

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

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

OSSE
Student Hearing Office
March 19, 2013

Parent,¹ on behalf of,
Student,

Petitioner,

Date

Issued: March 19, 2013

Hearing

Officer: Melanie Byrd Chisholm

v.

Case

No: 2012-0837

District of Columbia Public Schools,
Respondent.

Hearing

Dates: March 7, 2013

Room

s: 2004

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a [REDACTED], who is a 6th grade student attending School A. The student's current individualized education program (IEP) lists Other Health Impairment (OHI) as his primary disability and provides for him to receive thirteen (13) hours per week of specialized instruction within the general education setting and one hundred twenty (120) minutes per month of behavioral support services outside of the general education environment.

On December 26, 2012, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to provide the student with an appropriate IEP and placement in a timely manner; failing to complete a functional behavior assessment (FBA) and meeting to develop a behavior intervention plan (BIP) in a timely manner; and failing to complete a comprehensive psychological evaluation in a timely manner. As relief for this alleged denial of FAPE, Petitioner requested compensatory education.

On January 9, 2013, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that pursuant to the Settlement Agreement executed on August 8, 2012, DCPS provided a comprehensive psychological evaluation and an FBA; on November 29, 2012, the IEP Team agreed that the student would receive 13 hours of specialized instruction in the general education curriculum at School A; pursuant to the Settlement Agreement executed on August 8, 2012, the IEP Team discussed compensatory education at a November 29, 2012 IEP

¹ Personal identification information is provided in Appendix A.

Team meeting and determined that the student was not entitled to compensatory education because no services were missed during the 2011-2012 school year; if there was a denial of FAPE, the period for the denial of FAPE ended on the date that DCPS authorized the comprehensive psychological evaluation and the FBA; if the comprehensive psychological and FBA were authorized by DCPS on April 26, 2012, DCPS would have had until August 24, 2012 to complete the evaluations and the comprehensive psychological evaluation was completed on September 6, 2012 therefore there would have been a delay of only 11 days; DCPS authorized the FBA on August 8, 2012 and any delay in reviewing the FBA and drafting a BIP was not the fault of DCPS because the student was not present on the five days DCPS attempted to observe the student; and DCPS received the independent FBA on October 31, 2012 and based on issues with the independent FBA, the DCPS psychologist needed more information before the independent FBA could be reviewed.

On January 9, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on January 26, 2013, following the conclusion of the 30-day resolution period, and ended on March 11, 2013. The parties agreed to February 27, 2013 as the hearing date for this matter. On February 27, 2013, counsel for Petitioner and Respondent were present for the hearing however the parent had been taken to the emergency room that morning and Respondent's counsel was sick. Therefore, the parties jointly agreed to extend the date of the hearing and the 45-day timeline for eight (8) days. The Petitioner filed an unopposed Motion for Continuance on February 27, 2013 and an Interim Order on Continuance Motion was issued on March 7, 2013. Therefore, the Hearing Officer Determination (HOD) is due on March 19, 2013.

On January 24, 2013 and January 31, 2013, Hearing Officer Melanie Chisholm convened prehearing conferences and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on January 31, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On February 20, 2013, Petitioner filed Disclosures including twenty (20) exhibits and five (5) witnesses.² On February 19, 2013, Respondent filed Disclosures including six (6) exhibits and seven (7) witnesses. On February 28, 2013, Respondent filed supplemental Disclosures including four (4) additional exhibits.

The due process hearing commenced at approximately 9:27 a.m. on March 7, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-20 were admitted without objection. Respondent's Exhibits 1-6 and 9-10 were admitted without objection. The Petitioner objected to Respondent's Exhibits 7 and 8 arguing that the parent did not have the documents prior to the Disclosure. Respondent's

² A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Exhibits 7 and 8 were admitted over Petitioner's objection with the acknowledgment that the exhibits were not evidence that the parent received the documents at the time they were drafted or that the documents were reviewed or implemented.

During Petitioner's closing argument, Petitioner withdrew Issue #3 as outlined in the Prehearing Order. The hearing concluded at approximately 3:43 p.m. following closing statements by both parties.

Jurisdiction

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

ISSUES

The issues to be determined are as follows:

1. Whether DCPS' delay, from the parent's request for a comprehensive psychological evaluation on April 26, 2012, to the review of the comprehensive psychological evaluation on November 28, 2012, resulted in a denial of a FAPE because the student's IEP did not contain appropriate goals based on the student's strengths and weaknesses?
2. Whether DCPS' delay from October 15, 2011, when it was clear that the student's behavior needed to be addressed, to the student's IEP Team Meeting on November 28, 2012, in conducting a functional behavioral assessment (FBA) and drafting a behavioral intervention plan (BIP) resulted in a denial of a FAPE because the student's attendance, disruptive and off-task behaviors were not addressed?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is diagnosed with and has behaviors consistent with Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibit 9; Respondent's Exhibit 8; Psychologist's Testimony)
3. The student is capable of completing at least 8th grade math and reading work. (Tutor's Testimony; Special Education Teacher's Testimony)
4. A comprehensive psychological evaluation was conducted for the student in April 2010. (Petitioner's Exhibit 10)
5. The student attended School B for the 2011-2012 school year. (Stipulated Fact)

6. During the 2011-2012 school year, the student did not attend school during his mother's illness, was often late to school and often failed to attend class while in school. (Advocate's Testimony; Parent's Testimony; Social Worker's Testimony)
7. During the 2011-2012 school year, the student had an inability to focus and remain on task within the classroom, was disruptive, noncompliant, defiant, verbally aggressive, impulsive, disrespectful, refused to complete assignments, lacked self-control and required constant redirection. (Petitioner's Exhibit 5; Respondent's Exhibit 8; Social Worker's Testimony)
8. The student's October 27, 2011 IEP prescribes thirteen (13) hours per week of specialized instruction within the general education setting and one hundred twenty (120) minutes per month of behavioral support services outside of the general education environment for the student. (Petitioner's Exhibit 5)
9. The student's October 27, 2011 IEP contained annual goals to address the student's self-control in the classroom and during transitions; compliance with school, classroom and group rules; and appropriate expressions of feelings. (Petitioner's Exhibit 5)
10. The student's inappropriate behaviors increased after his mother experienced a stroke in December 2011. (Advocate's Testimony; Parent's Testimony)
11. From November 2011 - January 2012, School B conducted an FBA of the student. (Respondent's Exhibit 8; Social Worker's Testimony)
12. The January 2012 FBA accurately reflected the student's social/emotional functioning. (Social Worker's Testimony)
13. The January 2012 FBA did not address the student's truant behavior or the student's reaction to his mother's illness. (Respondent's Exhibit 8)
14. On January 26, 2012, School B developed a BIP for the student. (Respondent's Exhibit 7)
15. The student's January 26, 2012 BIP and January 2012 FBA do not contain IEP Team member signatures. (Respondent's Exhibits 7 and 8)
16. From August 15, 2011 through April 26, 2012, the student was absent 43 days and had 252 absences from individual classes. (Petitioner's Exhibit 15; Advocate's Testimony; Social Worker's Testimony)
17. On April 26, 2012, the student's IEP Team met to discuss the student's lack of progress and behavioral issues. (Advocate's Testimony)
18. At the student's April 26, 2012 IEP Team meeting, the team was primarily concerned about the student's behavior. (Advocate's Testimony)
19. At the April 26, 2012 IEP Team meeting, the parent requested an FBA, BIP and comprehensive psychological evaluation for the student. (Advocate's Testimony)
20. The student's April 26, 2012 IEP Team did not review the student's January 26, 2012 BIP and January 2012 FBA. (Advocate's Testimony; Social Worker's Testimony)
21. The student was retained in the 9th grade at the conclusion of the 2011-2012 school year. (Parent's Testimony)
22. On July 19, 2012, the Petitioner filed a Complaint alleging that DCPS denied the student a FAPE by refusing to complete a comprehensive psychological evaluation, FBA and BIP. (Respondent's Exhibit 4)
23. On August 6, 2012, DCPS issued an authorization letter for an independent comprehensive psychological evaluation and FBA. (Respondent's Exhibit 3)

24. The parties executed a Settlement Agreement on August 8, 2012 within which DCPS provided an independent comprehensive psychological evaluation and an FBA. (Stipulated Fact)
25. DCPS remained in constant contact with the Petitioner to follow the status of the completion of the independent examinations. (Compliance Case Manager's Testimony)
26. The student's September 6-7, 2012 Comprehensive Psychological Evaluation and September 6, 2012 Functional Behavioral Assessment were conducted by the same psychologist and include identical recommendations. (Petitioner's Exhibits 11 and 12; Psychologist's Testimony)
27. On September 6-7, 2012, the dates of the student's psychological evaluation and FBA, the student had difficulty focusing, was impulsive, restless and agitated. (Petitioner's Exhibit 12; Psychologist's Testimony)
28. The student may not have been performing to his ability on September 6-7, 2013. (Psychologist's Testimony; Tutor's Testimony; Special Education Teacher's Testimony)
29. The student's September 6-7, 2012 FBA was submitted to the IEP Team without the signature of the psychologist and referred to the student by the wrong name. (Psychologist's Testimony; Compliance Case Manager's Testimony)
30. After the student enrolled in School A, in October 2012, School A did not utilize the student's BIP drafted on January 26, 2012 however School A utilized behavior strategies such as breaks, modified assignments and extended time. (Special Education Teacher's Testimony)
31. Upon his enrollment in School A, the student continued to display significant truant behavior, was playful during class and needed encouragement to complete work but did not exhibit defiant or impulsive behaviors. (Petitioner's Exhibit 6; Advocate's Testimony; Special Education Teacher's Testimony)
32. On November 29, 2012, DCPS convened an IEP Team meeting where the parties discussed the results of the independent evaluations as well as services and placement for the student. (Stipulated Fact)
33. On November 29, 2012, the student's inappropriate behaviors had somewhat decreased from the inappropriate behaviors he had exhibited at School B. (Advocate's Testimony)
34. The Parent and the Advocate participated in the student's November 29, 2012 IEP Team meeting. (Advocate's Testimony; Compliance Case Manager's Testimony; Special Education Teacher's Testimony)
35. During the student's November 29, 2012 IEP Team meeting, the IEP Team updated the present level of performance for the student's social/emotional/behavioral functioning and determined to continue with the behavior goals from the student's October 27, 2011 IEP. (Petitioner's Exhibit 6)
36. On November 29, 2012, no IEP Team members, including the Parent and the Advocate, objected to the goals on the student's draft IEP. (Advocate's Testimony; Compliance Case Manager's Testimony; Special Education Teacher's Testimony)
37. The student's November 29, 2012 IEP prescribes thirteen (13) hours per week of specialized instruction within the general education setting and one hundred twenty

- (120) minutes per month of behavioral support services outside of the general education environment for the student. (Petitioner's Exhibit 6)
38. The student's November 29, 2012 IEP Team did not make any significant changes to the student's IEP annual goals, intensity or duration of services, or accommodations and modifications based on the results of the independent comprehensive psychological evaluation. (Petitioner's Exhibits 5 and 6; Advocate's Testimony; Special Education Teacher's Testimony)
 39. At the November 29, 2012 IEP Team meeting, the parties agreed to reconvene the student's IEP Team to discuss the results of the independent FBA. (Stipulated Fact)
 40. During the 2012-2013 school year, the student has continued to have attendance issues, has difficulty focusing, requires redirection and is frustrated. (Advocate's Testimony; Special Education Teacher's Testimony)
 41. The student is currently failing his classes because he refuses to complete assignments and fails to attend class. (Respondent's Exhibit 16; Special Education Teacher's Testimony)
 42. The student's IEP Team was scheduled to meet on January 24, 2013 to develop a BIP for the student however the meeting was rescheduled because the parent was not present for the scheduled meeting. (Compliance Case Manager's Testimony)
 43. From August 27, 2012 through February 6, 2013, the student was absent either the entire school day or from individual classes 63 days. (Petitioner's Exhibit 17; Special Education Teacher's Testimony)
 44. A BIP was developed for the student on February 20, 2013. (Advocate's Testimony; Compliance Case Manager's Testimony; Special Education Teacher's Testimony)
 45. The BIP developed on February 20, 2013 incorporated strategies already being used by School A and strategies not before used by School A. (Special Education Teacher's Testimony)
 46. It is highly unusual for a student to display a regression of 4-5 years in a six (6) month period. (Psychologist's Testimony; Tutor's Testimony)

CONCLUSIONS OF LAW

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

Burden of Proof

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

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized

instruction and related services which are individually designed to provide educational benefit to the handicapped.” The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.

Issue #1

Districts must reevaluate a special education student at least once every three years, and not more frequently than one time per year, unless the parents and district agree otherwise. 20 U.S.C. § 1414(a)(2)(b). A reevaluation occurs “if the local educational agency determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation ... or if the child’s parents or teacher requests a reevaluation.” 20 U.S.C. § 1414(a)(2)(1).

The IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student’s parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005). In light of the lack of statutory guidance, *Herbin* concluded that “[r]evaluations should be conducted in a ‘reasonable period of time,’ or ‘without undue delay,’ as determined in each individual case.” *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 Individuals with Disabilities Education Law Report 1127, 1129 (1995)).

In the present matter, at the student’s April 26, 2012 IEP Team meeting, the parent, through her advocate, requested a comprehensive psychological evaluation. The record does not include the reason the parent, through her advocate, requested this specific evaluation however it is clear that the parent was concerned about the student’s lack of academic progress. On July 19, 2012, the Petitioner filed a Complaint alleging that DCPS denied the student a FAPE by refusing to complete a comprehensive psychological evaluation. On August 6, 2012, as a part of a Settlement Agreement between DCPS and the Petitioner, DCPS issued an authorization letter for the Petitioner to obtain an independent comprehensive psychological evaluation. On November 29, 2012, the student’s IEP Team met to review the independent comprehensive psychological evaluation. The student’s November 29, 2012 IEP Team did not make any significant changes to the student’s IEP annual goals, intensity or duration of services, or accommodations and modifications based on the results of the independent comprehensive psychological evaluation. The student’s prior comprehensive psychological evaluation was completed in April 2010.

Evaluation is defined as, “procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special

education and related services that the child needs.” 34 CFR §300.15. In conducting an evaluation, a local educational agency (LEA) must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability” and the content of the child’s IEP. 34 CFR §300.304(b). IDEA regulations at 34 CFR §300.304(c)(4) require a student to be “assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.”

Here, it is important to note the distinction between “evaluation” and the parent’s request for a specific assessment tool. The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information.” *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)). On April 26, 2012, the parent requested a particular type of test. While the LEA did not have the obligation to conduct the specific test requested by the parent, DCPS did have obligation to timely respond to the parent’s request, either by conducting the assessment or providing written notice with a description of why the LEA was refusing the requested action (*see* 34 CFR §300.503) and had the obligation to gather relevant information as to why the student was not progressing academically. Noting the difference in evaluation and assessment, the Hearing Officer will nonetheless use evaluation standards as guidance for this analysis.

At the student’s April 26, 2012 IEP Team meeting, the team was primarily concerned about the student’s behavior. While the team was also concerned about the student’s lack of progress, the team was aware that the student’s lack of progress was directly related to his poor behavior, specifically his failure to complete assignments, his constant need for redirection and his excessive absences. In addition to the request for the comprehensive psychological evaluation, the parent and the advocate also requested an FBA and BIP for the student on April 26, 2012.

From the parent’s request for the comprehensive psychological evaluation on April 26, 2012, fewer than three months elapsed before the parent filed a Complaint on July 19, 2012, alleging that DCPS denied the student a FAPE by failing to conduct the comprehensive psychological evaluation. Within the 30-day resolution period, DCPS issued an authorization letter for the parent to obtain an independent comprehensive psychological evaluation. The independent evaluation was conducted approximately one month after DCPS authorized the evaluation and DCPS held the meeting to review the report shortly after receiving the report.

While a delay of seven months from the parent’s request in April 2012 to the IEP Team meeting to review the comprehensive psychological evaluation in November 2012 appears to be a significant delay, the question is whether in this individual case, the evaluation was conducted in a reasonable period of time or without undue delay. The Hearing Officer concludes that in this individual case, the delay in conducting the comprehensive psychological evaluation was reasonable and without undue delay. First, the student’s prior comprehensive psychological evaluation was completed only two years prior to the parent’s request. Next, following the

parent's request, the student continued to have significant truancy issues and the parent filed a Complaint on DCPS' failure to conduct the evaluation fewer than three months after the request. The IDEA acknowledges an LEA's difficulty in conducting an evaluation when the student is not present. (See 34 CFR §300.301(d)(1)). DCPS remained in constant contact with the Petitioner to follow the status of the completion of the independent examination and held the meeting to review the test shortly after obtaining a copy of the report. Finally, the information that could be gleaned from the assessment regarding the student's functioning was already available to and being considered by the student's IEP Team. For example, while the student's IEP Team was concerned about the student's behavior, the IEP Team was aware of his current social/emotional functioning.

A failure to timely reevaluate is, at base, a procedural violation of IDEA. See *Lesesne ex rel. B.F. v. District of Columbia*, Civil Action No. 04-620 (CKK), 2005 WL 3276205 (D.D.C. July 26, 2005) (characterizing cases "where a student is seeking a reevaluation, but is already in a placement" as involving procedural violations of IDEA). An IDEA claim is viable only if the procedural violations of procedural affected the student's substantive rights. See *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). The plaintiff bears the burden of proving a violation of substantive rights. See *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); see also *Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying parents relief because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

"A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of D.C.*, 637 F. Supp. 2d 11, 18-19 (D.D.C. 2009) (finding that the defendant's delay affected the student's substantive rights because the student's most recent IEP differed from the one previously issued). Here, even had the Hearing Officer concluded that the delay in conducting the comprehensive psychological evaluation was not reasonable, the student's education would not have been different had there been no delay. Following the review of the student's independent psychological evaluation on November 29, 2012, the student's IEP Team did not make any significant changes to the student's IEP annual goals, intensity or duration of services, or accommodations and modifications based on the results of the independent comprehensive psychological evaluation.

The Hearing Officer concludes that the failure of DCPS to timely conduct the comprehensive psychological evaluation of the student after the parent's request on April 26, 2012 was not a denial of a FAPE in that the procedural violation did not impede the child's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child or cause a deprivation of educational benefit to the student.

The Petitioner failed to meet its burden with respect to Issue #1.

Issue #2

IDEA regulations at 34 CFR §300.304(c)(6) require the public agency to ensure that evaluation of a child is sufficiently comprehensive to identify all the child's special education

and related services needs, whether or not commonly linked to the disability category in which the child has been classified. An FBA is an educational evaluation. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). “The IDEA...recognizes that the quality of a child’s education is inextricably linked to that child’s behavior” and “[an] FBA is essential to addressing a child’s behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.” *Id.* at 68.

Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child’s learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

In the District of Columbia, there are specific provisions in the District of Columbia Municipal Regulations that relate to BIPs. According to DCMR 5-3007.3, if a student’s behavior impedes the child’s learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child’s parents and to each teacher and service provider.

In the present matter, the Petitioner alleges that DCPS’ delay from October 15, 2011, when it was clear that the student’s behavior needed to be addressed, to the student’s IEP Team meeting on November 29, 2012, in conducting an FBA and drafting a BIP resulted in a denial of a FAPE because the student’s attendance, disruptive and off-task behaviors were not addressed. The Respondent argued that an FBA was conducted and a BIP developed for the student in January 2012; that even if the BIP was not drafted, the student’s IEP nonetheless offered educational benefit because the student’s social/emotional issues were identified in his IEP and the student was receiving behavioral support services to address these issues; and the delay in reviewing the independent FBA and developing a BIP was created by the student’s failure to attend school and problems with the independent FBA.

It is uncontested that the student had excessive absences from school and from individual classes. When the student did attend school, he often “skipped” individual classes. From August 15, 2011 through April 26, 2012, the student was absent 43 days and had 252 absences from individual classes. From August 27, 2012 through February 6, 2013, the student was absent either the entire school day or from individual classes 63 days.

While at School B, in addition to his truant behavior, the student was also inattentive, disruptive, defiant, verbally aggressive and impulsive. The student required constant redirection and verbal reinforcement. The student’s October 27, 2011 IEP contained annual goals to address the student’s self-control in the classroom and during transitions; compliance with school, classroom and group rules; and appropriate expressions of feelings. Following his mother’s stroke in December 2011, the student’s inappropriate behaviors increased.

From November 2011 through January 2012, DCPS conducted an FBA of the student to address the concerns of “being out of seat, defiance, bossiness, late assignments, noncompliance, picks on others, verbal aggression, off task, talking out, disorganization, making excuses, poor motivation, yelling, distracting others, minding other’s business, seeks attention.” The FBA did not address truancy. Also, although the Background Information section provided an opportunity to discuss the student’s home environment, the FBA did not address the student’s reaction to his mother’s health problems. On January 26, 2012, a BIP was developed for the student.

While DCPS conducted an FBA and developed a BIP for the student in January 2012, the Hearing Officer concludes that the FBA and BIP were never reviewed by the student’s IEP Team. Neither the FBA or BIP contain IEP Team member signatures, the student’s April 26, 2012 IEP Team did not review or discuss the FBA or BIP, the student’s special education teacher at School A was not aware of the BIP, the School B Social Worker did not remember the review of the FBA or BIP and the student’s mother and advocate were not aware of the FBA or BIP. Upon his enrollment in School A, the student continued to display significant truant behavior, was playful during class and needed encouragement to complete work but did not exhibit defiant or impulsive behaviors.

DCPS has an “affirmative duty” to address a student’s truancy. *R.B. v. Mastery Charter School*, 762 F. Supp.2d 745 (E.D. Pa 2010) (District had duty to respond to absences through educational intervention). Further, courts in the District of Columbia have held that the failure to create BIPs to address behavior issues can result in a material deprivation and lead to a finding of FAPE denial. *See Long v. District of Columbia*, 780 F. Supp.2d 49, 61 (D.D.C. 2011) (in ruling the District failed to provide an FBA/BIP for a Student, court stated that “the quality of a student’s education is inextricably linked to the student’s behavior”); *Shelton v. Maya Angelou Charter School*, 578 F.Supp.2d 83 (D.D.C. 2008) (FBA/BIP required where learning disabled student was suspended).

While the social/emotional/behavioral goals on the student’s October 27, 2011 and November 29, 2012 may have been appropriate to address some of the student’s behaviors, DCPS did not address the student’s truant behavior. The student was retained in the 9th grade at the conclusion of the 2011-2012 school year and was failing all of his classes after the 1st quarter of the 2012-2013 school year however the record indicates that the student was capable of completing his classwork when present in class. The School B Social Worker testified that the student was absent from school during his mother’s illness and had issues with “lateness” and “skipping” but would participate in counseling when he was present for school. The Social Worker also testified that the student required constant redirection and that she “would have” followed the student’s BIP but did not give specific strategies which with she used with the student.

The School A Special Education Teacher testified that the student is able to comprehend work in all subject areas but refuses to complete assignments. The Special Education Teacher also testified that although a BIP was not implemented for the student prior to February 20, 2013, School A used strategies to address the student’s behaviors within the classroom. Some, but not

all, of the strategies included in the student's February 20, 2013 BIP were utilized by School A prior to the implementation of the BIP. It is clear that the strategies utilized by School A prior to the implementation of the February 20, 2013 IEP were not sufficient to address all of the student's behaviors. While the student's inappropriate behaviors decreased somewhat from School B to School A, the student continued to be truant, continued to need constant redirection and continued to be disrespectful in class. The Hearing Officer concludes that the goals in the student's October 27, 2011 and November 29, 2012 IEP and the strategies used by School B and School A did not contain the appropriate support to allow the student to benefit from the instruction included on his IEP.

Pursuant to the August 8, 2012 Settlement Agreement, which provided an independent FBA, the student's IEP Team met on November 29, 2012. During the student's November 29, 2012 IEP Team meeting, the IEP Team updated the present level of performance for the student's social/emotional/behavioral functioning and determined to continue with the behavior goals from the student's October 27, 2011 IEP. While the student's November 29, 2012 IEP Team had a copy of the student's independent September 6-7, 2012 FBA, the IEP Team did not review the FBA because the report did not contain the signature of the evaluator and the report referred to the student by the wrong name. Since the IEP Team did not review the FBA, the IEP Team felt that it was not proper to develop a BIP for the student.

After obtaining a copy of the corrected FBA, DCPS scheduled an IEP Team meeting for January 24, 2013 to review the FBA and develop a BIP for the student. On January 24, 2012, the mother was not present for the meeting therefore DCPS rescheduled the meeting to ensure the participation of the parent. The IEP Team reconvened on February 20, 2013 and developed a BIP for the student.

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to develop appropriate behavioral interventions and supports to address the student's truant, disruptive and off-task behaviors from October 27, 2011 to February 20, 2013.

The Petitioner met its burden with respect to Issue #2.

Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

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

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

The starting point for calculating a compensatory education award is when the parent knew or should have known of the denial of a FAPE. The duration is the period of the denial. 20 U.S.C. §1415(f)(3)(C); 20 U.S.C. §1415(b)(6)(B); *See also Reid*, 401 F.3d at 523; *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) *citing Peak v. District of Columbia*, 526 F. Supp. 2d 32, 49 IDELR 38 (D.D.C. 2007). The Hearing Officer finds that the starting point of the denial of FAPE is October 27, 2011, the date the student's IEP Team met and discussed social/emotional/behavioral goals for the student but failed to address his truant behaviors. The end point of the denial of FAPE is February 20, 2013, the date a BIP was developed for the student and reviewed by his entire IEP Team. The Hearing Officer acknowledges that the development of the student's BIP was delayed by the independent evaluator's failure to sign and make corrections to the student's September 6-7, 2012 FBA and the parent's failure to attend the scheduled January 24, 2013 IEP Team meeting. Therefore, the Hearing Officer will take into account the delay which was not the fault of DCPS in calculating the compensatory education.

An award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued. *Reid*, 401 F.3d at 524. During the period of October 27, 2011 – February 20, 2013, an FBA should have been conducted and a BIP developed for the student. To the extent that an FBA was conducted and a BIP developed, the FBA and BIP should have been reviewed by the student's IEP Team and the BIP should have been provided to the student's parent, teachers and service providers. While the student may not have availed himself to education during this time period, behavioral supports should have been put into place to help ensure the student's participation in school during this time period. Had DCPS developed and implemented an appropriate BIP, the student would have likely attended school and availed himself to educational instruction and behavioral support services.

The Petitioner argued that the because of DCPS' failure to conduct an FBA and develop a BIP for the student, the student regressed 4-5 years in academic functioning from March 21, 2012 to September 6-7, 2012. However, the Hearing Officer concludes that the academic functioning levels indicated in the student's September 6-7, 2012 Comprehensive Psychological Evaluation are not valid. First, while it is typical for a student to experience some regression after a period of no instruction, such as summer break, it is highly unusual for a student to regress to this degree. Next, both the student's Special Education Teacher and the student's Tutor testified that the student is able to perform at least at the 8th grade level. Finally, the Psychologist acknowledged that the student was distracted and frustrated and may not have been performing to his ability on the dates of the September 6-7, 2012 examination.

The student's October 27, 2011 and November 29, 2012 IEPs prescribe 13 hours per week, slightly more than two and one half hours (2 ½) hours per day, of specialized instruction within the general education environment and 120 minutes per month of behavioral support services outside of the general education environment. One-on-one tutoring is a more intensive form of instruction and allows a student to progress at a faster rate than receiving instruction in a

large group environment. Therefore, the Hearing Officer concludes that an appropriate compensatory education award is for the student to be provided with one-on-one tutoring in core academic subjects for two (2) hours per week for the 43 weeks of school that DCPS did not appropriately address the student's truant behavior, less the time that the delay was not the fault of DCPS. Additionally, it is appropriate for the student to receive an additional one (1) hour per week for 18 weeks of behavior support to assist the student in understanding the importance of school attendance and developing strategies to actively and appropriately participate in the school and class environment and overcome inattentive impulsions.

ORDER

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

1. That DCPS provide a total of 86 hours of independent one-on-one tutoring in core academic areas for the student, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be completed by January 24, 2014;
2. That DCPS provide a total of 18 hours of independent behavioral support services, at a rate not to exceed OSSE's established rate for this service, to be completed by August 30, 2013;
3. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: March 19, 2013


Hearing Officer