

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

OSSE
Office of Dispute Resolution
March 30, 2015

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
)	
<i>Petitioner,</i>)	
)	
v.)	
)	Date Issued: March 27, 2015
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

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

PROCEDURAL BACKGROUND

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

The DPC was filed on December 16, 2014 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On December 23, 2014, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) on January 7, 2015. The parties did not reach an agreement during the RSM, but agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on January 16, 2015. On January 15, 2015, Petitioner filed an unopposed motion for a continuance, which was granted on January 27, 2015, and which extended the Hearing Officer Determination due date to March 27, 2015.

¹Personal identification information is provided in Appendix A.

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The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on January 14, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by March 2, 2015 and that the DPH would be held on March 9, 2015 and March 12, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”), an amended version of which was issued on January 27, 2015.

The DPH was held on March 9, 2015 and March 12, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-33 were deemed admitted into evidence, without objection.² Respondent’s exhibits R-2 and R-4 through R-34 were admitted into evidence, without objection. Respondent’s exhibits R-1 and R-3 were admitted into evidence over Petitioner’s objection.

Petitioner called the following witnesses at the DPH:

- (a) Petitioner/Parent
- (b) Parent’s Behavioral Specialist
- (c) Parent’s Psychologist
- (d) Parent’s Speech Language Pathologist
- (e) Director of Nonpublic Reading Program

Respondent called the following witness at the DPH:

- (a) Special Education Teacher
- (b) Program Manager, DCPS Office of Specialized Instruction
- (c) DCPS Social Worker
- (d) DCPS Speech Language Pathologist
- (e) DCPS School Psychologist

Petitioner and Respondent each gave an oral closing argument.

ISSUES

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

- (a) Whether DCPS denied Student a free appropriate public education (“FAPE”) by developing IEPs dated March 4, 2013, February 27, 2014 (“the specified IEPs”)³ and

²Respondent attempted to submit objections; however, the objections were not received by the opposing counsel, the IHO or the Office of Dispute Resolution by the filing deadline. Respondent was permitted to state Respondent’s objections on the record at the DPH; however, Petitioner’s disclosures are deemed admitted without objection.

³Petitioner’s DPC also included Student’s September 28, 2010, May 17, 2011 and February 20, 2012 IEPs; however, allegations related to these three IEPs are dismissed as outside of the SOL, as discussed

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September 15, 2014⁴ that were inappropriate for Student, and that did not provide Student with an appropriate placement. Specifically, the DPC alleges that the specified IEPs:

- 1) included vague and immeasurable goals that failed to address all areas of need;
 - 2) included baselines that failed to provide sufficient information to assess Student's progress on each goal;
 - 3) relied on infrequent and informal progress monitoring, such that Student's parent did not receive sufficient information to assess whether Student actually progressed on goals;
 - 4) called for specially designed instruction that consisted almost exclusively of accommodations, and that lacked research-based instruction, specifically in the areas of reading, math, and written language;
 - 5) included insufficient related services, particularly in speech and language and behavioral support services;
 - 6) failed to provide appropriate extended school year services ("ESY"), in terms of number of hours and nature of services,
 - 7) failed to include a behavioral intervention plan ("BIP") based on a comprehensive functional behavioral assessment ("FBA"), and
 - 8) were based on insufficient evaluations.
- (b) Whether DCPS denied Student a FAPE by failing to implement the specified IEPs. Specifically, the DPC alleges that DCPS consistently failed to provide the student with appropriate instruction in reading, math, written language, behavioral supports, speech and language, and executive functioning.
- (c) Whether DCPS denied Student a FAPE by consistently disciplining Student for behavior that was a manifestation of his disability, and by never suggesting the need for an FBA.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) compensatory education in the form of hours of instruction, by a provider of the parent's choice (Nonpublic Program), that equal the number of hours of inappropriate education provided to Student, or the number of hours required to make Student whole during the period in question, which is from December 16, 2012 (or, in the alternate, from September 28, 2010) until DCPS develops an appropriate program and placement.
- (b) an Order that DCPS immediately convene an IEP meeting to revise Student's IEP based on testing by independent evaluators. Specifically, Petitioner requests an Order requiring DCPS to develop an appropriate IEP based upon the findings of the IEEs secured by Petitioner, as described in the DPC. Petitioner intends to present evidence as to what an appropriate program for Student should include, such that the Hearing Officer could order development of a program with

below with respect to Respondent's motion to dismiss. The term "specified IEPs" for purposes of this decision include only the March 4, 2013 and February 27, 2014 IEPs.

⁴Petitioner alleged issues related to a September 15, 2014 IEP; however, neither party produced an IEP with this date, or presented any evidence regarding it; therefore, the Hearing Officer cannot does not find any denials of FAPE or findings with respect to a September 15, 2014 IEP.

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the specific attributes that Petitioner argued are appropriate.

- (c) Reimbursement for the neuropsychological portion of the independent evaluation, and the evaluation and observation of Parent's Behavioral Specialist, together with the costs of the experts for testifying.

FINDINGS OF FACT

1. Student _____ resides with his mother ("Parent"/"Petitioner") in Washington, D.C.⁵
2. Student was initially determined eligible for special education and related services on October 4, 2007.⁶ Student's disability classification is "intellectual disability."⁷
3. Student is _____ at District High School. The 2014-2015 school year has been Student's first year at District High School.⁸
4. There are nine other students in Student's self-contained classroom. One of Student's classmates has Downs Syndrome, and the rest have the classification "intellectual disability."⁹
5. During the 2013-2014 school year, Student attended District Middle School.¹⁰
6. During the 2012-2013 school year, Student attended District Grade School.¹¹

STUDENT'S BEHAVIOR

7. Student is a pleasant and engaging young man with many social strengths. Student has had periods of significant strife and dissention with his peers over the years, but he has also frequently had strong and positive interactions with his fellow special education students, as well as with general education peers during lunchtime and while playing on the basketball team.¹²

8. From at least the 2012-2013 school year through the present time, Student has had behavioral challenges at school, such as cursing, walking out of class, balling up his class work or otherwise exhibiting anger and opposition when he did not understand the academic material, making cheat sheets, and copying from other students' work.

He also sprayed a school supply substance onto another student, and kicked open a door, nearly striking a teacher. Though large for his age, he

⁵Testimony of Parent.

⁶ P-30-1.

⁷P-6-1.

⁸Testimony of Parent; testimony of Special Education Teacher.

⁹Testimony of Special Education Teacher.

¹⁰Testimony of Parent; testimony of DCPS School Psychologist.

¹¹Testimony of Parent; testimony of DCPS Speech Language Pathologist.

¹²Testimony of Parent; P-13; R-3-11; R-3-15.

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engages in a significant amount age and situationally inappropriate outbursts and crying, and will sometimes bite himself. His adaptive behavioral skills are generally low/extremely low. Student's in-school behavioral challenges are closely connected to his academic frustration, his low frustration threshold, his difficulty regulating his emotions, and his cognitive impairment.¹³

9. From at least the 2012-2013 school year through the present time, Student has not generally demonstrated a pattern of severe behaviors leading to frequent suspensions. For the most part, Student's teachers and behavioral support providers have been able to manage his behaviors.¹⁴

10. Student's academic difficulty causes him deep and persistent unhappiness and despair.¹⁵

STUDENT'S COGNITIVE ABILITIES

11. Student's disability classification is "intellectual disability" (sometimes referred to as "mental retardation"). Student has other impairments as well, such as in the area of speech and language.¹⁶ However, Student can learn, and Student has particular strengths and interests that, with the proper preparation and support, will empower him to live a functional and independent adult life.

12. Student has cognitive challenges that cause him to learn differently and at a slower pace than most people. Among Student's most significant learning challenges are in the areas of working memory and processing speed.

13. Student received psycho-educational testing at age 7, and also at age 14. A comparison of the two sets of test scores would initially appear to demonstrate that Student had experienced a cognitive decline over the years. However, the Hearing Officer does not find that Student has experienced a cognitive decline. As is typical for younger students, Student's early testing assessed his processing speed in addition other cognitive factors, but did not assess his working memory.¹⁷ As is typical for older students, Student's more recent testing assessed his processing speed *and* his working memory, in addition other cognitive factors. Whether or not working memory (and processing speed) scores are included in reporting Student's overall cognitive functioning score is crucially important, because those two specific weaknesses are among the key barriers Student encounters in an academic environment. None of Student's cognitive deficits – including weakness in processing speed and working memory – render him unable to learn. However, a full and square acknowledgement and embrace of these particular learning differences (also known as "deficits") is vital in order to craft the most meaningful educational programming for Student. In reaching this finding, the Hearing Officer accords

¹³Testimony of Parent; testimony of Special Education Teacher; testimony of School Psychologist; P-11; P-12; P-13; P-23; R-3.

¹⁴Testimony of School Psychologist.

¹⁵Testimony of Parent; testimony of Parent's Psychologist; P-13.

¹⁶Testimony of Parent's Speech Pathologist; testimony of DCPS Speech Language Pathologist P-19; P-24.

¹⁷P-32-3.

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significant weight to testimony of DCPS School Psychologist, DCPS Speech Language Pathologist, Special Education Teacher, as well as the relevant evaluation reports themselves. With respect this point, the Hearing Officer takes exception with, and accords little weight to, the conclusions of Parent's Psychologist and Parent's Speech Pathologist, except that their testimony and reports in some ways reinforce the conclusions drawn by DCPS School Psychologist, DCPS Speech Language Pathologist, Special Education Teacher.¹⁸ The DCPS witnesses span three different schools, have worked with directly with Student directly, and have spent considerable time considering, discussing and working to address Student's complex needs. For these reasons, the Hearing Officer accords them greater weight on this point.

14. In addition to continued academic preparation, technological and other supports (such as text to speech applications) will be useful to Student in helping to strengthen his life skills and readiness for independent living.¹⁹

STUDENT'S EVALUATIONS

15. Student received a comprehensive psychological assessment, a Woodcock Johnson III Assessment, and a speech language re-evaluation in February 2013.

16. Student received an independent speech assessment, dated October 28, 2013.

17. Student received an independent neuropsychological evaluation, incorporating an independent psychological evaluation, dated June 19, 2014.

THE SPECIFIED IEPs²⁰

Goals

18. In the March 4, 2013 and February 27, 2014, Student's goals were sufficiently specific to meet Student's needs, and address the relevant areas of Students needs.²¹

19. In the March 4, 2013 and February 27, 2014, Student's goals were sufficiently measurable, and used a standard of measurement appropriate for Student's learning needs. Petitioner argues that Student's IEP should set a 90% level of proficiency standard before Student could be considered to have mastered a goal. However, the Hearing Officer credits the testimony of Special Education Teacher that setting the proficiency goal as high as 90% for

¹⁸Petitioner opted not to offer any of witnesses as experts, and Respondent offered several of its witnesses as experts, all of which were qualified as experts, with no objection from Petitioner. However, the Hearing Officer is apprised of the impressive educational and professional backgrounds of Petitioner's witnesses, and assumes they would have been qualified as experts had they been offered as experts. They were permitted to testify to their professional opinions during the DPH, as though they had been offered and qualified as experts. For these reasons, the Hearing Officer's assignment of weight on this key point is not tied to the designation statuses of the respective witness.

¹⁹Testimony of Parent's Behavioral Specialist; testimony of Parent's Speech Pathologist; testimony of DCPS School Psychologist.

²⁰Petitioner alleged issues related to a September 15, 2014 IEP; however, neither party produced an IEP with this date, or presented any evidence regarding it; therefore, the Hearing Officer cannot does not find any denials of FAPE or findings with respect to a September 15, 2014 IEP.

²¹P-21-2; P-21-3; P-21-4; P-21-5; P-16-4; P-16-5; P-16-6; P-16-7; P-16-8.

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Student would cause him anxiety and frustration, because he would have difficulty attaining 90% proficiency within a school year, and he would have to continue to repeat the same goals over and over again, adding to his disappointment at making slow and limited progress.²²

Evaluations, Baselines and Progress Monitoring

20. The March 4, 2013 and February 27, 2014 IEPs were based current and sufficient formal and informal assessments.²³ Student's baselines include sufficient information to assess Student's progress on each goal.²⁴

Specially Designed Instruction and IEP Implementation

21. The March 4, 2013 and February 27, 2014 IEPs were crafted to provide specially designed, research-based instruction. Though the exact research on which the IEP component parts were based was not cited in the IEPs, the Hearing Officer credits the testimony of the DCPS witnesses that they brought/bring their research-based training to bear in helping to craft and implement Student's IEPs, and/or in selecting curricula appropriate for Student's learning needs. Petitioner presented evidence that most DCPS students with intellectual disability utilize the same or substantially similar curricula. Nonetheless, the Hearing Officer finds that the curricula being used for Student (such as the Edmark intensive whole word recognition reading program) are appropriate for his individual needs, even if they may or may not also be appropriate for many other students with similar needs.

22. The services listed on Student's March 4, 2013 and February 27, 2014 IEPs were appropriate for Student's needs, and those services were generally implemented appropriately, and paced at a level appropriate for Student.

ESY

23. Student received extended school year ("ESY") services in the summer of 2013, by way of his March 4, 2013 IEP. Student received 20 hours per week of specialized instruction outside of the general education setting, and 30 minutes per week of behavioral support services outside of the general education setting for ESY.²⁵ There was no evidence that either the number of service hours, or the nature of ESY services was inappropriate for summer 2013.

24. Student received ESY services in the summer of 2014, by way of his February 27, 2014 IEP. Student received 20 hours per week of specialized instruction outside of the general education setting, and 30 minutes per week of behavioral support services outside of the general education setting for ESY.²⁶ There was no evidence that either the number of service hours, or the nature of ESY services was inappropriate for summer 2014.

25. Student's February 12, 2015 IEP is not at issue in this litigation. Petitioner alleged issues related to a September 15, 2014 IEP; however, neither party produced an IEP with this

²²Testimony of Special Education Teacher.

²³R-9 through R-11.

²⁴P-21-2; P-21-3; P-21-4; P-21-5; P-16-4; P-16-5; P-16-6; P-16-7; P-16-8.

²⁵P-21-10.

²⁶P-14; P-16-12 and P-16-13.

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date, or presented any evidence regarding it; therefore, the Hearing Officer cannot and does not find any denials of FAPE or make any findings with respect to a September 15, 2014 IEP.

Lack of a BIP Based on a Comprehensive FBA

26. Student has a BIP, dated February 10, 2015,²⁷ and prior to that point, his most recent BIP was from February 2, 2009.²⁸

27. Student's behavioral pattern had been sufficiently problematic as of the development of the March 4, 2013 and February 27, 2014 IEPs that a BIP based on an FBA should have been prepared in conjunction with these IEPs.

ACADEMIC PROGRESS

28. Student made some degree of progress toward his IEP goals and with respect to his behavioral support services under his March 4, 2013 and February 27, 2014 IEPs.²⁹

NONPUBLIC PROGRAM

29. Nonpublic Program is an intensive reading and math instruction program. Its reading instruction is based heavily on strengthening students' phonics and word decoding skills. Nonpublic Program has a strong track record of success with many types of learners; however, it does not have data specific to its program's effectiveness for students with intellectual disability.³⁰

30. Nonpublic Program assessed Student for his suitability for its program; however, it did not assess for the impact his working memory and processing deficits would have on Student's ability to succeed in the program.³¹ Due to the significant impact Student's processing speed and working memory deficits have on the way he learns, his history of frustration with phonics based learning, his extremely low tolerance for academic frustration, and the importance of maximizing his remaining years of high school instruction to ensure he has the life skills to live a functional independent life, the Hearing Officer does not conclude that Nonpublic Reading Program would be appropriate for Student.

CONCLUSIONS OF LAW

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

²⁷P-7; R-6.

²⁸R-3-7.

²⁹R-12 through R-23.

³⁰ Testimony of Director of Nonpublic Program.

³¹ *Id.*; P-5.

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A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

A. Whether DCPS denied Student a free appropriate public education ("FAPE") by developing IEPs dated March 4, 2013, February 27, 2014 that were inappropriate for Student, and that did not provide Student with an appropriate placement. Specifically, the DPC alleges that the specified IEPs:

In order for an IEP to be appropriate, (1) the LEA must have complied with IDEA's administrative procedures and (2) the IEP must reasonably calculated to provide some educational benefit to Student. *See N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003); *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). The appropriateness of an IEP must be assessed as of the time the IEP was developed. *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) ("Because the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.") Petitioner does not assert that DCPS failed to comply with the administrative procedures attendant to developing Student's IEP. Rather, Petitioner claims that the March 4, 2013, February 27, 2014 IEPs are inappropriate in that they:

- 1) included vague and immeasurable goals that failed to address all areas of need;
- 2) included baselines that failed to provide sufficient information to assess Student's progress on each goal;
- 3) relied on infrequent and informal progress monitoring, such that Student's parent did not receive sufficient information to assess whether Student actually progressed on goals;
- 4) called for specially designed instruction that consisted almost exclusively of accommodations, and that lacked research-based instruction, specifically in the areas of reading, math, and written language;
- 5) included insufficient related services, particularly in speech and language and behavioral support services;
- 6) failed to provide appropriate extended school year services ("ESY"), in terms of number of hours and nature of services,
- 7) failed to include a behavioral intervention plan ("BIP") based on a comprehensive functional behavioral assessment ("FBA"), and were based on insufficient evaluations.

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At the time Student's IEP team met to develop his March 4, 2013 and February 27, 2014 IEPs, Student's behavioral challenges and their impact on his ability to make academic progress were well documented. The IDEA requires a student's IEP team to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior that is impeding the student's learning or that of others. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). A student's IEP must take into account and be designed to meet the unique needs of the student, and it must be "regularly revised in response to new information regarding the child's performance, behavior, and disabilities." *Suggs v. District of Columbia*, 679 F. Supp. 2d 43 (D.D.C. 2010), citing 20 U.S.C. §§ 1414(b)-(c).

Student previously had a BIP plan developed in 2009. In light of the fact that his academic frustration and behavioral challenges fuel one another, and in light of the fact that positive incentives can be a strong motivator for Student, his March 4, 2013 and February 27, 2014 should have incorporated a BIP, based on a comprehensive and up-to-date FBA. As discussed in the "Findings of Fact," Student's March 4, 2013 and February 27, 2014 IEPs were inappropriate to the extent that they did not incorporate BIPs. As also discussed in the "Findings of Fact" above, the Hearing Officer does not otherwise find the IEPs to be inappropriate. To the extent that a student's IEP is appropriate, his educational placement is also appropriate, if it is able to implement the terms and conditions of the IEP. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008) (Where a student's IEP was adequate, a school capable of implementing the IEP was an appropriate placement.). As further discussed below, there is no evidence that the service hours and/or other components of Student's IEP are not being properly implemented. While Student has significant social strengths, he is also working to develop age appropriate social skills; therefore, his classroom setting is appropriate for his needs. Petitioner meets the burden of proof on this issue as to the lack of a BIP with the specified IEPs, but does not otherwise meet the burden on this issue.

B. Whether DCPS denied Student a FAPE by failing to implement the specified IEPs. Specifically, the DPC alleges that DCPS consistently failed to provide the student with appropriate instruction in reading, math, written language, behavioral supports, speech and language, and executive functioning.

In reviewing failure-to-implement claims, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *See Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir. Sept. 11, 2007). Where an LEA's failure to implement is material (not merely *de minimus*), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. *See Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

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The Hearing Officer finds no evidence in the record that DCPS consistently failed to implement Student's IEPs, and certainly finds no evidence of a material failure to implement. Petitioner alleges that Student was not receiving "appropriate" instruction in reading, math, written language, behavioral supports, speech and language, and executive functioning; however the Hearing Officer disagrees, except to the extent that Student had no BIP in conjunction with the specified IEPs. The Hearing Officer makes no finding that the quantity of behavioral support included in the specified IEPs was insufficient, or that the behavioral support was not being implemented. Petitioner did not meet the burden of proof on this issue.

C. Whether DCPS denied Student a FAPE by consistently disciplining Student for behavior that was a manifestation of his disability, and by never suggesting the need for an FBA.

Under certain circumstances inapplicable to this case, DCPS must convene a student's IEP team "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct." 34 CFR § 300.530(e). While Student has had a history of behavioral challenges, and while the Hearing Officer has found he should have had an FBA in conjunction with the specified IEPs, the record does not reflect suspensions or strong forms of discipline have been necessary to manage Student's behavior. Student would likely have benefitted from some of the specific positive interventions would have been included in an earlier BIP. However, even when a BIP was not in place, the record does not reflect that Student was disciplined inappropriately. DCPS should have suggested an FBA in conjunction with one or both of the specified IEPs, and with respect to that aspect of the issue (DCPS' failure to suggest an FBA), Petitioner meets the burden of proof.

Compensatory Education

IDEA gives hearing officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010), quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527. *See also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10-11 (D.D.C. July 2, 2013).

In this case, the Hearing Officer has found a denial of FAPE on the grounds that Student, who previously had a BIP did not continue to have one in conjunction with the specified IEPs, though his behavior continued to impede his academic progress; and that DCPS did not suggest and conduct an FBA in conjunction with either of the specified IEPs. The harm Student experienced from lack of a BIP and an FBA was mitigated to some extent by the behavioral support services he received. Nonetheless, while the Hearing Officer does not find the disciplinary methods used for Student to have been inappropriate, the addition of specific

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positive behavioral supports would likely have been particularly effective for Student, who thrives on praise, affirmation and extra attention.

Petitioner's requested compensatory education (tutoring at Nonpublic Program) is not reasonably calculated to provide the educational benefits the Hearing Officer has found Student missed. Accordingly, the Hearing Officer will instead award as compensatory education 50 hours of behavioral support services to be utilized for mentoring, individual and/or family counseling, and/or any other reasonable purpose of Parent's choice.

Partial Motion to Dismiss

On February 26, 2015, Respondent filed a motion to dismiss allegations arising more than two years prior to the filing of the DPC ("District of Columbia Public Schools' Motion to Dismiss Petitioner's Claims Outside of the IDEA Statute of Limitations"). On March 3, 2015, Petitioner filed an opposition to the partial motion to dismiss ("Response to District of Columbia Public Schools' Motion to Dismiss"). The Hearing Officer has had the matter under advisement.

Respondent's partial motion to dismiss asserts that, pursuant to the two-year statute of limitations ("SOL") set out in 20 U.S.C. § 1415(b)(6)(B)³² and adopted by the District of Columbia in *District of Columbia Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities* (January 2011), Petitioner's DPC allegations related to Student's September 28, 2010, May 17, 2011 and February 20, 2012 IEPs, as well any claims related to the implementation of any of Student's IEPs prior to December 16, 2012 are barred by the SOL, and that the Hearing Officer is without jurisdiction to decide such claims, as they are outside of the SOL, and do not fall within either of the two exceptions provided in 20 U.S.C. § 1415(f)(3)(D) ("the (f)(3)(D) exceptions" or "subsection (f)(3)(D)").³³ Additionally, Respondent states that Petitioner brought two previous DPCs (one in May 2013 and one in January 2014) and withdrew them without prejudice, and that the September 28, 2010, May 17, 2011 and February 20, 2012 IEPs would have been timely under those two previous DPCs.

Petitioner's opposition to the motion to dismiss argues that 20 U.S.C. § 1415(b)(6)(B) ("subsection (b)(6)(B)") (which indicates that a parent can bring a DPC setting for allegations that occurred not more than two years before the date the parent knew or should have known about the allegation) should be read in conjunction with 20 U.S.C. § 1415(f)(3)(C) (which indicates that a parent shall request a DPH within two years of the date the parent knew or should have known about the alleged violation) should be read together to establish a SOL of up to four years. The parent would have two years from the "knew or should have known date" ("KOSHK date") to bring the DPC, and the DPC would be able to allege violations dating back two years

³²20 U.S.C §1415(b)(6)(B) provides that a party may bring a DPC that "sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint."

³³Exceptions to the two year SOL apply when a parent has been prevented from requesting a DPH because of: "(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent." 20 U.S.C. §1415(f)(3)(D).

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prior to the KOSHK date. In support of this proposition, Petitioner cites *I. H. v. Cumberland Valley School District*, 842 F.Supp.2d 762, 7873-774 (M.D.Pa. 2012); *G. L. v. Ligonier Valley School District Authority*, 2013 WL 6858963 (W.D. Pa. Dec. 30, 2013); and *Jana K. v Annville-Cleona School District*, 2014 WL 4092389 (M.D. Pa. August 18, 2014). Neither of the cited cases lead to a conclusion that a four year SOL is applicable to this case.

In *I. H. v. Cumberland Valley School District*, 842 F.Supp.2d 762, 7873-774 (M.D.Pa. 2012), the court found that the subsection (f)(3)(D) also applied to subsection (b)(6)(B), and that when either or both of the (f)(3)(D) exceptions were implicated, the petitioner could file a DPC within two years of the KOSHK date, and that Petitioner's claims could go back as far as two years prior to the KOSHK date. However, the court found that neither of the two (f)(3)(D) exceptions was implicated in that case; therefore, only the claims petitioner raised within the two year period starting from the KOSHK date could be considered.

In *G. L. v. Ligonier Valley School District Authority*, 2013 WL 6858963 (W.D. Pa. Dec. 30, 2013). The court found that plaintiffs had two years from the KOSHK to file a DPC alleging a child find violation, and that the DPC could encompass alleged violations as far back as two years prior to the KOSHK date. The court remanded the case back to the hearing officer to take evidence regarding the alleged child find violation from the two years prior to the KOSHK date. Additionally, the district court immediately certified the issue of its particular construction of the SOL as including the two years prior to the KOSHK date under the facts of that case for appeal to the to the Third Circuit.

In *Jana K. v Annville-Cleona School District*, 2014 WL 4092389 (M.D. Pa. August 18, 2014), a student was enrolled in a public school district from kindergarten until the end of 8th grade. During 7th grade (the 2009-2010 school year), the student began to exhibit severe depression and emotional problems, which the school was aware of, and which continued into 8th grade (the 2010-2011 school year), causing her academic performance and attendance to sharply decline. At the end of 8th grade, the student's parent withdrew her from public school and enrolled her in a private school. In the summer after the student's 9th grade year (July 9, 2012), the parent filed a DPC alleging child find violations, and the school district argued that any claims earlier than July 9, 2010 (two years prior to the filing of the DPC) were barred by the SOL. While finding that the school district had violated its child find obligations as early as the beginning of the 2010-2011 school year, the hearing officer concluded that the SOL barred him from considering violations that occurred prior to the middle of the 2010-2011 school year. Accordingly, he awarded compensatory education from the middle of the 2010-2011 school year through the filing of the DPC. While noting that the Third Circuit had not yet decisively ruled on the *G.L. v. Ligonier Valley Sch. Dist.* SOL construction, the district court held that the petitioner's child find allegations could date back as far two years prior to the KOSHK date, and that the DPC must have been (and was) filed within two years after the KOSHK date.

The Pennsylvania district court decisions Petitioner cites are not binding authority in this jurisdiction. However, even assuming courts in this jurisdiction would take the same approach to construing the SOL, the cited cases collectively stand for the proposition that in instances in which the KOSHK date comes after the date on which the alleged violation occurred and either: (1) one of the two specific (f)(3)(D) exceptions is triggered, or (2) the parent for some other

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reason did not have actual or imputed knowledge of the alleged violation close in time to when the violation allegedly occurred, the DPC can potentially include allegations spanning up to a four year period of time.

Of the three cited cases, the facts of *I.H. v. Cumberland Valley School District* are closest to those of the instant case, in that the student in that case (who was alleging a denial of FAPE due to lack of an appropriate IEP and placement) had already been determined eligible, and neither of the two (f)(3)(D) exceptions applied. The *I.H. v. Cumberland Valley School District* court ultimately found that only claims during the two year period after the KOSHK date could be considered. The court found that the “withholding of information” (f)(3)(D) exception did not apply, because “information” in this context refers solely to the statutorily required information – prior written notice and notice of procedural safeguards – neither of which the petitioner alleged had been withheld from her, as is true in the instant case. Likewise, the “specific misrepresentations” (f)(3)(D) exception did not apply because “at the very least, a misrepresentation must be intentional in order to satisfy [this exception].” *I. H. v. Cumberland Valley School District* at 775, citing to *Evan H.*, 2008 WL 4791634, *6, 2008 U.S. Dist. LEXIS 91442, *17–18; *Deborah A.*, 2009 WL 778321, *2, 2009 U.S. Dist. LEXIS 24505, *5.” The *I. H. v. Cumberland Valley School District* disagreed with the petitioner’s argument that an alleged inadequate evaluation and an alleged failure to accommodate the student’s learning disability were themselves misrepresentations that could trigger an expanded SOL. The court pointed out that if it were to hold “as Plaintiff would have us, that action which constitutes the basis for the IDEA claim itself can, absent more, satisfy the exception to the statute of limitations . . . the exception [would] become the rule, and the limitations period would be all but eliminated.”

G. L. v. Ligonier Valley School District Authority and *Jana K. v Annville-Cleona School District* are child find cases. As such, the students in those cases had not been determined eligible as of the KOSHK date. In such instances, a parent would not necessarily be in receipt of information like the notice of procedural safeguards or a prior written notice. Additionally, a parent may have no idea that they have rights under the IDEA to request an evaluation for their child, or that the LEA has an affirmative “child find” obligation to evaluate a child if the LEA has reason to suspect that that student has a disability. In *Jana K. v Annville-Cleona School District*, for example, a substantial amount of time passed before that parent KOSHK about the school district’s child find obligation. Meanwhile, the parent had unilaterally placed the student in private school to help get the student the assistance she needed. The parent filed a DPC within two years of the KOSHK date, but the child was already in private school at that point, so if the court had limited the violation period to the two years after the KOSHK date, the LEA could have to a large extent avoided liability.³⁴

In the instant case, Student was initially determined eligible on October 4, 2007.³⁵ There is no allegation that DCPS has withheld statutorily required information from Petitioner, or

³⁴On the other hand, allowing a petitioner to go back no more than two years prior to the KOSHK date sets some outside limit on the LEA’s potential liability, keeping the potentially liability from spanning, for example, for the entire school career of a child who should have been determined eligible in kindergarten, but whose parents KOSHK of the district’s child find obligation in 11th grade.

³⁵P-30-1.

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intentionally misrepresented information. The instant case is distinguishable from the two cited child find cases for the reasons stated above. Additionally the KOSHK date for the violations alleged in the instant case is the same date as the alleged violations themselves; therefore, the DPC may only include violations dating back as far as two years prior to the filing of the DPC. Even if courts in this jurisdiction would construe the SOL in the same manner as the three cited Pennsylvania district court cases, the cited cases that allowed an expanded SOL period are distinguishable from the instant case.

For these reasons, “District of Columbia Public Schools’ Motion to Dismiss Petitioner’s Claims Outside of the IDEA Statute of Limitations” is **GRANTED**, and Petitioner’s DPC allegations related to Student’s September 28, 2010, May 17, 2011 and February 20, 2012 IEPs, as well any claims related to the implementation of any of Student’s IEPs prior to December 16, 2012 are **Dismissed with Prejudice**.

ORDER

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

- A. DCPS shall fund 50 hours of behavioral support services to be utilized for mentoring, individual and/or family counseling, and/or any other reasonable purpose of Parent’s choice. Any time not utilized by June 30, 2016 shall be forfeited.
- B. DCPS shall reimburse Petitioner for the evaluation and observation of Parent’s Behavioral Specialist, including the cost for her time in testifying.

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

IT IS SO ORDERED.

Date: March 27, 2015

/s/ NaKeisha Sylver Blount
Impartial 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).