

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

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|------------------------|---|-----------------------------|
| STUDENT, <sup>1</sup>  | ) |                             |
| By and through PARENT, | ) |                             |
|                        | ) | Case No.                    |
| <i>Petitioner,</i>     | ) |                             |
| v.                     | ) | Bruce Ryan, Hearing Officer |
|                        | ) |                             |
| DISTRICT OF COLUMBIA   | ) | Issued: January 18, 2011    |
| PUBLIC SCHOOLS,        | ) |                             |
|                        | ) |                             |
| <i>Respondent.</i>     | ) |                             |

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STUDENT HEARING OFFICE

**HEARING OFFICER DETERMINATION**

**I. INTRODUCTION AND PROCEDURAL HISTORY**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS").<sup>2</sup> The Complaint was filed November 5, 2010, on behalf of a -year old student (the "Student") who resides in the District of Columbia, currently attends his neighborhood DCPS high school (the "High School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. He has an individualized education program ("IEP") that provides 19.5 hours per week of specialized instruction in a setting Outside General Education, plus 30 minutes per week of speech-language pathology services and 30 minutes per week of behavioral support services, also in a setting Outside General Education.

In her Complaint, Petitioner alleged that DCPS denied the Student a free appropriate public education ("FAPE") by, *inter alia*: (a) failing to comply with the terms and conditions of a

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<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

<sup>2</sup> The case was originally assigned to Hearing Officer Jim Mortenson, who conducted prehearing proceedings and issued two prehearing orders. The case was reassigned to this Hearing Officer on January 3, 2011, for the conduct of the due process hearing, due to the unavailability of IHO Mortenson.

May 13, 2010, settlement agreement; (b) failing to develop and implement an appropriate IEP; and (c) failing timely to evaluate the Student with a functional behavioral assessment (“FBA”). The relief sought included placement of the Student at a private, special education day school located in suburban Maryland (“Private School”), funding of independent evaluations, and proposed compensatory education services.<sup>3</sup>

A prehearing conference was held on November 15, 2010, and a Prehearing Order was issued November 16, 2010, which identified the two issues to be determined at hearing (as set forth in Part IV below). The Prehearing Order also permitted Petitioner to file a brief regarding the IHO’s authority to hear the breach of settlement claim in this case. *Prehearing Order*, p. 2.

DCPS then filed its Response on November 16, which asserted that that it has not denied the Student a FAPE. The Response responded, *inter alia*, that the Student’s IEP was reasonably calculated to provide educational benefit and that DCPS “intended to and would have conducted the FBA timely if the Student had presented in school with enough regularity for this to be accomplished.”<sup>4</sup>

On November 22, 2010, Petitioner filed a Memorandum of Points and Authorities in Support of Hearing Officer’s Authority to Hear a Settlement Agreement Violation Claim, arguing that the IHO had authority to hear such claim pursuant to the terms of the *Blackman/Jones* Consent Decree. A Second Prehearing Order was issued on November 24, 2010, ruling that the IHO does not have authority to hear or decide the claim that the settlement agreement between the parties was breached.

The 30-day resolution period ended without resolution on December 5, 2010; and five-day disclosures were filed by both parties, as directed, on December 29, 2010. On January 4, 2011, DCPS filed written objections to several of Petitioner’s disclosure documents.

On January 5, 2011, DCPS’ counsel sent an email to Petitioner’s counsel and the Hearing Officer attaching a copy of an FBA for the Student. DCPS’ counsel stated that “[m]y client just informed me this morning that it completed an FBA for the Student on the last day of school before the winter break.”<sup>5</sup> The attached FBA document is marked “DRAFT” and bears a “Fax Generated” date of 12/17/2010. *R-4*.

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<sup>3</sup> See *Due Process Complaint*, filed Nov. 5, 2010, pp. 1-3.

<sup>4</sup> *Response*, filed Nov. 16, 2010, p. 2.

<sup>5</sup> Email correspondence dated Jan. 5, 2011, from Laura George, Esq., Assistant Attorney General.

The Due Process Hearing was held in Room 2006 on January 6, 2011. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence:

**Petitioner's Exhibits:** P-1 through P-15; P-17; P-19.<sup>6</sup>

**Respondent's Exhibits:** R-1 through R-4.<sup>7</sup>

In addition, the following Witnesses testified on behalf of each party:

**Petitioner's Witnesses:** (1) Parent-Petitioner; (2) Educational Advocate; and (3) Private School Representative.

**Respondent's Witness:** Special Education Coordinator ("SEC"), DCPS' High School.

Oral closing statements were submitted on the record at the conclusion of evidence.

## **II. JURISDICTION**

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is January 19, 2011.

## **III. BACKGROUND AND SUMMARY**

The hearing on this due process complaint addressed DCPS' alleged (a) failure to develop an appropriate IEP at the August 30, 2010, team meeting and (b) failure to complete an FBA in a reasonable period of time since August 30, 2010. The Hearing Officer determines that (a) except for the lack of an appropriate BIP, Petitioner has failed to prove that the IEP is not reasonably calculated to provide educational benefit; and (b) DCPS failed to complete a timely FBA. Petitioner has failed to present evidence demonstrating that additional services are necessary to compensate the Student for a denial of FAPE, but other appropriate relief is ordered.

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<sup>6</sup> Petitioner withdrew Exhibits P-16 and P-18 of its disclosure documents. The Hearing Officer overruled DCPS' objections to Exhibits P-1, 2, 3, 4, 5, 13, 14 and 15, for the reasons stated on the hearing record.

<sup>7</sup> DCPS Exhibit R-4 is the FBA dated 12/17/2010, which was submitted by DCPS subsequent to the five-day disclosures.

#### IV. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

- (1) **Inappropriate IEP** – *Did DCPS deny the Student a FAPE by failing to offer or propose an individualized education program (IEP) reasonably calculated to provide educational benefit to the Student, when the IEP: (a) lacks an accurate statement of the Student’s present levels of academic achievement and functional performance; (b) lacks appropriate speech and language goals; (c) lacks a behavior intervention plan (BIP); and (d) lacks “full-time” specialized instruction outside of the general education setting and in a therapeutic environment?*
  
- (2) **Failure to Complete Timely FBA** – *Did DCPS fail to complete a functional behavioral assessment (FBA) within a reasonable time from August 30, 2010, when it was determined to be necessary?*

The requested relief identified in the Prehearing Order is: (1) placement at Private School; (2) and independent FBA, occupational therapy assessment, and a vocational II assessment; (3) compensatory education, consisting of two hours per week of tutoring provided by a tutor selected by Petitioner, to be provided until the Student obtains a diploma or progresses four grade equivalencies in all subjects; and (4) a \_\_\_\_\_ assessment and any \_\_\_\_\_ programs the assessment recommends.

#### V. FINDINGS OF FACT

1. The Student is a \_\_\_\_\_ year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with an Emotional Disturbance (“ED”). *See P-8 (08/30/2010 IEP).*
2. The Student has attended the High School during the 2009-10 and 2010-11 School Years. *See Complaint ¶ 2; Petitioner Testimony; SEC Testimony.*
3. On or about May 13, 2010, Petitioner and DCPS entered into a written settlement agreement (“SA”) whereby DCPS agreed, *inter alia*, to: (a) fund independent evaluations (consisting of a comprehensive psychological, adaptive behavior assessment, and speech/language evaluation); and (b) convene an IEP team meeting to review the evaluations, review and revise the IEP (if necessary), discuss and determine location of services, and discuss and determine compensatory education (if warranted). *P-1 (05/13/2010 SA), p. 2.*

4. On or about June 13, 2010, Petitioner obtained a completed Speech & Language Evaluation Report and submitted it to DCPS. *P-11*. The evaluation was conducted to determine present levels of functioning in speech and language skills and to determine if the Student demonstrates an educationally significant verbal communication deficit that adversely affects his academic performance. *Id.*, p. 1.
5. The June 13, 2010 Speech & Language Evaluation Report found, *inter alia*, that the Student presents with “severe deficits in his overall language skills as measured by the *Clinical Evaluation of language Fundamentals-4*.” *Id.*, p. 5. His expressive and receptive language skills were deemed below average, and his articulation skills were measured as average when producing single words. *Id.* Given the evaluation results, the evaluator recommended that the Student receive speech-language therapy services of 30 minutes per week. *Id.* The evaluator also made recommendations for appropriate goals and objectives in this area. *Id.*
6. On or about June 22, 2010, Petitioner obtained a completed Comprehensive Psychological Evaluation Report and submitted it to DCPS. *P-12*. The evaluation was conducted to assess the Student’s cognitive, academic, and personality functioning, and to identify social and emotional factors that impact his ability to perform effectively in the classroom. *Id.*, p. 1.
7. The June 22, 2010 Comprehensive Psychological Evaluation Report found, *inter alia*, that the Student scored in the Very Low range of cognitive functioning, with a General Ability Index (GIA) on the Woodcock-Johnson III of 57. *P-12*, p. 12. His academic achievement scores were also “severely depressed across the board,” and he “evidences difficulties with all academic areas that will impact his ability to succeed in the classroom without proper academic supports.” *Id.* However, the Student “does not meet criteria as a student with Mental Retardation, as the administration of the Vineland suggests Moderately Low adaptive skills, which are within normal limits for his age.” *Id.*
8. The June 22, 2010 Comprehensive Psychological Evaluation Report concluded that the Student meets diagnostic criteria for Mood Disorder Not Otherwise Specified, and that “his emotional symptomatology negatively impacts his school progress.” *P-12*, p. 13. The evaluator thus recommended that he be classified as a student with an Emotional Disturbance (ED). *Id.* The evaluator also recommended that the Student be classified as a student who meets criteria for Learning Disorder Not Otherwise Specified, with difficulties in all areas (Reading, Math, Oral Language, and Written Language). *Id.*

9. On or about July 30, 2010, DCPS convened a meeting of the Student's MDT/IEP Team to review the independent evaluations. *P-6*. The team determined that the Student qualified for special education as a student with ED. *Id.*, p. 3. The team discussed that the Student may also meet criteria for Specific Learning Disability (SLD), but DCPS members of the team advised that he could not qualify as both ED and SLD under OSSE rules. *Id.* With the exception of Petitioner and the Student's educational advocate, the team agreed with an ED-only eligibility classification. *Id.*, p. 4.
10. On or about August 30, 2010, DCPS convened another meeting of the Student's MDT/IEP Team to review and revise the Student's IEP. *See P-7* (8/30/2010 advocate meeting notes). The team developed an IEP that provides 19.5 hours per week of specialized instruction in a setting Outside General Education; 30 minutes per week of speech-language pathology services Outside General Education; and 30 minutes per week of behavioral support services Outside General Education. *P-8*, p. 7. Parent signed the IEP stating that she agreed with its implementation, but not with the hours of specialized instruction or related services. *Id.*, p. 1.
11. Consistent with the May 13, 2010 SA, the IEP team also discussed and determined compensatory education as part of the IEP developed at the August 30, 2010, meeting. *See P-8*, p. 10; *R-1*. DCPS developed a "Compensatory Educational Plan" dated 08/30/2010, which provides that DCPS will fund a total of 90 hours of specialized instruction in reading and a total of 25 hours of specialized instruction in math by an independent provider of the parent's choice, at a rate not to exceed \_\_\_\_\_ per hour. The services may begin September 30, 2010, and must be completed by August 31, 2011. *R-2*.<sup>8</sup>
12. At the August 30, 2010 meeting, the IEP team also discussed the Student's behavior problems at school. *See P-7* (MDT meeting notes); *Advocate Testimony*. The team decided to conduct an FBA and develop a BIP for the Student to address his behaviors, and Petitioner signed a written consent for such evaluation. *See P-7*, p. 4; *P-10*.
13. It is undisputed that DCPS failed to complete an FBA for the Student between August 30 and December 16, 2010. During this period, the Student was frequently absent from school. *R-3*; *SEC Testimony*; *see also Petitioner Testimony* (cross examination); *Advocate Testimony*

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<sup>8</sup> While this was referred to in the Complaint as a DCPS proposal for compensatory education, DCPS agreed at hearing that the 08/30/2010 Compensatory Educational Plan contained at R-1 constitutes a team-determined award of additional services that is now a part of the Student's IEP.

(cross examination). DCPS' attendance records show a total of 116 unexcused (and nine excused) class absences for the Student from August 16, 2010 to November 15, 2010. *R-3*. These excessive absences interfered with the timely completion of the FBA, which requires classroom observations. However, the evidence shows that DCPS could have acted to complete the FBA substantially more quickly than it did. *See Testimony of SEC & Advocate*. The Hearing Officer finds that a reasonable period of time in which to complete the FBA under the circumstances was approximately 60 days.

14. On or about December 17, 2010, DCPS completed a draft FBA for the Student. *See R-4; SEC Testimony*. The FBA states that the Student was referred for evaluation because he "has demonstrated a difficulty managing his emotions, making appropriate choices, respecting boundaries, and showing dedication to his academics." *R-4*, p. 1. "This has been evidenced by routine instances of class avoidance, walking out of class without permission, disrespect of authority, and using cell phone in class." *Id.* The FBA further notes that the Student "often leaves school by fourth period," that his current behavior is often inappropriate, and that the inappropriate behavior occurs on a daily basis. *Id.*, pp. 2-3.
15. The 12/17/2010 FBA indicates that the Student's attendance problems should be included in his behavior plan. *Id.*, p. 4. *See also DCPS' Response*, p. 2 ("Since the IEP was developed, it has become clear that attendance is a behavior that requires addressing" in BIP).
16. DCPS stipulated at hearing that it has not developed a BIP for the Student or incorporated a BIP into his IEP.
17. The evidence shows that the August 30, 2010, IEP is reasonably calculated to provide the Student with meaningful educational benefit, except for the omission of an appropriate BIP.
18. Petitioner has not demonstrated that the Student requires a full-time, out of general education, therapeutic program to address his special education needs.

## VI. DISCUSSION AND CONCLUSIONS OF LAW

### A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., 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).

### B. Issues/Alleged Denials of FAPE

#### 1. Inappropriate IEP

The IDEA requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...” 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982).<sup>9</sup> Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably

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<sup>9</sup> *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. “).

calculated to enable the child to receive educational benefits.”<sup>10</sup> The issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003). “Ultimately, the question ...is whether or not [any] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE.” *N.S. v. District of Columbia*, 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

In this case, Petitioner claims that that the August 30, 2010 IEP is not reasonably calculated to provide educational benefit because the IEP: (a) lacks an accurate statement of the Student’s present levels of academic achievement and functional performance; (b) lacks appropriate speech and language goals; (c) lacks a behavior intervention plan (BIP); and (d) lacks “full-time” specialized instruction outside of the general education setting and in a therapeutic environment. Petitioner has not presented sufficient evidence to prevail on claims (a), (b) and (d), but has presented sufficient evidence to prevail on claim (c) regarding the BIP.

#### ***Lack of BIP***

Petitioner has shown that the current IEP is deficient to the extent it lacks any BIP. The IEP Team must consider the use of “positive behavioral interventions and supports, and other strategies,” to address any behavior that “impedes the child’s learning or that of others.” *Id.*, 300.324 (a) (2) (i). D.C. law further provides in such circumstances that an “individual behavior plan shall be developed and incorporated into the IEP.” DCMR 5-E3007.3. At the time of the August 30, 2010 IEP, DCPS recognized that the Student frequently engaged in aggressive and inappropriate behaviors that adversely affected his ability to succeed academically and in a general education setting. *P-8*, p. 6. These findings were later confirmed in the FBA it completed in mid-December, 2010, which documents the Student’s non-compliant behaviors and the need for developing an appropriate behavioral support plan. See *R-4*.

The team also determined that the Student’s severe attendance problems should be specifically addressed in his behavior plan. *R-4*, p. 4. Moreover, the Special Education

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<sup>10</sup> *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate “can only be determined as of the time it is offered for the student, and not at some later date”); *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op.* at p. 6 (“Because the IEP must be ‘tailored to the unique needs’ of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child’s performance, behavior, and disabilities, and must be amended if its objectives are not met.”).

Coordinator (SEC) testified at hearing that the Student was *not* making academic progress at the High School because of his attendance. *See SEC Testimony* (cross examination) (Student's "attendance is prohibiting him from making any progress"). In the same vein, Petitioner testified that she believes the Student's behavior problems have worsened during this school year, but that the "biggest problem is getting him to school each day." *Petitioner's Testimony* (cross examination). Petitioner believes that when the Student comes to school and attends classes, he is able to participate. *Id.* The Student's advocate also testified that his frequent absences could be one explanation for his failing grades. *Advocate's Testimony*. Both parties further agreed that it is not uncommon for ED students to have attendance problems and for the IEP team to address those problems in an appropriate BIP. *Id.; SEC Testimony*.

It is undisputed that, as of the date of hearing, no BIP had yet been developed and incorporated into the Student's IEP. The SEC also admitted that she has taken no action in response to the Student's (or any other special education students') being listed on school truancy reports. *See SEC Testimony* (cross examination). While DCPS generally employs an FBA to develop a BIP, *id.*, it need not wait for a formal assessment in every case, especially where the FBA may be delayed by one of the very behaviors (*i.e.*, lack of attendance) that needs to be addressed by a BIP. Accordingly, the Hearing Officer concludes that Petitioner has carried her burden of proof on Issue 1, with respect to the IEP's lacking a BIP, *i.e.*, paragraph (c) of Issue 1.

### ***Remaining IEP claims***

With respect to the claim under paragraph (a), the August 30, 2010 IEP appears to include an appropriate "statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum," as required by the IDEA. 20 U.S.C. 1414(d)(1)(A)(i). Petitioner has not demonstrated how the specific statements in the IEP (P-8, pp. 2-6) fail to meet these statutory requirements and/or are not reasonably calculated to provide educational benefit. Moreover, to the extent Petitioner disagrees with the Student's disability classification,<sup>11</sup> she has not shown how a different classification would necessarily affect the

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<sup>11</sup> As noted above, the IEP team discussed that the Student may meet criteria for Specific Learning Disability (SLD), but found the Student eligible only as a child with an Emotional Disturbance (ED) after DCPS members of the team advised that he could not qualify as both ED and SLD. *See* 34 C.F.R. 300.8 (c) (10) (ii) ("Specific learning disability does not include learning problems that are primarily the result of ... emotional disturbance ...."); DCMR 5-E3001.1 (same). In any event,

Student's involvement and progress in the general education curriculum, or other needs that result from his disability, so as to make the IEP statements inappropriate.<sup>12</sup>

With respect to the claim under paragraph (b), the August 30, 2010 IEP also appears to include an appropriate statement of measurable annual goals in the area of Communication, Speech and Language, designed to meet the Student's needs and to enable him to be involved in and make progress in the general education curriculum, together with a description of how progress toward meeting the annual goals will be measured. 20 U.S.C. 1414(d)(1)(A)(i). Petitioner has not demonstrated how the speech/language goals in the IEP (*P-8*, p. 5) fail to meet these statutory requirements and/or are not reasonably calculated to provide educational benefit, as compared with the suggested goals and objectives in the June 2010 evaluation report (*P-11*, pp. 5-6).

Finally, with respect to the claim under paragraph (d), Petitioner has failed to prove that the Student requires a "full-time, out of general education, therapeutic program." *Complaint*, p. 2, ¶ 15; *see also Prehearing Order*, p. 2, ¶ 3 (A) (2). Petitioner did not establish that the 19.5 hours of specialized instruction provided in his IEP is insufficient to meet the Student's academic needs or to provide him with meaningful educational benefit. While Petitioner testified that the Student's "biggest areas of need" are in reading, writing and spelling, she did not present evidence to show what additional specialized instruction was necessary, or how the instruction provided in the IEP is inadequate, to make progress toward achieving his annual IEP goals in these areas. *Petitioner's Testimony*; *see also Advocate's Testimony*. Nor did Petitioner prove that the Student's emotional and behavioral difficulties necessitate, at least at this stage, placing him entirely outside the general education setting in a full-time, therapeutic environment with no contact with any non-disabled, general education students. *Id. See also Private School Representative Testimony* (cross examination) (testifying that she does not know whether the Student has exhibited the types of behaviors commonly addressed within her school's ED

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<sup>12</sup> Misclassification of disabilities for an otherwise eligible child does not *per se* give rise to a cognizable claim under the IDEA. *See, e.g.*, 34 C.F.R. 300.111(d) ("Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of this Act."). The key question is whether the IEP properly addresses the educational needs of the child that result from a child's disability (or disabilities), whether or not commonly linked to the disability category in which the child has been classified. *See* 34 C.F.R. §§300.304(b)(6), 300.305(a), 300.320(a).

program). Accordingly, the Hearing Officer finds no basis for overturning the IEP team's decisions in this area.<sup>13</sup>

## 2. Failure to Complete a Timely FBA

A functional behavioral assessment ("FBA") is considered an educational evaluation under the IDEA. *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). As the *Harris* court explained, the "FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." 561 F. Supp. 2d at 68. Thus, where DCPS fails to complete an FBA in a timely manner, or fails to act on a parent's request for an independent evaluation (as in *Harris*), the failure may constitute a denial of FAPE during the period that the IEP is not sufficiently tailored to the needs of the student. *Id.*

In this case, the IEP team decided at its August 30, 2010 meeting to conduct an FBA and develop a BIP for the Student to address his classroom behaviors, and Petitioner signed a written consent for such evaluation at that time. *See P-7*, p. 4; *P-10*. It is undisputed that DCPS failed to complete an FBA for the Student between August 30 and December 16, 2010, a period of almost four months. While the Student's excessive absences no doubt made timely completion of the FBA more difficult, the evidence shows that DCPS should have had ample opportunity to complete the FBA within the first two months of the 2010-11 SY. A typical FBA requires only 3-4 classroom observations of approximately one-hour duration over different parts of the school day, and DCPS' witness did not even know when the observations (or attempted observations) occurred here. *See Advocate Testimony; SEC Testimony*. Had DCPS completed an FBA for the Student within this reasonable period of time (*i.e.*, approximately 60 days), the FBA would have been available to the IEP team by the end of October, 2010, and it then would have been feasible for the team to develop an appropriate BIP and to incorporate it into the IEP by no later than the end of November, 2010. Thus, the Student has been harmed by not having the benefit of an

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<sup>13</sup> The Hearing Officer notes that the parties may differ as to their interpretation of "full-time" specialized instruction, as referenced in the Prehearing Order and Complaint, with DCPS' witness testifying that 19.5 hours is generally considered "full-time" within the ED cluster program at the High School. *See SEC Testimony*. The remaining hours of the school day are devoted to necessary related services (one hour in this case), electives, and lunch. *Id.* Regardless of how this term should be interpreted in this case, however, Petitioner has not shown that the Student requires more than 19.5 hours of specialized instruction, or that he needs to take electives and lunch with disabled peers only.

appropriate BIP designed to address his attendance issues and other problem behaviors at school during at least December 2010 and thus far in January 2011.

Obviously, this is not an extreme case where a student “languished for over two years” while a request for FBA was pending and an IEP was not sufficiently tailored to his needs. *Harris*, 561 F. Supp. 2d at 68-69. Nevertheless, the Hearing Officer concludes that Petitioner has shown that DCPS denied the Student a FAPE by failing to complete the FBA within approximately 60 days so that an appropriate BIP could be incorporated into the IEP. Alternatively, the Hearing Officer concludes that Petitioner has shown that DCPS committed a significant procedural violation in failing to complete an FBA more quickly (and to develop and incorporate a BIP), and that such procedural inadequacy has (a) impeded the Student’s right to a FAPE, (b) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student, and/or (c) caused a deprivation of educational benefit. 34 C.F.R. 300.513. Accordingly, the Hearing Officer concludes that Petitioner has carried her burden of proof on Issue 2.

**C. Appropriate Relief**

Having found a violation and denial of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The Hearing Officer exercises his discretion to grant appropriate equitable relief as set forth in the Order below.

As noted above, the Hearing Officer concludes that Petitioner has not demonstrated in this hearing that the Student requires a “full-time,” out of general education, “therapeutic” setting for delivery of all services. Hence, Petitioner’s proposed placement at Private School has not been shown to be necessary and appropriately tailored to meet the specific needs of the Student. *See Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005). The Student does not currently have a full-time IEP, and Petitioner has not demonstrated that full-time services are required to meet the Student’s needs. Petitioner also has not shown that Private School represents the least restrictive environment (LRE) capable of meeting the Student’s special education needs, where Private School has only disabled students and cannot offer any

interaction with non-disabled peers. Nor has Petitioner demonstrated that any of the independent evaluations it requests (FBA, OT and vocational) would be appropriate equitable relief, given the findings and conclusions in this case.

Compensatory education is an equitable remedy available to a hearing officer, exercising his/her authority to grant "appropriate" relief under IDEA. Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services...to be provided prospectively to compensate for a past deficient program.'" *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted). "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." 401 F.3d at 524. *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'"). "This means that the plaintiff has the burden of 'propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record.'" *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. Sept. 13, 2010), slip p. at 8, quoting *Friendship Edison Public Charter School v. Nesbitt* ("*Nesbitt II*"), 583 F. Supp. 2d 169, 172 (D.D.C. 2008 (Facciola, Mag. J.)). Where Petitioner has an adequate opportunity to present evidence necessary to support a compensatory education award consistent with *Reid*, but fails to do so, a hearing officer may conclude that no compensatory award should issue. *Phillips*, at note 4.

In this case, the Hearing Officer has carefully considered Petitioner's proposed compensatory education plan, as well as the other testimony and evidence presented at hearing. Petitioner's primary evidence in support of her compensatory education proposal was the testimony of the Student's educational advocate, who has a Ph.D. in Special Education and was stipulated by the parties as an expert. The advocate testified that, in her opinion, the Student has made no academic progress during the 2010-11 School Year (based primarily on his 10/28/2010 grade report) and requires the type and amounts of services specified in the Complaint and

Prehearing Order as a remedy.<sup>14</sup> In assessing the weight and credibility of the testimony presented by Petitioner, the Hearing Officer takes account of the fact that the advocate first met the Student the day before the hearing for approximately 20 minutes and has never observed him in a classroom setting. *See Advocate Testimony.*

The Hearing Officer concludes that Petitioner's proposed plan fails to meet the *Reid* standard because Petitioner has not shown that the proposed services are "reasonably calculated to provide the educational benefits that likely would have accrued" from an appropriate program of special education (*i.e.*, one with a timely FBA and a BIP incorporated into his IEP) that DCPS should have supplied between August 30, 2010 and the present. Petitioner's plan also does not appear to be reasonably tailored to the unique needs and deficits of the Student. In fact the specific compensatory education relief requested in this case is the exact same tutoring and intensive reading/writing program that the advocate proposed in early August to compensate for alleged educational harm for the three years from 2007 to 2010, based on demonstrated regression between 12/19/07 and 06/09/10 measurements. *See P-14*, p. 2. But the IEP team has already considered such evidence and awarded 115 hours of comparable individual tutoring services for this earlier time period (*see R-1*), which are incorporated into the 08/30/2010 IEP and are currently available for the benefit of the Student. An award of additional educational services to compensate for the same educational harm would be duplicative and improper. Beyond that, Petitioner has failed to present evidence tying her request to any new educational deficits or demonstrating a causal connection between those deficits and DCPS' denial of FAPE since August 30, 2010. *See, e.g., Reid, supra; Phillips*, slip op. at 10-11 & n. 4. Moreover, the period of any denial of FAPE in this case is relatively brief, based on the timing of the FBA and BIP, and affects only the behavioral intervention aspects of the program.

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<sup>14</sup> A written compensatory education plan was originally included as proposed Exhibit P-16 in Petitioner's five-day disclosures, but was withdrawn at the beginning of the due process hearing. In lieu of that written plan, Petitioner's expert advocate appeared to rely on her earlier compensatory education proposal dated August 2, 2010, contained at Exhibit P-14, which is consistent with the relief requested in the Complaint. *See Advocate Testimony.*

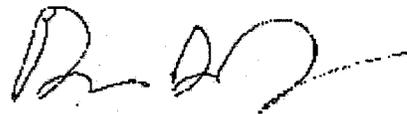
## VII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Within **twenty (20) calendar days** of this Order (*i.e.*, by **February 7, 2011**), DCPS shall convene a meeting of the Student's MDT/IEP Team, with all necessary members including the Parent participating. The purpose of the meeting shall include: (a) to review the Functional Behavioral Assessment (FBA) dated December 17, 2010; (b) to develop a Behavior Intervention Plan (BIP) based on the FBA and other relevant information, which shall include but not be limited to behavioral interventions, supports and strategies to address his attendance issues; and (c) to review and revise, as appropriate, the Student's Individualized Education Program (IEP) in light of all relevant updated information, including to incorporate the BIP into the IEP.
2. All other requests for relief in Petitioner's November 5, 2010 Due Process Complaint are **DENIED**.
3. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***

Dated: January 18, 2011



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Impartial Hearing Officer

### NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).