children's National Medical Center.⁸⁰

⁷² Testimony of Parent.

⁷³ Testimony of Nonpublic Director.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ p-9.

58. In preparation for drafting a proposed compensatory education plan, Literary Specialist administered the following evaluations to Student: (1) Peabody Picture Vocabulary Test-4, (2) Woodcock Reading Mastery Test-Revised, Word Attack Subtest, (3) Slosson Oral Reading Test-Revised, (4) Wide Range Achievement Test-4, Spelling Subtest, (5) Gray Oral Reading Test-4, and (6) Informal Tests of Phonemic Awareness.⁸¹

59. Literacy Specialist's fee for the testing he conducted is \$175. The fee for him to prepare a report based on the testing he conducted would be an addition \$75.⁸²

CONCLUSIONS OF LAW

“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 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student'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).

- (a) **Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs for Student, as required by 34. C.F.R. § 300.324, by failing to provide sufficient levels of specialized instruction to address Student's lack of progress, failing to include appropriate LRE, failing to include appropriate goals, and failing to include a behavior intervention plan in the May 2013, March 2014 and February 2015 IEPs.**

In order for an IEP to be appropriate, (1) the LEA must have complied with IDEA's administrative procedures and (2) the IEP must be reasonably calculated to provide some educational benefit to Student. *See N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003); *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). The appropriateness of an IEP must be assessed as of the time the IEP was developed. *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) (“Because the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated

⁸¹ Testimony of Literary Specialist; P-27-1.

⁸² Testimony of Literacy Specialist.

to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.”) Petitioner does not assert that DCPS failed to comply with the administrative procedures attendant to developing Student’s IEP. Rather, Petitioner claims that the May 2013, March 2014 and February 2015 IEPs are substantively inappropriate.

A student’s IEP team must review the student’s IEP on at least an annual basis, and must revise the student’s IEP to address any lack of expected progress toward annual goals, reevaluation results, parentally provided information about the child, the child’s anticipated needs, and “other matters” as appropriate. When a student’s behavior is impacting the student’s learning or that of others, the IDEA requires a student’s IEP team to consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). A student’s IEP must take into account and be designed to meet the unique needs of the student, and it must be “regularly revised in response to new information regarding the child’s performance, behavior, and disabilities.” *Suggs v. District of Columbia*, 679 F. Supp. 2d 43 (D.D.C. 2010), citing 20 U.S.C. §§ 1414(b)-(c).

Mathematics Goals. Student’s mathematics present levels in the March 2013 IEP do not reflect progress from his 2012 IEP. However, his 2013 mathematics goals do not appear to be so divergent from his present levels as to represent a denial of FAPE. Student’s present levels in the March 2014 IEP reflect some progress from his 2013 IEP. The mathematics goals from 2014 are largely the same as 2013; however, given that Student was making progress on the goals, the hearing officer does not find that the decision to maintain the goals for an additional year was necessarily so unreasonable as to represent a denial of FAPE. Student’s mathematics present levels in the February 2015 IEP reflect progress from 2014, and the 2015 IEP includes new mathematics goals. Given Student’s progress in mathematics, the hearing officer does not find his February 2015 IEP goals to be so divergent from his present levels or otherwise unreasonable as to render them a denial of FAPE.

Reading Goals. Student’s May 2013 reading present levels reflect some progress since 2012; however, he was still reading on a first grade level. Though most of his four goals centered around comprehension, he did have a goal devoted to improving phonics, word analysis and decoding skills. The hearing officer does not find the May 2013 reading goals to be so inappropriate as to rise to a denial of FAPE. Student’s March 2014 reading present levels reflect meaningful progress, going from a first grade reading level to the beginning of the third grade reading level. Student’s March 2014 reading goals were repeated from 2013; however, given the progress he had made in reading from the previous year, the hearing officer does find the team’s judgment to maintain the goals for an additional year to rise to the level of a denial of FAPE. Student’s reading present levels in his February 2015 IEP reflect significant regression from 2014. The February 2015 IEP contains no phonics, word analysis or decoding reading goals; rather, it only includes comprehension goals. The hearing officer does not find the February 2015 reading goals to be appropriate, given Student’s continued reading weakness, the regression he had shown, and the fact Student’s reading weakness was impacting him in other academic areas (such as through his persistent struggle with math word problems. The hearing officer finds the February 2015 reading goals to be a denial of FAPE.

Written Expression. Student's March 2013 written expression present levels do not reflect progress from his 2012 IEP. Given Student's difficulty with letter formation and writing complex sentences, goals for him to write narratives, opinion pieces and produce clear and coherent writing seem too advanced for his skill level, particularly without more realistically attainable goals also being included. For these reasons, the hearing officer finds the March 2013 written expression goals to be a denial of FAPE. Student's March 2014 written expression IEP present levels do not reflect progress from 2013, and the goals essentially repeat from 2013. As was the case with respect to the 2013 IEP, the hearing officer finds the goals in the 2014 IEP to deny Student a FAPE, especially given his previous lack of progress with goals at that level. Student's February 2015 written expression IEP present levels do not reflect progress; however, one of the goal was simplified to sentence-level writing, which is more appropriate for his present levels. The hearing officer does not find the February 2015 written expression present level to rise to the level of denying Student a FAPE.

BIP. Student's 2012 psychoeducational evaluation recommends a behavioral intervention plan, and Student has been having significant behavioral issues that impede his learning and/or the learning of others since at least October 2013. Therefore, the hearing officer finds that the failure to include a behavioral intervention plan reflecting consideration of the use of positive behavioral interventions and supports, and other strategies, to address Student's behaviors, with or in conjunction with Student's May 2013, March 2014 and February 2015 IEPs, was a denial of FAPE.

Given that Student was demonstrating some progress, but that it was so uneven and unstable, the hearing officer finds that the failure to increase his hours of specialized instruction in the May 2013, March 2014 and February 2015 was a denial of FAPE, and that Student's LRE designation of 15 hours per week of specialized instruction outside of the general education setting, with a 120 minute per month of behavioral support services outside the general education setting, was inappropriate for him and a denial of FAPE for the same reasons.

Petitioner meets her burden on this issue, as specified above.

(b) Whether DCPS denied Student a FAPE by failing to complete comprehensive triennial re-evaluations in February 2015, specifically due to the failure to obtain updated evaluations to determine the cause of Student's lack of progress and failure to complete a functional behavior assessment, pursuant to 34 C.F.R. §300.303 and 34 C.F.R. §300.304.

A student who has been determined eligible for special education and related services must be re-evaluated at least every three years, and more frequently if the student's educational and/or related services needs call for a reevaluation. *See* 34 C.F.R. §300.303(b)(2). Evaluations are to be conducted in accordance with the procedures set out in 34 C.F.R. §300.304. Student's uneven progress, lack of progress, regression and adverse behaviors would have made it appropriate to reevaluate him prior to February 2015. Certainly, Student should have had a functional behavioral evaluation by at least two years prior to the filing of the DPC, and should have had his triennial reevaluation no later than February 2015. The failure to timely reevaluate

is a procedural violation of the IDEA. *Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. 2010). However, in this case it rises to a denial of FAPE because it impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, and caused a deprivation of educational benefit. Petitioner meets her burden of proof on this issue.

- (c) Whether DCPS denied Student a FAPE from the May 2013 IEP to present by failing to provide an appropriate educational placement in a setting that could address the full scope of Student's special education needs in a fully self-contained special education setting and/or school, pursuant to 34 C.F.R. §300.115, 300.116, 300.17 and 300.324.**

As stated above, the hearing officer has found the failure to increase Student's hours of specialized instruction and LRE from May 2013 to February 2013 to have been a denial of FAPE. Prior to February 2015, the hearing officer does not find Student required a different type of educational setting; however, as of February 2015, he was significantly declining academically and his behaviors were deteriorating in a way that stemmed from, and continued to adversely impact, his disability. Due to the cumulative impact of previous denials of FAPE, the hearing officer finds that as of February 2015, the failure to provide a different type of educational setting for Student constituted a denial of FAPE.

- (d) Whether DCPS denied Student a FAPE by erroneously concluding that the behaviors resulting in a suspension of 25 days were not a manifestation of Student's disability.**

Though Petitioner carries the burden of proof on the other issues raised in the DPC, Respondent carries the burden of persuasion with respect to proving that its manifestation determination decision did not deny Student a FAPE. *See* DCMR tit. 5-B, § 2510.16. The repeated tier 3 behaviors Student had exhibited throughout the school year, and for which he was suspended for at least ten days in January 2015, are the types of behaviors identified in his 2012 psychoeducational evaluation and in his IEPs for the past several years. While it is possible for someone with student's disability to demonstrate oppositional behaviors that are not a function of the person's disability, and while it may be the case that Student's act of knocking the phone out of his teacher's hand was oppositional, the testimony from Department Chair is that Student was not given a long term suspension solely for knocking the phone out of his teacher's hand, but rather for repeated tier 3 behaviors throughout the year. For these reasons, the hearing officer does not find that DCPS met its burden of persuasion that the February 2015 manifestation determination was appropriate, and finds that the manifestation determination denied Student a FAPE.

- (e) Whether DCPS denied Student a FAPE by failing to implement Student's IEP during his suspension from January 30, 2015 through March 9, 2015.**

While Parent received some mixed messages about whether Student was to report to school while his 25 day suspension was under appeal, Parent did not follow up with the appropriate personnel at the school or make other sufficient efforts to clarify her understanding

that Student was not to report to school during the suspension appeal. The hearing officer finds that Student would have been permitted to attend school for all but the 10 days of the suspension that were upheld on appeal. For these reasons, the hearing officer does not find that DCPS failed to implement Student's IEP for the full period from January 30, 2015 through March 9, 2015, but the hearing officer does not find that DCPS failed to implement Student's IEP for ten school days during that period of time, as the record establishes that District Middle School did not provide Student any academic services during his 10-day suspension. Petitioner meets her burden of proof on this issue to the extent described above.

REQUEST FOR NONPUBLIC PLACEMENT

An order for DCPS to fund a placement at Nonpublic School is part of the relief Petitioner seeks for those issues on which a denial of FAPE was found. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

a. Nature and Severity of Student's Disability

Student is significantly below grade level in mathematics, reading and written expression. In particular, Student's deficits in reading cause him difficulty in his other academic areas. Additionally, "Student tends to have difficulty controlling his temper, displaying disruptive behavior, and controlling his impulses. Student has a history dating back at least to his initial IEP in 2012⁸³ of manifesting adverse behaviors as a result of, and/or to distract from, academic difficulty. As stated in his March 19, 2014 IEP, Student "is constantly out of seat or requesting to leave the class for some reason. When being instructed in the general education classroom, he spends much time in the hallway with peers." Student's behavioral and academic deficits are severe.

b. Student's Specialized Educational Needs

Student's full-scale I.Q. is in the low average range, his processing speed is in the low average range, and his working memory is in the borderline range; however, Student scored higher in the areas of verbal comprehension and perceptual reasoning and his cognitive profile indicates that he can learn with support. Student's reading difficulties are a central factor in his other academic difficulties, as well as his behavioral difficulties. Student requires a small group setting to be academically successful.

⁸³ P-1-2.

c. Link between Student's Needs and the Services Offered by Private School

Nonpublic School is a full-time special education day school with certified special education teachers that serves mostly learning disabled students, as well as some with other health impairment, emotional disturbance and other disabilities. Nonpublic School has 7-10 students and three teachers assigned to each class. Students receive a great deal of one-on-one instruction, and are escorted throughout the building 100% of the time throughout the school day, which would assist with Student's class avoidance tendencies. Nonpublic School has worked with students with behavioral problems in the past, and has a school-wide behavioral support system with rewards and expectations. If a student requires more behavioral support than the school-wide behavioral support system, the student's team meets to determine what that individual student needs. Nonpublic School could meet Student's academic and behavioral needs.

d. Cost of Placement at Private School

Nonpublic School's costs have been approved by OSSE, and the hearing officer deems them to be reasonable.

e. Extent to Which Private School Represents Least Restrictive Environment

Student has demonstrated some uneven progress over the past several years, but it has been unstable, due in large part to his reading deficits. Cumulative denials of FAPE have caused him to significantly regress behaviorally and academically this school year. While his previous IEPs have only required 15 hours of specialized instruction for Student, outside of the general education setting, District Middle School has provided all of Student's academic instruction outside of the general education setting during the 2014-2015 school year, yet Student still regressed. Though Student received a behavioral intervention plan shortly before the DPH, the hearing officer does not find that that it will be sufficient for Student's needs or help him make meaningful progress, because it was prepared prior to a functional behavioral assessment being conducted for Student, and it does not address the academic/class avoidance issues the functional behavioral assessment identifies. For these reasons, the hearing officer concludes that Nonpublic School represents Student's LRE for the present time, due to his interrelated academic deficits and behavioral problems.

Based on the totality of factors discussed above, the hearing officer concludes that Nonpublic School is reasonably calculated to address Student's disabilities and educational needs. Accordingly, the hearing officer concludes that Nonpublic School is an appropriate placement for Student under the *Branham* analysis.

COMPENSATORY EDUCATION

IDEA gives hearing officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206

(D.D.C. 2010), quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527. See also, e.g., *Turner v. District of Columbia*, 2013 WL 3324358, 10-11 (D.D.C. July 2, 2013).

Here, Petitioner claims Student was harmed by DCPS' failure to develop appropriate IEPs for Student in May 2013, March 2014 and February 2015, failure to appropriately/timely reevaluate Student, failure to provide an appropriate educational setting for Student, making an inappropriate manifestation determination, and failure to implement Student's IEP from January 30, 2015 through March 9, 2015. The hearing officer has found a denial of FAPE on at least a portion of each issue, but not as to each sub-issue, and not to each time period Petitioner alleges. As compensatory education, Petitioner requests 150 hours of compensatory education in a multi-sensory reading, spelling/writing and mathematics program, and a laptop equipped with text to speech software (namely Kurzweil 3000) and speech to text software (namely Dragon Naturally Speaking).

As discussed in the "Conclusions of Law" above, the hearing officer's findings of denial of FAPE are not as expansive as Petitioner's allegations. The hearing officer expects that placement at Nonpublic School will go a long way toward closing the gap between the educational services Student should have received and those he did receive. Therefore, the hearing officer will award 60 hours of tutoring as compensatory education in the area of reading, which is Student's area of greatest deficit, and which has an adverse impact on his other academic subjects. Since the record does not establish the extent to which Student would have access to speech-to-text and/or text-to-speech technology while at Nonpublic School, the hearing officer will not order this technology.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. DCPS shall fund Student's placement at Nonpublic School for the 2015-2016 school year, including transportation;
- B. Prior to the start of the 2015-2016 school year, DCPS shall reverse the manifestation determination made in February 2015 and amend Student's educational records to reflect that the behaviors were a manifestation of his disability;
- C. Within 20 business days of this Order, DCPS reimburse Parent or Literacy Specialist for \$175 fee for the assessments Literacy Specialist conducted on Student in May 2015, and shall fund the \$75 fee for Literacy Specialist to prepare a report based on the assessments he conducted, so that Student's IEP team may review and consider the report;
- D. Within 20 business days of this Order, DCPS shall fund 60 hours of tutoring in the area of reading through a provider of Parent's choice. Tutoring hours shall be paid at DCPS prevailing rates. All tutoring hours not utilized by August 31, 2017 shall be forfeited;
- E. No later than September 30, 2015, DCPS shall conduct a functional behavioral assessment of Student or, at its option, fund an independent functional behavioral assessment.

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- F. Within 10 school days⁸⁴ of receiving the functional behavioral assessment described in Order “D” above, DCPS shall convene a meeting of Student’s IEP team to review new information and revise Student’s behavioral intervention plan and/or IEP as appropriate.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: June 29, 2015

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner’s Attorney: Kimberly Glassman, Esq. (electronically)

DCPS’ Attorney: William Jaffe, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

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).

⁸⁴ Any delay on the part of Parent, Student and/or their representatives shall not be counted against DCPS.