

**District of Columbia
Office of the State Superintendent of Education**

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Student Hearing Office
May 21, 2014

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer: Charles M. Carron</p>
---	---

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

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

The DPC was filed April 4, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools (“DCPS”).

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

On April 8, 2014, the undersigned was appointed as the Impartial Hearing Officer and bifurcated the issues raised in the DPC, with the expedited disciplinary issue remaining being adjudicated separately in Case No. 2014-0165, and the non-expedited issues being adjudicated in this case.

On April 14, 2014 Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

The undersigned held a Prehearing Conference (“PHC”) by telephone on April 16, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by May 7, 2014 and that the Due Process Hearing (“DPH”) would be held on May 14, 2014.

A Resolution Meeting was held on May 6, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period already had ended on May 4, 2015. The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on May 5, 2014 and will conclude on June 18, 2014.

No motions were filed by either party and the DPH was held on May 14, 2014 from 9:32 a.m. to 1:06 p.m. at the Student Hearing Office, 810 First Street, NE, Room 2004, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-18

Respondent’s Exhibits: R-1 through R-12

Hearing Officer’s Exhibits: HO-1 through HO-7

The following witnesses testified on behalf of Petitioner at the DPH:

(a) Petitioner;

(b) Petitioner’s Psychologist, who was admitted, over Respondent’s objection, as an expert in (i) assessment of children for special education, and (ii) the development of Individualized Education

Programs (“IEPs”); and

(c) Educational Advocate, who was admitted, over Respondent’s objection, as an expert in the development and implementation of IEPs.

No witnesses testified on behalf of Respondent at the DPH.

The parties gave oral closing arguments and did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA’s 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 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the DPC are as follows:

The Student is male, Current Age, and attends Current Grade at a public school (the “Attending School”). The Student has been determined to be eligible for special education and related services as a child with a disability, Other Health Impairment (“OHI”), under the IDEA.

Petitioner claims that Respondent has denied Student a FAPE by failing to conduct a Functional Behavioral Assessment (“FBA”), to develop a Behavior Intervention Plan (“BIP”), to provide access to the Student’s education records, or to include sufficient services and an appropriate placement in his IEP.

IV. ISSUES

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at the DPH:²

(a) Since October 9, 2013, has Respondent denied the Student a FAPE by failing to conduct an FBA in response to Petitioner's request(s)?

(b) Since October 9, 2013, has Respondent denied the Student a FAPE by failing to develop and implement a BIP to address the Student's behavior that impedes his learning and/or that of others?

(c) Since December 9, 2013, has Respondent violated IDEA's education records provisions by failing to provide Petitioner the opportunity to inspect or review the Student's education records, specifically, attendance records, progress reports, report cards, standardized test scores, class schedules, IEPs, evaluations, meeting notes, service provider logs, letters, emails and disciplinary records?

(d) Since January 8, 2014, has Respondent denied the Student a FAPE by failing to review and revise his IEP to address (i) his lack of progress toward annual goals, (ii) his lack of progress in the general education curriculum, (iii) his anticipated needs, and/or (iv) information provided by Petitioner?

² On the record at the DPH, Petitioner's counsel withdrew the following issue: On or about December 16, 2013, did Respondent deny the Student a FAPE because the IEP developed for him (i) failed to include sufficient specialized instruction in the outside general education setting and/or (ii) failed to place the Student in a therapeutic environment?

V. RELIEF REQUESTED

Petitioner requests the following relief:³

- (a) a finding that Respondent denied the Student a FAPE;
- (b) an Order that Respondent fund an independent FBA;
- (c) an Order that Respondent revise the Student's IEP, including his placement, in accordance with the Hearing Officer's finding, or, in the alternative, convene an IEP Team meeting to review and revise the Student's IEP, including his placement, consistent with the Hearing Officer's findings;
- (d) compensatory education, specifically 144 hours of one-on-one tutoring in Mathematics, Reading and Written Expression, and 45 hours of counseling;
- (e) an Order that all meetings be scheduled through Petitioner's counsel, in writing, via facsimile; and
- (f) an Order that Respondent send all notices to Petitioner's counsel with copies to Petitioner.

³ In the DPC, Petitioner also requested the following relief that the undersigned determined to be inappropriate: (a) attorney's fees and costs, which only a court can award; (b) a finding that Petitioner is the prevailing party, which only a court can make; (c) an order that Respondent file a Response within 10 calendar days of the filing of the DPC, which is moot because Respondent filed a timely response; (d) an order that if Respondent failed to file a timely Response, the arguments and facts averred by Petitioner be deemed true and accurate and act as a waiver, on the part of Respondent, of the desire to have a Resolution Session Meeting, and that the timeline of the DPH be accelerated accordingly, which is moot because Respondent filed a timely response; (e) an order that Respondent, within 15 calendar days of receiving the DPC, file any Notice of Insufficiency, which is not ripe because Respondent has not filed a Notice of Insufficiency; and (f) an order that if Respondent fails to file a Notice of Insufficiency within 15 calendar days of receiving the DPC, that this constitute a waiver on the part of Respondent to make such an argument subsequently, which is not ripe because Respondent has not filed a Notice of Insufficiency.

VI. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male, Current Age. R-6-1.⁴
2. The Student resides in the District of Columbia. *Id.*, testimony of Petitioner.
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with OHI. R-7.

The Student's Matriculation at the Attending School

4. At the beginning of School Year ("SY") 2013-2014, the Student attended a District of Columbia public charter school, from which he was expelled for bad behavior. Testimony of Petitioner.

5. On October 7, 2013, the Student began attending Attending School. *Id.* On that day, Petitioner received three telephone calls from Attending School instructing her to pick up the Student because he was running around the school building and being disrespectful. *Id.*

6. Petitioner was informed by Attending School that she needed to bring the Student to school the next day for a "reentry meeting." *Id.* When Petitioner did so, the Principal of Attending School was unavailable to meet with her and her educational advocate. *Id.*

⁴ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

Petitioner's Letter of October 9, 2013

7. On October 9 2013, the day after Petitioner had brought the Student to Attending School for the "reentry" meeting, Respondent wrote a letter to the Principal and several staff members of Attending School, requesting an initial evaluation of the Student to determine whether he was a child with a disability. P-8, R-10.

8. The letter was received by Respondent on October 15, 2013. P-8-1.

9. Petitioner's letter specifically requested "a comprehensive psychological, Functional Behavior Assessment, an occupational therapy evaluation, and a speech language eval." *Id.*

10. Petitioner expressed concerns about the behaviors her son displayed at the Attending School and his prior school. *Id.*

11. Petitioner's letter stated that she required documentation of any future suspension or disciplinary action of the Student. P-8-2 (incorrectly numbered P-8-1).

The Student's Initial Evaluation

12. On October 23, 2013, Respondent acknowledged Petitioner's referral for initial evaluation of the Student. P-12-1.

13. On November 18, 2013, Respondent provided Petitioner a Prior Written Notice ("PWN") to proceed with the evaluation process. P-1-1.

14. On November 18, 2013, Petitioner provided written consent for the Student to be evaluated. R-9.

15. On December 9, 2013, Petitioner's counsel reiterated the request for evaluation, including a comprehensive psychological evaluation and an FBA. P-9-1.

16. On December 11 and 13, 2013, DCPS Psychologist conducted a comprehensive psychological evaluation of the Student, finding that the Student presented significant symptoms of Attention Deficit Hyperactivity Disorder (“ADHD”) and required specialized instruction as well as behavior support services. P-4, R-8.

17. Petitioner agreed with the evaluation. R-7-2, testimony of Petitioner.

18. Petitioner’s Psychologist agrees with the evaluation. Testimony of Petitioner’s Psychologist.

19. According to Petitioner’s Psychologist, DCPS Psychologist’s evaluation highlights the impact of the Student’s ADHD on his learning: although his achievement scores were at grade level when tests were administered one-on-one with limited distractions and many opportunities for redirection, his ability to learn in the classroom setting was impeded by his distractibility, impulsivity and hyperactivity. *Id.*

20. Petitioner’s Psychologist’s review of the Student’s IEP, the FBA conducted in April 2014, and the Student’s report card and attendance history⁵ reinforced his view that the Student’s deficits in executive functioning and his behavior resulting from ADHD had and continues to have an adverse impact on his academic functioning. *Id.*

⁵ Respondent’s counsel attempted to discredit Petitioner’s Psychologist on the basis that he had not met or tested the Student, or interviewed Petitioner, the Student’s teachers, the Student’s social worker or school psychologist, and he had not participated in any meetings regarding the Student. However, as an expert, it was entirely appropriate for Petitioner’s Psychologist to give an expert opinion based upon a review of records—in this case, Respondent’s own records. Respondent’s counsel also attempted to discredit Petitioner’s Psychologist on the basis that he was paid by Petitioner’s law firm to provide testimony while being paid a salary as a full time employee of another school system. There is no evidence that Petitioner’s Psychologist’s employer prohibits “moonlighting.” More important, there was no suggestion, much less evidence, that Petitioner’s Psychologist’s fee is based upon the outcome of this matter. Accordingly, the undersigned finds no merit to Respondent’s counsel’s innuendo.

December 16, 2013 Eligibility Meeting and Initial IEP

21. The Student's Multidisciplinary Team ("MDT")⁶ met on December 16, 2013 to determine his eligibility. P-16, R-6.

22. The Team determined that the Student was eligible for special education and related services as a child with OHI based upon ADHD or Attention Deficit Disorder ("ADD"). P-2-1, P-16-1 through -3, R-7 (unnumbered page).

23. The Team found that the Student's disability impacted his participation in the general education curriculum in the academic areas of Mathematics, Reading and Written Expression, as well as his emotional, social and behavioral development. R-7-1.

24. The Team developed an initial IEP for the Student. P-2.

25. The IEP contained academic goals in Mathematics, Reading and Written Expression. P-2-3 through -5.

26. The IEP also contained goals for the Student's emotional, social and behavioral development. P-2-6 and -7.

27. The IEP prescribed 10 hours per week of specialized instruction and 120 minutes per month of behavioral support services, all in the general education setting. P-2-8. Apparently this was a mistake because Petitioner's notes of the meeting indicate that the specialized instruction would be provided on a "pull out" basis (P-3-13), and it is illogical that behavioral support services would be provided in the general education classroom.

28. Petitioner's counsel recommended an FBA and a BIP to address the Student's behavior problems in school. R-6-4.

⁶ The parties use sometimes use the terms IEP Team and MDT interchangeably. The distinction is not material to determination of the issues in the instant case.

29. Respondent's representatives on the Team were of the opinion that an FBA and a BIP might not be needed because the Student had not been receiving counseling services on a consistent basis that he now would receive, *i.e.*, 120 minutes per month of behavioral support services. P-3-14, R-6-4.

30. Petitioner agreed that she would give Respondent an opportunity to implement the Student's IEP before moving forward with the FBA and BIP. R-6-4.

31. Respondent's representatives stated that if the initial IEP did not work, the Team could come back to the table to revise it. Testimony of Petitioner.

32. Respondent provided Petitioner with an Evaluation Summary Report that, *inter alia*, listed the types of data used in the evaluation, *i.e.*, input from Petitioner at the meeting and the evaluation conducted by DCPS Psychologist. R-7-3 through -4.

December 20, 2013 IEP Amendment

33. On December 20, 2013, the Student's IEP Team amended his IEP to provide that his specialized instruction and behavioral support services would be provided in the outside of general education setting. P-3-1, -8 and -9.

34. Based upon his review of the Student's education records, Petitioner's Psychologist would have recommended that the Student's IEP include more hours of specialized instruction in the outside of general education setting (between 15 and 20 hours per week rather than 10), as well as a BIP. Testimony of Petitioner's Psychologist.

35. Petitioner's Psychologist acknowledged that he did not know why the Team determined that the Student should receive 10 hours per week of specialized instruction,

and that the people who work with the Student are in the best position to determine the services he needs. *Id.*

36. Based upon the entire record, the undersigned finds that the Student's December 20, 2013 IEP was reasonably calculated to confer educational benefit, even though a greater number of hours of specialized instruction outside the general education setting might have maximized the Student's potential.

Requests for Access to the Student's Education Records and Responses Thereto

37. On December 9, 2013, Petitioner's counsel requested a copy of the Student's educational records for SY 2013-2014, or in the alternative, the opportunity for Petitioner's representative to access and review the Student's educational file and make copies. P-9-3.

38. On December 16, 2013, at the MDT meeting, Respondent provided Petitioner a copy of a draft of DCPS Psychologist's comprehensive psychological evaluation of the Student. Testimony of Petitioner.

39. Petitioner and her counsel did not have this evaluation in advance of the December 16, 2013 meeting. *Id.*, testimony of Educational Advocate.

40. Because they did not have the evaluation in advance of the December 16, 2013 meeting, Petitioner, her counsel and educational advocate had nothing to prepare for the meeting. Testimony of Educational Advocate.

41. Three to four weeks later, Petitioner received a copy of the final version of the comprehensive psychological evaluation. Testimony of Petitioner.

42. On December 6, 11 and 20, 2013 and January 10, 2014, Petitioner's counsel reiterated the request for educational records. P-11-1, -2, -4 and -5.

43. Petitioner never received any communication from Respondent advising her how or when she could review the Student's education records. Testimony of Petitioner.

44. Other than the comprehensive psychological evaluation, the Student's IEPs, and an FBA conducted in April 2014, Petitioner has received no copies of education records from Respondent. *Id.*

The Student's Academic Progress at Attending School During SY 2013-2014 to Date

45. From the beginning of SY 2013-2014 through the end of Term 3, at Attending School, the Student was performing significantly below grade level in Reading, Writing & Language, Speaking & Listening, Math, Social Studies, Science and World Languages. P-5-4. Although in the first term he was approaching expectations for Current Grade in Music and Art, in the second and third terms he was performing significantly below grade level. *Id.* In Health & Physical Education, the Student was rated "approaching expectations" for all three terms. *Id.*

46. Petitioner spoke with Special Education Teacher to express her concern that the Student's grades were getting worse. Testimony of Petitioner.

47. The Student is failing all of his subjects and Petitioner expects him to be retained in Current Grade, although no one from Attending School has informed her that he will be retained or that he must attend summer school. *Id.*

48. Based upon the entire record, the undersigned finds that Respondent should have been on notice, by mid-February 2014, that the Student was not making academic

progress with the specialized instruction and services provided in his December 20, 2013 IEP.

The Student's Work Habits, Personal and Social Skills During SY 2013-2014 to Date

49. Throughout SY 2013-2014, Petitioner has received calls from the Student's Special Education Teacher and from the Attending School Local Educational Agency Representative ("LEA Rep.") advising her that the Student was running around the school, could not be located, was not where he was supposed to be, and was being disrespectful, and that she should pick him up but he was not being suspended.

Testimony of Petitioner.

50. On one occasion when Petitioner came to Attending School, she found the Student in a kindergarten classroom; on another occasion, she found him playing video games; on another occasion, she found him in the hallway and his general education teacher later stated that she had not seen him for 40 minutes. *Id.*

51. Twice the Student has been brought home by Attending School staff members because he had been running around the school. *Id.*

52. The Student's bad behavior at the beginning of SY 2013-2014 occurred primarily when he was in the general education classroom; however, since the 2014 spring break, Special Education Teacher has been sending text messages to Petitioner almost every day regarding the Student's bad behavior, *i.e.*, fighting, walking out of class, and not paying attention. *Id.*

53. Petitioner spoke with the Student's counselor to ask what could be done, to which the counselor responded that she would speak with LEA Rep. and get back in touch with Petitioner, but she never did. *Id.*

54. According to Respondent's own records, from the beginning of SY 2013-2014 through the end of Term 3, the Student *rarely*: followed directions, completed class work on time, worked well with others, cooperated, used time wisely, completed and returned homework, participated in class discussion, made an effort, followed classroom rules, followed playground rules, followed school rules, respected the rights/property of others, or practiced self-control. P-5-4. During the first two terms of SY 2013-2014, the Student *rarely* listened while others spoke; during the third term he did so with limited prompting. *Id.*

55. Based upon the entire record, the undersigned finds that since October 7, 2013, the Student's behavior has significantly impeded his learning.

Petitioner's Request for Another IEP Team Meeting

56. On February 12, 2014, Petitioner's counsel wrote to Respondent requesting a meeting to discuss Petitioner's concern that the Student's report card indicated he was performing "below basic" in all academic areas, as well as her concern that the Student's "escalating behaviors" were resulting in him missing a significant amount of instruction because he was being taken to other classrooms or being allowed to play video games.

P-11-7.⁷

⁷ In her closing argument, Respondent's counsel asserted that Petitioner never requested an IEP Team meeting to revise the Student's IEP. The evidence is to the contrary.

57. Based upon the entire record, the undersigned finds that by February 12, 2014, Respondent was on notice that the Student's December 2013 IEP was ineffective and needed to be reviewed and revised.

58. Based upon the entire record, the undersigned finds that the Student's behavior was the cause of his failure to make academic and social-emotional progress.

59. Based upon the entire record, the undersigned finds that if the Student's behavior had been properly addressed through additional behavioral support services such as more hours of counseling and interventions such as a BIP, then the 10 hours per week of specialized instruction in his IEP would have remained reasonably calculated to confer educational benefit; however, without those additional hours of counseling and interventions such as a BIP, as of mid-February 2014 the Student's IEP ceased to be reasonably calculated to confer educational benefit.

Events Subsequent to the Filing of the DPC

60. On April 28, 2014, Respondent conducted an FBA, finding that the Student "exhibits poor self control, verbal and physical aggression within the school setting," that he "engages in inappropriate behaviors ... which may include throwing crayons, calling people ethnic names, barking like a dog, writing on the desk, [leaving] out of the classroom setting when he gets frustrated or is being corrected for his behaviors," that he "arrives at school off-task daily," that he "has difficulty entering into his classroom setting and engaging appropriately," that he "does not remain on task long," that his behavior is somewhat but not entirely better in a smaller setting, that he "exhibits consistent off-task behaviors," that he "has difficulty engaging appropriately with peers

and adults and is frequently in verbal altercations,” that he “requires frequent redirection and is difficult to re-engage,” that he “habitually leaves the classroom when he is confronted by an adult or involved in conflict,” that he “consistently has difficulty with controlling his impulses and managing his emotions,” that he “has difficulty staying on task in the classroom,” that he “avoids the academic expectations placed on him,” that he calls other students nasty names, that he is “dishonest when confronted and will give a false account of what occurred,” that he snatched items from another student, talked rudely to other students, engaged in name calling, assaulted a teacher, knocked over a chair, threw spitballs, kicked objects, and crawled on the floor. R-1.

61. The FBA noted that various informal interventions had been attempted but had not been successful. R-1-3.

62. Despite the 120 minutes per month of counseling that the Student received under his IEP, he had not been “able to show any significant growth within the classroom settings,” and he had not kept up with behavioral charts that had been implemented to assist him since February 2014 due to his organizational skills and his level of frustration. R-1-2.

63. Petitioner’s Psychologist agrees with the FBA. Testimony of Petitioner’s Psychologist.

64. No BIP has been developed based upon the Student’s FBA. Testimony of Petitioner.

65. Based upon the entire record, the undersigned finds that the information upon which the FBA was based was available to Respondent no later than mid-February 2014

and that if Respondent had convened an IEP Team meeting in mid-February 2014, the IEP Team would have requested an FBA at that time.

66. Based upon the entire record, the undersigned finds that the Student's FBA demonstrates the need for a BIP, and that if the FBA had been conducted in mid-February 2014, a BIP would (or should) have been developed and implemented by the end of February 2014.

Compensatory Education Plan

67. Educational Advocate testified as to the appropriateness of the Student's IEP based upon her interpretation of IDEA. The undersigned struck this testimony as beyond the scope of Educational Advocate's expertise.

68. Educational Advocate developed a Compensatory Education Plan (the "Plan") for the Student. P-13.

69. The Plan recommends 144 hours of tutoring and 45 hours of counseling to remediate the Student's absences from the classroom due to his behavior, his regression in reading based on the decline in his curriculum test scores from his previous school, and his failing grades in all subjects at Attending School. *Id.*

70. Educational Advocate does not know how much time the Student missed from his classes or what instruction he missed. *Id.*

71. The Plan asserts that the Student requires 15 hours of counseling and 30 hours of tutoring to remediate Respondent's failure to conduct an FBA and implement a BIP in October 9, 2013. P-13-1. However, Educational Advocate did not explain how she

derived these hours except to say that it was based upon her experience tutoring children with disabilities. Testimony of Educational Advocate.

72. The Plan asserts that the Student requires 15 hours of counseling and 66 hours of tutoring to remediate the inappropriateness of the Student's IEP from December 16, 2013 to date. P-13-2. However, Educational Advocate did not explain how she derived these hours except to say that it was based upon her experience tutoring children with disabilities. Testimony of Educational Advocate.

73. The Plan asserts that the Student requires 15 hours of counseling and 48 hours of tutoring to remediate Respondent's failure to revise the Student's IEP and to implement a BIP. P-13-2 and -3. However, Educational Advocate did not explain how she derived these hours except to say that it was based upon her experience tutoring children with disabilities. Testimony of Educational Advocate.

74. The undersigned finds that Educational Advocate had no basis for the compensatory education she recommended; accordingly, her testimony and the Plan have been given no weight in determining compensatory education in this case.

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VIII. CREDIBILITY

The undersigned found all three witnesses to be credible, to the extent of their first hand knowledge or professional expertise.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

Procedural Violations of IDEA

3. Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C. §1414(f)(3)(E). *See also*, 34 C.F.R. §300.513(a); *accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006).

Education Records Access Rights

4. Under 20 USC §1415(b)(1), a Local Educational Agency (“LEA”) receiving federal assistance, such as Respondent, must establish and maintain procedures including an “opportunity for the parents of a child with a disability to examine all records relating to such child.” *Accord*, DCMR §5-E3021.

34 C.F.R. §300.501(a) provides as follows:

Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

- (1) The identification, evaluation, and educational placement of the child; and
- (2) The provision of FAPE to the child.

34 C.F.R. §300.613 states that each LEA

must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any

hearing ... or resolution session ... and in no case more than 45 days after the request has been made.

5. Because Respondent failed to permit Petitioner to inspect and review the Student's education records prior to the December 16 and 20 MDT and IEP Team meetings (Findings of Fact 39, 43 and 44), Respondent has violated IDEA's education records provisions.

6. Because Petitioner and Petitioner's Psychologist agree with the comprehensive psychological evaluation (P-4) and FBA (R-1) conducted by Respondent (Findings of Fact 17, 18 and 63), Respondent's failure to provide Petitioner the opportunity to inspect and review these documents prior to the meetings at which they were discussed did not impede the Student's right to a FAPE, significantly impede Petitioner's opportunity to participate in educational decision-making for the Student, or cause a deprivation of educational benefit.

7. Because Petitioner has been in continuous contact with teachers and staff at Attending School (Findings of Fact 49-53), Respondent's failure to provide Petitioner the opportunity to inspect and review the Student's education records did not impede the Student's right to a FAPE, significantly impede Petitioner's opportunity to participate in educational decision-making for the Student, or cause a deprivation of educational benefit.

8. Based upon the entire record, the undersigned finds that Respondent's failure to provide the Petitioner the opportunity to inspect and review the Student's education records constituted a procedural violation of IDEA but not a denial of FAPE.

Parent's Right to Demand an FBA

9. An FBA is an “evaluation” under IDEA. *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (2008).

10. The parents of a child with a disability have the right to obtain an Independent Educational Evaluation (“IEE”) if they disagree with an evaluation obtained by the LEA. 34 C.F.R. §300.502(b).

11. In the instant case, Petitioner agreed with the evaluation obtained by Respondent. Finding of Fact 17. No provision of IDEA or its implementing regulations provides a parent the right to an additional evaluation in the absence of disagreement with the LEA’s evaluation.

Adequacy of IEP

12. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia, supra* at 65 (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general: The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415 (m) of this title.

(ii) Rule of construction: Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a

child's IEP that is already contained under another component of such IEP.

20 U.S.C. §1414(d)(1)(A).

13. 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*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982)(“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 201.

14. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor 'in determining whether an IEP is reasonably calculated to provide education benefits.’”) (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student's progress, courts should defer to the administrative agency's expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP's substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ.*, Hawaii, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while “sympathetic” to parents' frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

K.S. v. District of Columbia, ___ F. Supp. 2d ___, 113 LRP 34725 (2013).

15. Because the Student’s December 20, 2013 IEP was reasonably calculated to provide educational benefit (Finding of Fact 36), it was sufficient under IDEA at the time it was developed.

When an IEP Must be Revised

16. IEPs must be reviewed and revised:

Review and revision of IEPs—(1)General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child’s anticipated needs; or

(E) Other matters.

34 C.F.R. §300.324(b).

17. Because the Student’s IEP should have been reviewed and revised mid- to late February, 2014 (Finding of Fact 59), Respondent’s failure to convene the IEP Team to do so denied the Student a FAPE.

When Behavioral Interventions are Required

18. A child with a disability who is removed from his current educational placement, must receive, as appropriate, “a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior

violation so that it does not recur.” 20 U.S.C. §1415(k)(1)(D)(ii), *accord*, 34 C.F.R. §300.530(d)(ii).

19. In the instant case, Respondent has not suspended the Student for more than 10 days during SY 2013-2014, so he was not “removed from his educational placement”; accordingly, the provisions cited in the immediately preceding paragraph requiring an FBA and a BIP were not triggered.

20. Apart from the specific provisions of IDEA regarding FBAs and BIPs when a Student has been removed from his educational placement, IDEA requires a child’s IEP Team, in developing the IEP of a child whose behavior impedes his learning or that of others, to “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. §1414(d)(3)(B)(i).

21. In the instant case, the Student’s behavior significantly impeded his learning (Finding of Fact 55); accordingly, after two months’ experience under an IEP that did not improve the Student’s behavior, the IEP Team was required to consider behavioral interventions and supports or other strategies to address his behavior.⁸

22. Based upon the entire record, the undersigned finds that behavioral interventions and supports, whether or not called a BIP, were required for the Student by the end of February, 2014 and Respondent’s failure to provide such interventions and supports constituted a denial of FAPE.

23. Based upon the entire record, the undersigned finds that as of the end of February, 2014, the Student required more behavioral support services, in the form of

⁸ Thus, Respondent’s counsel’s assertion that the BIP provisions of IDEA do not apply because the Student did not have enough incidents of *discipline* is an incorrect interpretation of IDEA.

one-on-one counseling, than he was receiving under his IEP; specifically, the Student required a weekly session of one hour to address his behaviors on a consistent basis and Respondent's failure to provide such increased services constituted a denial of FAPE.

Compensatory Education

24. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) ("*Reid*"). That relief may include compensatory award of prospective services:

When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

Id.

25. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005). Educational programs, including compensatory education, must be qualitative, fact-intensive, and "above all tailored to the unique needs of the disabled student." *Id.*

26. Mechanical calculation of the number of hours of compensatory education (a "cookie-cutter approach") is not permissible. *Reid*. Rather, compensatory awards "should aim to place disabled children in the same position they would have occupied but for the school district's violation of IDEA." *Id.* Awards compensating past violations must "rely on individual assessments." *Id.*

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended

programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

Id. However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an "individually-tailored assessment". *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (citing *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted)).

27. The hearing officer must base a compensatory education award on evidence regarding the student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.*

28. However, Petitioner's failure, as in the instant case, to justify a specific award does not waive the student's right to compensatory education. *Gill v. District of Columbia*, 751 F. Supp. 2d 104 (D.D.C. 2010).

29. Based upon the entire record, the undersigned concludes that the Student has effectively lost two and a half months of education (March through mid-May 2014) due to Respondent's failure to revise his December 20, 2013 IEP by mid- to late February 2014 after two months of observing the Student's academic failure and his worsening behavioral problems.

30. The undersigned concludes that a child with ADHD, such as the Student, is unlikely to benefit from additional hours of instruction at the end of the school day; accordingly, remediation of the Student's academic deficits due to Respondent's failure to revise his IEP by the end of February 2014 requires academic instruction of the Student during the summer, whether at summer school or through tutoring, or a combination thereof.

31. Assuming the Student has missed approximately 10 weeks of education, at approximately 25 hours per week of instruction, compensatory education calculated on an hour for an hour basis would require 250 hours of compensatory instruction. However, the undersigned concludes that this amount of instruction likely would overwhelm the Student. Accordingly, as set forth in Section X *infra*, the undersigned concludes that the equivalent of four hours per day, five days per week, for six weeks, is the appropriate amount of instruction to remedy the denial of FAPE.

Summary

30. Since October 9, 2013, Respondent has not denied the Student a FAPE by failing to conduct an FBA in response to Petitioner's request(s) because Petitioner agreed with Respondent's evaluations of the Student and absent disagreement with an evaluation, a parent does not have the right to an IEE.

31. Between October 9, 2013 and mid-February 2014, Respondent did not deny the Student a FAPE by failing to develop and implement a BIP to address the Student's behavior that impedes his learning and/or that of others because it was reasonable for Respondent to evaluate the Student, develop and implement an initial IEP, and observe the Student's social, emotional and behavioral progress under that IEP. However, in mid-February, 2014, when Petitioner requested an IEP Team meeting to discuss the Student's escalating behaviors, Respondent should have convened such a meeting, and the IEP Team should have implemented a BIP (or positive behavioral interventions and supports).

32. Since December 9, 2013, Respondent has violated IDEA's education records provisions by failing to provide Petitioner the opportunity to inspect or review the

Student's education records, particularly his disciplinary records (if any). However, there is no evidence that the Student suffered educational harm as a result of Petitioner's lack of access to these records, as she has been actively involved in the Student's education and in almost daily communication with teachers and staff at the Attending School. Thus, Respondent's failure to provide access to the Student's education records is a procedural violation of IDEA rather than a denial of FAPE.

33. Between January 8, 2014 and mid-February 2014, Respondent did not deny the Student a FAPE by failing to review and revise his IEP, because it was appropriate to observe his progress under the December 20, 2013 IEP; however, since mid-February 2014, when it was apparent that the Student was not making progress under the December 20, 2013 IEP, Respondent has denied the Student a FAPE by failing to review and revise his IEP to address his lack of progress in the general education curriculum and his disruptive behavior.

X. ORDER

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

1. No later than June 2, 2014, Respondent shall inform Petitioner in writing of her right to review all of the Student's education records and the dates, times and locations where those records may be reviewed. A list of the categories of education records shall be included.

2. No later than June 6, 2014, Respondent shall convene a meeting of the Student's Individualized Education Program ("IEP") Team, with all necessary members,

including Petitioner, to (a) develop a Behavior Intervention Plan (“BIP”) based upon the FBA conducted April 28, 2014, to be implemented immediately; (b) amend the Student’s IEP to increase his behavioral support services to one hour per week of one-on-one counseling in the outside of general education setting; and (c) review the Student’s academic, social, emotional and behavioral progress and make any additional revisions to his IEP that may be appropriate, including a change in the Student’s placement if the IEP Team determines the Student’s current placement is not sufficiently restrictive and/or a change in the Student’s location of services if the IEP Team determines that Attending School cannot implement his revised IEP.

3. If the IEP Team determines not to make any additional revisions in the Student’s IEP besides those described in Paragraph 2(a) and (b) above, nothing in this Order shall preclude Petitioner from filing a new Due Process Complaint if she disagrees with that determination.

4. If the IEP Team determines to make revisions in the Student’s IEP besides those described in Paragraph 2(a) and (b) above, nothing in this Order shall preclude Petitioner from filing a new Due Process Complaint if she disagrees with those revisions.

5. As compensatory education for the denial of FAPE, beginning June 9, 2014 and continuing through August 22, 2014, Respondent shall provide or fund 120 hours of academic tutoring for the Student, provided that if the Student is approved to attend summer school, the hours of instruction offered during summer school shall offset the hours of tutoring on an hour for an hour basis, whether or not the Student attends summer school. Any tutoring hours not used by August 22, 2014 shall be forfeited. If the

tutoring is not provided at the Student's residence, Respondent shall provide transportation.

6. All written communications from Respondent to Petitioner concerning the above matters, including but not limited to the notice described in Paragraph 1 and the invitation to the IEP Team meeting described in Paragraph 2, shall include copies to Petitioner's counsel by facsimile or email.

7. Any delay caused by Petitioner or Petitioner's representatives (e.g., absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

8. Petitioner's other requests for relief are DENIED.

Dated this 21st day of May, 2014.



Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

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