

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”)</p> <p>Respondent.</p> <p>Case # 2017-0133</p> <p>Date Issued: September 15, 2017</p>	<p style="text-align: center;">CORRECTED HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: August 23, 2017 August 24, 2017 August 25, 2017</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

¹ Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to the student’s decision which must be removed prior to public distribution.

This “Corrected” HOD is issued to make typographical and/or grammatical changes only; no substantive changes have been made. The HOD issuance date, September 15, 2017, remains unchanged, as does the applicable appeal date.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities 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 August 23, 2017, August 24, 2017, and August 25, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2006. The parties submitted written closing arguments on August 31, 2017.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and in grade _____.² The student resides in the District of Columbia and is a child with a disability pursuant to IDEA. The student attends a District of Columbia Public Charter School (“School A”) for which District of Columbia Public Schools (“DCPS”) is the local educational agency (“LEA”). The student has attended School A since school year (“SY”) 2011-2012.

On May 15, 2017, the student’s mother (“Petitioner”) filed this due process complaint alleging that student’s individualized educational program (“IEP”) and placement for the past two school years at School A were/are inappropriate and that DCPS failed to fully implement the student’s IEP. Petitioner seeks a finding that DCPS has denied the student a free appropriate public education “FAPE” and that DCPS be ordered to fund the student’s tuition and transportation to the non-public school Petitioner has identified (“School B”).

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on May 18, 2017, and denied the allegations in Petitioner complaint. In response DCPS asserted, inter alia, that in no prior meeting has Petitioner asserted that student’s IEP and placement at School A were inappropriate and all concerns raised by Petitioner and/or her representative were discussed and addressed during the student’s most recent IEP meeting.

The parties participated in a resolution meeting on June 9, 2017, and the parties did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on June 15, 2017, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on July 29, 2017.

Petitioner filed an unopposed motion to continue and extend the HOD due date to allow for the hearing dates requested by the parties because of their unavailability for the initial hearing dates. The motion was granted and the HOD due date was extended by forty-eight (48) calendar days to September 15, 2017.

² The student’s current age and grade are indicated in Appendix B.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on May 31, 2017, and issued a pre-hearing order (“PHO”) on June 5, 2017, outlining inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate educational placement at School A during SY 2015-2016 and SY 2016-2017.
2. Whether the LEA denied the student a FAPE by failing to provide the student with appropriate IEPs on March 31, 2015, and subsequent thereto up to and including the student’s March 7, 2017, IEP because the IEPs (a) lack sufficient behavior support, (b) lack appropriate assistive technology (“AT”), (c) failed to identify and program for the student’s communication needs and sensory processing dysfunction, (d) lack Applied Behavior Analysis (“ABA”) and a proper means for it to be implemented, (e) lack extended school year (“ESY”), and (f) contained vague and un-measurable goals and objectives.
3. Whether the LEA denied the student a FAPE by failing to implement the student’s IEP during SY 2015-2016 and SY 2016-2017 by failing to provide the student with (a) a dedicated aide, (b) ABA, (c) a sensory diet, (d) positive behavior interventions, (e) related services, and (f) ESY.

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 68 and Respondent’s Exhibits 1 through 28) that were admitted into the record and are listed in Appendix A.⁴ Witnesses’ identifying information is listed in Appendix B.⁵

³ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

⁴ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁵ Petitioner presented seven witnesses: Petitioner, Petitioner’s education advocate employed by the law firm representing Petitioner, a family/community advocate, a Board Certified Behavior Analyst (“BCBA”) representing School B where Petitioner is seeking to have the student placed, another BCBA, the student’s Applied Behavior Analysis (“ABA”) home supervisory provider, and a representative from another non-public school to which the student had been admitted. Respondent presented five witnesses: the assistant principal of School A, the director of therapeutic services at School A, an assistive technology specialist from School A, the speech language pathologist from School A, and a BCBA from school A.

SUMMARY OF DECISION:

The Hearing Officer concludes that Respondent sustained the burden of proof by a preponderance of the evidence on issues #1, and #2 with regard to the appropriateness of the student's IEP and placement. Petitioner did not sustain the burden of proof by a preponderance of the evidence as to implementation of the student's IEP. Having adjudicated the issues of their merits; the Hearing Officer dismissed the complaint with prejudice.

FINDINGS OF FACT:⁶

1. The student resides in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of Autism. (Petitioner's Exhibit 46-1)
2. The student attends School A, for which DCPS is the student's LEA. The student has attended School A since SY 2011-2012. The student's first School A IEP was developed on September 23, 2011, and was updated annually. The student's most recent IEP is dated March 7, 2017. In the past two years, the student has had IEPs at School A dated March 22, 2016, and March 31, 2015. (Petitioner's Exhibits 4-1, 10-1, 13-1, 24-1, 46-1)
3. A June 2014 independent speech language evaluation stated among other things that the student required direct one-to-one instruction from a professional trained in Applied Behavior Analysis ("ABA"), a self-contained classroom with low student to teacher ratio. The evaluator stressed that the student has the potential to be a multi-modality communicator with the right educational program including therapeutic intervention and assistive technology ("AT"). The evaluation noted that a dedicated aide, teacher, or speech pathologist could provide instruction, but specific communication programs addressing, requesting commenting, reporting and initiation should be directly supervised by the speech pathologist. (Petitioner's Exhibit 10-1, 10-6)
4. In June 2014, an independent occupational therapy ("OT") evaluation and an independent psychological evaluation were conducted. The psychological evaluation recommended educational programming that is full day, highly structured, and designed for children with autism and significant cognitive impairment. The evaluation also recommended that the student's education programming be behaviorally based and that the main component of the student's education be individualized teaching that relies predominantly on ABA techniques using discrete trial learning procedures with 35-40 hour per week of programming in total. (Petitioner's Exhibit 9-1, 9-6)

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) 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.

5. On October 27, 2014, School A convened meetings to review the independent evaluations and discuss Petitioner's request for ABA therapy. The evaluating psychologist noted that the student had been making progress, since receiving ABA therapy at home and stated that there should be an emphasis on data collection. The School A representative described School A as using a combination of ABA and treatment and education of children with autism and communication handicaps ("TEACH") methodologies. The team agreed that the BCBA working with the student would observe the student's classroom and work with the classroom teacher on when to incorporate the discrete trials and come up with a plan of when it would make sense to incorporate these discrete trials in the student's program. There were no changes made to the student's IEP. (Petitioner's Exhibits 11-1, 11-4)
6. On March 31, 2015, School A convened the student's annual IEP review meeting. Petitioner participated in the meeting along with her attorney at the time and educational consultant. Among other things, the team discussed the frequency of using discrete trails during the student's school day. The team agreed to add ABA services as a part of the student's specialized instruction under "Supplemental Services and Aids" and would develop an ABA protocol specific to the student's needs that will be incorporated though the student's weekly school schedule. The student's dedicated aide was increased to 30 hours per week and was trained on ABA protocols for the student. Petitioner expressed concern as to whether School A was an appropriate placement for the student. The School A staff believed they could implement the student's IEP and would update the student's behavior plan, reading goals, social, and daily living goals. (Petitioner's Exhibit 12-1, 12-5, Respondent's Exhibit 7-2, 7-6)
7. On March 31, 2015, School A made a determination that for the student's safety, when traveling on the bus to and from school, the student needed the use of a safety harness. (Petitioner's Exhibit 16)
8. The student's March 31, 2015, IEP prescribed all the student's services outside general education and prescribed the student's least restrictive environment ("LRE") as a structured therapeutic environment with a low student to staff ratio, significant accommodations and modifications and individualized support in a separate day school. The student was to be provided 28 hours per week of specialized instruction and 1 hour per week each of speech-language pathology and occupational therapy and 30 minutes per month of consultative speech-language pathology. The IEP also prescribed that the student have a dedicated aid 30 hours per week. The IEP did not prescribe ESY services, as School A is an eleven-month school. The IEP did not provide for any assistive technology devices. (Petitioner's Exhibit 13-11, 13-12, Respondent's Exhibit 2-4)
9. The student's March 31, 2015, IEP included goals and objectives in five areas of concern. In academics, the IEP included goals in math and reading. The IEP also included goals in the areas of adaptive/daily living skills ("adaptive"), communication/speech and language ("speech"), emotional, social and behavioral development ("social/emotional"), and motor skills/physical development ("PD"). The IEP included the student's present levels

of performance in each area of concern. (Petitioner's Exhibit 13-2, 13-3, 13-4, 13-5, 13-6, 13-7, 13-8, 13-9)

10. The student's March 31, 2015, IEP had two math goals: (1) [i]n order to increase the student's functional numeracy skills, [the student] will independently completed tasks related to US currency including receptively identifying US currency and its value, and creating sets of coins to represent a price of an item with 80% accuracy over 3 consecutive trials, and (2) [i]n order to further develop the student's functional numeracy skills, [the student] will independently match the digital time to an analog clock with a red hour hand for half-hour increments with 80% accuracy for 3 consecutive trials." Each of the two goals included specific objectives or milestones to the general math goal. (Petitioner's Exhibit 13-2, 13-3)
11. The March 31, 2015, IEP had three reading goals: (1) [the student] will improve the student's functional literacy skills by answering "WH" comprehension questions related to a grade level text with visual supports from a field of four in 4 out of 5 opportunities over 3 consecutive sessions, (2) [the student] will continue to increase the student's functional literacy skills by spelling twenty 5-8 letter functional sight words with 80% accuracy over 3 consecutive sessions, and (3) [the student] will continue to increase the student's functional literacy skills by spelling twenty 5-8 letter grade level sight words with 80% accuracy over 3 consecutive sessions. (Petitioner's Exhibit 13-3, 13-4)
12. The March 31, 2015, IEP had one adaptive goal: (1) [the student] will improve the student's daily living skills by following a task analysis for brushing teeth, given 1 verbal and 1 gesture prompt and visual supports for each step in 4 out of 5 opportunities over two weeks as documented by staff. (Petitioner's Exhibit 13-5)
13. The March 31, 2015, IEP had one speech goal: (1) [the student] will increase the student's expressive language skills by using 1-3 words of total communication (i.e. core language board, verbalizations) to initiate communication acts, to make requests, to comment, and to indicate the student's wants/needs when provided no more than 1 visual prompt with 80% accuracy across 3 targeted sessions as documented and observed quarterly by the speech-language pathologist and/or staff. (Petitioner's Exhibit 13-6)
14. The March 31, 2015, IEP had five social/emotional goals: (1) [the student] will increase the student's social skills by engaging in 2 social exchanges with a peer given no more than 1 visual prompt in 4 out of 5 opportunities, (2) given consistent and systematic implementation of the current positive behavior support plan, [the student] will engage in climbing behavior no more than an average of 1 time per week for 4 consecutive weeks, (3) given consistent and systematic implementation of the current positive behavior support plan, [the student] will engage in elopement behavior no more than an average of 1 time per month for 4 consecutive weeks, (4) given consistent and systematic implementation of the current positive behavior support plan, [the student] will engage in tantrum behavior no more than an average of 1 time per month for 4 consecutive weeks, and (5) [the student] will expand the student's ability to identify emotions in others by

justifying how they feel (i.e. “I am happy because I am at school”) as outlined in the objective below.⁷ (Petitioner’s Exhibit 13-7, 13-8)

15. The March 31, 2015, IEP had one PD goal: [the student] will demonstrate increased fine motor, bi-manual, and visual motor skills as evidenced by completion of the following objective and as observed and documented by the therapist (OT) and classroom staff.⁸ (Petitioner’s Exhibit 13-9)
16. On June 30, 2015, School A convened a program review meeting at which Petitioner and her attorney at the time participated. The team discussed the student’ speech/language services, goals, and approach, as the counsel did not agree with the student using the core language board. At the request of Petitioner’s counsel, School A agreed to conduct speech/language and assistive technology evaluations. (Respondent’s Exhibit 5-2, 5-3)
17. School A conducted an AT assessment on June 18, 2015. The speech language evaluation was conducted in July 2015. The speech language evaluation noted the student had severe speech sound deficits and recommended the student continue to receive speech services weekly with emphases on the initiation of communication and vocabulary development. The AT assessment noted that the student was observed using an iPad, the student communicated without prompts using the device but was less likely to verbalize. The evaluator noted that the student was a verbal communicator and benefits from visual supports that limit the need for verbal prompts to initiate communication and independently used the communication board. The evaluator recommended that the student continue to benefit from this type of alternative communication system. There was no recommendation for additional hi-tech communication devices. (Petitioner’s Exhibits 19-1, 19-6, 20-1, 20-4)
18. On March 22, 2016, School A held an annual IEP review and updated the student’s IEP. Petitioner participated in the IEP meeting. The IEP noted that the student was a verbal communicator who uses a core language board to assist with initiation and expansion of the student’s verbal language. [The student] should be given limited to no verbal prompting for initiation and use of the student’s communication skills in order to promote independence in this skill. Visual supports and aids may be used to assist [the student] in the student’s communication throughout the school environment. The IEP also noted, with regard to the positive behavior interventions, that the student has a positive behavior support plan that outlines interventions relating to eloping, tantrums, and climbing. In addition, it notes the student has sensory diet that is implemented daily. (Petitioner’s Exhibit 24-1, 24-2)
19. The March 22, 2016, IEP present levels of performance (“PLOP”) in math noted the student’s progress in counting from the student’s previous IEP math PLOP and mastery

⁷ The objectives included using a picture scenario card to identify emotions and causes of emotions to independently identify emotions.

⁸ The objectives included using adapted scissors, coloring, writing the student’s first and last name and using a mature utensil grasp.

of recent goals of addition and subtraction using manipulatives and mastery of the ability to create sets of coins to represent a given amount of money up to 1 dollar. The student's math goals and objectives were updated to account for progress. The IEP noted that the student had mastered all of the reading goals from the previous IEP and the reading goals were updated. (Petitioner's Exhibit 24-3, 24-4, 24-5)

20. The March 22, 2016, IEP also updated the goals and objectives in the other areas of concern. The adaptive goals were expanded to include face washing, and body cleaning in addition to teeth brushing to complete the task analysis with 100% accuracy as documented weekly. The speech, social/emotional, PD goals and objectives were also updated. The student's LRE, level of specialized instruction, and related services remained the same as the previous IEP. The classroom aides and services section were updated to include visual supports, core language board, individual schedule, sensory diet, token board, and ABA programming as a part of specialized instruction hours. The IEP continued to provide the student with a dedicated aid for 30 hours per week. The IEP did not include ESY, as School A is an eleven-month program. The IEP noted that the student did not require assistive technology devices at this time. However, in the classroom accommodations and assessment section, the IEP noted the student had the use of a calculator, human scribe, speech-to-text or external assistive technology for selected responses on ELA/Literacy Assessments. (Petitioner's Exhibit 24-2, 24-6, 24-7, 24-9, 24-10, 24-11, 24-12, 24-13, 24-14, 24-15, Respondent's Exhibit 2-4)
21. Along with the student's IEP, School A developed and implemented a positive behavior support plan ("PBSP") developed on March 31, 2015, and revised on March 31, 2016, with the objectives of increasing the student's appropriate social interactions with peers, play skills, and transitions, as well as having the student remain in designated areas until completion of work. The plan targeted a decrease in the following behaviors: climbing, elopement and tantrums. (Petitioner's Exhibit 14-1, 14-2)
22. The student's IEP progress reports noted that the student was progressing and mastering some of the student's IEP goals. (Respondent's Exhibit 17-6 through 17-23)
23. On October 11, 2016, an independent Augmentative and Alternative Communications ("AAC") report was generated. The report noted the student used a communication board and recommended trials sessions of high tech AAC devices with voice output to promote the student's language developments and to address Petitioner's expressed concerns that student did not use the communication board at home, did not know how to use it, and became frustrated with it and requested a different means for the student to communicate. (Petitioner's Exhibit 32-1, 32-6)
24. On October 14, 2016, School A convened an IEP meeting to discuss amending the student's reading goal. The team agreed to amend the reading goal and also discussed Petitioner's concern that she had observed the school staff assigned to the student being at significant distance from the student putting the student at risk of jumping or climbing. School A agreed to speak with the classroom staff and to assure staff remained in close proximity of the student. (Respondent's Exhibit 3-1, 3-2, 3-3)

25. On March 7, 2017, School A conducted the student's most recent IEP annual review. Petitioner participated in the meeting along with her educational advocate. The IEP noted that the student does not require assistive technology devices at this time. The comment regarding the student's use of a core language board to assist with initiation and expansion of the student's verbal language was maintained in the IEP. The IEP also notes with regard to the positive behavior interventions that the student has a PBSP that outlines interventions relating to eloping, tantrums, climbing, and inappropriate touching. In addition, it notes the student has sensory diet that is implemented daily. The team agreed to the student's IEP level of specialized instruction, related services, and goals and agreed that School A remained the student's LRE as an appropriate placement for the student. (Petitioner's Exhibit 46-1, 46-2, Respondent's Exhibit 2-2, 2-3, 2-4)
26. The March 7, 2017, IEP PLOP for math restated the student's abilities and challenges mentioned in the previous IEP, and also noted that the student had mastered multiplication using the support of a calculator, and achieved proficiency without a calculator multiplying factors 5 and below. It also noted the student had mastered the ability to create sets of coins and to determine the value of mixed set of currency up to \$50. The student's math goals and objectives were updated to account for progress and to focus on the student being able to independently determine the total costs of items on a shopping list, and complete multiplication problems containing factors from 0 thorough 12. The IEP noted that the student had mastered all of the reading goals from the previous IEP and the reading goals were updated. (Petitioner's Exhibit 46-3, 46-4, 46-5)
27. The March 7, 2017, IEP also updated the goals and objectives in the other areas of concern. The adaptive goal baseline indicated that the student had mastered the task analysis involving self-care (tooth brushing, face washing) and noted the student's ability to write the student's own name, but the letters were neither uniform in size, nor aligned on paper. The adaptive goal was changed to focus on the student's use of a writing instrument or electronic device with a display and keyboard to be able to write the student's personal information including the student's full name, address and telephone number. The speech, social/emotional, PD goals and objectives were also updated. The student's LRE and level of specialized instruction and related services remained the same as the previous IEP. The classroom aides and services section was updated to include visual supports, individual schedule, sensory diet, token board, and ABA programming as a part of specialized instruction hours. The IEP continued to provide the student with a dedicated aide for 30 hours per week. The IEP did not include ESY services, as School A is an eleven-month program. The IEP noted that the student did not require assistive technology devices at this time. (Petitioner's Exhibit 46-2, 46-6, 46-7, 46-8, 46-9, 46-10, 46-11, 46-12, 46-13, 46-14, 46-15)
28. The March 7, 2017, justification and plan for the student's dedicated aid notes that the student exhibits many behaviors in which the student's safety is a concern. The student occasionally climbs and stands on furniture, elopes or touches staff inappropriately (touches faces or will try to place staff's hands on the student's chest) to gain attention. When [the student] wants to escape from a less desired activity the student will fall to the

floor or tantrum (crying, hitting staff). [The student] has been provided with visual supports, consultation with a behavioral specialist and instruction strategies to help the student understand the concern for the student's safety. [The student] needs a dedicated aide to ensure the student's safety as well as to help the student understand appropriate safe behaviors as well as frequently revisiting rules about appropriate interactions. (Petitioner's Exhibit 47)

29. School A is implementing the specialized instruction and related services prescribed in the student's IEP. School A maintains a data sheet report that records the discrete trials that are utilized to implement each of the student's IEP goals and objectives. The data is collected by the student's dedicated aide and teacher and the report notes the student's accuracy in completing the tasks associated with the student working on the student's academic and related services IEP goals. When the student has a change in the student's dedicated aide, there are procedures in place for other School A staff to fill in as the student's aide until a replacement aide is in place. (Witness 11's testimony, Respondent's Exhibits 19, 20, 21)
30. The student receives ABA therapy at the student's home two hours per day for five days per week. The ABA therapy is provided to the student primarily by two different behavior therapists who work with the student at home and in community settings. These therapists have been trained in behavior therapy techniques by the supervising BSBA. The therapists focus on the student's skill acquisition in tasks such as dialing the phone, functional communication skills, and reduction of the student's maladaptive behaviors. A formal assessment occurs every 6 months to modify the student's treatment plan. (Witness 1's testimony)
31. The student has rare spontaneous communication but will respond to questions. The student can communicate two to three words when asked. Most people would understand the student when the student states the student's name, age, phone number. Otherwise, it is difficult for individuals to understand much of what the student says. (Witness 1's testimony)
32. The student's home ABA supervisor participated in the student's IEP meeting at School A on March 22, 2016, and June 10, 2016, to support Petitioner. The ABA supervisor expressed her concerns at the first meeting that the student's reading goal was not functional and should focus on the student's comprehension. As a result of her concerns, the team amended the student's IEP reading goal. There was no ABA certified person at the meeting to attest to that the ABA was being provided and provided appropriately. However, Petitioner did not request to review the ABA data and no request was made to speak with the ABA who would have reviewed the data. At the time of the meeting the student's behavior issues were lessening. (Witness 1's testimony, Petitioner's Exhibit 26)
33. The student's IEP mentions ABA as part of specialized instruction but it is not clear in the IEP how much, by whom, or when the ABA is being provided. Nothing in the data indicated the frequency with which ABA is being provided to the student or when it is

happening. The student's School A behavior plan was developed by a BCBA and provides goals and consequences and features of ABA. The student's maladaptive behaviors of climbing, eloping, tantrums, and inappropriate touching appear to have decreased. However, the data School A shared did detail what part of the day, where, or with whom these behaviors are taking place. (Witness 1's testimony, Petitioner's Exhibits 13-11, 14 59)

34. The student has made substantial progress with the student's home ABA services. The student can cook with some support and has demonstrated ability in the following tasks: tooth brushing, washing, tying the student's shoes, handwriting, compliance in the community, leisure skills – basketball, soccer, and interacts appropriately with peers. The student's social skills still require prompting. The student's tooth-brushing goal, however, has apparently not been demonstrated at home with any frequency. (Witness 1's testimony, Petitioner's Exhibit 30)
35. At School A data is collected with regard to the student's instruction by the classroom teacher, teacher aid, or the student's dedicated aid. The data is usually collected usually either trial-by-trial or corrected task analysis. The staff is looking at specific skill that can be broken down into separate steps such as tooth brushing or shoe tying. Data is taken on each step until the student gets a task. Goal mastery is usually measured as 4 to 5 opportunities 80% and not just in one setting. Generalization of the skill by the student in the natural environment is very important. The School A BSBA works directly with the student's teacher and other training throughout the school year to staff. (Witness 7's testimony)
36. At School A ABA is implemented in discreet trials anytime the student is sitting one-on-one with a staff member. The student is also provided group instruction. The classroom teacher supervises the classroom staff and the BCBA works with the teacher. Data for the student is collected in a program book and measured as correct, incorrect, or prompted. The teacher is the case manager and has access to the data. (Witness 7's testimony)
37. Petitioner has requested an augmentative communication device for the student. The student has made progress on the student's intelligibility and articulation, and if the student has a speech generation device, it will contradict and perhaps inhibit the student's verbal communication skills. (Witness 8's testimony)
38. School A makes certain that equipment for the student's sensory diet is available and provided. The sensory diets are posted and the sensory room is available for the student's use. (Witness 10's testimony)
39. School A has 250 public charter school students and there are up to 35 non-public students from Virginia and Maryland of intellectual disability ("ID"), multiple disabilities ("MD"), Autism and other health impairment ("OHI"). School A is designed to serve students with some kind of intellectual disability. There is no exposure to non-disabled peers, but there are opportunities for general education students to come into the school

from time to time. School A has functional life skills curriculum – functional reading and math - based on the Community Resource Community Guide and Life Centered Education. (Witness 11’s testimony)

40. School A does not ascribe to a single educational model. In addition to ABA, School A uses Treatment and Education of Children with Autism and Communication Handicaps (“TEACH”) that has similar characteristics to ABA. School A incorporates different methodologies because one model does not work for all students. All teachers have been trained in ABA. All teachers are also trained in teacher talk series to provide natural communication for children. School A has a new hire orientation with weeklong positive behavior support training and paraprofessionals receive regular training from staff and related service providers. (Witness 11’s testimony)
41. School A has a 1 student to 1.5 adults ratio. In classrooms where the students are older, there is 1 to 2 ratio. The teacher is the direct supervisor in the classroom and the teacher reports to house managers who report to the assistant principal and principal. The teacher and the BCBA come in to support the related service providers. Students at School A are grouped according to their individual needs, where the grouping makes sense and considers parent input. School A offers regular parent training. (Witness 11’s testimony)
42. The student’s IEP does not prescribe specific hours of ABA; however, the student’s teacher presented Petitioner with a schedule of when ABA is provided. Since there has been no request to change the schedule of discreet trial training, the student receives two 30-minute sessions per day. The rest of the day the student is in one- to one and group activities with the dedicated aide. School A is using ABA principles of learning and is implementing the student’s IEP as the team agreed. The student is acquiring skills and continuing to learn commensurate with the student’s IQ. School A can increase more discrete trial training for the student if that is what the team believes is necessary. However, School A does not agree one to one ABA needs to be provided to the student 35 to 40 hours per week. (Witness 11’s testimony)
43. The student’s parent has concerns about the student’s developmental, sensory, attention seeking, and non-compliant behavior. She also has concerns about the student’s communication problems, as the student seems to continue to require prompting to say “hello” and interact with peers. The student had a dedicated aide at School A in September 2016 that the student got along well with the aid for three to four months. But that aid left School A and was replaced by another aide who stayed with the student for a few months. The student then was provided the current dedicated aid. When the student’s parent has gone to School A on occasion to observe the student she has seen the student unattended and was told by the teacher the student’s aide was working with someone else at that moment. (Petitioner’s testimony)
44. The School A staff have tried to assure Petitioner that ABA is a part of the student’s positive behavior intervention. However, Petitioner believes another school setting would better serve the student’s needs. Petitioner has visited School B, private school where the student would be provided one-to-one discreet trials most of the school day.

When the student visited the school, Petitioner was surprised by how compliant the student was during the visit. She considered another private school that has an OSSE certificate of approval but thought the travel time to that school would be too long for the student. (Petitioner's testimony)

45. School B, is a private special education school that focuses exclusively on students with autism and provide one-to-one ABA therapy most of the school day. However, all teachers are not board certified behavior analysts. School B has applied for, but not yet received, an OSSE certification of approval ("C of A"). The cost of School B is approximately \$300 per day. Petitioner presented a compensatory education plan requesting that as compensatory education for the alleged denials of FAPE the student be placed at School B. (Witness 3's testimony, Witness 5 testimony, Witness 6's testimony, Petitioner's Exhibits 54, 67)

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").

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

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

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)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO

and at the hearing, Respondent held the burden of persuasion on issues #1 and #2.⁹ Petitioner established a prima facie case on issues # 1 and #2 before the burden of persuasion fell to Respondent. Petitioner held the burden of persuasion on issue #3. The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to provide the student an appropriate educational placement at School A during SY 2015-2016 and SY 2016-2017.

Conclusion: Respondent presented sufficient evidence to demonstrate that the student's placement at School A was and is appropriate.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is determined at least annually and is based on the child's IEP. 34 CFR § 300.116(b) (1) (2). *At the beginning of each school year*, each public agency must have *in effect*, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320. 34 C.F.R. § 300.323(a) (emphasis added).

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." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a

⁹ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) The student's paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *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.")

The evidence demonstrates that School A is a public charter school and a special education day school for students with a variety of disabilities and with some level of intellectual disability. The student has no interaction with non-disabled peers. The evidence demonstrates the student's classroom generally has a 1:1.5 teacher to adult ratio. The student is assigned a dedicated aide who works with the student throughout the school day and related services are delivered both in group and individual sessions. School A also incorporates ABA methodologies throughout its programming, but ABA is not the exclusive instructional methodology used at School A.

The evidence demonstrates that since the student has attended School A the student has had exposure to ABA and the TEACH methodologies and learns both through individual and group instruction. Based on the student's IEP progress reports and the changes made in the last few years to the student's IEP present levels of performance and the progression in the student's IEP goals, it is apparent the student is making progress. Although the student's progress has not been at the pace Petitioner has apparently hoped for, the evidence, nonetheless, demonstrates the student has made both academic and life skill progress while at School A. The evidence also demonstrates that during the student's IEP meetings when Petitioner has been accompanied by counsel and the student's home ABA supervisor, requests for modifications to the student's IEP have been considered and in some instances made in an effort to address the concerns that Petitioner has expressed. The evidence also demonstrates that the student has a positive behavior support plan that has been instituted to address the behaviors that have been of concern and that these behaviors have not been totally extinguished but have shown decline.

While Petitioner presented evaluations and witnesses who testified that student's programming should include more direct one to one instruction using ABA and discrete trials, there was evidence that the School A IEP team considered the requests but did not believe that the exclusive use of the discrete trials for 35 hours per week would be beneficial for the student. The School A witnesses who were familiar with the student during the time the student has attended School A were far more credible because of their experience with the student, that the methodologies used as School A are valid and that the student's interaction at school A with students with disabilities other than autism and with varied skills is a more natural learning environment from which the student can benefit.

Petitioner proposed that the student be placed in a school that has applied for but not yet received the OSSE C of A. This school, School B, focuses exclusively on students with autism and would provide the student one to one discrete trails as a methodology the majority of the school day. The Hearing Officer was not convinced by the evidence that School A cannot or has not implemented the student's IEP over the last two school years that the student has attended. The Hearing Officer likewise was not convinced that the methodologies of instruction and provision of services that School A employs have been anything but beneficial to the student. Consequently, the Hearing Officer concludes that Respondent sustained the burden of proof by a

preponderance of the evidence that School C was an appropriate placement for the student for the past two school years and continues to be so.

ISSUE 2: Whether the LEA denied the student a FAPE by failing to provide the student appropriate IEPs on March 31, 2015, and subsequent thereto up to and including the student's March 7, 2017, IEP because the IEPs (a) lack sufficient behavior support, (b) lack appropriate AT, (c) failed to identify and program for the student's communications needs and sensory processing dysfunction, (d) lack ABA and a proper means for it to be implemented, (e) lack ESY, and (f) contained vague and un-measurable goals and objectives.

Conclusion: Respondent sustained the burden of proof by preponderance of the evidence that the student's IEPs for the past two years while attending School A have been reasonably calculated to provide the student educational benefit.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Under the recent Supreme Court decision, *Andrew F. v. Douglas County School District Re-1*, a district must provide "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. 988, 999 (2017).

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 47

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The evidence demonstrates that the student's IEPs do not specifically prescribe behavior support services as a related service. However, in the justification for the dedicated aide School A made clear a primary reason for the dedicated aide is to ensure the student's safety and to address behaviors that may put the student at risk. In addition, School A has Positive Behavior Support Plan in place to address the specific behaviors that have been of concern for the student, specifically climbing, eloping, tantrums, and most recently, inappropriate touching. The plan

outlines specific methods of increasing and reinforcing appropriate behaviors for the student.

The School A witness credibly testified that the student's behaviors are addressed by the student's classroom teacher and the student's dedicated aide as well as related service providers. School A collects monthly data to reflect the student's progress relative to the behavior plan. Although there is data that indicates the student's behavior concerns decreased and then rose some recently, the evidence did not sufficiently demonstrate that the student's behavior concerns were escalating or that they were not being sufficiently addressed. Consequently, the Hearing Officer concludes the student IEPs did not lack sufficient behavior support.

The evidence demonstrates that the School A conducted an assessment to determine whether the student would benefit from assistive technology particularly around [REDACTED] communication. Although Petitioner asserted the student should have and would benefit from AT for the student's communication, the School A speech pathologist credibly testified that the student is a verbal communicator and that any use of technology might result in a decline in the student's verbal communication. The student's IEP did provide for appropriate external AT in classroom assessments. The evidence demonstrates that the student's IEP clearly addresses the student's communication needs with provision of speech language services and with goals and objectives in the area of speech language. By contrast, there was no testimony that refuted the facts that the student's communication needs are being addressed with appropriate goals and services. Although there was testimony that the student's speech was sometimes unintelligible, there was evidence that the student is making progress relative to the student's speech language goals. However, there was insufficient evidence that the student's IEP is inappropriate because it does not provide for assistive technology.

The IEP also mentions that the student has a sensory diet and there was credible testimony that School A posts the student's sensory diet and maintains the equipment that is provided for in the student's sensory diet. Consequently, the Hearing Officer does not conclude the student's IEPs are inappropriate in this regard.

The student's IEP clearly delineates that ABA is to be provided as a part of the student's specialized instruction. The IEP does not specifically prescribe the when and who as to the ABA delivery. However, School A's witness credibly testified that ABA techniques are used throughout the school day and that the student is provided ABA one to one discrete trials for two 30 minutes sessions per day and it is provided by the student's teacher, the teacher's aide and the student's dedicated aide. Although the specifics of the when and who of ABA therapy are provided is not in the student's IEP, the Hearing Officer does not conclude that the lack of specificity is a fatal flaw to the student's IEP, as it specifically prescribes that ABA is to be provided.

The evidence demonstrates that the student's IEP did not prescribe ESY because School A is an eleven-month program and, therefore, it is unnecessary to specifically prescribe that the student is to be provided ESY services. Consequently, the Hearing Officer does not conclude that the absence of ESY services on the student's IEP, renders the IEP inappropriate.

Lastly, Petitioner asserts that the student's IEP goals and objectives are vague and unmeasurable.

The evidence demonstrates that the student's academic and related service goals are specific and include objectives that include specific actions toward realization of the goals during the time the IEP is to be implemented. The evidence demonstrates that the student's IEP goals were amended each year to account for the student's progress. There was insufficient evidence presented to refute the validity and appropriateness of the student's IEP goals. Consequently, and for the foregoing reasons, the Hearing Officer concludes that Respondent sustained the burden of proof by a preponderance of the evidence that the student's IEPs were reasonably calculated to provide the student's education benefit.

ISSUE 3: Whether the LEA denied the student a FAPE by failing to implement the student's IEP during SY 2015-2016 and SY 2016-2017 by failing to provide the student (a) a dedicated aide, (b) ABA, (c) sensory diet, (d) positive behavior interventions, (e) related services and (f) ESY.

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.

“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) 844 F. Supp. 2d 23, February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that student was provided a dedicated aide, ABA, sensory diet, positive behavior interventions, and related services during SY 2015-2016 and during SY 2016-2017. The student is assigned a dedicated aide throughout the school day as required by the IEP. Petitioner testified that she raised concerns about the student's dedicated aide not being in close proximity, which was promptly addressed by School A staff. The evidence demonstrates that when the student's aide left the school there was a process and procedure used by the school to ensure the student had a staff member to fill in for the aide until a replacement aide was in place.

The student's IEP clearly delineates that ABA is to be provided as a part of the student's specialized instruction. School A's witness credibly testified that ABA techniques are used throughout the school day and that the student is provided ABA one to one discrete trials for two 30 minutes sessions per day and it is provided by the student's teacher, the teacher's aide and the student's dedicated aide. Also, the School A witness testified credibly that student's sensory diet is posted in that the equipment required is present, available and used by the staff to address the student's sensory needs.

As stated above, School A has Positive Behavior Support Plan in place to address the specific behaviors that have been of concern for the student, specifically climbing, eloping, tantrums, and most recently, inappropriate touching. The plan outlines specific methods of increasing and reinforcing appropriate behaviors for the student. The School A witness credibly testified that

the student's behaviors are addressed by the student's classroom teacher and the student's dedicated aide as well as related service providers. School A collects monthly data to reflect the student's progress relative to the behavior plan.

The evidence demonstrates the student is provided the related services that are prescribed in the IEP and there was no evidence presented that that the student did not receive the student's related services, and positive behavior interventions.

The evidence demonstrates that the student's IEP did not prescribe ESY because School A is an eleven-month program and therefore it is unnecessary to specifically prescribe that the student is to be provided ESY services. The evidence demonstrates that the student attended the full eleven-month program School A offers. Petitioner presented no evidence that DCPS failed to materially provide the student the services outlined in the student's IEP.

Petitioner requested that the student be placed at School B because the school promises to provide ABA therapy for the entirety of the school day. As Respondent's aptly points out, if Petitioner is seeking increased ABA discrete trial training, School A can offer that to the student if the student's IEP team deems it appropriate. The Hearing Officer encourages the parties to convene an IEP meeting to further address the parent's concerns and requests, that may very well be available and accommodated for at School A.

ORDER:

1. Petitioner has not established a denial of FAPE, and so no relief is warranted.
2. The complaint is hereby dismissed with prejudice.
3. All relief requested by Petitioner is denied.

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 ninety (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

Hearing Officer

Date: September 15, 2017

Copies to: Counsel for Petitioner
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
contact.resolution@dc.gov