

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on May 8, 2013, and concluded on May 9, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age and resides with his parents in the District of Columbia. The student has been determined to be a child with a disability under IDEA with a classification of autism. The student was first found eligible on October 25, 2010. Prior to the eligibility determination, DCPS Early Stages completed psychological, occupational therapy and speech language evaluations that all found the student had significant developmental delays across all areas tested. At the time of the evaluations the student was nearing age three and was enrolled in a pre-school program at Gallaudet University.

The student’s initial individualized educational program (“IEP”) was developed October 25, 2010. The student attended a DCPS elementary school from January 2011 to April 2011 then the student’s parents enrolled in him in a public charter school that he attended from April 2011 to July 2011. The student’s parents then enrolled the student in a DCPS school (“School B”) in an inclusion classroom for school year (“SY”) 2011-2012.

The student’s annual IEP review occurred on November 3, 2011, and the student’s IEP was amended on May 31, 2012. The May 31, 2012, IEP prescribed the following services: 7.5 hours of specialized instruction per week outside general education and 15 hours per week of specialized instruction inside general education. The related services were: 4 hours per month of speech-language pathology outside general education and 2 hours per month inside general education and 6 hours per month of occupational therapy outside general education.

At the end of SY 2011-2012 School B staff informed the student’s parents that School B was not an appropriate educational setting for the student because he was not high functioning enough for the School B program to meet his needs.

On June 8, 2012, DCPS issued a prior written notice (“PWN”) to a “self-contained classroom...” at another DCPS elementary school “School C.” The PWN stated that student requires more support than currently provided.

The student’s parent agreed to the student’s placement at School C in its self-contained program.

On August 10, 2012, in preparation for SY 2012-2013, the student’s mother emailed School C’s principal requesting an IEP meeting to address concerns about the student’s IEP. The email

noted that the IEP lacked full-time special education hours, noting the student's history of wandering off and the need to develop a plan to address this concern early in the school year. School C's principal responded to the email stating that once the school year began and the school staff had a chance to observe and work with the student the school would reach out to schedule an IEP meeting.

On September 12, 2012, the parents provided DCPS an independent speech and language evaluation. On October 10, 2012, the parents provided DCPS with an independent neuropsychological evaluation by Kathleen Atmore, Psy.D. Petitioners assert DCPS did not respond or schedule a meeting to review the evaluations.

Dr. Atmore recommended school placement for the student "in a private educational setting that is specifically adapted to meet his needs as a child with autism as soon as possible... [to] include 1:1 instruction and small group activities, highly structured consistent schedules, a verbal behavior/ABA methodology using both 1:1 instruction and naturalistic settings, multidisciplinary collaboration between teachers, speech pathologists, occupational therapists and other providers, and access to assistive technology as needed."

On October 26, 2013, DCPS presented the student's parents with a draft IEP and scheduled an IEP meeting for October 30, 2012, which was rescheduled to November 1, 2012, due to weather concerns. The draft IEP prescribed 25 hours per week of specialized instruction outside general education and 4 hours per month each of speech-language pathology and occupational therapy to reflect the services the student had been receiving since he arrived at School C at the start of SY 2012-2013.

On or about October 26, 2012, the parents provided DCPS with a copy of an independent OT evaluation completed by the National Institutes of Health ("NIH"). The evaluation showed the student had weaknesses in grasping, visual-motor integration, and fine motor skills, as well as significant sensory motor needs. It recommended the implementation of a listening program, like Therapeutic Listening, to support the student's regulation, engagement and social interaction.

In addition to the services received at school, the student receives significant amounts of services in the home and community at the parents' expense. These independent Applied Behavioral Analysis ("ABA") and occupational therapy ("OT") services have resulted in some limited progress. Petitioners assert the progress is limited because the same services are not provided to the student during his school day.

DCPS convened the IEP meeting on November 1, 2012. Petitioners attended and the student's private speech therapist and Board Certified Behavior Analyst ("BCBA") participated by telephone. The DCPS personnel included, among others, the DCPS school psychologist, speech language pathologist and two occupational therapists.

The IEP drafted on November 1, 2012, increased the student's hours of specialized instruction to 25 hours/week outside general education, 4 hours/month of speech-language pathology and 4 hours/month of occupational therapy. This IEP reduced occupational therapy from 6 hours to 4

hours per month. The IEP goals were in the areas of reading, math, adaptive living skills, speech language, and social/emotional/behavioral development. At the end of the meeting Petitioners requested that DCPS provide the student a private placement.

On November 5, 2012, Petitioners filed a due process complaint that resulted in a Hearing Officer Determination (“HOD”) issued January 28, 2013. The HOD concluded that Petitioner’s had not asserted claims as to any action by DCPS following its issuance of the June 8, 2012, PWN that placed the student at School C and concluded Petitioners were free to file a due process complaint for any alleged violations by DCPS and alleged denials of a FAPE after that date. Accordingly, Petitioner filed the current due process complaint on March 8, 2013, challenging, inter alia, the appropriateness of the student’s November 1, 2013, IEP and the appropriateness of his placement in the program at School C.

On February 2, 2013, Petitioners learned that the student would be moved to a different classroom with a different teacher than he had since he began attending School C. Petitioners eventually found that the student’s previous classroom teacher had been absent a significant amount of time and DCPS offered Petitioners compensatory services for the time the previous teacher had been absent.

In the current due process complaint Petitioners also assert that the student’s new classroom is an inappropriate setting for the student because of, inter alia, the number of children and the size of the classroom. Following the classroom change the student’s parents requested an IEP meeting and that their independent providers observe the student’s new classroom. DCPS agreed and an occupational therapist Petitioners retained conducted an observation on February 20, 2013. On February 21, 2013, DCPS convened an IEP meeting. The parent invited an education policy specialist who is also a news reporter. Petitioners assert DCPS required the reporter to leave the meeting despite the parent’s objection.

At the February 21, 2013, IEP meeting, the student’s parent raised several concerns about the student’s alleged regression. Petitioners allege DCPS ignored the student’s limited progress and regression in some areas. Petitioners assert DCPS refused a change in the student’s placement.

Petitioner requested as relief in the due process complaint that DCPS be ordered to fund the appropriate placement located by the parent, including transportation, at a separate day school for children with autism, such as the _____ School.² Alternatively, Petitioners requested that the Hearing Officer order DCPS to submit a referral package to schools that only accept referrals from local education agency’s (“LEAs,”) and order that the student be placed in a program with the attributes the Hearing Officer finds necessary, incorporating the recommendations of the student’s neuropsychological evaluation.

DCPS filed a timely response to the complaint on March 18, 2013. DCPS denied the allegation that it failed to provide the student a FAPE and requested that the Hearing Officer deny

² Petitioners assert this relief is necessary both as compensatory education for the alleged denials of FAPE throughout the 2012/13 school year, including failure to implement the IEP, and prospective relief to meet the current educational needs of the student.

petitioner's request for relief. Specifically DCPS asserted, inter alia, the November 1, 2012, IEP was appropriate and the IEP team met again on February 21, 2013, at the request of the parent to review and revise the student's IEP. DCPS asserts the student's current IEP and placement at School C remains appropriate.

A resolution meeting was held March 29, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing; rather, the parties chose to allow the full 30-day resolution period to expire before the 45-day timeline began. Thus, the 45-day period began on April 8, 2013, and originally ended (and the HOD would have been due) on May 22, 2013.

The Hearing Officer conducted a pre-hearing conference on April 11, 2013, at which the issues to be adjudicated were discussed and determined. On April 22, 2013, the Hearing Officer issued the final pre-hearing order outlining, inter alia, the issues to be adjudicated.

The parties appeared for hearing on May 8, 2013, and May 9, 2013. At the close of the hearing on May 9, 2013, the parties submitted a joint motion to extend the HOD due date by six calendar days to allow for submission of written closing arguments. The parties submitted written closing arguments on May 16, 2013, and the record in this case was closed as of that date.³

ISSUES ADJUDICATED:

1. Whether DCPS violated 34 C.F.R. §300.324 and denied the student a free and appropriate public education ("FAPE") by failing to develop an appropriate IEP on November 1, 2012, and on February 21, 2013, by: (a) failing to include IEP goals that incorporate the use of sign, and/or (b) failing to remove IEP goals that rely on PECS⁴, and/or (c) failing to include listening therapy and/or (d) failing to provide for 1:1 instruction.
2. Whether DCPS violated 34 C.F.R. §300.323 and denied the student a FAPE by unduly delaying the student's IEP meeting, following the parents' August 2012 request for the meeting and thus delaying the review of the independent evaluations that recommended substantive changes in the student's programming and preventing the parents from timely raising their concerns to the IEP team.
3. Whether DCPS violated 34 C.F.R. §300.115 and/or §300.116 and denied the student a FAPE by failing to provide him an appropriate placement in a setting (a) specifically designed for students with autism, and/or (b) that includes provision of 1:1 instruction, and/or (c) provides access to appropriate sensory breaks and equipment in his classroom or close proximity to his classroom, and/or (d) where the student is not at all with non-disabled peers.

³ Subsequent to submission of written closing arguments, on May 10, 2013, Petitioner submitted a motion to re-open the record to include evidence of an event that allegedly occurred May 9, 2013, at the student's school. On May 15, 2013, the Hearing Officer issued an order denying the motion to re-open the record.

⁴ Picture Exchange Communication

4. Whether DCPS violated 34 C.F.R. § 300.503 and denied the student a FAPE by failing to issue a PWN following the February 21, 2013, IEP meeting outlining its refusal to comply with the parent's request for a change in placement for the student to a school specifically designed for children with autism.
5. Whether DCPS violated 34 C.F.R. §300.17 and/or §300.324 and denied the student a FAPE by failing to implement the student's IEP from August 29, 2012, through the date the complaint was filed by (a) failing to provide him instruction the first week of school, and/or (b) failing to have a certified teacher to provide specialized instruction and/or (c) by failing to implement ABA properly, including collecting and analyzing data, and/or (d) failing to have the DCPS autism coach available to provide sufficient supervision in the student's classroom.
6. Whether DCPS violated 34 C.F.R. 300.322 and denied the student a FAPE by failing to issue a proper letter of invitation, including a list of attendees to the February 21, 2013 meeting and/or failing to inform the parents that a DCPS attorney would be present, despite the fact that DCPS was informed the parents' attorney would not be present.
7. Whether DCPS violated 34 C.F.R. 300.321 and denied the student a FAPE by failing to permit the parent's identified team member from participating in the February 21, 2013 meeting.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 43⁵ and Respondent's Exhibits 1 through 33) that were admitted into the record and are listed in Appendix A.⁶ Any documents not admitted are so noted in Appendix A. Witnesses are listed in Appendix B.⁷

⁵ Petitioner's documents are listed sequentially, however, there is no document #40.

⁶ Objections to admission of documents by both parties were considered and noted for the record. Any documents that were not admitted are so noted in Appendix A. The specific objections made by each party are as follows: Petitioner made the following objections to the following documents presented by Respondent on the ground of relevance: R-28 Short Bus Diaries Blog Entry March 1, 2013, R-29 LinkedIn Page Joy Resmovits Undated, R-30 Jenniferfrentress.com PowerPoint Undated, R-31 Denisedantley.com PowerPoint Undated, R-32 Invisible Boy Facebook Page Undated, R-33 Email: Internet Domain Registration April 26, 2013; documents. Respondent made the following objections to the following documents presented by Petitioner: P-2, P-3, P-4, and P-5 on the grounds of relevance. "The appropriateness of the student's previous IEPs and his placement at School C in June 2012 were litigated in the previous due process hearing. The January 28, 2013, closing order dismissed the allegations that the student's IEPs and placement were inappropriate during the 2011-2012 school year. The IEP at P-5 is a draft and not the student's finalized IEP." DCPS objected to P-27 and P-28 because "the Hearing Officer does not have jurisdiction to hear issues regarding teacher licensure and certification. As asserted in DCPS's response, complaints about staff qualifications must be filed against the State Education Agency, OSSE, pursuant to 34 C.F.R. §§300.151-300.153." DCPS objects to P-31 on the grounds of relevance. "This document does not make any fact of consequence in the case more or less likely. Additionally, Petitioner offers no witness who can authenticate or testify about the contents of the document." DCPS objected to P-41 on the grounds of relevance. "The clips of the student prior to? SY 2012-2013 are not relevant to the student's needs and progress while in attendance at School C. The previous complaint disposed of the issues that were raised prior to the current school year." DCPS objected to P-42 and P-43 on the grounds of authentication. "Petitioner has not identified a witness who can testify to the authenticity and relevance of the articles."

⁷ The parties made the following stipulations as to witnesses: Petitioner offered [REDACTED] as an expert in the field of clinical and neuropsychology, diagnosis and evaluation of children with autism. DCPS stipulated to this offer and field of expertise. Petitioner offered [REDACTED] as an expert in the fields of speech language pathology, Applied Behavior

FINDINGS OF FACT:⁸

1. The student is age [REDACTED] and resides with his parents in the District of Columbia. The student has been determined to be a child with a disability under IDEA with a classification of autism.⁹ The student was first found eligible on October 25, 2010. Prior to the eligibility determination DCPS Early Stages completed psychological, occupational therapy and speech language evaluations that found the student had significant developmental delays across all areas tested. At the time of the evaluations the student was nearing age three and was enrolled in a pre-school program at [REDACTED] [REDACTED] (Petitioner's Exhibits 2-1, 8-1, 10-2, 14, 17)
2. The student's initial IEP was developed October 25, 2010. The student initially attended a DCPS elementary school from January 2011 to April 2011 then the student's parents enrolled in him in a public charter school which he attended from April 2011 to July 2011. The student's parents then enrolled the student at School B in an inclusion classroom for SY 2011-2012. (Petitioner's Exhibits 3-1, 12-2,
3. The student's annual IEP review occurred on November 3, 2011, and the student's IEP was amended on May 31, 2012. The May 31, 2012, IEP prescribed the following services: 7.5 hours of specialized instruction per week outside general education and 15 hours per week of specialized instruction inside general education. The related services were: 4 hours per month of speech-language pathology outside general education and 2 hours per month inside general education and 6 hours per month of occupational therapy outside general education. (Petitioner's Exhibit 3-1, 3-15)
4. At the end of SY 2011-2012 School B staff informed the student's parents that School B was not an appropriate educational setting for the student because he was not high functioning enough for the School B program to meet his needs. (Petitioner's Exhibit 12-2)
5. On June 8, 2012, DCPS issued a PWN to a "self-contained classroom..." at another DCPS elementary school, School C.¹⁰ The PWN stated that student required more

Analysis, evaluation, treatment and programming for children with autism. DCPS stipulated to this offer and field of expertise. Petitioner will offer [REDACTED] as an expert in the field of Applied Behavior Analysis, evaluation, treatment and programming for children with autism. DCPS stipulated to this offer and field of expertise. DCPS will offer [REDACTED], BCBA, as an expert in the field of Applied Behavior Analysis, evaluation, treatment and programming for children with autism. Petitioner stipulated to this offer and field of expertise. DCPS will offer [REDACTED] BCBA, as an expert in the field of Applied Behavior Analysis, evaluation, treatment and programming for children with autism. Petitioner stipulated to this offer and field of expertise.

⁸ The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted separately by more than one party the Hearing Officer may only cite one party's exhibit.

⁹ Stipulation by parties

¹⁰ Stipulation by parties

support than he was currently provided and his needs would be better [served] in a self-contained classroom. However, the student's IEP was not changed at that time to reflect that all services would be provided outside general education. (Petitioner's Exhibit 4-1)

6. The student's parents agreed to the placement at School C in its self-contained program. On August 10, 2012, in preparation for SY 2012-2013, the student's mother emailed School's C principal requesting an IEP meeting to address concerns about the student's IEP. The email noted that the student's IEP lacked full-time special education hours, noting the student's history of wandering off and the need to develop a plan to address this concern early in the school year. School C's principal responded to the email stating that once the school year began and the school staff had a chance to observe and work with the student the school would schedule an IEP meeting. (Respondent's Exhibit 21)
 7. When the student's parent first registered the student at School C in August 2012 prior to the school year starting, the School C staff was not aware the student had an IEP. The student attended his first day at School C on Friday of the first week of SY 2012-2013, according to a staggered start schedule that the student's parents received by mail from DCPS. However, his parents were never notified by DCPS that the student's autism classroom actually started on Monday of the first week of school. Thus, the student missed the first four days of the school year. These occurrences caused the parents to believe School C had not sufficiently prepared for the student's arrival there. (Mother's testimony)
 8. Once the student began attending School C he was placed in one of two early childhood self-contained autism classrooms. Each of the two classrooms were staffed by a special education teacher and two instructional assistants. The number of students in the classrooms averaged six students with a student to staff ratio of approximately 2 to 1. (Petitioner's Exhibit 24)
 9. The parents were concerned about whether sufficient precautions were in place to address the student's behaviors of wandering off because he had done so on three occasions at School B. DCPS staff did not respond to the parent's satisfaction to her request that an IEP meeting be convened at the start of SY 2012-2013. (Mother's testimony)
 10. On September 12, 2012, the parents provided DCPS an independent speech and language evaluation. The evaluation included a clinical assessment of articulation and phonology, preschool language scale and assessment of basic language and learning skills. The student's auditory comprehension and expressive communication and articulation were assessed at well below average and the evaluator recommended speech-language services for 3-4 hours per week. (Petitioner's Exhibit 16-2, 16-5)
 11. On October 10, 2012, the parents provided DCPS with an independent neuropsychological evaluation conducted by [REDACTED], Psy.D. The neuropsychological evaluation found significant concerns in the student's social
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reciprocal interaction, communication, repetitive behavior and stereotyped patterns. The student had clinically elevated scores in social awareness, social cognition, social communication, social motivation and autistic mannerisms. The report also showed significant concerns in withdrawn behavior, aggressive behavior, symptoms of pervasive developmental disorder, inattention and hyperactivity. [REDACTED] noted that she was not able to conduct cognitive testing due to severe behavior dysregulation and inattention, but behavioral observations noted cognitive and adaptive impairments in the mild to moderate range. (Petitioner's Exhibit 12-4, 12-5, 12-6)

12. [REDACTED] a neuropsychologist at [REDACTED] ([REDACTED]) conducted a neuropsychological evaluation of the student in September 2012. She reviewed all the student's prior evaluations, school records and the student's IEP developed just prior to the evaluation. During the evaluation the student was overactive, dis-regulated and had a hard time maintaining his mood; his emotional reaction was highly variable and Dr. [REDACTED] could keep the student engaged in an activity for no more than 2 minutes. In addition to the time she saw the student during the evaluation in September 2012 she saw the student again in May 2013 to conduct an observation. (Dr. [REDACTED]'s testimony)
13. At the time of the evaluation the student used some expressive language – single words and phrases. His language was limited but sometimes spontaneous but not always in context. When prompted the student used single words and made eye contact when she worked at engaging him. Dr. [REDACTED] was not able to evaluate the student's cognitive abilities but based on observing his behavior, during this "snap shot" at that moment and based on prior testing she expected him to be better regulated. (Dr. [REDACTED]'s testimony)
14. Dr. [REDACTED] was expecting the student to be better regulated and making more progress based upon the baseline of the student's initial assessments in 2010. She expected to see that the student's development was staying steady and not dropping. However, she saw a decline in his language, social interaction and behavior regulation. (Dr. [REDACTED]'s testimony)
15. Dr. [REDACTED] recommended school placement for the student "in a private educational setting that is specifically adapted to meet his needs as a child with autism as soon as possible... [to] include 1:1 instruction and small group activities, highly structured consistent schedules, a verbal behavior/ABA methodology using both 1:1 instruction and naturalistic settings, multidisciplinary collaboration between teachers, speech pathologists, occupational therapists and other providers, and access to assistive technology as needed." (Petitioner's Exhibit 12-6, 12-7)
16. The independent evaluations the parents provided DCPS indicate the student was virtually non-verbal when he was evaluated and his language was minimal when he began attending School C. (Petitioner's Exhibits 12-3, 19-4)

17. In early October the parents had a meeting at School C with the student's classroom teacher and other staff to address the parents' concern that they were not receiving adequate communication from the student's classroom teacher. However, the parents believe that a meeting was only scheduled after they sought their attorney's assistance to request a formal IEP meeting. DCPS scheduled an IEP meeting for the student on October 30, 2013, but that was rescheduled due to bad weather and actually held November 1, 2012. (Mother's testimony)
18. On October 26, 2013, DCPS presented the student's parents with a draft IEP and scheduled an IEP meeting for October 30, 2012, which was rescheduled to November 1, 2012, due to weather concerns. The draft IEP prescribed 25 hours per week of specialized instruction outside general education and 4 hours per month each of speech-language pathology and occupational therapy to reflect the services the student had been receiving since he arrived at School C at the start of SY 2012-2013. (Respondent's Exhibit 4-1, Petitioner's 5-1, 5-13)
19. On or about October 26, 2012, the parents provided DCPS with a copy of an independent OT evaluation completed by NIH. The evaluation showed the student had weaknesses in grasping, visual-motor integration, and fine motor skills, as well as significant sensory motor needs. It recommended the implementation of a listening program, like Therapeutic Listening, to support the student's regulation, engagement and social interaction. (Petitioner's Exhibit 19-5)
20. In addition to the services received at school, the student receives significant amounts of services in the home and community at the parents' expense. He receives private OT twice per week, and private speech therapy for two hours per week after school. In addition, the student is provided ABA therapy at home afterschool and for a few hours on weekends. In all he has three therapists working with him seven days per week. (Mother's testimony)
21. DCPS convened the IEP meeting on November 1, 2012. Petitioners attended and the student's private speech therapist and BCBA participated by telephone. The DCPS personnel included, among others, the DCPS school psychologist, speech language pathologist and two occupational therapists. (Respondent's Exhibit 4-1)
22. The IEP drafted on November 1, 2012 increased the student's hours of specialized instruction to 25 hours/week outside general education, 4 hours/month of speech-language pathology and 4 hours/month of occupational therapy. This IEP reduced occupational therapy from 6 hours to 4 hours/month. The IEP goals were in the areas of reading, math, adaptive living skills, speech language, and social/emotional/behavioral development. (Petitioner's Exhibit 5-2, 5-3 through 5-11)
23. At that November 1, 2013, meeting DCPS reduced the student's speech-language and OT services. Although the parents had sent DCPS independent evaluations prior to this meeting, the parents got the impression that DCPS staff members had not reviewed the evaluations prior to the meeting. The student's parents did not agree

with the IEP developed on November 1, 2013, IEP because it did not incorporate recommendations of the evaluations. But there was no specific disagreement with the change in services. The parent did express a desire for PECS to not be used with the student. Following the meeting the parents attempted to present a letter to the School C special education coordinator requesting that DCPS place the student in a private school. DCPS did not agree to the request for the student's private placement. (Mother's testimony, Respondent's Exhibit 4-2, 4-3)

24. On November 5, 2012, Petitioners filed a due process complaint alleging violations by DCPS. After a hearing a HOD issued January 28, 2013, dismissed Petitioners claims. The HOD concluded that Petitioners had not asserted claims as to any action by DCPS following its issuance of the June 8, 2012, PWN that placed the student at School C and concluded Petitioners were free to file a due process complaint for any alleged violations by DCPS and alleged denials of a FAPE after that date. Accordingly, Petitioner filed the current due process complaint on March 8, 2013, challenging, inter alia, the appropriateness of the student's November 1, 2013, IEP and the appropriateness of his placement in the program at School C. (HOD Case # 2012-762, Petitioner's Exhibit 1)
25. On or about February 2, 2013, in a letter addressed to all families with students in School C's autism program, School C's principal informed Petitioners that the two self contained classrooms for students with autism would be combined with one lead special education teacher and a substitute teacher and four classroom instructional assistants who had been working with the students since the beginning of the school year. (Petitioner's Exhibit 24)
26. As a result of this letter Petitioners later became aware that the teacher that had been the student's special education teacher for the first semester of SY 2012-2013 was no longer working for DCPS and had been absent a significant portion of the first semester of the school year. (Father's testimony)
27. Following the change in classroom the student's parents requested an IEP meeting and for their independent providers to observe the student's new classroom. On February 20, 2013, an occupational therapist that Petitioners retained conducted an observation of the student's new classroom. The classroom had 12 students, 4 aides and 1 special education teacher and 1 "substitute" teacher. (Ms. Testimony)
28. On February 21, 2013, DCPS convened an IEP meeting at the request of the parent to review and revise the student's IEP. The parent provided information for the team to consider on the day of the meeting that included approximately forty suggested adjustments to the student's IEP goals. (Ms. Dantley's testimony)
29. The parent had also invited an education policy specialist who is a news reporter. Once the person was identified as a reporter DCPS requested that the reporter leave the meeting and she complied. DCPS offered to reconvene the meeting so that the parent's counsel could be present, but the parent stated the he wanted to continue the meeting.

The team attempted to revise the student's IEP but could not complete the process because the parent eventually refused to continue the meeting and left upset that a DCPS attorney participated in the meeting and would not leave the meeting when the parent requested him do so. (Ms. [REDACTED]'s testimony, Ms. [REDACTED]'s testimony, Petitioner's Exhibits 6-2, 7-2)

30. DCPS did not issue a letter of invitation to the parent in advance of the February 21, 2013, IEP meeting that listed the DCPS attorney as a participant in the February 21, 2013, meeting. The parent was not represented by counsel at the meeting and because and because of that, when the DCPS attorney refused to leave at the parent's request, the parent ended the meeting. (Petitioner's Exhibit 6-2)
31. The parents did not receive a formal letter of invitation to the February 21, 2013, IEP meeting and were not aware that a DCPS attorney would be participating in the meeting. For the student's father the DCPS attorney being present made it difficult for the meeting to be productive as the attorney interjected his opinion on the IEP goals the father presented. The DCPS attorney stopped the meeting on several occasions to have a separate meeting among DCPS personnel that excluded the parent. (Father's testimony)
32. The student's father believes the student's first semester teacher at School C had a total of 26 absences during the school year prior to the student being moved to the combined classroom in February 2013. At the February 21, 2013, meeting DCPS gave the parent a proposal for 50 hours of independent ABA therapy at \$110 per hour. (Father's testimony, Petitioner's Exhibit 6-4, 6-5)
33. The parents' home based ABA program for the student is rigorous and the parents believe that the School C program is in conflict with the student's home based-training and may even be counterproductive and contributing to the student's apparent skill regression. (Father's testimony)
34. During the recent spring break when the student was home from school for one week the student's mother observed some progress: he used the correct word in asking for what he wanted and engaged in more unprompted requests. The home based therapists were working with the student 3 to 4 hours per day in the morning and afternoon, with a different therapist coming in the afternoon. The student seemed to have lost these gains when he returned to school after spring break. (Mother's testimony)
35. On April 19 DCPS reconvened an IEP meeting and revised some of the student's IEP goals the parents then allowed DCPS to implement. (Father's testimony)
36. Dr. [REDACTED] saw the student again in May 2013 and as a result of her observation she is worried about the student as he is less connected, less communicative but more active and more detached than he was in the September 2012 when he was evaluated. Between September and May she saw a decline in all areas.

37. In Dr. [REDACTED]'s opinion the student has not made progress and there has been some regression. It is not typical for a child with autism to regress the way he has at such an older age, but regression is common - you might see regression in 18 month to 2 year olds. His loss of daily life skills is of particular concern. She typically sees progress in a child that is receiving regular services as this student is with the level of services that he has had but she does see them lose daily living and language skills. (Dr. [REDACTED]'s testimony)
38. In her experience Dr. [REDACTED] has not seen students at this student's age display skill regression, but she cannot state the cause of the student's regression. Dr. [REDACTED] believes the student is not making progress in language, regulation and daily living skills and consequently recommends interventions to assist him in making more progress. (Dr. [REDACTED]'s testimony)
39. In addition to his autism diagnosis the student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). The student's attention problems will affect his progress. When he is engaged he tends to focus for a longer time particularly when prompted and someone is working with him one on one. (Dr. [REDACTED]'s testimony)
40. Dr. [REDACTED] recommends that the student be placed in a school that can provide ABA one to one and a consistent routine with educators trained in teaching students with autism. The student could not demonstrate skills unless it was one to one. If he is in a small group he needs someone prompting him. In her opinion the student cannot benefit from a group any larger than 5 or 6 students or being with non-disabled peers at this time as it would be over-stimulating to him – the noise and motion would be difficult for him and impact his ability to be available for learning. (Dr. [REDACTED]'s testimony)
41. The student's parents have engaged the services of [REDACTED] a BCBA, who has worked with the student for the past 2 years. Ms. [REDACTED] provides the student's therapy and supervises other staff who provide the student verbal behavior therapy in his home for 14 to 15 hours per week. (Ms. [REDACTED]'s testimony)
42. Ms. [REDACTED] observed the student in his classroom in February 2013 soon after the classrooms had been combined. She observed at that time what she considered to be unstructured teaching techniques that were different than what she thought could have been done to obtain progress with the student. It is her opinion there seemed to be no data recording as should occur in an ABA setting. She saw what she concluded was improper reinforcement of the student's behaviors. She noticed several missed opportunities for the student to learn and observed what she considered to be inappropriate use of teaching procedures where the student's goals were not being worked on in an appropriate way. (Ms. [REDACTED]'s testimony)
43. Ms. [REDACTED] the student's private OT, also conducted a classroom observation of the student since he has been in the combined classroom. She observed at the time of her

visit that there were ten students and seven adults in the classroom. Adults came in and out but the classroom teacher and her intern remained in the room the entire time. She observed in the morning time and noticed the classroom seemed hectic with children doing lots of running. The student was in the sensory area in the classroom and a staff member made sure that he and another child stayed in that area until the teacher began circle time. (Ms. [REDACTED] s testimony, Petitioner’s Exhibit 25)

44. Later during that visit Ms. [REDACTED] observed the student going through a door in the gym that lead to the stage area. At the time there was an adult on the stage who was there to meet any children that happened to wander through the door and onto the stage. The student was not in any danger of being lost during that incident. At the time of the observation the staff was still learning the student’s behavior plan which now all staff members have come to know and implement. (Ms. [REDACTED] r’s testimony)
45. The student came to his current classroom at School C on February 4, 2013, because his original teacher left on extended medical leave and the school’s two autism classrooms were combined. The student’s current classroom has a certified special education teacher with ABA certification. The special education teacher serves as the lead instructor of the autism classroom and she has staff that she trains and leads. The classroom staff have been trained by the classroom teacher and the DCPS Autism specialist in ABA methodology. The teacher and her staff use ABA strategies and communication to teach the students based on their individual needs. (Ms. [REDACTED] s testimony)
46. There are currently eleven students with autism in the class. One student is mainstreamed most of the day so consequently there are ten students in the classroom along with a long-term substitute teacher and four aides for a total of six adults. From January 2013 until April 2013 there was also an intern from [REDACTED] [REDACTED] working with the classroom teacher all day four days per week. (Ms. [REDACTED] s testimony)
47. The classroom has six individual work-stations. An adult will take one or two students to those stations during the “discrete trial” work time. There are two group areas for eating and a play area in the back of the room near the students’ cubbies. Each adult is assigned to one or two children daily rotating every day in order to generalize the students’ skills to ensure they can perform skills for more than one person. The classroom is structured and follows the same schedule each day. The student is taken off the bus to a special room and then brought to the classroom for breakfast at 8:45 am. The student has an adult who accompanies him all day to look out for his wandering and placing things in his mouth. The students do a sign-in activity then have the bathroom break. From 8:45 am to 9:15 am the students have breakfast. At 9:15 am the morning circle begins – there are two different groups. Then the students have specials classes: Music, Art or Physical Education. (Ms. [REDACTED] ’s testimony)
48. There are two days per week when there are no specials and the classroom teacher creates a classroom activity. Then there is work time – one to one focus on leisure

skills, play skills for 30 min each. Thereafter the students have recess for 30 minutes then they have lunch in the classroom for 30 minutes. This is followed by a rest period for 90 minutes after lunch. Then there is a group activity in the classroom and the students are released to go home. The student's parent usually picks him up at nap-time to leave and receive private related services. (Ms. [REDACTED] s testimony)

49. When the student changed classrooms his current teacher received the programming binder and assessments from his previous teacher and the current teacher worked with the DCPS autism specialist to create the programming that is being implemented now with the student. It is not certain whether ABA data was consistently maintained for the student prior to him coming to in new classroom. However, since he has arrived in the new classroom data has been consistently maintained. ([REDACTED] testimony, Respondent's Exhibit 12, 13, 14)
50. The student's current teacher sends reports of the student's activities and progress daily. The student's backpack is sent to the school principal first and she edits out the negative comments from the daily log. The student's teacher and school staff have not been able to talk directly with parents on a regular basis because the parents don't trust the school and its staff and therefore it is difficult to have a positive and cooperative relationship between school and home. There are no positive suggestions to the staff from the parents and it seems that the parents don't want to work with the school. The negative and offensive comments in the communication log have created difficulty in collaborating with the parents and collaborating with the student's home staff. The classroom teacher believes School C is appropriate. The student can receive the services prescribed in his IEP at School C and receive one to one support. (Ms. [REDACTED] s testimony, Respondent's Exhibits 17, 18)
51. When the student came to School C he did not have the verbal language. The student has been having occasional trouble with toileting. The student is able to go to the OT sensory room in the school three times per day. It takes a couple of minutes to get to the sensory room and the student and a staff member will usually run to the OT room to allow the student further exertion to assist his need for stimulation. (Ms. [REDACTED] s testimony)
52. Some of the student's IEP goals have been in place since 2011. He has been able to progress on some goals and some have been refined to better enable the staff to measure goal mastery. If the goal is not mastered it is brought over to the next IEP and if the student does not master a goal with the prescribed year it doesn't mean he has not made progress. (Ms. [REDACTED]'s testimony)
53. The student's IEP amended in April 2013 added the mastery criteria and took one goal out and added goals the parent requested. The goals that were added were appropriate based upon the student's recent VB-MAPP. (Ms. [REDACTED]'s testimony)
54. The student's parents have requested that the student only be provided verbal prompting. They requested that no pictures be used for communication, only for

programming. The teacher would have like to be able to use pictures or “PECS” with the student because she believes it increases verbal language. This was in the student’s previous IEP. (Ms. [REDACTED]’s testimony)

55. The student’s DCPS speech language pathologist provides the student 30 minutes of speech language therapy twice per week. The student has severe receptive and expressive language delays. He has many needs in expressive, pragmatic and receptive language. The student only spoke a few words and was virtually nonverbal throughout the day with the teachers. The DCPS speech language pathologist reviewed the student’s evaluation from CNMC and OT evaluation from NIH. The student’s scores in the 50s indicate severe delays and limited language and the NIH evaluation stated the student was non-verbal. The student’s language has regressed since 2011. The DCPS speech-language provided has not seen any language regression in this student since she has been working with him since he arrived at School C. She is not aware of whether the student has been diagnosed with a regressive form of autism disorder. (Ms. [REDACTED]’s testimony)¹¹

56. The DCPS speech language pathologist was seeing the student four hours per month outside general education because there was no such setting for the student at School C. She changed the services at the November 1, 2012, IEP meeting to outside general education and she informed the parent of that fact at the meeting. The student does not require additional services because he is making progress with the services he is currently receiving. He has begun to make verbal requests using physical gestures. He can sit and attend longer with his speech language session and can sit longer after having the sensory input. The goals that the parent provided at the April 19, 2013, meeting were meshed and targeted the same skills but no longer use multiple modalities for the student to express himself. (Ms. [REDACTED] testimony, Petitioner’s Exhibit 9)¹²

57. The School C staff has become increasingly uncomfortable communicating with the student’s parents because of the social media posting and public campaign that the parents have engaged in threatening to ruin the staff’s reputations because of the parent’s perception about the services the student has received at School C and in DCPS. (Ms. Pickar’s testimony, Respondent’s Exhibit 32)

58. The student is provided with direct and consultative OT services at School C as his IEP prescribes. The student is provided three sensory breaks per day and has access to the school’s OT room. The OT room has equipment available the student to assist his sensory needs and to assist in implementing the OT goals in his IEP. (Ms. [REDACTED]’s testimony)

59. The student has been accepted to attend the [REDACTED] School (“ [REDACTED] located in [REDACTED] Maryland, north of [REDACTED] is a private special education day school that serves students with autism and other communication disorders. The school

¹¹ Designated as an expert in Speech Language Pathology

currently serves students from Pre-K to second grade and the school is expanding to include grades three to five for SY 2013-2014. has been in operation since 2007. There are currently 15 students and it has the capacity for 27 students. (Ms. s testimony, Petitioner's Exhibit 37)

60. school has two certified special education teachers. However, the majority of instruction is conducted by staff instructors supervised by the certified teachers. Each of the special education teachers is responsible for supervising up to nine instructors and nine students. The instructors do not have to be teachers or have a college degree, although many do have degrees. The special education teachers are not Applied Behavior Analysis ("ABA") certified. The school's director is the only staff member who is ABA certified. (Ms. s testimony)
61. is certified by the Maryland State Department of Education and serves students from various local educational agencies. Most students come from Baltimore and school districts surrounding Baltimore. does not have a certificate of approval from OSSE. has had one DCPS student in the past. (Ms. s testimony)
62. operates on a 12-month school year: 216 school days. Tuition is per year and includes up to 40 hours of speech-language services. Additional related services including OT are billed at a rate of \$150 per hour. (Ms. s testimony)
63. addresses foundation learning skills and behavioral readiness. Most of the instruction is one to one instruction using the ABA approach of verbal behavior. There is some group instruction. Teaching goals are selected from students' assessments which the teacher select. The instructors pick the learning targets based on the students' interest. Group instruction is lead by the special education teachers. (Ms. s testimony)
64. Each student has the individualized mix of natural environment teaching time and intensive teacher time at a table. As students gains skills they transfer those skills to the table teaching. Approximately 15% of a student's day is spent in intensive table teaching and the rest of the day is spent in a natural environment with an instructor. uses a highly structured system that is data driven keeping close track of how many times a student is prompted and responds in order to make effective changes to a student's educational program as needed. (Ms. s testimony)
65. The school focuses on assisting students with the function of language and how to use language to get their needs met using requests and labeling. The school attempts to make certain students have a full understanding of language across all domains while teaching to a student's motivation. Each student has one instructor in the morning and a different instructor in the afternoon to generalize the skills so that students don't simply respond to a single individual's prompting. (Ms. s testimony)
66. The school has sensory equipment including four rooms students use for activities – dark and light play, texturing material, a quiet space, an OT room and trampoline and

an indoor play room and built in playground. The school has an indoor gym with multiple suspensions and swings. (Ms. ██████'s testimony)

67. The ██████ certified teachers met with student, reviewed his draft IEP and OT evaluations, and concluded that the student is an appropriate candidate for the school. The staff believe the school will allow the student to develop his language skills and the school can implement his IEP instructional and related services goals. The student's language range is in the middle of the students the school serves. The school will have to hire an instructor who will be dedicated to work with this student. (Ms. ██████'s testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ¹³ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

¹³ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS violated 34 C.F.R. §300.324 and denied the student a FAPE by failing to develop an appropriate IEP on November 1, 2012, and on February 21, 2013, by: (a) failing to include IEP goals that incorporate the use of sign, and/or (b) failing to remove IEP goals that rely on PECS, and/or (c) failing to include listening therapy and/or (d) failing to provide for 1:1 instruction.

Conclusion: Petitioner failed to demonstrate by a preponderance of the evidence that the student’s November 1, 2013, and the February 21, 2013, IEPs were inappropriate.

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Schaefer v. Weast, 554 F.3d 470 (U.S. App. 2009) “The court is required to focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Blackmon v Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999) Requirements of the IDEA are satisfied when a school provides individualized education and services sufficient to provide disabled children with some educational benefit

DCPS convened an IEP meeting on November 1, 2012. The evidence demonstrates that the student entered School C with an IEP requiring services both in and out of the general education setting. The student was placed in a self-contained classroom at the end of the SY 2011-2012 as agreed to by Petitioners. At the November 2011 meeting, the team changed the student’s hours to reflect the out of general education services the student was receiving and Petitioners had already agreed to when the student left School B.¹⁴

The student’s speech language services previously provided in the general education setting were removed from the IEP because the student was no longer in that setting. The student’s OT services previously provided in the general education setting were also removed from his IEP.

Petitioners participated in the November 1, 2012, IEP meeting. The evidence indicates that they disagreed with the IEP but did not specifically object to the change in his speech and OT services.¹⁵ Petitioners did not raise any objection to these services until the March 8, 2013, complaint.

Petitioner presented scant evidence regarding the appropriateness of IEP goals that require the use of PECS. However, Ms. [REDACTED] testified that she has not used the methodology because

¹⁴ FOF #6

¹⁵ FOF #23

of the parent's insistence against it but that it would assist the student in language development.¹⁶

Petitioner also introduced scant evidence that the student requires sensory integration or listening therapies to access his education. The student requires sensory input and breaks to enable him to cope in the educational environment and sensory/motor breaks are incorporated in the student's IEP and program.¹⁷

Petitioners allege the student requires 1:1 instruction throughout the school day. They rely on the neuropsychological evaluation supervised by Dr. Atmore in support of the need for 1:1. This evaluation recommends the student's "school program include 1:1 services and small group activities with a low student - teacher ratio" and a "Highly structured environment with consistent schedules."

The student is being provided 1:1 support throughout the day in a highly structured environment that enables him to participate in small group activities with his disabled peers.¹⁸ The student's November 1, 2012, IEP was appropriate. It was based on the individualized needs of the student at the time as determined by the team.

Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed "as a snapshot, not a retrospective").

The IEP team met twice at the parent's request, after the November 2012 meeting to revise the student's goals. Although the team convened on February 21, 2013, the student's IEP was not changed on the date. During the April 19, 2013, meeting the team considered the Petitioners' suggested goals and incorporated many of the requested changes in the IEP. As Ms. Schneider testified the IEP goals were appropriate and only revised to bring them in line with the Petitioners' requests.¹⁹

ISSUE 2: Whether DCPS violated 34 C.F.R. §300.323 and denied the student FAPE by unduly delaying the student's IEP meeting, following the parents' August 2012 request for the meeting and thus delaying the review of the independent evaluations that recommended substantive changes in the student's programming and preventing the parents from timely raising their concerns to the IEP team.

Conclusion: Petitioners failed to sustain the burden of proof by a preponderance of the evidence that DCPS failed to convene an IEP meeting for the student within reasonable time following the

¹⁶ FOF # 55

¹⁷ FOF # 59

¹⁸ FOF #s 48, 49

¹⁹ FOF # 54

parent request.

Petitioner alleges DCPS violated 34 C.F.R. §300.323 by unduly delaying the student's IEP meeting. §300.323 requires a public agency to have an IEP in effect for all students with disabilities. At the beginning of the 2012-2013 school year there was an IEP in effect for the student. Although the IEP did not yet prescribe all services outside general education the evidence demonstrates that Petitioners knew the student would be in a self-contained autism program.²⁰

On August 1, 2013 prior to the beginning of the school year, Petitioners requested an IEP meeting for the student. On August 10, 2013, Petitioners sent a second email requesting a meeting. School C's principal responded the same day that a meeting would be convened "when the school year starts rolling, and we have had a chance to observe/work with you and [the student]." This response provided two weeks prior to the beginning of the school year, when staff had yet to report, was reasonable. The school needed time to get to know the student before making changes to his IEP.

On September 28, 2012, one month into the school year, Petitioners again requested a meeting to discuss concerns about the student's education. On or about October 1, 2012, the school agreed to convene a meeting to discuss the parents' concerns. Evidence indicates that DCPS convened such a meeting for the student to discuss the parents' concerns around October 2, 2012. Thereafter, DCPS scheduled an IEP meeting the end of October that was actually convened November 1, 2013.

The evidence demonstrates DCPS replied in a reasonable time to the request for a meeting. DCPS convened an initial meeting within the first month of school.²¹ An IEP meeting was convened within the first 2 months of school after the members of the team had an opportunity to work with and observe the student. A delay in convening the meeting was reasonable. Further, there was no testimony regarding educational harm to the student because of the 2-month delay. Accordingly, the Hearing Officer concludes that Petitioners failed to sustain the burden of proof by a preponderance of the evidence on this issue; there was no procedural violation that rose to level of a denial of a FAPE to the student.

ISSUE 3: Whether DCPS violated 34 C.F.R. §300.115 and/or §300.116 and denied the student a FAPE by failing to provide him an appropriate placement in a setting (a) specifically designed for students with autism, and/or (b) that includes provision of 1:1 instruction, and/or (c) provides access to appropriate sensory breaks and equipment in his classroom or close proximity to his classroom, and/or (d) where the student is not at all with non-disabled peers.

Conclusion: Petitioners failed to sustain the burden of proof by a preponderance of the evidence that the student's placement at School C is an inappropriate program and/or placement for the student.

²⁰ FOF #s 5, 6

²¹ FOF # 17

34 C.F.R 300.115 provides: (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must--

(1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R 300.116 Placements states:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that (a) The placement decision—(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions of this subpart, Including Sec. Sec. 300.114 through 300.118;

Petitioners principally allege that the student has made no progress since attending School C and has in fact regressed in his language abilities and daily life skills because the School C program is inappropriate. However, the evidence reveals that any regression in the student's language skills began prior to his attendance at School C.²² The student's language abilities have not regressed in the current school year and the student has made some progress. Despite the agency's concerted efforts to ensure he receive a FAPE, the Petitioner's have apparently lost confidence in DCPS and School C and there seems to be a total break down in communication between the student's school and home.²³

Schaffer v. Weast, 546 US 49 (2005) The Petitioner has the burden of proving that the proposed placement for the student is inappropriate at the time.

MM v District of Columbia, 607 F.Supp.2d 168 (D.D.C 2009) The Court adopted the standard set out for placement in *Rowley*: a hearing officer in determining placement must consider whether IEP is reasonably calculated to enable student to receive educational benefit

Petitioners allege DCPS failed to provide the student an appropriate placement in an autism classroom, with 1:1 instruction, access to sensory breaks and equipment, which is outside the general education setting. On June 8, 2013, DCPS issued a PWN placing the student in a self-contained autism classroom at School C. The parents participated in and agreed to the change of placement.

Initially the student was in a self-contained autism classroom with a special education teacher, 2 aides, and 4 other students. The student's teacher had health problems and in late January 2013, when it became apparent that the teacher would not return, DCPS combined the student's classroom with the other self-contained autism classroom. In the new classroom there are 10 autistic students assigned to the class throughout the day.

²² FOF #16

²³ FOF #51

The classroom teacher is a BCBA and special education teacher, supervises a staff of 4 aides, a long-term substitute teacher. She writes all of the student's programming plans and trains the aides on how to implement ABA procedures and data collection. There are 6 individual workstations and two areas for group activities in the class. One aide is assigned to work with the student throughout the entire day. The student also has access to sensory equipment in the classroom and in the school. The aides and teacher have been trained. Additionally, it appears the student has little interaction with his general education peers.

Petitioners failed to prove that the student's placement at School C is inappropriate. Petitioners' witnesses, [REDACTED] and [REDACTED] testified about their limited observations of the student's current classroom. Both [REDACTED] and Ms [REDACTED] visited the student's classroom for a short duration. Both women testified that the classroom was a bit hectic. However, their visits occurred in the first few weeks after the two autism classes were combined. The staff and students were still adjusting to the change.

Ms. [REDACTED] also testified that the student left the gym area and was "missing" for a period of 60 seconds. The classroom teacher indicated, however, that student did not exit the gym. Rather, he wandered through the doors leading to the stage, where a staff member was stationed to intercept him. There is no evidence of harm to the student at School C since the beginning of the school year.

Testimony from the DCPS staff who work with the student daily confirm that his language skills have remained constant and the student's speech abilities are about the same presently as they were when he arrived at School C. For the foregoing reasons the Hearing Officer concludes that Petitioner failed to sustain the burden of proof that the student's current placement at School C is inappropriate.

ISSUE 4: Whether DCPS violated 34 C.F.R. § 300.503 and denied the student a FAPE by failing to issue a PWN following the February 21, 2013, IEP meeting outlining its refusal to comply with the parent's request for a change in placement for the student to a school specifically designed for children with autism.

34 C.F.R. 300.503 provides: Prior notice by the public agency; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include--

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

Conclusion: Petitioners failed to sustain the burden of proof by a preponderance of the evidence

that the failure to issue a prior notice was a material violation that prevented the parents from participating in the decision making process regarding providing a FAPE to the student.

The IDEA requires an LEA to provide a PWN when the agency proposes or refuses a particular action with respect to the student. Petitioners presented insufficient evidence regarding a request for change in placement during the February 21, 2013 IEP meeting. DCPS convened a meeting to revise the student's IEP at the parents' request. The team attempted to review the 40 proposed goals presented by Petitioner at the beginning of the meeting and revise the IEP goals to incorporate the requested changes. The student father and the DCPS witnesses testified that the meeting ended abruptly when he refused to continue. The team did not complete the revision of the IEP. There was no testimony during the hearing about a request for a change in placement during this meeting. DCPS was not required to issue a PWN refusing to initiate a change in the placement of the student following the February 21, 2013 meeting, as none was requested. Although the parent's notes from the meeting indicate that a request was made the DCPS notes do not. Thus, the Hearing Officer does not conclude that parent's notes of the meeting are due any greater credibility.

ISSUE 5: Whether DCPS violated 34 C.F.R. §300.17 and/or §300.324 and denied the student FAPE by failing to implement the student's IEP from August 29, 2012, through the date the complaint was filed by (a) failing to provide him instruction the first week of school, and/or (b) failing to have a certified teacher to provide specialized instruction and/or (c) by failing to implement ABA properly, including collecting and analyzing data, and/or (d) failing to have the DCPS autism coach available to provide sufficient supervision in the student's classroom.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student IEP was not fully implemented during the first semester of SY 2012-2013 prior to be moved to Ms. Schneider's classroom and the student was thus denied a FAPE.

Courts have held that the aspects of an IEP not followed must be "substantial or significant," and "more than a de minimus failure". The deviation from the IEP's stated requirements must be "material." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). See also *Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. 2011); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d at 76. DCPS failed to implement many aspects of Max's IEP, which together amount to a material denial of FAPE.

The student's IEP calls for the implementation of ABA and maintenance of tracking of data. There is little ABA data from August – January when the student was with his first classroom teacher.²⁴

The student's first semester teacher missed a significant amount of school. DCPS' offer of missed services proves it. The letter says "DCPS acknowledges that there was a period of time

²⁴ FOF # 49

where a special education teacher was not provided at School C.²⁵ The Hearing Officer concludes that this missed services for which DCPS offered to compensate the student is sufficient proof that the services were not provided and that the student was denied a FAPE.

However, as to the claim that the student's teacher first semester was not certified, the Hearing Officer concludes that he does not have jurisdiction to address such a claim.

34 C.F.R. §300.18(f) provides:

Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint under §§300.151 through 300.153 about staff qualifications with the SEA as provided under this part.

Prince George's County Pub. Schs., 53 IDELR 33, (SEA MD 2009)

"A parent may not, for example, file a due process complaint alleging that the student was denied a FAPE because the student did not have a highly qualified teacher." (citing 34 CFR §§300.18(f) and 300.156(e) and Federal Register, Vol. 71, No. 156, August 2006, p. 46562)

Houston Indep. School District v. Bobby R. 200 F3d 341 (5th Circ. 2000)

"To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant portions of the IEP "

Van Dunn ex rel. Van Dunn v. Baker School Dist., 5J 502 F3d 811 (9th Circ. 2007)

A material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP

Petitioners allege DCPS failed to implement the student's IEP during the 2012-2013 SY. Specifically they claim DCPS failed to provide him instruction during the first week of school, to have a certified teacher provide specialized instruction, to properly implement ABA, and to make the Autism coach available to provide supervision over the student's classroom.

The parent testified that the student began school on the last day of the first week of school in August 2012 because of a mistake on DCPS' behalf. Even if DCPS failed to communicate the appropriate information about the student's first day of school, it does not meet the standard of material failure to implement the student's IEP. The student was out of school only the first four days of school. During this time, students become acclimated with their new classroom and teacher. There is no evidence that this student had a difficult time acclimating to his environment or was harmed after missing those days.

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The testimony and evidence indicate that the student's IEP has been appropriately implemented since he was moved to his new classroom. Ms. [REDACTED] is a certified special education teacher and BCBA, trained to implement ABA practices. She is appropriately collecting data and adjusting the student's programming as necessary to ensure he accesses his education. Petitioners have not challenged the implementation of the student's IEP since he was moved to the new classroom in late January.

However, as stated above the evidence clearly indicates that the student was denied special education services during the first semester of SY 2012-2013 and was thus denied a FAPE.

ISSUE 6: Whether DCPS violated 34 C.F.R. 300.322 and denied the student FAPE by failing to issue a proper letter of invitation, including a list of attendees to the February 21, 2013 meeting and/or failing to inform the parents that a DCPS attorney would be present, despite the fact that DCPS was informed the parents' attorney would not be present.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of evidence on this issue.

§300.322(b)(1) Notice to parents of an IEP team meeting must "Indicate the purpose, time, and location of the meeting and who will be in attendance"

Lesesne v. Dist. of Columbia, 447 F.3d 828 (D.C.Cir. 2006)

"An IDEA claim is viable only if those procedural violations affected the student's substantive rights"

C.M. v. Bd. Of Educ., 128 Fed.Appx. 876, 881 (3d Cir. 2005)

"[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable"

M.M. ex rel. D.M. v. Sch. Dist., 303 F.3d 523, 533-34 (4th cir. 2002)

"If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations."

Petitioner presented no evidence about the provision or contents of any letter of invitation ("LOI") inviting the parents to the February 21, 2013 meeting. The parent testified that he attended the February 21, 2013 IEP meeting but did not testify regarding receipt of an LOI for the meeting. He objected to the participation of counsel for DCPS in the meeting.

Even if DCPS failed to comply with the procedural requirement to provide an LOI identifying the participants in the IEP meeting, it does not rise to a substantive violation. The team did make any changes to the IEP. DCPS convened another meeting within a month on April 19, 2013.

ISSUE 7: Whether DCPS violated 34 C.F.R. 300.321 and denied the student FAPE by failing to permit the parent's identified team member from participating in the February 21, 2013 meeting.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence

on this issue.

34 C.F.R. §300.323(c) provides: Each public agency must ensure that--

- (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and
- (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

34 C.F.R. §300.321(a)(6) provides: The IEP team for a child with a disability includes “At the discretion of the parent or the agency other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate”

Petitioner alleges DCPS failed to let its identified team member participate in the February 21, 2013, IEP meeting. A news reporter accompanied the parent to the meeting. There was no evidence that this reporter had “knowledge or special expertise” regarding this child or children with autism that would have been helpful to the IEP team in making decisions about his specific needs as an autism student.

Her exclusion from the meeting was not a violation of the IDEA. But even if the parent has a right to have anyone, including a reporter present at the meeting, failure to let her participate was a procedural violation which does not rise to a substantive violation. The IEP team’s ability to continue the meeting and make decisions about the student’s education was not impacted by her absence.

CONCLUSION

Petitioner’s maintained that they met their burden of proof and that the substantive and procedural violations alleged warrant placement, with transportation, to the School for the remainder of the 2012/13 and the 2013/14 school years. Alternatively, Petitioner’s requested an Order that DCPS refer the student to an appropriate location that includes the provision of ABA and 1:1 instruction.

Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982)

Schools are required to provide a “basic floor opportunity...consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child”

Fort Zumwalt Sch. Dist. V. Clynes, 119 F.3d 607, 612 (8th Cir. 2011)

“IDEA does not require that a school either maximize a student’s potential or provide the best possible education”

Brannum v. Dist. of Columbia, 427 F.3d 7 (D.C.Cir. 2005)

When fashioning an equitable remedy five factors must be considered in determining whether a placement is appropriate:

- Nature and severity of the student's disability
- Student's specialized educational needs
- Link between those needs and services offered by private placement
- Placement's cost
- Extent to which placement represents LRE

Petitioners request that the hearing officer place the student at _____ school to remedy the alleged IDEA violations. Pursuant to *Rowley*, the IDEA requires students be provided a "basic floor opportunity" to access their education. The evidence and testimony indicates this student is being educated in a small classroom environment where he receives 1:1 support throughout the entire day and participates in small group activities with his peers. He also has access to sensory equipment in the classroom and the OT room, which provide the input he needs to maintain focus. The student has made progress this school year and is accessing his education.

Even though Petitioner has proven harm to the student as a result of DCPS' failure to fully implement the student's IEP during the first semester of SY 2012-2013, the Hearing Officer concludes placement at _____ is unwarranted because Petitioners fail to meet the *Brannum* standard for an equitable remedy.

First, there are only two certified special education teachers on staff at _____. Each is responsible for supervising the 8 aides who are not certified but are individually responsible for providing the students' specialized instruction. The aides, not the teachers write the student's service plans and provide the majority of the instruction.

Upon the Hearing Officer's inquiry, _____ costs \$84,000 a year per student. In addition related services which are not included are billed at \$150 per hour. This student's IEP requires 4 hours per month of speech language and 4 hours per month of OT services, much of which is not included in the base cost of the school. The cost of _____ is in the Hearing Officer's opinion exorbitant as compared to the cost of other non-publics for which OSSE sets approved rates.

_____ also does not hold a COA from OSSE and there are currently no students from DCPS enrolled at the school. In addition, requiring a 5 year old student whose communications skills are extremely limited to travel from 1-2 hours to and from _____ on a school bus with staff who are not trained to communicate with him seems problematic.

Appropriate Relief:

IDEA authorized District Courts and Hearing Officers to fashion "appropriate" relief, e.g., 20 U.S.C. § 1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations." *Florence County Sch. Dist. For v. Carter*, 5

A compensatory award fashioned by the Hearing Officer must be the result of a "fact-specific" inquiry that is "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, 401 F.3d at 524. This means that the plaintiff has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record." *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt ("Nesbitt II")*, 583 F. Supp. 2d 169, 172 (D.D.C. 2008) (Facciola, Mag. J.).

Furthermore, the Court must be wary of "mechanical" calculations because a "reasonable calculation" of a compensatory award "must be qualitative, fact-intensive, and above all tailored to the unique needs of the disabled student." Branham, 427 F.3d at 9 (citing Reid, 401 F.3d at 524) (internal quotation marks omitted); but see *Stanton ex rel. K.T. v. Dist. of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (Huvelle, J.) (holding that formulaic calculations are not per se invalid, so long as the evidence provides a sufficient basis for an "individually-tailored assessment") (citing *Brown ex rel. E.M. v. Dist. of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (Bates, J.) (internal quotation marks omitted)).

However, "Reid certainly does not require [a] plaintiff to have a perfect case to be entitled to a compensatory education award"; on the contrary, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid." *Stanton*, 680 F. Supp. 2d at 207.

Although Petitioners' first request for relief is that the student be placed at _____ for the reasons mentioned above the Hearing Officer does not consider the student's placement at _____ is appropriate. Petitioners' alternative request for relief is that DCPS be ordered to provide the student a private placement that meets the students needs. Consequently, the Hearing Officer concludes that the student's prospective placement in a private school for SY 2013-2014 is the appropriate remedy for DCPS' failure to implement the student's IEP during the first half of SY 2012-2013.

ORDER:

1. DCPS shall, within thirty (30) calendar days of the issuance of this Order convene a placement meeting at which the placement team will identify at least three private schools that primarily provide services to students with autism and that use ABA methodology and provide one to one instruction and that hold a valid OSSE COA, and DCPS shall thereafter submit referral packages to agreed upon schools.
2. DCPS shall within (60) calendar days of the issuance of this Order, convene a placement meeting for the student and the placement team shall determine an appropriate private placement for the student for SY 2013-2014 as compensation to the student for the denial of FAPE to the student determined in this HOD.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: May 28, 2013