OSSE
Office of Dispute Resolution
June 15, 2016

District of Columbia

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Confidential

Parent on Behalf Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") ("LEA") Respondent. Case # 2016-0084 Date Issued: June 15, 2016	CORRECTED HEARING OFFICER'S DETERMINATION [2] Hearing Dates: June 1, 2016 June 2, 2016 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

[2] This "Corrected" HOD is issued to make typographical and/or grammatical changes only; no substantive changes have been made. The HOD issuance date, June 15, 2016, remains unchanged, as does the applicable appeal date.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Education Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on June 1, 2016, and concluded on June 2, 2016, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student has been determined to be a child with a disability pursuant to IDEA with a disability classification of Multiple Disabilities ("MD") including Autism Spectrum Disorder and other health impairment ("OHI") for Attention Deficit Hyperactivity Disorder ("ADHD"). On April 1, 2016, the student's mother ("Petitioner") filed this due process complaint alleging DCPS denied the student a free appropriate public education ("FAPE") by, inter alia, failing to develop an appropriate IEP on April 2, 2014; failing to implement the student's April 2, 2014, and September 30, 2015, IEPs; and failing to provide the student with an appropriate educational setting during school year ("SY") 2015-2016.

Petitioner seeks as relief that the Hearing Officer finds DCPS denied the student a FAPE. Petitioner requests an order requiring DCPS to place and fund the student at a full time, non-public, special education day school.[3] In the alternative, Petitioner requests a school closer to the student's home. Petitioner requests that DCPS reimburse the Public Defender Service the $300.00 fee paid to Petitioner's expert. Finally, Petitioner seeks assistive technology as compensatory education.

On April 11, 2016, DCPS filed a timely response to the Petitioner's complaint in which it denies it failed to provide the student with a FAPE. DCPS contends, inter alia, that the IEP developed for the student was appropriate and fully implemented while the student was enrolled at a DCPS school; the student is currently in juvenile detention and DCPS is no longer his local education agency ("LEA"); therefore is not the entity obligated to provide the student a FAPE and/or a prospective educational placement. The most DCPS can be obligated to provide is compensatory education.

The parties participated in mediation in lieu of a resolution meeting on April 20, 2016. The parties did not reach an agreement and did not mutually agree to proceed directly to hearing. Thus, the 45-day period began on May 1, 2016, and ends [and the Hearing Officer's Determination ("HOD") is due] on June 15, 2016.

The Hearing Officer convened a pre-hearing conference on the complaint on April 27, 2016, and issued a pre-hearing order on May 3, 2016, outlining, inter alia, the issues to be adjudicated.

[3] The Hearing Officer concluded as a result of discussions on record at the hearing that because the student is currently in a LEA (DYRS) that is not DCPS, and no other LEA is a party to this matter, the requested relief of prospective placement will be considered as compensatory education should Petitioner sustain the burden of proof on a denial of FAPE to the student.

ISSUES: [4]

1. Whether DCPS denied the student a FAPE by failing to allow Petitioner to review all the student's education records pursuant to 34 C.F.R. 300.501(a) because DCPS did not maintain complete educational records for the student.

2. Whether DCPS denied the student a FAPE by failing to timely update the student's February 7, 2013, IEP.

3. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on April 2, 2014, due to: (a) lack of adequate IEP goals, and/or (b) an inappropriate reduction of specialized instruction inside general education and behavior support services.

4. Whether DCPS denied the student a FAPE by failing to evaluate the student for autism by the time of development of the student's April 2, 2014, IEP.[5]

5. Whether DCPS denied the student a FAPE by failing to implement the student's April 2, 2014, IEP by not providing the student 12.5 hours per week of specialized instruction outside general education.

6. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate educational setting that addressed Autism Spectrum Disorder from November 2015, when he began attending School C.

7. Whether DCPS denied the student a FAPE by failing to permit Petitioner, through her expert, to observe the student's educational program at School C in February 2016.

8. Whether DCPS denied the student a FAPE by failing to implement the student's September 30, 2015, IEP due to: (a) lack of a dedicated aide and/or (b) failure to implement occupational therapy interventions, and/or (c) failure to provide transportation services.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 72 and DCPS Exhibits 1 through 18) that

[4] The Hearing Officer restated the issue(s) at the outset of the hearing, and the parties agreed that these were the issue(s) to be adjudicated.

[5] The complaint alleges the parent requested an evaluation for Autism at this IEP meeting.

were admitted into the record and are listed in Appendix A).[6] Witnesses' identifying information is listed in Appendix B.[7]

SUMMARY OF DECISION:

Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE on the following issues: (1) failing to maintain the student's educational records, (2) failing to update the student's IEP in a timely manner; (3) failing to develop an appropriate IEP on April 2, 2014, due to (a) lack of adequate IEP goals, and (b) an unjustified reduction in special education services; and (5) failing to implement the student's April 2, 2014, IEP.

Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE on the following issues: (4) failing to evaluate the student for autism; (6) failing to provide the student with an appropriate educational setting for Autism Spectrum Disorder; (7) failing to permit Petitioner, through her expert, to evaluate the student's educational program at School C, and (8) failing to implement the student's September 30, 2015, IEP due to (a) lack of a dedicated aide; (b) failure to implement occupational therapy interventions, and (c) failure to provide transportation services.

The Hearing Officer directs DCPS, upon the student's release from detention and transition from School B, to place and fund the student for SY 2016-2017 at a non-public school, provide Petitioner an independent assistive technology assessment and convene a multidisciplinary team meeting at the student's new school placement to review the evaluation and review and revise the student's IEP as appropriate.

FINDINGS OF FACT: [8]

1. The student is a youth committed to the custody of the District of Columbia Department of Youth and Rehabilitative Services ("DYRS"). The student has been determined to be child with a disability pursuant to IDEA with a MD classification including autism and OHI for ADHD. (Witness 4's testimony, Petitioner's Exhibits 23-1, 29-1)

2. During school year ("SY") 2012-2013 the student attended a public charter school that is its own local educational agency ("LEA"). The student had an IEP during that school

[6] Any docments that were ojbected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

[7] Petitioner presented six witnesses: Petitioner, a psychologist, a psychiatrist, a counselor and a case manager from District of Columbia Department of Youth Rehabilitation Services ("DYRS"), and the Special Education Manager for School B. DCPS did not present any witnesses.

[8] The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. If the source of the finding is a document then the second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

year, dated February 7, 2013, that identified him with a disability classification of emotional disability ("ED"). The IEP prescribed the following services: 16.5 hours per of specialized instruction inside general education, 12.25 hours per week of specialized instruction outside general education, and 2 hours per week of behavioral support services outside general education. (Petitioner's Exhibit 19-1, 19-10)

3. The student began SY 2013-2014 at a different public charter school that is also its own LEA. The student continued to attend this school until November 1, 2013, when the student was detained at the District of Columbia juvenile detention center and began to attend the school at that center ("School A") for which DCPS is the LEA. (Petitioner's Exhibit 1-9)

4. The student was no longer detained and attending School A at the time his February 7, 2013, IEP was due to be updated. The student was re-detained and again attending School A by April 2014. (Respondent's Exhibit 1-2)[9]

5. On April 2, 2014, School A updated the student's IEP. Petitioner and her counsel participated in the April 2, 2014, IEP meeting. The student also participated in the meeting. Petitioner asked that the student receive services for autism as well as his other diagnosis of ED and ADHD. Petitioner did not provide the team any documentation of an autism diagnosis. Petitioner asked that evaluations be conducted for autism. The team did not take action to evaluate the student for autism. The team continued the student's ED disability classification. (Petitioner's Exhibit 21-1, 21-2)

6. The School A team reported at the April 2, 2014, meeting that the student was making progress, and his teachers reported he was doing well in all classes, engaged, focused and pleasant to work with. The student's social/emotional goals were discussed and he had improved in this area as well. As a result, there was a recommendation to reduce the student's behavioral support services to 30 minutes per week. (Respondent's Exhibit 13)

7. School A removed the 16.5 hours of specialized instruction in the general education setting from the student's IEP. The April 2, 2014, IEP prescribed the following services: 12.25 hours per week of specialized instruction outside general education, and 30 minutes per week of behavioral support services outside general education. Petitioner disagreed with the IEP and the reduction in services. (Petitioner's testimony, Respondent's Exhibit 13, 14)

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8. The April 2, 2014, IEP contained virtually identical math and reading goals to the student's IEP four years prior dated March 10, 2010, when the student attended a previous DCPS school. Some of the written expression and emotional, social and behavioral development goals were carried over from the goals in his February 3, 2013,

[9] DCPS asserted in its response to the complaint that the student was released from detention and not attending School A on the date his February 7, 2013, IEP expired, but was detained again sometime in March 2014, and School A updated his IEP shortly thereafter on April 2, 2014. Petitioner presented no evidence that the student remained detained on February 7, 2014. Consequently, the Hearing Officer concluded the student was not detained and was not attending School A on this date.

IEP, but changed slightly. (Respondent's Exhibit 14-1, 14-3, 14-4, 14-5, Petitioner's Exhibits 16-1, 16-2, 16-3, 19-7, 19-8, 19-9)

9. On May 6, 2014, the student was moved to Mountain Manor Treatment Center in Maryland and remained there through June 5, 2014. The student was given a report card for the time he attended which indicates he received some educational services while there. (Petitioner's Exhibit 27)

10. The student returned to detention and School A in November 2014 and remained at School A until February 2015. (Petitioner's Exhibit 29-1)

11. On February 20, 2015, the student was moved by DYRS to its other secured detention center where students attend a school at the center ("School B"), for which DCPS is not the LEA. School B is operated by a public charter school and DYRS is the LEA for School B. A member of the charter school administrative staff serves as the LEA representative for the school. School B is monitored by OSSE for compliance with special education and other regulatory requirements. (Witness 3' testimony, Petitioner's Exhibit 29-1)

12. On April 1, 2015, School B updated the student's IEP and maintained his ED disability classification. The IEP included goals in the areas of math, reading, written expression and emotional, social and behavioral development. The IEP prescribed the following services: 12.5 hours of specialized instruction in general education and 120 minutes per month of behavioral support services in general education. (Petitioner's Exhibit 22-1, 22-3, 22-4, 22-5, 22-6, 22-7, 22-8)

13. While at School B, the student was provided a psychiatric evaluation and an occupational therapy ("OT") evaluation in June 2015. The student was diagnosed with autism and the OT evaluation recommended the student be provided sensory accommodations and OT consultative services. (Witness testimony 2's testimony, Witness 5's testimony, Petitioner's Exhibits 29, 33, 39)

14. The May 15, 2015, psychiatric evaluation noted, among other things, the student's belated autism diagnosis, and his sensory stimulation seeking, substance abuse history, unpredictable anger and propensity to attack a peer or staff member with little provocation. The evaluator recommended the student be placed in a psychiatric residential placement upon his release from detention and his move from School B. (Witness 5's testimony, Petitioner's Exhibit 29-1, 29-2 29-3)

15. While at School B the student was in a setting with general education students with classes co-taught by general education and special education teachers. The classes had no more than 10 students with several adults in the classroom. Because School B is operated at a detention facility with significant structure and routines, the school is akin to a residential placement. School B also provided the student supports that amounted to a dedicated aide assisting him in staying focused and completing assignments. As a

result, the student's academic performance improved. (Witness 2's testimony, Witness 3's testimony, Petitioner's Exhibit 24-1)

16. The student was provided an academic assessment soon after he arrived at School B in March 2015 and his academic performance was assessed again in October 2015 prior to his departure. The student made academic gains during his time at School B. (Petitioner's Exhibits 1-12, 31)

17. On September 30, 2015, in anticipation of the student being released from detention, School B developed an IEP for the student that reflected the services and educational setting the IEP team believed the student would need upon release. (Witness 3's testimony, Petitioner's Exhibit 23)

18. The School B team determined the student required a therapeutic environment and rewrote the student's IEP to require 27 hours of specialized instruction each week outside of general education and 240 minutes each month of behavioral supports and a dedicated aide. The team left the section describing the amount time and location where the aide would be needed blank. This was to be determined once the student arrived at his next school placement. (Witness 3's testimony, Exhibit 23-1, 23-14)

19. School B also prepared a document that detailed the type of educational placement and accommodations the School B team believed the student required in his next school. The document stated that the student was in need of "a therapeutic and specialized environment …not available at [School B,] and thus a change of placement is required." The document also recommended an assistive technology evaluation and a review of the OT evaluation and direct OT services. (Witness 3's testimony, Petitioner's Exhibit 24)

20. Despite the School B IEP team's recommendation that the student was in need of a therapeutic placement outside general education, DYRS, the student's LEA at the time, was not prepared to fund the student in a non-public placement upon his release from detention. School B's IEP team members made suggestions of several non-public schools the student could attend. (Witness 2's testimony, Witness 3's testimony, Petitioner's Exhibit 52-G, 52K-2, 52K-3, 52L-2)

21. DCPS, DYRS and OSSE, have entered into a Memorandum of Agreement ("MOA") with regard to educational procedures and decisions for youth committed to DYRS and housed at, inter alia, the DYRS detention facilities. Pursuant to the MOA, DYRS is the agency responsible for ensuring FAPE for youth committed to DRYS and attending School B for all purposes except determining educational placement and location of services after discharge from School B. (MOA-II B page 3)

22. Pursuant to the MOA, DYRS is to coordinate with DCPS for all students who will be attending DCPS schools upon release, and, inter alia, coordinate with individual charter schools, adult education, and/or GED programs for all other students. (MOA-IV B 10 pages 5 & 6)

23. Pursuant to the MOA, DYRS and DCPS are required to follow procedures to ensure an orderly transition from School B to a DCPS school. This includes, among other things, that educational records are submitted to DCPS timely, and for students with IEPs, that the DCPS "step down team" makes a recommendation to the School B's IEP team regarding the next location of educational services. (MOA- IV C 4 page 7)

24. Pursuant to the MOA, if the School B IEP team disagrees with DCPS' recommendation, DYRS is to convene an IEP meeting with the goal of sharing information, allowing a student to express his concerns, review and/or revise the IEP if necessary, and determine the placement and proposed location. (MOA- IV C 5 page 7)

25. Based upon communication between DYRS, School B placement transition staff, and DCPS, it was determined that the student, upon release from detention, would first go to his neighborhood DCPS school and a thirty day review would be conducted. If the student's needs could not be met at his neighborhood school, DCPS would make a placement determination. (Witness 3's testimony 56 c-8)

26. The School B IEP team disagreed with the student's placement at his neighborhood school. DYRS did not agree to participate in the IEP meeting that is mandated by the MOA. (Petitioner's Exhibit 56C-1, 56C-3, 56C- 6),

27. Petitioner visited the student's neighborhood school, and she was told it could not implement the student's IEP. DCPS then assigned the student to a program in another DCPS [redacted] school ("School C"). Petitioner visited the School C program and determined that the program was not appropriate for the student because the students were on certificate track. The student was then placed in the Behavior and Education Support ("BES") program at School C so he could be on diploma track. (Parent's testimony)

28. The student remained detained and attending School B until November 2015 when he was released by DYRS and began living with his mother. On November 15, 2015, the student was enrolled at ("School C") with the IEP dated September 30, 2015, developed by School B. (Parent's testimony, Respondent's Exhibit 12)

29. The student attended School C regularly and was a model student. However, by the time School C convened a meeting on December 8, 2015, the student's attendance had begun to wane. Petitioner and her counsel participated in the meeting along with members of the School B staff who had worked with the student. The student participated in the meeting by phone and stated there were no distractions that prevented him from attending class. During this meeting, the MDT discussed the student's attendance, and problems with bus transportation, whether the student required a dedicated aide and whether the student needed assistive technology for his occupational therapy. (Respondent's Exhibit 6)

30. By December 15, 2015, the student began missing days from school and began to be non-compliant with his DYRS case manager's requirements. He began staying away from home at night, often spending the night with his godfather who resides in Maryland. Petitioner and the godfather began discussions regarding the godfather becoming the

student's foster parent and the student residing in Maryland and attending school in Maryland at a program that could meet the student's needs. (Witness 4's testimony, Petitioner's Exhibit 57A)

31. Some of the student's absences were due to the transportation failures by OSSE. The school bus would often fail to arrive when scheduled or would fail to arrive at all. On those occasions Petitioner called the OSSE transportation hotline to complain, called School C to explain the student's absence or late arrival to school. During the time the student attended School C transportation for the student was a frequent problem. (Parent's testimony, Petitioner's Exhibit 59)

32. DCPS amended the student's September 30, 2015, IEP on December 8, 2015, to include transportation services. The student's disability classification remained the same and the team prescribed 25 hours per week of specialized instruction outside general education, 2 hours per month of behavioral support services, 90 minutes per month of occupational therapy, a dedicated aide with no location, beginning or ending date, transportation, extended school year services and a post-secondary transition plan. However, Petitioner was not aware the IEP had been amended, but the student's DYRS case manager received a copy of the revised IEP from DCPS. (Parent's testimony, Witness 4's testimony, Respondent's Exhibit 7-1, 7-13, 7-16, 7-18)

33. DCPS convened a MDT on January 12, 2016, that included Petitioner and her counsel. The team discussed transportation services, assistive technology and the student's dedicated aide. The team also discussed the causes and effects of the student's absences that were both due to transportation problems and his plain failure to attend school. School C agreed that a dedicated aide would be provided by January 20, 2016. The School C team noted that the student had not been in school since November 20, 2016, and that the student needed to be in school 30 days consistently to determine baseline academic data for the student. (Witness 4's testimony, Respondent's Exhibit 5)

34. DCPS provided the student direct OT services at School C on at least two occasions starting in February 2016. The services were attempted on additional days when the student was absent. School C implemented the dedicated aide requirement of IEP and the dedicated aide was available to the student at least by January 28, 2016. However, on two occasions in February 2016 when the student's DYRS case manager came to School C with the student, the dedicated aide was not present. (Witness 4's testimony, Respondent's Exhibit 11, Petitioner's Exhibit 40C)

35. On February 11, 2016, Petitioner requested a FBA be conducted of the student and Petitioner signed a form consenting to the evaluation. By February 23, 2016, the student had been absent from school 34 days, 21 of which were unexcused absences. (Parent's testimony, Respondent's Exhibits 2, 4, 8)

36. The student found the computer-based work in the BES program boring; his attendance and transportation problems continued, and he lost the desire to attend School C. He eventually stopped attending. DYRS ultimately returned the student to secured detention. (Witness 4's testimony)

37. The student was detained on April 4, 2016 and on April 5, 2016, returned to secured

detention and began attending School B. He has remained detained and at School B since, and was there at the time of the hearing. (Stipulation)

38. Petitioner hired a consultant, who testified as an expert witness, to observe and make a determination whether School C's BES program was appropriate for the student. The consultant went to School C twice in February 2016 and attempted to visit the BES program. However, he was not allowed to visit the student's specific program because on the two occasions that he attempted to visit the student was not in school. As a result, the consultant did not observe the BES program. The consultant opined that the physical setting of the school building was inappropriate for the student because it is too big and noisy and would likely cause him to be distracted due to his disabilities of ADHD and sensory seeking behaviors due to his autism. The consultant also opined that the computer-based instruction used in the BES program would also be problematic for the student. The consultant has never met or evaluated the student but based his opinions on review of the student's evaluations and educational records. (Witness 1's testimony)

39. As a part of his services to Petitioner, the consultant also visited a non-public special education school ("School D") that serves students with autism to determine its ability to meet the student's educational needs. The consultant recommends, because the student needs specialized support throughout the school day, that he be placed at School D. The teaching staff are certified and trained to address concerns of students with autism and in the consultant's opinion, the physical environment would meet the student's needs as described by the student's evaluations and educational records. (Witness 1's testimony)

40. In October 2015 School D reviewed the student's educational documents and expressed to Petitioner that the school staff believed the student could benefit from their program. Petitioner visited School D and was pleased with what she saw and believes it is appropriate school for the student. As of April 20, 2016, School D had an opening for a student in its [redacted] school program but needs a referral packet from OSSE or DCPS to consider the student for possible placement. (Parent's testimony, Petitioner's Exhibits 62C-1, 63-B3)

41. The School B psychiatrist who evaluated the student also testified as an expert witness and offered her opinion of characteristics of a school that would meet the student's needs. The student needs a specialized program for students with autism with staff trained to work with students on the autism spectrum. The staff should have training in Applied Behavior Analysis ("ABA") therapy. A classroom with other ASD children would be ideal but the student needs to be in a class with high cognitive and high academic functioning students.

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:
A free appropriate public education or FAPE means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.
Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to allow Petitioner to review all the student's education records pursuant to 34 C.F.R. 300.501(a) because DCPS did not maintain complete educational records for the student.

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

Pursuant to 34 C.F.R. 300.501(a) The parents of a child with a disability must be afforded, in accordance with the procedures of Sec. Sec. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to- (1) The identification, evaluation, and educational placement of the child; and (2) The provision of FAPE to the child.

Petitioner failed to present any testimony or evidence concerning the education records that were allegedly not provided by DCPS. Petitioner made a claim in her due process complaint about records that were not provided. Petitioner cannot sustain her burden of proof as to absent records merely by claiming that records are missing. Petitioner can only sustain the burden of proof by providing testimony that there are specific records under the custody and control of DCPS that they have not provided to her. In this case, the student changed schools numerous times and was in and out of the custody of DYRS. The student also attended schools that were their own LEAs. Absent testimony concerning the missing records and proof that DCPS has the records, the Hearing Officer cannot conclude that Petitioner prevailed on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to timely update the student's February 7, 2013, IEP.

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

Pursuant to 34 C.F.R. 300.324 (b) Each public agency must ensure that, subject to the IEP Team--(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate…

The student's February 7, 2013, IEP was developed at a public charter school that is its own LEA, and the student began attending another public charter school that is its own LEA. By November 1, 2013, the student was returned to DYRS, but was released from the facility before his IEP annual review was due. The student returned to School A by April, after the student's IEP had expired. On April 2, 2014, the student's IEP was updated. Petitioner did not provide any evidence concerning where the student was at the time his IEP expired. However, DCPS, in its response, asserted the student left detention in February 2014, prior to the IEP expiring, and returned in March 2014, after the IEP expired and the IEP was updated on April 2, 2016. Consequently, the Hearing Officer must conclude, absent evidence that the student remained in detention at the time his IEP expired, that Petitioner did not sustain the burden of proof on this issue. In addition, there was no evidence presented as to any harm to the student due to the failure to timely update the IEP, had there been proof that the student was actually detained on that date and attending School A.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on April 2, 2014, due to: (a) lack of adequate IEP goals, and/or (b) an inappropriate reduction of specialized instruction inside general education and behavior support services.

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

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010).

The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia,* 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Id. at 206-07

"[T]he 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." *S.S. ex rel. Schank 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)). An IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley,* 458 U.S. at 204. "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). *District of Columbia v. Walker*, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) ("the adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ., Hawaii,* No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011)

The evidence in the case demonstrates that when the student's IEP was developed on April 2, 2014, at School A, School A removed the specialized instruction that was to be provided the student in the general education classroom and reduced his behavioral support services. In addition, it appears that School A changed the student's math and reading goals to reflect goals the student had years prior in a previous IEP. The only testimony offered regarding this meeting was the parent's testimony that she disagreed with the IEP and reduction of services. There was no testimony or evidence as to the effects that the reduction in services or the change in goals had on the student's academic progress during his time at School A. The evidence demonstrates that when the student later attended School B and his IEP was updated in April 2015, School B maintained the same level of services that were in his School A IEP, and there he made academic

progress. Although it might seem odd that IEP goals included in the IEP were used in an IEP from years prior, there was no evidence that indicated that the change in student's reading and math goals was inappropriate or that they were not goals the IEP team members at School A thought were consistent with the student's then-current level of academic functioning. Consequently, absent any probative evidence that the reduction in services and the change in the IEP math and reading goals was inappropriate, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to evaluate the student for autism by the time of development of the student's April 2, 2014, IEP.[10]

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

Pursuant to 34 C.F.R.§ 300.303 (a) A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311— (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation. (b) Limitation. A reevaluation conducted under paragraph (a) of this section— (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

Pursuant to 34 C.F.R. § 300.304 (c)(4): Each public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

Pursuant to 34 C.F.R. § 300.306 a school district must ensure that after a student has been appropriately evaluated for special education and that a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8. D.C. law requires that a "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

On April 2, 2014, when the student's February 7, 2013 IEP was updated, Petitioner requested that the student be evaluated for autism. DCPS took no action to evaluate the student at the time of the request. Rather, DCPS continued with the student's ED disability classification. It was not until June 2015 that the student was finally evaluated and determined to have autism while he was attending School B. Although a change in disability classification does not necessarily dictate a change in a student's programming, in this instance the change in the student's disability classification significantly changed the services the student was provided. The

[10] The complaint alleges the parent requested an evaluation for autism at this IEP meeting.

evidence demonstrates that once the student was diagnosed with autism at School B, his programming and accommodations were changed and, as a result, the student made academic progress. The delay in diagnosing the student was more than a year. This is a significant time in which the student did not have an appropriate disability category and appropriate services. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to implement the student's April 2, 2014, IEP by not providing the student 12.5 hours per week of specialized instruction outside general education.

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

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.
(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP…
(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

"To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the …authorities failed to implement substantial or significant portions of the IEP." *Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted Houston Indep. School District v. Bobby R. 200 F3d 341 (5th Circ. 2000)

There was no evidence presented that demonstrated that while the student was at School A, he was not provided the hours of specialized instruction outside general education that his IEP prescribed. Accordingly, the Hearing Officer concludes that Petitioner did not sustain the burden of proof on this issue.

ISSUE 6: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate educational setting that addressed Autism Spectrum Disorder from November 2015, when he began attending School C.

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

IDEA requires that children with disabilities be placed in the least restrictive environment ("LRE") so that they can be educated in an integrated setting with children who do not have

disabilities to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5)(A). Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." See 20 USC 1412(a)(5), 34 CFR 300.114(a)(2)(i)-(ii) (emphasis added); 34 C.F.R. § 300.550; *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.") Further, an appropriate location of services under the IDEA is one that is capable of "substantially implementing" a Student's IEP. *Johnson v. District of Columbia*, 962 F. Supp. 2d 263 (D.D.C., 2013).

Pursuant to D.C. Code § 38-2561.02. (c): Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:

1. DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
2. Private or residential District of Columbia facilities; and
3. Facilities outside of the District of Columbia.

The evidence in this case demonstrates that when the student was released from detention and transitioned from School B, the School B IEP team was insistent that the student was in need of a program that would provide him even more intense services than he was being provided at School B to address his academic, social and emotional and sensory seeking behaviors related to his autism. The School B team members made suggestions of programs they believed could meet the student's needs. However, DYRS took no action to ensure that the student was placed in a program that the IEP team deemed appropriate.

Pursuant to the MOA, it was up to DCPS to make a recommendation regarding the student's school, which was done. The School B IEP team disagreed with that recommendation. The evidence does not demonstrate that DYRS and DCPS followed the procedures fully after the disagreement arose. Nonetheless, the student was moved to a program at School C for students primarily with emotional and behavioral concerns and not a program that was specifically designed to address the student's unique needs related to his autism.

The testimony of two expert witnesses indicates that the student was and is in need of a program in a school environment that will meet his unique needs and that he is unlikely to function appropriately in a large conventional high school setting. The evidence demonstrates that once the student arrived at School C he was initially engaged and was attending but disengaged and stopped attending. Absent any testimony presented by Respondent to the contrary, the Hearing Officer concludes that the placement that DCPS offered to the student at School C in its BES program was inappropriate and a denial of a FAPE to the student.

ISSUE 7: Whether DCPS denied the student a FAPE by failing to permit Petitioner, through her expert, to observe the student's educational program at School C in February 2016.

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

Under DC Code § 38-2571.03, codified on March 10, 2015, parents are afforded new rights.
(5) Each LEA shall allow the parents of a student to visit and observe, either personally or through a designated representative, their child's current or proposed educational program; provided, that the LEA may require advance notice of any proposed visit or observation and an LEA may limit visits or observations as necessary to protect the safety of other students in the educational program and comply with applicable federal and local privacy laws.

The evidence demonstrated that Petitioner's consultant, on her behalf, went to School C twice in February 2016 to observe the BES program and form an opinion as its appropriateness for the student, and twice he was turned away. There was no evidence presented by Respondent to refute this fact or to provide a context for the visits and why they were not allowed despite the student not being present at the time of the visit. The requirement above does not speak to any requirement that the student be present at the time of the requested observation. Absent any contradictory evidence by Respondent, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue and that DCPS significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE by not allowing Petitioner's consultant to observe the student's program at School C.

ISSUE 8: Whether DCPS denied the student a FAPE by failing to implement the student's September 30, 2015, IEP due to: (a) lack of a dedicated aide and/or (b) failure to implement occupational therapy interventions, and/or (c) failure to provide transportation services.

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

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.
(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP…
(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

The evidence demonstrates that although the student began attending School C on November 16, 2015, the student was not provided a dedicated aide and OT services until late January 2016 and February 2016, respectively. There was evidence that the student received two OT sessions although the services started well after the student had arrived. There is no evidence the student ever connected to the dedicated aide as related by Petitioner's witness when she took the student to the school to specifically meet with the dedicated aide.

In addition, the evidence demonstrates that some of the student's absences were due to transportation problems with the bus not arriving at the scheduled time to pick up the student or not arriving at all. Although the Hearing Officer finds it unlikely that these lapses in transportation were the reason for the majority of the student's absences, the lack of all these related services being promptly and consistently provided appears to be a significant contribution to why the student eventually disengaged from School C and stopped attending altogether.

There was insufficient evidence by Respondent and no testimony presented to counter the evidence that these services were not started promptly and not provided consistently. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue that the student was denied a FAPE in this regard.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

The Hearing Officer has concluded that the student was not appropriately and timely evaluated and was not provided an appropriate educational placement when he was released from detention and transitioned from School B. The evidence indicates that the student was in need of a far more restrictive placement than he was provided and his needs were not met at School C. In addition, School C did not fully implement the student's IEP once he arrived. The Hearing Officer also concluded DCPS significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE by not allowing Petitioner's consultant to observe the student's program at School C.

Petitioner has asked as relief that DCPS fund and place the student at School D and asked for compensatory education in the form of assistive technology.

Because the student is currently at School B, for which DCPS is not the student's LEA, and DCPS is not currently responsible for providing the student a FAPE, the Hearing Officer concluded that the requested relief of prospective placement would be considered as compensatory education.

Pursuant to the MOA between DCPS, DYRS and OSSE, DCPS makes the recommendation regarding a student's school location if the student is returning to DCPS. It is uncertain at this juncture when or where the student will ultimately be released by DYRS and whether he will be residing in the District of Columbia when he is released.

However, what is clear is that when the student was last released to the community by DYRS, DCPS ultimately made the determination of where the student would attend school and placed

the student in an inappropriate placement. Consequently, the Hearing Officer will grant as compensatory education the student's placement in a non-public special education school for SY 2016-2017.

Although Petitioner requested placement at School D, there was insufficient testimony presented from which the Hearing Officer can conclude that School D meets all the requirements for a prospective placement. [11] There was no testimony as to cost. In addition, there was no evidence that the student has actually been accepted to School D, only an indication that the student would be considered for acceptance once documentation has been provided by DCPS or OSSE. Consequently, the Hearing Officer will not grant the requested relief of placement at School D. Rather, the Hearing Officer directs in the order below that DCPS place and fund the student at a non-public school as part of the compensatory education and that DCPS send placement application packets to three schools, one of which shall be School D.

Although there was testimony as to what types of assistive technology will be helpful to the student, the Hearing Officer was not convinced by this testimony that the student should be awarded the specific technology mentioned. The witness who testified had neither met nor evaluated the student. The Hearing Officer finds it more reasonable that the specific technology that may help the student to be determined with the input of the teachers and staff at his next school placement. Accordingly, the Hearing Officer awards Petitioner an independent AT assessment that can be reviewed by a MDT to determine the most appropriate AT equipment for the student in his new educational setting.

ORDER: [12]

1. DCPS shall, within ten (10) business days of the issuance of this order send admission placement packets to at least three non-public schools that have a OSSE certificate of approval, including, School D (The Autism Center at the Prince George's County Campus of the Children's Guild), if School D has such a certification.

2. DCPS, upon the student's release from detention and transition from School B [redacted], shall place and fund the student for SY 2016-2017 at one of the non-public schools to which the student has been accepted of those schools DCPS sent admission placement packets to pursuant to this order. If the student is admitted to more than one of

[11] "A hearing officer or court may award a prospective private placement as relief to ensure that a child receives the education required by the IDEA in the future where a balance of the relevant factors justifies such a placement. In addition to the conduct of the parties, which is always relevant in fashioning equitable relief, the following factors must be balanced before awarding such relief: the nature and severity of a student's disability; the student's specialized individual educational needs; the link between those needs and the services offered by the private school; the private school placement's costs; and the extent to which the placement represents the least restrictive environment."

[12] Any delay in Respondent School A in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

the three schools to which admissions packets were sent, Petitioner is authorized by this order to select the school of her choice from those to which the student was admitted.

3. DCPS shall, within thirty (30) calendar days of the issuance of this order, authorize an independent assistive technology ("AT") evaluation at the OSSE prescribed rate and provide it to Petitioner.

4. Within thirty (30) calendar days of the student's attendance at the non-public school at which the student is placed pursuant to this order, DCPS shall convene a MDT meeting to review the independent AT evaluation and determine what AT will be provided to the student and review and revise the student's IEP as appropriate.

5. If the student is not admitted to any of the three schools to which admission placement packets are sent, the student's placement for SY 2016-2017, prior to his release from detention, shall be determined in strict accordance with the terms of the MOA between DYRS, DCPS and OSSE.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

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Coles B. Ruff, Esq.
Hearing Officer
Date: June 15, 2016

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