

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office

Parent,<sup>1</sup> on behalf of,  
Student,\*

Petitioner,

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,  
Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student \_\_\_\_\_ who attended School A for the 2012-2013 school year. The student's most recent individualized education program (IEP) lists Multiple Disabilities (MD) as his primary disability and provides for him to receive twenty-five (25) hours per week of specialized instruction outside of the general education environment, sixty (60) minutes per week of behavioral support services outside of the general education environment, forty-five (45) minutes per week of occupational therapy outside of the general education environment, and one hundred twenty (120) minutes per month of speech-language pathology outside of the general education environment.

Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS). \_\_\_\_\_ Petitioner filed an amended Complaint against DCPS alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to provide the student with an appropriate IEP once the team determined his needs had changed in March 2013 and May 2013; changing the student's educational placement in the middle of the school year; making a placement decision without involving the parent or other people knowledgeable about the student; failing to provide any written or formal offer of placement for the student through the issuance of a Prior Written Notice once the student's parents were told that the student could no longer return to School A; failing to offer the student an appropriate placement following the determination that School A could no longer implement the student's IEP; and failing to implement the student's IEP after he

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was removed from School A. As relief for the alleged denials of FAPE, the Petitioner requested, *inter alia*, compensatory education; within 10 days of the date of the Hearing Officer Determination (HOD), for DCPS to convene an IEP Team meeting, with staff members familiar with the student, to revise the student's IEP to include specialized instruction in an environment with a 3:1 student-teacher ratio; the use of a de-escalation room, behavior technicians and clinical staff certified to provide crisis intervention and therapeutic holds; placement in and funding for a private special education day school; and transportation as a related service.

Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that: at the student's manifestation determination review meeting, the student's location of services was discussed in detail and DCPS sought a more appropriate location of services for the student; both parents were present at the meeting; at the student's IEP Team meeting, the parents agreed to enroll the student in School B; the parents did not express a desire for the student to remain in his current location of services; DCPS involved the parent and all appropriate multidisciplinary team members when making decisions regarding the student's IEP and location of services; at the IEP Team meeting, the entire team, including the parents, agreed with the student's IEP; the student's IEP was substantially similar to the student's IEP; at the meeting, it was explained that additional data, in the form of an observation, was necessary to determine the most appropriate location of services and that School B was a temporary location of services; while the parent voiced concerns, the parents agreed to enroll the student in School B; a Prior Written Notice is not required for a change in location of services; the parents were provided notice of the change in location of services; DCPS was unable to implement the student's IEP because the student failed to enroll and attend school following the student's IEPs were appropriate at the times the IEP were drafted; and the student's IEP Team did not intend or agree to include therapeutic terminology in the student's IEPs.

the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on following the conclusion of the 30-day resolution period of the amended Complaint, and ends on

Hearing Officer convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on . The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days

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<sup>2</sup> Petitioner agreed that Respondent did not need to file another Response after the filing of the amended Complaint.  
\*The student is a minor.

to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

Petitioner filed Disclosures including forty-eight (48) exhibits and six (6) witnesses. Respondent filed Disclosures including nine (9) exhibits and four (4) witnesses.

Petitioner's Exhibits were admitted without objection. Petitioner's Exhibit 8 was admitted, over Respondent's objection, because the exhibit was found to be relevant. Petitioner's Exhibit 24 was withdrawn by Petitioner. Petitioner's Exhibit 36 was withdrawn by Petitioner. Petitioner's Exhibit 37 pages 1-18 were withdrawn by Petitioner. Petitioner's Exhibit 37 pages 19-22 were admitted, over Respondent's objection, because they were found to be relevant. Petitioner's Exhibit 39 was not admitted because it was found to be irrelevant. Respondent's Exhibits 1-4 and 6-9 were admitted without objection. Respondent's Exhibit 5 was not admitted because it was not a complete document and duplicative of the record. The entire document is located in Respondent's Exhibit 1.

### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

### ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to appropriately revise the student's IEP specifically by failing to provide the student with specialized instruction outside of the general education environment for 25 hours per week and a placement able to provide behavioral technicians, a de-escalation room and staff certified to administer therapeutic holds, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS denied the student a FAPE by removing the student from his location of services on

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<sup>3</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

<sup>4</sup> At the scheduled time to begin the hearing the Petitioner's attorney, Respondent's attorney, Respondent and Hearing Officer were present. The Petitioner arrived at approximately 9:42 a.m.

3. Whether, DCPS determined the student's placement without a group of persons, including the parent and other persons knowledgeable about the student, and if so, whether this failure constitutes a denial of a FAPE?
4. Whether DCPS failed to provide written notice of the decision to change the student's placement on and if so, whether this failure constitutes a denial of a FAPE?
5. Whether DCPS failed to implement the student's amended IEP from through present, and if so, whether this failure constitutes a denial of a FAPE?

### **FINDINGS OF FACT**

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is classified as a student with MD. His disabilities include specific learning disabled (SLD) and Other Health Impaired (OHI) based on his Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibits 3, 4, 7, 17, 21, 40, 41, 42 and 43; Respondent's Exhibits 2 and 6; Mother's Testimony)
3. For the 2011-2012 and 2012-2013 school years, the student attended School A. (Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 15, 26, 30, 31, 32, 33, 34, 35, 37, 38, 40, 41, 42 and 43; Respondent's Exhibits 1, 2, 3 and 4; Mother's Testimony)
4. School A is a public charter school. (Petitioner's Exhibit 6; Respondent's Exhibit 4; Mother's Testimony)
5. School A is its own local educational agency (LEA) however has elected for DCPS to be its LEA for special education purposes. (Petitioner's Exhibit 6; Respondent's Exhibit 4)
6. DCPS does not have the ability to assign a student to a public charter school. (Behavior Support Specialist's Testimony)
7. School B is the student's neighborhood school. (Mother's Testimony)
8. In 2011, the student was reevaluated. (Petitioner's Exhibits 34 and 38)
9. In 2011, on the Reynolds Intellectual Assessment Scale (RIAS), the student scored in the moderately below average range of overall intelligence. (Petitioner's Exhibits 17 and 38)
10. In 2011, the student's Broad Reading and Broad Written Language scores fell in the very low range and his Broad Math score fell in the low range. (Petitioner's Exhibits 17, 18 and 38)
11. In October 2011, the student was reading slightly above the 2<sup>nd</sup> grade level and read a 5<sup>th</sup> grade level text at 25 words correct per minute with 75% accuracy. (Petitioner's Exhibits 17 and 43)
12. In 2011, socially/emotionally, the student was inconsistent. On some days the student refused to complete any classwork and on other days the student worked through specified time periods. (Petitioner's Exhibit 17)

13. In 2011, the student's primary inappropriate behaviors included disruptive behaviors such as making noises, pounding on the desk, kicking the desk, talking out of turn, talking back to adults when given directions and exhibiting reactions such as profanity and threats. (Petitioner's Exhibits 17 and 26)
14. In 2011, the student worked well in unstructured boy's group, took direction well from other students, did well in tae-kwon-do and had "lots" of friends. (Petitioner's Exhibit 17)
15. On \_\_\_\_\_ the student exhibited behavior which necessitated a restraint. (Petitioner's Exhibit 34)
16. In February 2012, the student's IEP Team increased the specialized instruction on the student's IEP from 13.5 hours per week outside of the general education setting and four hours per week within the general education setting to 23 hours per week outside of the general education setting. (Petitioner's Exhibits 15, 34, 41 and 42)
17. The February 2012 IEP Team's recommendation to increase the student's specialized instruction stemmed from the student's lack of academic success and attention-seeking behaviors. (Petitioner's Exhibit 15; Mother's Testimony)
18. During the 2012-2013 school year, the student participated in the general education environment for Nonfiction. (Petitioner's Exhibits 2 and 30; Respondent's Exhibit 1)
19. During the 2012-2013 school year, the student's participated in a point-level system. (Petitioner's Exhibits 2 and 15; Respondent's Exhibit 1; Student's Testimony)
20. The point-level system ranged from Level 1 (the highest level) to Level 3 (the lowest level). (Petitioner's Exhibits 2 and 15; Respondent's Exhibit 1)
21. For the first quarter of the 2012-2013 school year, the student earned the grade letter "C+" in math, "C" in reading, "C+" in writing and "C" in Nonfiction. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
22. For the first quarter of the 2012-2013 school year, the student was on Level 3 of the point/level system 31% of school days and on Level 2 68% of school days. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
23. For the first quarter, the student received the fewest points on the point-level system for staying on task. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
24. For the second quarter of the 2012-2013 school year, the student earned the grade letter "B+" in math, "C+" in reading, "A-" in writing and "B-" in Nonfiction. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
25. For the second quarter of the 2012-2013 school year, the student was on Level 3 24% of school days, on Level 2 41% of school days and Level 1 27% of school days. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
26. On \_\_\_\_\_ the student was receiving an "F" in Nonfiction. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
27. On \_\_\_\_\_ the student's Nonfiction grade included several missing homework assignments. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
28. The behaviors the student exhibited in his general education class during the 2012-2013 school year consisted of off-task behaviors. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
29. The student became angry when he received consequences for his behavior and often became emotionally escalated after receiving a consequence. (Petitioner's Exhibit 8)

30. During the 2012-2013 school year, the student had difficulty calming down and could remain escalated for an extended period of time. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
31. Taking a walk is a strategy used by the student to calm down. (Student's Testimony)
32. During the 2012-2013 school year, the student received specialized instruction in an environment with a 2:1 student-teacher ratio. (Petitioner's Exhibits 1, 2, 15, 30 and 34; Respondent's Exhibit 1; Student's Testimony)
33. During the 2012-2013 school year, the student had, on average, two disciplinary incidents per month. (Petitioner's Exhibit 34)
34. None of the student's disciplinary incidents during the 2012-2013 school year necessitated a physical restraint. (Petitioner's Exhibit 34)
35. Both disciplinary incidents in August 2012 occurred in the student's special education classroom. (Petitioner's Exhibit 34)
36. One of the two disciplinary incidents in September 2012 began in the student's special education classroom. The second disciplinary incident in September 2012 is noted as threats and aggression toward a "teacher" but the record is not clear which teacher. (Petitioner's Exhibit 34)
37. All three disciplinary incidents in October 2012 occurred in the student's special education classroom. (Petitioner's Exhibit 34)
38. The disciplinary incident in November 2012 occurred in the student's special education classroom. (Petitioner's Exhibit 34)
39. The two disciplinary incidents in December 2012 occurred in the student's special education classroom. (Petitioner's Exhibit 34)
40. The disciplinary incident in January 2013 occurred in the student's special education classroom. (Petitioner's Exhibit 34)
41. The two disciplinary incidents in February 2013 occurred in the student's special education classroom. (Petitioner's Exhibit 34)
42. The March disciplinary incident, that was the subject of the manifestation determination review, began in the student's special education classroom. (Petitioner's Exhibits 34 and 35)
43. It is clear that one of the other two disciplinary incidents in March 2013 began in the student's special education classroom but it is not clear where the other March 2013 disciplinary incident occurred. (Petitioner's Exhibit 34)
44. In February 2013, School A contacted DCPS regarding the student and the possibility that School A may not have been an appropriate location of services for the student. (Petitioner's Exhibits 15 and 30)
45. The parent was not aware that School A made a referral to DCPS regarding the student or of DCPS' subsequent observation. (Mother's Testimony)
46. On \_\_\_\_\_ DCPS conducted an observation of the student. (Petitioner's Exhibit 30)
47. On \_\_\_\_\_ during DCPS' observation of the student in his special education class, during lunch and in his regular education class, the student did not exhibit any of the behaviors listed as behaviors of concern in the student's \_\_\_\_\_ and previous BIPs. (Petitioner's Exhibit 30)

48. During the observation, the student consistently raised his hand in his general education class in attempts to answer questions related to the instructional activity. (Petitioner's Exhibit 30)
49. On the the student was demonstrating progress in the area of behavior. (Petitioner's Exhibit 30)
50. Following the observation, DCPS offered recommendations for the student's School A IEP Team, including access to general education, and provided strategies and interventions for School A to utilize in providing service to the student. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
51. On DCPS participated in an IEP Team meeting for the student where the student's test score reports, attendance report, grades, point-level system data and teacher observations were reviewed. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
52. The IEP Team discussed the student's transportation needs. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
53. On DCPS suggested that the student receive an AT evaluation. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
54. On School A agreed to research specific software to use for the student. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
55. The student's IEP Team developed a BIP for the student on (Petitioner's Exhibit 31)
56. The student participated in the development of the BIP. (Petitioner's Exhibit 31)
57. The student's BIP included academic and behavioral interventions. (Petitioner's Exhibit 31)
58. The behavioral interventions included on the student's BIP include having an opportunity to utilize specific coping strategies, to request that his seat be moved and to ask for a short break in another area of the classroom. (Petitioner's Exhibit 31)
59. The student's BIP provides for the student to receive one opportunity per day to take a "calming break" outside of the classroom with supervision and opportunities for movement within the classroom. (Petitioner's Exhibit 31)
60. The student's BIP includes the strategy of the teacher marking a piece of paper when the student's behavior begins to escalate and if the student receives three marks he will use a coping strategy such as deep breathing, a break in the classroom or a break outside of the classroom. (Petitioner's Exhibit 31)
61. The student's BIP includes the rewards of attending lunch in the cafeteria, participating in recess, attending special classes, attending physical education, staying at school for "Fun Friday," running errands for the teacher, performing classroom jobs, going to the bathroom unsupervised, having a locker in the classroom, using the computer, choosing from a reward box, and sitting in special areas. (Petitioner's Exhibit 31; Student's Testimony)
62. On the student engaged in an argument with another student, threatened to "kill" the other student and picked up chairs, scissors, metal desk legs and cardboard rolls and threatened to "kill" the other student while holding the metal desk legs. (Petitioner's Exhibits 32, 34 and 35; Mother's Testimony)

63. On \_\_\_\_\_ School A contacted DCPS regarding the student. (Petitioner's Exhibit 34)
64. On \_\_\_\_\_ a multidisciplinary team (MDT) met to conduct a manifestation determination based on the student's behavior on \_\_\_\_\_ (Petitioner's Exhibit 3; Respondent's Exhibit 2)
65. DCPS participated in the \_\_\_\_\_ manifestation determination review. (Petitioner's Exhibit 3; Respondent's Exhibit 2; Mother's Testimony)
66. Prior to the \_\_\_\_\_ manifestation determination review, the parent was not aware that School A contacted DCPS regarding the student. (Mother's Testimony)
67. The student's father attended the \_\_\_\_\_ meeting in person and the student's mother attended the \_\_\_\_\_ meeting by phone. (Petitioner's Exhibit 3; Respondent's Exhibit 2)
68. The \_\_\_\_\_ MDT agreed that the student's IEP was appropriate however "the placement and location of services is inappropriate." (Petitioner's Exhibit 3; Respondent's Exhibit 2)
69. On \_\_\_\_\_ School A clearly indicated to DCPS that School A was unable to implement the student's IEP. (Petitioner's Exhibit 3; Respondent's Exhibit 2; Mother's Testimony)
70. The \_\_\_\_\_ MDT was aware of the student's tendency to remain escalated when he received consequences. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
71. The \_\_\_\_\_ MDT used the term "therapeutic," however did not define the term. (Petitioner's Exhibit 3; Respondent's Exhibit 2; Mother's Testimony)
72. The \_\_\_\_\_ MDT determined that the student needed increased counseling services and a behavior technician. (Petitioner's Exhibit 3; Respondent's Exhibit 2)
73. The \_\_\_\_\_ MDT did not revise the student's IEP to include a behavior technician or a de-escalation room. (Petitioner's Exhibits 3, 4 and 7; Respondent's Exhibit 2)
74. The \_\_\_\_\_ MDT determined that the student's behavior on \_\_\_\_\_ was a manifestation of his disability. (Petitioner's Exhibit 3; Respondent's Exhibit 2)
75. On \_\_\_\_\_ an expulsion hearing was held related to the student's behavior on \_\_\_\_\_ (Petitioner's Exhibits 33 and 35; Mother's Testimony)
76. Following the expulsion hearing on \_\_\_\_\_ the student received a 20-day suspension. (Petitioner's Exhibit 33; Mother's Testimony)
77. On \_\_\_\_\_ the student had mastered one math goal, progressed toward three math goals, made no progress toward one math goal, progressed toward three reading goals, mastered one reading goal, made no progress toward one reading goal, progressed toward three written expression goals, one written expression goal had just been introduced, progressed toward one speech goal, regressed from one speech goal, progressed toward two social/emotional goals, regressed from one social/emotional goal, progressed toward two OT goals, one OT goal had just been introduced and made no progress toward two OT goals. (Respondent's Exhibit 3)
78. On \_\_\_\_\_ the student was poised to master the OT goals which had been introduced, with continued support. (Respondent's Exhibit 3)
79. During the third quarter of the 2012-2013 school year, the student progressed toward utilizing organizational skills and strategies in the classroom. (Respondent's Exhibit 3)

80. During the third quarter of the 2012-2013 school year, the student demonstrated a strong understanding of schedules and routines and began to explore action steps to take in order to accomplish his goals. (Respondent's Exhibit 3)
81. During the 2012-2013 school year, the student worked well with computer programs. (Petitioner's Exhibit 15; Respondent's Exhibit 3)
82. From \_\_\_\_\_ through \_\_\_\_\_ the student was in an interim alternative placement. (Petitioner's Exhibits 1, 6 and 33; Respondent's Exhibit 4; Mother's Testimony)
83. The student's 20-day suspension concluded on \_\_\_\_\_ (Petitioner's Exhibit 33; Mother's Testimony)
84. On \_\_\_\_\_ the student's parents, the student, a social worker, a special education teacher, a DCPS program manager, and a designee for School A met to discuss the student's location of services and the procedure for DCPS to determine an appropriate location. (Petitioner's Exhibit 6; Respondent's Exhibit 4; Mother's Testimony)
85. The special education teacher who participated in the \_\_\_\_\_ meeting was involved in the development of the student's \_\_\_\_\_ Amended IEP, the student's \_\_\_\_\_ BIP, and a review of an FBA for the student. (Petitioner's Exhibits 4, 6, 13, 26 and 31; Respondent's Exhibit 4)
86. The program manager who participated in the \_\_\_\_\_ meeting was involved in the \_\_\_\_\_ and \_\_\_\_\_ meetings for the student. (Petitioner's Exhibits 2, 3, 6, 31 and 34; Petitioner's Exhibits 1, 2 and 4; Mother's Testimony)
87. The social worker who participated in the \_\_\_\_\_ meeting wrote a \_\_\_\_\_ detailed letter regarding the student's functioning at School A, provided counseling services to the student and attended numerous meetings related to the student and the development of the student's BIPs. (Petitioner's Exhibits 2, 3, 6, 8, 26, 27, 28, 29, 31, 37, 40, 41, 42 and 43; Respondent's Exhibits 1, 2 and 4)
88. The "designee of School A" who participated in the \_\_\_\_\_ meeting was a staff member of School A and prior to the \_\_\_\_\_ meeting, participated in the development of the student's \_\_\_\_\_ BIP. (Petitioner's Exhibits 6 and 29; Respondent's Exhibit 4)
89. The student's \_\_\_\_\_ IEP prescribed 23 hours per week of specialized instruction outside of the general education environment, two hours per week of specialized instruction within the general education environment, 60 minutes per week of behavioral support services, 45 minutes per week of occupational therapy and 120 minutes per month of speech-language pathology. (Petitioner's Exhibit 7)
90. The student's \_\_\_\_\_ IEP does not include extended school year (ESY) services. (Petitioner's Exhibit 7)
91. On \_\_\_\_\_ School A would not permit the student to return to School A. (Petitioner's Exhibit 6; Respondent's Exhibit 4; Mother's Testimony)
92. On \_\_\_\_\_ DCPS informed the parents that the student was temporarily assigned to School B in order for the LEA's LRE Team to complete an observation of the student. (Petitioner's Exhibit 6; Respondent's Exhibit 4; Mother's Testimony)
93. On \_\_\_\_\_ DCPS instructed the parent to delay enrollment until the principal of School B could be notified regarding the situation. (Petitioner's Exhibit 6; Respondent's Exhibit 4; Mother's Testimony)

94. On [redacted] the mother expressed her concern with purchasing a uniform for School B, which would not be the student's final location of services, and expressed her dislike of School B. (Petitioner's Exhibit 6; Respondent's Exhibit 4; Mother's Testimony)
95. On [redacted] the members of the team removed transportation from the student's IEP because the student was being assigned to his neighborhood school. (Petitioner's Exhibits 6 and 7; Respondent's Exhibit 4; Mother's Testimony)
96. On [redacted] with the exception of transportation as a related service, the team did not make any other changes to the student's [redacted] Amended IEP. (Petitioner's Exhibits 4, 6 and 7; Respondent's Exhibit 4; Mother's Testimony)
97. At the conclusion of the [redacted] meeting, the parents indicated that they would enroll the student in School B following confirmation from the DCPS program manager that the principal had been notified. (Petitioner's Exhibit 6; Respondent's Exhibit 4)
98. On [redacted] the parents had not yet received confirmation that DCPS had spoken with the School B principal. (Petitioner's Exhibit 1; Mother's Testimony)
99. On [redacted] the parent, through an attorney, requested that DCPS allow the student to remain in School A until an appropriate location of services could be identified. (Petitioner's Exhibit 1; Mother's Testimony)
100. On [redacted] DCPS informed the parent of the location assignment to School C. (Petitioner's Exhibit 1; Mother's Testimony)
101. Following DCPS' written notification of the student's assignment to School C, the parent did not enroll the student in School C. (Mother's Testimony)
102. The program at School C provides specialized instruction and related services outside of the general education environment, a behavior technician, a 3:10 teacher-student ratio, a team trained in positive behavior techniques and strategies, a point-level behavioral system, a de-escalation room and available staff if students need to go for a walk to calm down. (Respondent's Exhibit 8; Behavior Support Specialist's Testimony)
103. The School C program is relocating to School D. (Petitioner's Exhibit 1; Behavior Support Specialist's Testimony)
104. The student did not attend school from [redacted] through the end of the 2012-2013 school year. (Mother's Testimony)
105. At the end of the 2012-2013 school year, the student was promoted to the next grade level. (Student's Testimony)
106. The student enjoys eating lunch in the cafeteria with nondisabled peers. (Student's Testimony)
107. School D is the student's assignment for the 2013-2014 school year. (Behavior Support Specialist's Testimony)
108. School D is able to provide specialized instruction, speech-language therapy, OT, behavioral support services, a behavior technician and a de-escalation room. (Petitioner's Exhibit 1; Respondent's Exhibit 8; Behavior Support Specialist's Testimony)
109. School D has a class size of ten students with a teacher, a paraprofessional and a behavior technician. (Petitioner's Exhibit 1; Respondent's Exhibit 8; Behavior Support Specialist's Testimony)

110. School D has mixed grade classes however provides instruction in whole group, small group and individually. (Respondent's Exhibit 8; Behavior Support Specialist's Testimony)
111. School D utilizes "blended" instruction – instruction 75% through the teacher and 25% on the computer. (Respondent's Exhibit 8; Behavior Support Specialist's Testimony)
112. School D offers a classroom point-level system. (Respondent's Exhibit 8; Behavior Support Specialist's Testimony)
113. School E is a private special education day school. (School E Director of Admissions' Testimony)
114. Students attending School E do not have access to nondisabled peers. (School E Director of Admissions' Testimony)
115. School E is able to provide specialized instruction, speech-language therapy, OT, behavioral support services, a behavior technician and a de-escalation room. (School E Director of Admissions' Testimony)
116. School E has grade level classrooms however some classes are grouped by cognitive ability rather than grade level. (School E Director of Admissions' Testimony)
117. School E has a class size of nine students with two teachers and a behavior specialist. School E offers a school-wide point-level system. (School E Director of Admissions' Testimony)
118. School E costs between \$270.00 and \$280.00 per day for tuition. (School E Director of Admissions' Testimony)
119. School E charges at least \$120.00 per hour for related services. (School E Director of Admissions' Testimony)
120. Lindamood Bell has a 60 hour minimum for services. (Advocate's Testimony)

## CONCLUSIONS OF LAW

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

### Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for

determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir.

#### Issue #1

The Petitioner alleged that DCPS failed to appropriately revise the student's IEP on and/or specifically by failing to provide the student with specialized instruction outside of the general education environment for 25 hours per week and a placement able to provide behavioral technicians, a de-escalation room and staff certified to administer therapeutic holds.

#### *Specialized Instruction*

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

The student is classified as a student with MD. His disabilities include SLD and ADHD (OHI). In December 2011, the student was reevaluated. In 2011, on the RIAS, the student scored in the moderately below average range of overall intelligence. In 2011, the student's Broad Reading and Broad Written Language scores fell in the very low range and his Broad Math score fell in the low range. Socially/emotionally in 2011, the student was inconsistent. On some days the student refused to complete any classwork and on other days the student worked through specified time periods. The student was disciplined for being disruptive, e.g., making noises, pounding on the desk, kicking the desk, talking out of turn, talking back to adults when given directions and exhibiting reactions such as profanity and threats. The student also worked well in unstructured boy's group, took direction well from other students, did well in tae-kwon-do and had "lots" of friends.

In February 2012, the student's IEP Team increased the specialized instruction on the student's IEP from 13.5 hours per week outside of the general education setting and four hours per week within the general education setting to 23 hours per week outside of the general education setting. The IEP Team's recommendation to increase the student's specialized instruction stemmed from the student's lack of academic success and attention-seeking behaviors which the student's IEP Team believed to be a result of the student attempting to mask his lack of academic success.

During the first quarter of the 2012-2013 school year, the student earned the grade letter “C+” in math, “C” in reading, “C+” in writing and “C” in Nonfiction. The student participated in the general education environment for Nonfiction. During the second quarter of the 2012-2013 school year, the student earned the grade letter “B+” in math, “C+” in reading, “A-” in writing and “B-” in Nonfiction. Behaviorally, during the first quarter of the 2012-2013 school year, the student was on Level 3 of the point/level system 31% of school days and on Level 2 68% of school days. Level 3 is the lowest level. The student received the fewest points for staying on task. During the second quarter of the 2012-2013 school year, the student was on Level 3 24% of school days, on Level 2 41% of school days and Level 1 27% of school days.

During the 2012-2013 school year, the student had, on average, two disciplinary incidents per month. Both incidents in August 2012 occurred in the student’s special education classroom. One of the two incidents in September 2012 began in the student’s special education classroom. The second incident in September 2012 is noted as threats and aggression toward a “teacher” but the record is not clear which teacher. All three incidents in October 2012 occurred in the student’s special education classroom. The incident in November 2012 occurred in the student’s special education classroom. The two incidents in December 2012 occurred in the student’s special education classroom. The incident in January 2013 occurred in the student’s special education classroom. The two incidents in February 2013 occurred in the student’s special education classroom. The March incident, that was the subject of the manifestation determination review, began in the student’s special education classroom. It is clear that one of the other two incidents in March 2013 began in the student’s special education classroom but it is not clear where the other March 2013 incident occurred.

On \_\_\_\_\_ the student’s IEP Team agreed that the student’s IEP goals were appropriate for the student. The student’s IEP prescribed 23 hours per week of specialized instruction outside of the general education environment and two hours per week of specialized instruction inside of the general education environment. Although the student was receiving an “F” in his general education class, the student’s grade included several missing homework assignments. While the general education teacher noted that the student had difficulty applying skills he was learning, the student had earned a “C” during the first semester and a “B-” during the second semester in the general education class.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of “mainstreaming” or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 CFR §300.114(a)(2). For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.*

The Petitioner argued that DCPS should have revised the student's IEP on \_\_\_\_\_ and/or \_\_\_\_\_ to include 25 hours per week of specialized instruction outside of the general education environment. The record does not support this argument. First, the nature or severity of the student's disability was not such that education in his regular class with the use of supplementary aids and services could not be achieved satisfactorily. The student had received average and above average grades during the first two quarters in his general education class. Although the student's grade level decreased during the third quarter, the student was missing several homework assignments. Further, the student's behavior in his general education class consisted of off-task behaviors. With the possible exceptions of one September 2012 incident and one March 2013 incident, none of the incidents resulting in an incident report during the 2012-2013 school year occurred in the student's general education classroom. In other words, the student's behavior was better in the general education environment than it was outside of the general education environment.

For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). On \_\_\_\_\_ the student had mastered one math goal, progressed toward three math goals, made no progress toward one math goal, progressed toward three reading goals, mastered one reading goal, made no progress toward one reading goal, progressed toward three written expression goals, one written expression goal had just been introduced, progressed toward one speech goal, regressed from one speech goal, progressed toward two social/emotional goals, regressed from one social/emotional goal, progressed toward two OT goals, one OT goal had just been introduced and made no progress toward two OT goals. The student progressed during the third quarter of the 2012-2013 school year with utilizing organizational skills and strategies in the classroom. The student developed a strong understanding of schedules and routines and began to explore action steps to take in order to accomplish his goals.

The Hearing Officer concludes that DCPS did not fail to appropriately revise the student's IEP on \_\_\_\_\_ and/or \_\_\_\_\_ to provide the student with specialized instruction outside of the general education environment for 25 hours per week.

#### *Placement/Location of Services*

The Petitioner also argued that DCPS failed to appropriately revise the student's IEP on \_\_\_\_\_ and/or \_\_\_\_\_ specifically by failing to include a placement<sup>5</sup> able to provide behavioral technicians, a de-escalation room and staff certified to administer therapeutic holds.

Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit

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<sup>5</sup> The Hearing Officer notes that throughout the record the terms "placement" and "location of services" are used interchangeably or incorrectly. For purposes of this analysis, the Hearing Officer interpreted the term based on the context of its use.

the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

“Educational placement,” as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). The Comments to the Federal Regulations note that “placement” refers to points along the continuum of placement options available for a child with a disability and “location” refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (

On \_\_\_\_\_ an MDT met to conduct a manifestation determination based on the student’s behavior on \_\_\_\_\_. Prior to the \_\_\_\_\_ meeting, School A had contacted DCPS regarding the student and the possibility that School A may not have been an appropriate location of services for the student. The \_\_\_\_\_ team noted that the student’s IEP was appropriate however “the placement and location of services is inappropriate.” The student’s IEP included a \_\_\_\_\_ BIP, specialized instruction within and outside of the general education environment and behavioral support services. While the team used the term “therapeutic,” the term appeared to be defined as increased counseling services and a behavior technician.

The record indicates that the student needed to take breaks throughout the day. The student also became angry when he received consequences for his behavior and often became emotionally escalated after receiving a consequence. The student had difficulty calming down and could remain escalated for an extended period of time. The student testified that when he becomes angry he knows to “try to calm down” and in order to calm down he can take to an identified adult or take a walk.

The student’s \_\_\_\_\_ BIP include several academic and behavioral interventions. The behavioral interventions include having an opportunity to utilize specific coping strategies, to request that his seat be moved and to ask for a short break in another area of the classroom. Additionally, the student will receive one opportunity per day to take a “calming break” outside of the classroom with supervision and opportunities for movement within the classroom. The BIP includes the strategy of the teacher marking a piece of paper when the student’s behavior begins to escalate and if the student receives three marks he will use a coping strategy such as deep breathing, a break in the classroom or a break outside of the classroom. The BIP lists rewards such as attending lunch in the cafeteria, participating in recess, attending special classes, attending physical education, staying at school for “Fun Friday,” running errands for the teacher, performing classroom jobs, going to the bathroom unsupervised, having a locker in the classroom, using the computer, choosing from a reward box, and sitting in special areas. The student participated in the development of the BIP.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. On [redacted] the MDT clearly indicated that the student needed the support of a behavior technician. The student's IEP was not revised to include a behavior technician. Additionally, while the [redacted] MDT did not articulate that the student needed a de-escalation room, the team was aware of the student's tendency to remain escalated when he received consequences and the student's BIP, which was reviewed at the [redacted] meeting, indicated that the student needed an area to "calm down" outside of the classroom. Although the BIP provided one break per day outside of the classroom, another intervention provided that when the student received three marks on a piece of paper he could take a break outside of the classroom. A de-escalation room, in conjunction with a behavior technician, is a necessary support in order to appropriately implement these interventions. The student's IEP was not revised to include a de-escalation room.

Although the Petitioner alleged that the student required staff certified to administer therapeutic holds, the record indicates that only once in two years did the student exhibit behavior which necessitated a restraint. The incident occurred on [redacted] and the student's IEP and BIP were revised several times before the [redacted] meeting.

The Hearing Officer concludes that on [redacted] DCPS should have included the supports of a behavior technician and a de-escalation room on the student's IEP. The entire team, including the DCPS representative, agreed that the student needed the support of a behavior technician. From [redacted] through [redacted] the student was in an interim alternative placement. No evidence regarding the student's performance or progress during this time period was entered into the record. Therefore, the Hearing Officer concludes that what was necessary to provide the student with a FAPE on [redacted] was the same as what was necessary to provide the student with a FAPE on [redacted].

The Petitioner met its burden with respect to Issue #1, relative to the appropriateness of the student's IEP providing a "placement" able to provide behavioral technicians and a de-escalation room on [redacted] and [redacted]. However, while DCPS should have included the supports of a behavior technician and a de-escalation room on the student's IEP and did not, the student was in an interim alternative placement from [redacted] through [redacted] and the location of services offered by DCPS on [redacted] provided a behavior technician and a de-escalation room. Therefore, the harm resulting from DCPS' failure to include the supports of a behavior technician and a de-escalation room on the student's IEP on [redacted] or [redacted] may be limited.

#### Issue #2

The Petitioner alleged that DCPS denied the student a FAPE by removing the student from his location of services on [redacted].

On [redacted] the student's location of services was School A. School A is a public charter school. The District of Columbia Code defines "public charter school" as a publicly funded school in the District of Columbia that: (A) Is established pursuant to subchapter II of

this chapter; and (B) Except as provided under §§ 38-1802.12(d)(5) and 38-1802.13(c)(5)<sup>6</sup> is not a part of the District of Columbia Public Schools. D.C. Code § 38-1800.02(29). A public charter school shall be considered to be a local educational agency for purposes of Part A of Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6311 et seq.)...” D.C. Code § 38-1802.10(a)(1). Notwithstanding any other provision of this chapter, each public charter school shall elect to be treated as a local educational agency or a District of Columbia public school for the purpose of Part B of the Individuals with Disabilities Education Act (20 U.S.C. 1411 et seq.) and §504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). D.C. Code § 38-1802.10(c). School A has elected to treat DCPS as its LEA for special education purposes. Public charter schools that elect to be treated as a part of the DCPS for purposes of IDEA and the Rehabilitation Act of 1973 shall ensure the provision of services for all special education levels in collaboration with DCPS. 5 DCMR §E-924.3.

In or about February 2013,<sup>7</sup> School A contacted DCPS requesting that DCPS find “an appropriate placement” for the student because School A was concerned about “the increasing frequency and intensity of his acting out behaviors” and that the student had “not responded to the 2:1 setting” and continued to “demonstrate inappropriate behaviors that prohibit learning for not only himself, but for the other student who is in the classroom with him.” In response to the referral, DCPS conducted an observation of the student on [redacted] During DCPS’ observation of the student in his special education class, during lunch and in his regular education class, the student did not exhibit any of the behaviors listed as behaviors of concern in the student’s [redacted] and previous BIPs. The observer noted that the student “consistently raised his hand in his general education class in attempts to answer questions related to the instructional activity” and that a review of the student’s progress reports indicated that the student was “demonstrating progress in the area of behavior supports.” DCPS offered recommendations for the student’s School A IEP Team, including access to general education, and provided strategies and interventions for School A to utilize in providing service to the student. The parent was not aware of the referral to DCPS or of DCPS’ observation.

It is unclear whether School A made the referral to DCPS in order to collaborate regarding potential strategies that could be helpful in providing services to the student or whether School A made the referral to DCPS to indicate to DCPS that School A was unable to serve the student. On [redacted] DCPS participated in an IEP Team meeting for the student where a variety of student data was reviewed. DCPS suggested that the student receive an AT evaluation and School A agreed to research specific software to use for the student. While the record does not strongly support the contention that the student’s IEP Team determined that a different location of services was necessary for the student or that School A was unable to implement the student’s IEP prior to [redacted] the record is clear that on [redacted] during the student’s manifestation determination review, School A clearly indicated to DCPS that the school was unable to appropriately implement the student’s IEP.

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<sup>6</sup> D.C. Code §§ 38-1802.(d)(5) and 38.1802.13(c)(5) relate to procedures when a public charter school’s charter has not been renewed or has been revoked.

<sup>7</sup> Although Petitioner’s Exhibit 34 lists [redacted] as the date a referral was submitted to DCPS, the record indicates that the intervention of a 2:1 setting was implemented during the 2012-2013 school year and therefore the Hearing Officer concludes that the date included in this exhibit is most likely a typographical error.

The Petitioner made two separate arguments related to Issue #2. The first argument was that DCPS should not have removed the student from School A, as a location of services, on [redacted] because it was the end of the school year and case law prohibits a transfer at that point in the school year. The second argument was that DCPS should have removed the student from School A, as a location of services, earlier in the school year to avoid the student having to move toward the end of the school year. The Hearing Officer is not persuaded by either of these arguments.

The District of Columbia Code provides that a public charter school: (A) Shall exercise exclusive control over its expenditures, administration, personnel, and instructional methods, within the limitations imposed in this subchapter; and (B) Shall be exempt from the District of Columbia statutes, policies, rules and regulations established for the District of Columbia Public Schools by the Superintendent, Board of Education, Mayor, District of Columbia Council, or Authority, except as otherwise provided in the school's charter or this chapter. D.C. Code § 38-1802.04(c)(3). Additionally, the principal of a public charter school may expel or suspend a student from the school based on criteria set forth in the charter granted to the school. D.C. Code § 38-1802.06(g). On [redacted] School A would not permit the student to return. Although School A elected DCPS as its LEA for special education purposes, DCPS had no authority to assign the student to School A as a location of services.

Further, while the Petitioner argued that the case law does not permit a change in location of services for a student mid-year, the specific facts of this case suggest otherwise. In *Holmes v. District of Columbia*, 680 F. Supp. 40, 41-42 (D.D.C. 1988), the court found that the LEA's proposed placement, under the circumstances in the case which included that the proposed placement was in a start-up posture and the student was a senior, was not an appropriate placement. The court emphasized that "the appropriate place for this youngster is to permit him to finish the remaining seven months of his high school education in the environment that he has been accustomed to over the past three years." In *Block v. District of Columbia*, 748 F. Supp. 891 (D.D.C. 1990), the Hearing Officer found that while a school may be appropriate for a student if he begins the school year there, it is not necessarily appropriate to inject the student into that school part-way through the school year. See also *Burger v. Murray County School Dist.*, 612 F. Supp. 434, 437 (N.D. Ga.1984) ("Obvious advantages inhere to any child who is permitted to learn in a stable environment. This advantage may have even more meaning to a handicapped child.").

In both of these cases, the court found that it was inappropriate to transfer a child mid-year to another school. However, the current matter is distinguished from these cases. Specifically, in both cases outlined above, the students' locations prior to the proposed change were deemed to be appropriate for the student. In the present case, the student's current location of services was inappropriate because the student's IEP Team agreed on [redacted] that School A was unable to implement the student's IEP. The Hearing Officer analogizes this specific situation to the situation in *Johnson v. District of Columbia*, 839 F. Supp. 2d 173 (D.D.C. [redacted]) where the Court found that the stay-put provision was not designed to keep a child in a school that cannot provide the necessary services for a student. Although [redacted] was toward the end of the school year, the concept that a student should not be removed

from a location of services toward the end of the school year is not designed to keep a child in a school that cannot provide the necessary services for the student.

The Petitioner's second argument that DCPS should have removed the student from School A earlier in the school year to avoid the student having to move toward the end of the school year is not clearly supported by the record. The record contains evidence that School A contacted DCPS in February 2013. Based on School A's request, DCPS conducted an observation of the student however did not observe any of the behaviors listed as behaviors of concern in the student's BIP. DCPS then participated in an MDT meeting for the student on \_\_\_\_\_ where data regarding the student, the student's IEP and the student's transportation needs were discussed.

There is contradictory evidence regarding whether or not the team agreed that School A was an inappropriate location of services on \_\_\_\_\_. The \_\_\_\_\_ Meeting Notes indicate that School A agreed to "look into" obtaining technology and software to enhance the student's academic performance and that the student's father was satisfied with the student's "placement" at School A. In an undated Justification for New Location of Services, the writer noted that at the \_\_\_\_\_ MDT meeting, "the team, including [the student's] father, agreed that [School A] is not the most appropriate placement for [the student]." School A again reached out to DCPS on \_\_\_\_\_ four days after the incident which led to the student's 20-day suspension.

As noted above, the burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. Here, the Petitioner is the party seeking relief therefore the Petitioner has the burden of proof.

The Hearing Officer concludes that DCPS did not deny the student a FAPE by removing the student from his location of services on \_\_\_\_\_. On \_\_\_\_\_ School A, as an LEA, would not permit the student to return to School A. Pursuant to 5 DCMR §E-924.3, DCPS had the obligation to provide special education services to the student yet pursuant to the D.C. Code, did not have any authority to assign the student to School A as a location of services. Further, as a practical matter, on \_\_\_\_\_ when DCPS was formally informed of School A's determination that the school could not implement the student's IEP, one week had already elapsed since the student had engaged in the behavior which resulted in a 20-day suspension. Prior to \_\_\_\_\_ the record is clear that School A sought assistance from DCPS but the record is not clear that School A could not implement the student's IEP.

The Petitioner failed to meet its burden with respect to Issue #2.

### Issue #3

Pursuant to the IDEA regulations at 34 CFR §§300.327 and 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. In determining the educational

placement of a child with a disability, including a preschool 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. 34 CFR §300.116(a)(1).

The Petitioner alleged that DCPS denied the student a FAPE by determining the student's placement without a group of persons, including the parent and other persons knowledgeable about the student on

On the student's parents, the student, a social worker, a special education teacher, a DCPS program manager, and a designee for School A met to discuss the student's location of services. Prior to the meeting, the special education teacher at the meeting was involved in the development of the student's Amended IEP; the student's BIP; and a review of an FBA for the student. Prior to the meeting, the program manager at the meeting was involved in the and meetings for the student. The social worker present at the meeting wrote a detailed letter regarding the student's functioning at School A; provided counseling services to the student; and attended numerous meetings related to the student and the development of the student's BIPs. The "designee of School A" at the meeting was a staff member of School A and prior to the meeting, participated in the development of the student's BIP.

The team discussed that the purpose of the meeting was to address School A's request for a new location of services for the student and the procedure for DCPS to determine an appropriate location. DCPS informed the parents that the student was temporarily assigned to School B. The mother expressed her concern with purchasing a uniform for School B, which would not be the student's final location of services, and stated that she "did not like" School B. DCPS explained that the assignment was a temporary assignment in order for the LEA's LRE Team to complete an observation of the student.

Since School B was the student's neighborhood school, the members of the team removed transportation from the student's IEP. With the exception of transportation as a related service, the team did not make any other changes to the student's IEP. The student's annual goals, specialized instruction, related services, accommodations and modifications remained identical to the student's Amended IEP. At the conclusion of the meeting, the parents indicated that they would enroll the student in School B following confirmation from the DCPS program manager that the principal had been notified.

"Educational placement," as used in IDEA means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (*citing AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). Hence, school districts are afforded much discretion in determining which school a student is to attend. *See White, supra*. The Comments to the Federal Regulations note that "placement" refers to points along the continuum of placement options available for a child with a disability and "location" refers to the physical surrounding, such as

the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (

At the meeting, the only change made to the student's IEP or programming was the removal of transportation as a related service. The student's annual goals, specialized instruction, related services and accommodations and modifications remained identical to the student's previous IEP. Although the parent "did not like" School B, there was no compelling evidence presented which suggested that that assignment to School B constituted a change in placement rather than a change in location of services.

The Hearing Officer concludes that DCPS did not deny the student a FAPE by determining the student's placement without a group of persons, including the parent and other persons knowledgeable about the student on because DCPS did not change the student's placement on On DCPS made a change to the student's location of services which was necessary, given School A's refusal to allow the student to remain at the school, and which was within the discretion of the LEA. Further, all of the members of the MDT meeting had participated in other meetings regarding the student and the development of his educational program.

The Petitioner failed to meet its burden with respect to Issue #3.

#### Issue #4

The IDEA regulations at 34 CFR §300.503(a) mandates that written notice be given to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

The IDEA regulations at 34 CFR §300.513(a)(2) state that 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 child'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.

The Petitioner alleged that DCPS denied the student a FAPE by failing to provide written notice of the decision to change the student's placement on As discussed in Issue #3, DCPS did not change the student's placement on On DCPS changed the location of services for the student. The IDEA regulations at 34 CFR §300.503(a) do not require written notice of a change in location of services for a student.

Even if written notice were required for a change in location of services, the Petitioner did not provide evidence of how the lack of written notice impeded the child's right to a FAPE, 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 caused a deprivation of educational benefit. The parents were aware of the subject of the meeting. From the student's IEP Team had been discussing a change in location of services for the

student. The notes from the \_\_\_\_\_ manifestation determination review indicated that DCPS would identify a location of services and that School A felt that it could no longer implement the student's IEP. The father attended the \_\_\_\_\_ meeting in person and the mother attended the \_\_\_\_\_ meeting by phone. Additionally, both parents attended the \_\_\_\_\_ meeting and participated in the discussion regarding the location assignment for the student and the \_\_\_\_\_ meeting notes document the student's location of services assignment to School B.

The Petitioner failed to meet its burden with respect to Issue #4.

#### Issue #5

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the Fifth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, the student's school is a charter school which functions as its own LEA, with the exception of the provision of special education. For special education purposes only, DCPS is the LEA for School A. On \_\_\_\_\_ the student concluded a 20-day suspension from School A for "possessing a weapon." While the behavior that led to the suspension was found to be a manifestation of the student's disability, because of the nature of the behavior, the student received his special education and related services in an interim alternative educational setting at School A's headquarters. Upon completion of the 20-day suspension, School A would not permit the student to return to the LEA.

On \_\_\_\_\_ DCPS became aware that the student would need an alternate location of services at the conclusion of the student's 20-day suspension. On \_\_\_\_\_

DCPS informed the parent that the student was assigned to School B, his neighborhood school, on a temporary basis until a more appropriate location of services could be identified. While DCPS instructed the parent to enroll the student in School B and the parent agreed to enroll the student in School B, DCPS instructed the parent to delay enrollment until the principal of School B could be notified regarding the situation.

On [redacted] not having received confirmation that DCPS had spoken with the School B principal, the parent's attorney requested that DCPS allow the student to remain in School A until an appropriate location of services could be identified. On [redacted] DCPS informed the parent of the location assignment to School C. Following DCPS' written notification of the student's location assignment, the parent did not enroll the student into school.

The student's [redacted] IEP prescribed 23 hours per week of specialized instruction outside of the general education environment, two hours per week of specialized instruction within the general education environment, 60 minutes per week of behavioral support services, 45 minutes per week of occupational therapy and 120 minutes per month of speech-language pathology. From [redacted] through [redacted] an appropriate location of services was not made available to the student. Although DCPS assigned the student to School B during this time, DCPS acknowledged that School B was not an appropriate location of services for the student and instructed the parents to await communication from the program manager prior to enrolling the student in School B. The program manager did not contact the parents until [redacted]

The Petitioner argued that DCPS failed to implement the student's IEP following [redacted] because School C was unable to provide the student a FAPE and that it was not reasonable to expect the parent to send the student to a program that was closing at the end of the school year. The Hearing Officer is not persuaded by these arguments. First, the program at School C was able to provide the student with specialized instruction and related services outside of the general education environment, as prescribed by his [redacted] IEP. Although not included in his IEP, School C also provided a behavior technician, 3:10 teacher-student ratio, a team trained in positive behavior techniques and strategies, a point-level behavioral system, a de-escalation room and available staff if the student needs to go for a walk to calm down. Next, the School C program is relocating to School D, the student's proposed location assignment for the 2013-2014 school year. Even if the School C program were closing at the end of the 2012-2013 school year, the closure of a program at the end of a school year does not constitute a failure to provide a FAPE.

The Hearing Officer concludes that DCPS failed to implement the student's IEP, in its entirety, from [redacted] through [redacted]. Although DCPS informed the parent of a location of services for the student on [redacted] DCPS instructed the parent not to enroll the student into the school until the principal was notified of the situation. First, DCPS had the obligation to implement the student's IEP whether or not the School B principal was fully informed of the situation, and next, DCPS did not inform the parent that the student was able to be enrolled in a location of services until [redacted]. Although the parent desired for the student to remain in School A, DCPS did not have the authority to assign the student to School A.

Finally, although the parent did not like the assignment location to School C, DCPS made FAPE available at School C yet the parent chose not to accept DCPS' offer of FAPE on

Although the Petitioner was not satisfied with DCPS' offer of FAPE, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an "education ... designed according to the parent's desires") (citation omitted). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. Further, where a student does not avail himself of the benefits of his IEP because he is frequently absent from classes, a local education agency cannot be found to deny FAPE to the student. *Nguyen v. District of Columbia* 681 F.Supp.2d 49, 54 IDELR 18 (D.D.C.

During the eight day lapse in services, the student missed approximately 40 hours of specialized instruction, 96 minutes of behavioral support services, 72 minutes of occupational therapy and 48 minutes of speech-language therapy. The failure of DCPS to provide specialized instruction, behavioral support services and occupational therapy from through constitutes a material failure to implement the student's IEP. Given the prescription of 120 minutes per month of speech-language therapy, DCPS' failure to provide a location of services for eight days did not constitute a material failure to provide speech-language therapy.

The Petitioner met its burden with respect to Issue #5, for the period of through

#### Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4 h Cir. 2003). In this case, the denial of FAPE is DCPS' failure to include appropriate supports on the student's IEP to address her ADHD behaviors in all subject areas.

As relief, the Petitioner requested compensatory education in the form of a Lindamood Bell evaluation and between 75 and 100 hours of Lindamood Bell courses in reading, written language and mathematics. The calculation was based on the last seven weeks of school and four weeks of ESY. Lindamood Bell has a 60 hour minimum for services. Additionally, the Petitioner requested that the Hearing Officer place the student in a private special education day school, School E, for the 2013-3014 school year.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met

her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

Here, DCPS deprived the student a FAPE from [redacted] through [redacted] for failure to implement the student's IEP. The student's [redacted] IEP prescribed 23 hours per week of specialized instruction outside of the general education environment, two hours per week of specialized instruction within the general education environment, 60 minutes per week of behavioral support services, 45 minutes per week of occupational therapy and 120 minutes per month of speech-language pathology. For the period of [redacted] through [redacted] DCPS failed to implement the student's IEP for eight days. The Hearing Officer concluded that the failure of DCPS to provide approximately 40 hours of specialized instruction, 96 minutes of behavioral support services and 72 minutes of occupational therapy was a material failure to implement the student's IEP.

While the Petitioner requested compensatory education for the remainder of the 2012-2013 school year and for four weeks of ESY, DCPS made FAPE available to the student on [redacted] and the student's [redacted] IEP does not include ESY. Although School A does provide a summer program, the student was not assigned to School A and a school summer program is not equivalent to ESY.

DCPS also denied the student a FAPE by failing to revise the student's [redacted] IEP to include the supports of a behavior technician and a de-escalation room. As noted in Issue #1, the harm resulting from this denial may be limited. The student was in an interim alternative placement from [redacted] until [redacted] and on [redacted] DCPS assigned the student to a location of services which provided a behavior technician and a de-escalation room. Therefore, although the supports were not included on the student's IEP, the supports were nonetheless offered. However, it is possible that had DCPS appropriately revised the student's IEP on [redacted] then DCPS would have had adequate data to assign the student to an appropriate location of services on [redacted] thereby prompting the parent to enroll the student into school. The Hearing Officer is not fully persuaded by this theory however because the mother made clear her desire for the student to remain in School A.

Although the student did not attend school from [redacted] through the end of the school year, the student nonetheless was promoted to the next grade. No clear evidence of where the child would have been if not for the denial of FAPE was provided however the student was demonstrating progress toward many IEP goals on [redacted] using his [redacted] IEP Progress Report as a baseline, would have likely mastered additional academic goals had his IEP continued to have been implemented following his suspension. Since independent one-on-one tutoring is a more targeted service than a classroom situation, the Hearing Officer believes that an hour-for-hour award is equitable given the potential harm resulting from DCPS' failure to include the supports of a behavior technician and a de-escalation room on the student's [redacted] IEP and the 2:1 student-teacher environment in which the student was receiving specialized instruction.

Since the MDT on \_\_\_\_\_ noted that the student required more counseling services, the failure of DCPS to implement the behavioral support services on the student's IEP from \_\_\_\_\_ through \_\_\_\_\_ likely caused the student to regress from some of the progress he had made during the first two quarters of the 2012-2013 school year. Therefore, it is equitable to provide the student with counseling services in addition to the 96 minutes missed in order to recoup the probable regression.

On \_\_\_\_\_ the OT commented that with continued support the student would master his OT goals which had been introduced. It is equitable for the OT who is working with the student on his OT goals for the 2013-2014 school year to provide the missed OT to the student for continuity.

For the request for the prospective placement for the 2013-2014 school year, the Hearing Officer must consider the factors in *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). These considerations include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the LRE. DCPS has proposed a program in School D and the Petitioner is requesting the private special education day school, School E.

While the student's overall intelligence is moderately below average, his Broad Reading and Broad Written Language scores are in the very low range and his Broad Math score is in the low range, his deficits are not so severe as to require specialized instruction in a private school. Both School D and School E are able to provide the specialized instruction prescribed by the student's IEP. Additionally, while the student displayed significant behavior problems during the 2012-2013 school year, the student behaved more appropriately in the general education environment.

The student's specialized education needs include specialized instruction, speech-language therapy, OT, behavioral support services, a behavior technician and a de-escalation room. Both School D and School E are able to provide specialized instruction, speech-language therapy, OT, behavioral support services, a behavior technician and a de-escalation room. Additionally, the student's BIP lists rewards such as attending lunch in the cafeteria, participating in recess, attending special classes, attending physical education, staying at school for "Fun Friday," running errands for the teacher, performing classroom jobs, going to the bathroom unsupervised, having a locker in the classroom, using the computer, choosing from a reward box, and sitting in special areas. Given that the BIP was developed while the student was in a public school, several of the rewards include interaction with nondisabled peers. School E is not able to provide some of the rewards included in the student's BIP.

School E has a class size of nine students with two teachers and a behavior specialist. School D has a class size of ten students with a teacher, a paraprofessional and a behavior technician. School E offers a school-wide point-level system and School D offers a classroom point-level system. The point-level systems in School D and School E are substantially similar to the point-level system included in the student's BIP. School E has grade level classrooms

however some classes are grouped by cognitive ability rather than grade level. School D has mixed grade classes however provides instruction in whole group, small group and individually.

The Petitioner argued that School D was inappropriate because School D uses “blended” instruction – instruction 75% through the teacher and 25% on the computer and that computer instruction is inappropriate for the student. The student’s progress reports from School A indicate that the student worked well with computer programs. The Petitioner specifically argued that the computer program Plato, which is utilized by School D, is inappropriate for the student because Plato requires a 3<sup>rd</sup> grade reading level and the student does not read on a 3<sup>rd</sup> grade level. The Hearing Officer is not persuaded by this argument. In October 2011, the student was reading slightly above the 2<sup>nd</sup> grade level. In Fall 2011, the student read a 5<sup>th</sup> grade level text at 25 words correct per minute with 75% accuracy. On the student’s progress report, the student had mastered one reading goal and was progressing toward three others. Although the student did not earn a “progressing” toward one reading goal, the comments on the goal indicated that the student had significantly improved his ability to decode unfamiliar words. Additionally, the Mother testified that the student was reading on a 3<sup>rd</sup> grade level.

School E costs between \$270.00 and \$280.00 per day for tuition. Additionally School E charges at least \$120.00 per hour for related services. There was no evidence presented regarding the cost of the program at School D.

School E is a more restrictive setting than School D. School E does not offer any interaction with nondisabled peers. The student testified that he enjoys eating lunch in the cafeteria with “everyone” and is able to participate in homeroom, physical education and special classes if he earns the privilege. With the possible exceptions of one incident in September 2012 and one incident in March 2013, none of the incidents resulting in an incident report during the 2012-2013 school year occurred in the student’s general education classroom. There was no evidence that the student was unable to appropriately participate in lunch or other activities with nondisabled peers. Therefore, School E is not the least restrictive environment for the student.

The Petitioner argued that the student’s IEP Team agreed that the student needed “therapeutic” services. There is conflicting evidence in the record as to whether the student’s team agreed that the term “therapeutic” needed to be included on the student’s IEP. Even if the School A team members agreed that the student needed “therapeutic” services, the mere fact that all participants were in agreement at that meeting however does not translate into a substantive entitlement to a particular educational service under the Act, without a revision to the IEP. *W.A. v. Pascarella*, 153 F.Supp.2d 144, 35 IDELR 91 (D. Conn. 2001). Additionally, the student’s IEP Team did not define “therapeutic.” The record is clear that the student’s team felt that the student required a behavior technician and counseling services. Although the student’s IEP Team did not specifically mention a de-escalation room, the record is clear that the student also requires this support. Both School D and School E offer these supports.

Although the District must pay for private school placement if no suitable public school is available, if there is an appropriate public school program available, the District need not consider private placement, even though a private school might be more appropriate or better

able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (citations and quotations omitted). The Hearing Officer concludes that School D is an appropriate public school program for the student.

### ORDER

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

1. Issues #2, #3 and #4 are **dismissed** with prejudice.
2. For DCPS to provide the student with 40 hours of independent tutoring, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be completed by 4.
3. For DCPS to provide the student with five hours of independent counseling services, at a rate not to exceed OSSE's established rate for this service, to be completed by
4. For DCPS to provide 72 minutes of occupational therapy to the student, in addition to the occupational therapy prescribed by the student's IEP, to be completed by 3.
5. Within 15 business days of the date of this Order, for DCPS to convene an IEP Team meeting for the student to revise the student's IEP to include the supports of a behavior technician and a de-escalation room.
6. All other relief sought by Petitioner herein is **denied**.

### 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 USC §1415(i).

Date:

  
Hearing Officer