

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

OSSE
Office of Dispute Resolution
June 23, 2015

PETITIONER,
on behalf of STUDENT,¹

Date Issued: December 19, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2014-0427

v.

Hearing Date: December 4, 2014

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 2003
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by an inappropriate Individualized Education Plan (IEP) developed by the IEP team at CITY ELEMENTARY SCHOOL on January 30, 2014, by DCPS' failure to evaluate Student in all areas of suspected disabilities and its failure to afford the parent access to all of Student's education records.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 6, 2014, named DCPS as Respondent. The parties met for a resolution session on November 5, 2014 and did not reach an agreement. On October 31, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on November 6, 2014.

The due process hearing was held before this Impartial Hearing Officer on December 4, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner testified and called as witnesses CLINICAL PSYCHOLOGIST, NONPUBLIC SCHOOL ADMISSIONS COORDINATOR, VOLUNTEER ADVOCATE and LAW FIRM ADVOCATE. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-24, P-26 through P-30, P-32, P-33, P-37 and P-39 were admitted into evidence without objection, including Exhibits P-24, P-26, P-27 through P-29, P-32 and P-33 which were admitted over DCPS' objections. DCPS' objections to Exhibits P-31 and P-35 were sustained. Exhibits P-25, P-34, P-36 and P-38 were withdrawn. DCPS' Exhibits R-1, R-2, R-4, R-6 and R-7 were admitted into evidence, including Exhibit R-2 which was admitted over Petitioner's objection. Petitioner's objections to Exhibits R-3 and R-5 were sustained. Exhibit R-7 was not offered.

At the end of Petitioner's case-in-chief, DCPS' Counsel made a motion for a directed finding against the Petitioner on all issues, which was argued by counsel. I

granted DCPS' motion for a directed finding on the alleged failure of DCPS to conduct an Occupational Therapy (OT) assessment. I denied DCPS' motion as to the remaining issues. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the October 31, 2014 Prehearing Order:

- Whether DCPS has denied Student a FAPE by failing to evaluate him in all areas of suspected disabilities, including with an OT assessment and an updated Functional Behavioral Assessment (FBA);
- Whether DCPS denied Student a FAPE by not ensuring that an appropriate IEP was developed on January 30, 2014, in that the IEP lacks appropriate and specific annual goals, provides an insufficiently restrictive, therapeutic environment, lacks sufficient behavioral support services, lacks sufficient Specialized Instruction services outside general education, does not provide for Extended School Year (ESY), does not meet his need for a dedicated aide and does not include an appropriate Behavior Intervention Plan (BIP); and
- Whether DCPS has denied Student a FAPE by failing to afford the parent access to Student's education records including service logs and behavior incident reports.

For relief, Petitioner requests that DCPS be ordered to conduct an OT evaluation, an FBA and all other assessments needed to evaluate Student's suspected disabilities; that DCPS be ordered to ensure Student's IEP team reviews and revises his IEP based upon the new assessments and data, and revises Student's IEP to provide for a dedicated aide and Extended School Year (ESY) services, an updated BIP, and appropriate hours of Specialized Instruction and Behavior Support services; that DCPS be ordered to fund

Student's placement at and transportation to Nonpublic School; and an order for DCPS to afford the parent access to Student's education records including all behavior and incident reports and service tracker logs. Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in this case.

PRIOR HEARING OFFICER DETERMINATION

In October 2013, Petitioner filed a prior due process complaint against DCPS on behalf of Student (Case No. 2013-0551). The principal issue in that case was whether DCPS had failed to comply with its child-find obligation to evaluate and identify Student as a child with an IDEA qualifying disability during the 2012-2013 school year.

Following a due process hearing, former Hearing Officer Melanie Byrd Chisholm issued a Hearing Officer Determination on November 13, 2013 (the November 13, 2013 HOD), ordering DCPS, *inter alia*, to complete a comprehensive psychological assessment and an FBA of Student and to convene a multidisciplinary team (MDT) meeting to complete the initial evaluation process and determine Student's eligibility for special education and related services. Exhibit P-4.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE child, resides with Mother in the District of Columbia. Testimony of Mother. On January 30, 2014, Student was first determined to be eligible for special education and related services as a child with Multiple Disabilities (MD) based upon the concomitant disabilities Emotional Disturbance (ED) and Other Health Impairment - Attention Deficit/Hyperactivity Disorder (OHI-ADHD). Exhibit P-12.

2. On October 23, 2013, prior to being determined eligible for special

education services, Student was referred by his teacher to the Student Support Team (SST) at City Elementary School, due to aggressive behaviors, getting out of his seat, name calling and difficulty transitioning between activities. Student was provided with interventions consisting of being placed in a “buddy teacher’s” classroom, working with a social worker, being provided with leadership roles in the class, preferential seating and the use of an i-phone or computer. On November 14, 2013, a 504 Plan (Section 504 of the Rehabilitation Act of 1973) was also implemented due to Student’s diagnosis of ADHD. A Behavior Intervention Plan (BIP) was developed for Student on September 19, 2013, which included a behavior chart, incentives for positive behaviors, and negative consequence for inappropriate behaviors. Exhibit P-18. Despite these interventions, Student continued to exhibit disruptive behaviors that resulted in his removal from class on a weekly basis and often daily. Exhibit P-16.

3. After the November 13, 2013 HOD was issued, DCPS completed a comprehensive psychological evaluation of Student on December 23, 2013 and an FBA on December 17, 2013. Exhibits P-16, P-17. In the psychological evaluation report, the DCPS school psychologist reported, *inter alia*, that Student’s overall cognitive functioning fell within the Average range. On the Woodcock-Johnson Tests of Achievement, Student’s scores were in the Average range in math and in the High Average range in reading and writing. Teacher and parent responses to the Conners 3rd Edition (Conners 3) rating scales indicated significant elevations in inattention, hyperactivity, aggression and peer relations. On the Behavior Assessment System for Children, Second Edition (BASC-II), teacher and parent rating scales indicated significant concerns regarding Student’s externalizing and acting-out behaviors. Student had demonstrated an inability to build or maintain satisfactory interpersonal

relationships with peers and teachers, as well as inappropriate types of behavior or feeling under normal circumstances. Student was reported to be failing all of his classes as a result of his behaviors. The school psychologist reported that although Student had the ability to complete his academic work, his behaviors had negatively affected his ability to learn in the classroom setting without constant interventions. Exhibit P-16.

4. An initial special education eligibility determination meeting was convened for Student on January 30, 2014. Based upon the December 23, 2013 psychological evaluation, the December 17, 2013 FBA, a December 3, 2013 Educational Evaluation and other existing data, the eligibility team determined that Student was eligible for special education and related services under the MD classification. Exhibits P-12, P-13. The team reported, *inter alia*, that despite the implementation of multiple strategies, Student continued to engage in major verbal and physical challenging behaviors in the academic setting and that he continued to have difficulty in the general education setting in both structured and unstructured settings. In academics, the team reported that there were no significant weaknesses or concerns for Student in math, reading or written expression. Exhibit P-13.

5. Student's IEP team met on January 30, 2014 to develop his initial IEP. Mother attended the meeting and her attorney participated by telephone. The IEP team reported that Student's behavior impeded his learning or that of other children. The IEP noted as considerations: Student consistently engages in verbal and physical aggression in the academic setting, that he has difficulty remaining on task in the academic setting and engages in behaviors that disrupt learning opportunities, that Student's behaviors include yelling in the academic setting, throwing objects, hitting others and refusing to follow directives from adults. Exhibit P-5.

6. The IEP team identified Mathematics, Cognitive and Emotional, Social and Behavioral Development as areas of concern. For mathematics, Student's disability was reported to negatively affect his processing and application of knowledge, to affect his ability to sustain attention, concentrate and exert control to access the general education curriculum. For cognitive, it was reported that Student benefits from consultation from the teacher to help with additional accommodations to help him perform in the class, that his distractions limit his ability to focus at times and that Student needs additional time, prompting and redirection. For Present Levels of Performance in the Emotional, Social and Behavioral Development Area of Concern, the IEP team reported that Student's verbal and physical aggressive behavior presented major challenges in the academic setting. The data collected for the FBA revealed that Student engaged in such verbally and physically aggressive behaviors 80 percent of the time. Exhibit P-5.

7. In the IEP Least Restrictive Environment (LRE) narrative, the IEP team reported that Student's disability warranted an integrated program necessary for his success. His removal from the general education setting for Behavioral Support Services was solely based on the statement that "student needs to prevent harmful effects to his success." Exhibit P-5.

8. The IEP team provided that Student would receive 240 minutes per month of Behavioral Support Services outside General Education, and, as Consultation Services, 2.5 hours per week of Specialized Instruction and 30 minutes per month of Behavioral Support Services. Exhibit P-5. The 2.5 hours per week of Specialized Instruction Consultation Services were for math consult hours by the special education case manager. Exhibit P-27.

9. DCPS also agreed to provide Student 40 hours of Behavioral Support Services independent counseling as compensatory education. By email of February 3, 2014, Petitioner's Counsel wrote DCPS' COMPLIANCE CASE MANAGER that Mother, through her attorneys, had agreed that the January 30, 2014 IEP would be acceptable "with the comp ed tutoring [*sic*] hours you agreed to." Petitioner's counsel confirmed in an email sent later that day that DCPS had agreed to 40 hours of counseling, not tutoring, as the compensatory education. DCPS issued a funding authorization letter for the counseling services to Petitioner's Counsel on February 3, 2014. Petitioner's counsel confirmed receipt of the authorization letter. Exhibit P-28.

10. Student's September 19, 2013 BIP was revised on January 28, 2014. The revised IEP included, as an incentive, the opportunity for Student to earn academic computer instruction time for being on task in his regular academic blocks. Exhibit P-18. The BIP was revised again on April 30, 2014. The objectives of the revised BIP were to have Student remain seated during instruction time, exhibit less defiant behaviors and accept responsibility for his actions and increase his capacity to regulate his mood, manage his frustration and maintain positive peer relationships. Positive intervention strategies in the April 30, 2014 BIP included one-to-one assistance by the teacher, positive verbal and nonverbal affirmations, proximity and attention to reinforce appropriate behaviors, the opportunity for Student to express his feelings and short breaks for when Student is overwhelmed, maximum supervision in less structured times and breaking down his workload into increments. Exhibit P-18.

11. At the end of the 2013-2014 school year, Student had made no progress on his January 30, 2014 IEP goals, except he was reported to be progressing on identifying anger triggers and successful ways to respond to challenging situations. The

special education teacher reported that Student's behavior and lack of engagement did not even allow evaluation of his progress on his mathematics goals. Exhibit P-8.

12. At the end of the 2013-2014 school year, Student's classroom teacher commented that Student performed at the basic level in all academic areas; that he had the potential to do much better; that he does not follow directions; and that he rarely listens to authority figures. The teacher concluded that if Student were able to improve in those areas, we would have great success in the next school year. Exhibit P-21.

13. In a series of emails beginning August 27, 2014, Volunteer Advocate requested City Elementary School to provide copies of Student's education records. Exhibit P-27.

14. City Elementary School convened a multidisciplinary team meeting for Student on October 3, 2014. At that meeting, the team discussed Student's ongoing behavior issues. Law Firm Advocate stated that the parent and her representatives believed Student needed full-time services in a stand-alone special education school. Law Firm Advocate also requested an updated BIP for Student, which he understood would encompass an updated FBA. Exhibit P-29, Testimony of Law Firm Advocate.

15. This school year, the City Elementary School social worker and special education teacher have been providing extensive 1:1 services to Student. The social worker has been meeting with Student daily for 1 to 1½ hours. Student spent two hours with the special education teacher every afternoon to work one-on-one on math, reading or whatever was not completed in the regular education classroom. Exhibit P-23. At the November 5, 2014 resolution meeting in this case, the DCPS special education coordinator reported that "it literally takes having one-on-one adult supervision throughout the whole day to have anything that looks like on task or a positive day."

The school staff has worked out a routine to make sure that Student has a one-on-one setting. Exhibit P-23.

16. On December 2, 2014, an IEP team meeting was convened for Student. It was agreed at the meeting that Student would have a “full-time IEP.” Mother agreed with that proposal. Student's school placement was not discussed at the meeting.

Testimony of Mother.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. Did DCPS deny Student a FAPE by failing to evaluate him in all areas of suspected disabilities, including with an OT assessment and an updated FBA?

Petitioner first contends that DCPS failed to evaluate Student in all areas of suspected disabilities. DCPS responds that it conducted an functional behavioral assessment (FBA) of Student on December 17, 2013 and that Petitioner has not proven that it was required to conduct an updated FBA or an occupational therapy (OT) assessment.

The IDEA requires that a local education agency (LEA) must ensure that a child

with a disability is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006).

In her due process complaint, Petitioner alleged that Student has “warranted an OT assessment as [his] handwriting has been observed to be poor” and he had never been assessed in the area of fine motor skills. In the due process hearing, I granted DCPS’ oral motion for a directed finding against Petitioner on her OT assessment claim because in her case-in-chief, Petitioner did not make a *prima facie* showing that an OT assessment had been requested or that Student’s motor skills were an area of suspected disability.

Petitioner also contends that DCPS denied Student a FAPE by not conducting an FBA reassessment in the 2014-2015 school year to update Student’s December 17, 2013 FBA. The IDEA provides that a reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. As stated in § 300.303, consistent with section 614(a)(2) of the IDEA, a parent can request a reevaluation at any time. *See* Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46641 (August 14, 2006). The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student’s parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, *Herbin* concluded that “[r]evaluations should be

conducted in a ‘reasonable period of time,’ or ‘without undue delay,’ as determined in each individual case.” *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010).

In this case, although DCPS’ FBA of Student was conducted less than ten months before, Law Firm Advocate requested at an October 3, 2014 IEP meeting that a new FBA be conducted. Petitioner’s due process complaint in this case was filed on October 6, 2014. DCPS’ not conducting an FBA of Student in the three days before the due process complaint was filed was not undue delay. I find Petitioner has not established that DCPS violated the IDEA or denied Student a FAPE by not conducting an FBA reevaluation in the 2014-2015 school year.

2. Did DCPS deny Student a FAPE by not ensuring that an appropriate IEP was developed on January 30, 2014, in that the IEP lacks appropriate and specific annual goals, provides an insufficiently restrictive, therapeutic environment, lacks sufficient behavioral support services, lacks sufficient Specialized Instruction services outside general education, does not provide for Extended School Year (ESY), does not meet his need for a dedicated aide and does not include an appropriate Behavior Intervention Plan (BIP)?

In the November 13, 2013 HOD, the hearing officer ordered DCPS to complete its special education eligibility evaluations of Student and, if Student were found eligible, to develop an initial IEP for him. Pursuant to the order, Student’s eligibility was confirmed on January 30, 2014 and his IEP was developed the same day. The IEP included annual goals for mathematics, cognitive and behavioral areas of concern. It provided Student 240 minutes per month of Behavioral Support Services as direct services. As Consultation Services, the IEP also specified that Student would receive 2.5 hours per week of Specialized Instruction and 30 minutes per month of Behavioral Support

Services.²

The parent attended the IEP meeting and Petitioner's Counsel participated by telephone. Petitioner's Counsel agreed at the meeting that the IEP was acceptable to the parent, provided that DCPS also provided Student 40 hours of independent counseling/behavioral support services as compensatory education. On February 3, 2014, in furtherance of that agreement, DCPS provided a funding authorization letter for Student to receive 40 hours of independent counseling services.

Despite having agreed to the content of the initial IEP at the January 30, 2014 meeting, Petitioner, through her attorney, now contends that the IEP was not appropriate when it was developed because it lacked appropriate annual goals, provided inadequate Behavioral Support Services, provided insufficient Specialized Instruction Services, lacked a BIP and did not provide for a dedicated aide or ESY services. DCPS maintains that the initial IEP was appropriate based upon the information available to the IEP team at the time it was offered.

"The question of whether a public school placement is appropriate rests on '(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010) (quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004)). In this case,

² The IEP does not explain the nature of the Consultation Services. U.S. Department of Education comments describe how special education teachers who do not directly instruct children could provide consultation services to other teachers, such as adapting curricula, using behavioral supports and interventions, or selecting appropriate accommodations for children with disabilities. They could also assist children with study skills or organizational skills and reinforce instruction that the child has already received from a highly qualified teacher in a core academic subject. See Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46557-46558 (August 14, 2006).

Petitioner alleges both a procedural violation and that the IEP was substantively inappropriate.

Procedural Compliance

First the Petitioner contends that the IEP lacked appropriate and specific annual goals, which would be an IDEA procedural deficiency. *See A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 -165 (D.D.C.2005) (failure to comply with the IDEA's requirement for appropriate annual goals was a procedural deficiency in the IEP.) The IDEA requires that each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability. *See* 34 CFR § 300.320(a)(2).

The January 30, 2014 IEP provided academic goals for mathematics and behavioral goals for Cognitive and for Social, Emotional and Behavioral Development. At the time the IEP was developed, Student was not reported to have significant weaknesses or concerns in math or other academic areas. There was no evidence at the hearing that the mathematics goals in the IEP were not appropriate for Student.

With regard to the behavioral goals, I agree with Petitioner that the annual goals for Cognitive and for Emotional, Social and Behavioral Development were deficient. At the January 30, 2014 IEP meeting, the IEP team was provided extensive behavioral data from Student's initial eligibility evaluations. In the December 2013 psychological evaluation and the FBA, the evaluators reported that Student "consistently engage[d] in oppositional behaviors, physical aggression and ma[de] verbal threats which impede[d] his ability to maximize his academic success. He was reported to have difficulty transitioning from one activity to another and to exhibit behavior concerns such as

bullying, hitting, threatening others, cursing, yelling, running out of class and defiant behaviors. These behaviors were reported to be severe to moderate and to occur across settings with various adults. Student was also reported to be demonstrating defiance that was atypical for his age and to be lashing out often at his peers decreasing their willingness to engage with him. School Psychologist reported in her December 23, 2013 psychological evaluation report that, although Student had the ability to complete his academic work, his behaviors negatively impacted his ability to learn in the classroom setting without constant interventions, and that as a result of his behaviors, Student was failing all of his classes.

In the January 30, 2014 IEP, the IEP team provided three annual goals related to Student's behavior concerns:

Cognitive:

Student will be able to focus, concentrate and follow instructions for 20 minutes in 2 out of 3 tries in the classroom when doing structured activities.

Emotional, Social, and Behavioral Development:

Annual Goal 1: Given Behavioral Support Services, Student will demonstrate appropriate interactions with peers in the academic setting in 3/5 opportunities.

Annual Goal 2: Given Behavioral Supports, Student will learn to identify his anger triggers and articulate ways to successfully respond to frustrating situations in 8/10 trials.

Exhibit P-5. Even without the benefit of expert testimony,³ given the severity of Student's reported behavior issues, I find that on their face, these three goals were not sufficiently comprehensive and did not meet the IDEA's requirement that the annual goals be calculated to enable Student to be involved in and make progress in the general

³ *Cf. Maynard v. District of Columbia*, 701 F.Supp.2d 116, 125 (D.D.C.2010) (Experience and expertise of hearing officer in this specialized area.)

education curriculum.

Failure to comply with the IDEA's standards for appropriate IEP goals is a procedural violation of the IDEA. *See A.I. ex rel. Iapalucci, supra*. Procedural violations of the Act do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir. 2006), citing *C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (*per curiam*). In this case, Petitioner has not shown that the inadequate behavioral goals in the January 30, 2014 IEP resulted in a loss of educational opportunity to Student or deprived the Mother of her IEP participation rights. Therefore, I find that Petitioner is not entitled to compensatory education relief for this procedural violation. *See Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir.1990) (refusing to award compensatory education where procedural faults committed by Board did not cause the child to lose any educational opportunity); *Lesesne, supra*.

Substantive IEP Claims

i. Services and Setting

Although Petitioner and her attorney agreed to the initial IEP at the January 30, 2014 IEP meeting, Petitioner, by the same attorney, now alleges that the special education and related services, as well as the educational placement, provided in the January 30, 2014 IEP were not appropriate. The appropriateness of an IEP is judged prospectively, not by the effectiveness of the program in hindsight. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008):

“[B]ecause the question ... is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated 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 statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.”

Id. 66-67 (internal quotation marks and citations omitted).

With regard to the provision of Specialized Instruction and Related Services, the January 30, 2014 IEP team knew from Student’s recently completed eligibility evaluations that he was failing all of his classes because his behaviors negatively impacted his ability to learn in the classroom setting without constant interventions. The IEP team offered Student 240 minutes per month of Behavioral Support Services and no direct services in the classroom. Petitioner offered no expert evidence that when the IEP was agreed to by the parent, it was not “reasonably calculated to enable [Student] to receive educational benefits,” *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Moreover, DCPS also agreed to provide Student 40 hours of independent behavioral support counseling as compensatory education services. The parent, through her attorney agreed on February 3, 2014 that the IEP services, supplemented by the 40 hours of independent counseling, were acceptable. Petitioner offered no expert testimony that the IEP services, which she and her attorney agreed to, were not appropriate for Student.

Petitioner also contends that the IEP team’s decision not to remove Student from the general education setting did not provide him a sufficiently restrictive, therapeutic environment. Under the IDEA’s Least Restrictive Environment requirement, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled” and “[s]pecial 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 CFR § 300.114(a)(2). Petitioner offered no evidence at the due process hearing, that when Student's initial IEP was developed, Student could not have been successfully educated in the regular classroom environment with appropriate aids and services.

While to this hearing officer, the IEP team's decision not to offer Student more behavioral support services, a dedicated aide, or other IEP aids and supports in the initial IEP is problematical, it was a decision made by the entire IEP team, including the parent and Petitioner's Counsel, based upon the information available at the time.

ii. Extended School Year

The January 30, 2014 IEP specified that Student did not require ESY services. "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *Johnson v. District of Columbia*, 873 F.Supp.2d 382, 386 (D.D.C.2012), quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir.2002). Petitioner offered no competent evidence in this case that when Student's initial IEP was developed, the IEP team should have determined that Student's gains over the 2013-2014 school year would have been significantly jeopardized without the reinforcement of summer ESY services. I find that Petitioner has not shown that when the January 30, 2014 IEP for Student was offered, ESY services were necessary to a FAPE.

iii. Behavior Intervention Plan

Petitioner also maintains that the January 30, 2014 IEP was inadequate because

it did not contain a Behavior Intervention Plan (BIP). The IDEA requires the IEP team, in the case of a child whose behavior impedes the child's learning or that of others, to consider the use of positive behavioral supports, and other strategies to address that behavior. *See* 34 CFR § 300.321(a)(2)(i).

Petitioner is apparently under the misapprehension that Student was not provided a BIP until April 30, 2014. *See* Compensatory Education Plan, Exhibit P-32. ("From January 7, 2014 - April 30, 2014 [Student] was without a BIP") The hearing evidence established that City Elementary School developed a BIP for Student on September 19, 2013. That BIP, which included a behavior chart, incentives for positive behaviors, and negative consequence for inappropriate behaviors, was revised on January 28, 2014 before Student's initial IEP team meeting. The revised IEP included, as an incentive, the opportunity for Student to earn academic computer instruction time for being on task in his regular academic blocks. Student's BIP was revised again on April 30, 2014. The IDEA does not require that a BIP be incorporated into a child's IEP. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). I find that Petitioner has not established that Student was denied a FAPE because the January 30, 2014 IEP team did not incorporate his BIP in the IEP.

In summary, the substance of Student's January 30, 2014 IEP, including the hours of specialized instruction and related services, was adopted by Student's IEP team, pursuant to the mandate of the November 13, 2013 HOD, based upon the representations of Mother and her attorney that they agreed to the program and concurrent with DCPS' agreement to provide Student, separately, 40 hours of independent counseling services. Even though the parent agreed to the content of the initial IEP, DCPS may still be held responsible if the IEP denied Student a FAPE. *See*,

e.g. M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir.1996). (“[A] child’s entitlement to special education should not depend upon the vigilance of the parents Rather, it is the responsibility of the child’s teachers, therapists, and administrators – and of the multi-disciplinary team . . . – to ascertain the child’s educational needs, respond to deficiencies, and place him or her accordingly.”) In this case, however, Petitioner offered no expert evidence that the IEP, to which she and her attorney had agreed, was not appropriate for Student at the time it was offered. I conclude that Petitioner has not met her burden of proof to establish that the January 30, 2014 IEP was not reasonably calculated to provide some educational benefit to Student. *J.N., supra*, 677 F.Supp.2d at 322.

3. Did DCPS has deny Student a FAPE by failing to afford the parent access to Student’s education records including service logs and behavior incident reports?

For her final issue, Petitioner alleges that DCPS did not allow the parent’s representatives access to Student’s education records. Under the IDEA, an LEA must permit parents to inspect and review any education records, that are collected, maintained, or used by the agency, with respect to the identification, evaluation, and educational placement of their child, and the provision of a FAPE to the child. *See* 34 CFR §§ 300.501 (a), 300.613(a). *See, also, Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13, 21 (D.D.C.2008) (Parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records.) Although the right to inspect and review records includes the right to request that the agency provide copies of the records containing the information, if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records, an LEA is not normally required to send parents copies of education

records. *See Assistance to States for the Education of Children with Disabilities, supra*, 71 Fed. Reg. at 46645, 46688.

Beginning in August 2014, Volunteer Advocate repeatedly requested DCPS to provide him copies of Student's education records, including discipline records. However, the hearing evidence does not establish which requested discipline records, if any, have not been provided to the parent or that the parent's representatives were not permitted to review Student's records at City Elementary School. I find that Petitioner has not met her burden of proof to establish that DCPS did not afford her access to Student's education records.

Remedy

In this decision, I have found that the only violation of the IDEA proven by the Petitioner was procedural, namely that DCPS failed to ensure that the behavioral goals in the January 30, 2014 IEP were reasonably calculated to enable Student to be involved in and make progress in the general education curriculum. On December 2, 2014, two days before the due process hearing in this case, DCPS convened an IEP team meeting for Student, at which a "full-time" IEP was offered for Student. Mother agreed with this IEP. In order to ensure that the December 2, 2014 IEP includes appropriate annual goals, I will order that the revised IEP comply with the IDEA procedural requirements for appropriate annual goals. Because Petitioner has not proven that the January 30, 2014 IEP was not reasonably calculated to enable Student to receive education benefits and has not met her burden of proof on the other issues in her complaint – failure to evaluate in all areas of suspected disabilities and failure to afford her access to Student's education records – no other relief is warranted.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. DCPS shall ensure that Student's revised IEP, considered at the December 2, 2014 IEP meeting, contains appropriate annual goals that comply with the requirements of the IDEA, 20 U.S.C. § 1415(d)(1)(A)(II)-(III) and 34 CFR § 300.321(a)(1)-(3).
2. All other relief requested by the Petitioner herein is denied.

Date: December 19, 2014

s/ Peter B. Vaden
Peter B. Vaden, 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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team