

**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
April 29, 2013

Parent,¹ on behalf of,
Student,

Petitioner,

Date Issued: April 28, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,

Respondent.

Case No: 2013-0139

Hearing Dates: April 19, 2013

Rooms: 2003

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a seven (7) year old male, who is a 1st grade student attending School A. The student's current individualized education program (IEP) lists Emotional Disturbance (ED) as his primary disability and provides for him to receive twenty (20) hours per week of specialized instruction outside of the general education setting, two hundred forty (240) minutes per month of behavioral support services within the general education environment, fifteen (15) minutes per month of speech-language consultative services and sixty (60) minutes per month of behavioral support consultative services.

On March 13, 2013, 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 update the student's evaluations, failing to conduct a triennial reevaluation, failing to comprehensively evaluate the student, failing to convene a manifestation determination review, failing to make an appropriate manifestation determination, and failing to devise and implement an appropriate IEP for the student. As relief for this alleged denial of FAPE, Petitioner requested independent comprehensive psychological, functional behavioral, speech-language and neurological/neuropsychological assessments; an IEP Team meeting within 10 days of the receipt of the independent assessments to review and revise the student's IEP; individual and group counseling for ninety (90) minutes per week; a dedicated aide; a finding that the student's behavior was a manifestation of his disability;

¹ Personal identification information is provided in Appendix A.

compensatory education; and development and implementation of a behavior intervention plan (BIP).

On March 19, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that: DCPS held a triennial reevaluation for the student on November 2, 2012, and found that the student continued to be eligible for special education and related services based on assessments, reviewed on October 8, 2012, in math, reading and written expression; the November 2, 2012 IEP Team determined that no other assessments were needed; DCPS finalized a functional behavioral assessment (FBA) for the student on November 2, 2012 and incorporated the results in the student's November 2, 2012 IEP; DCPS convened a manifestation determination review on March 1, 2013; the student's behavior was found to be a manifestation of the student's disability and the student's suspension was lifted; the Petitioner attended the manifestation determination review; the student's November 2, 2012 IEP was based on updated academic and behavioral assessments and was reasonably calculated at the time of its development to provide educational benefit to the student; a neuropsychological assessment is not the responsibility of the local educational agency (LEA); and there is a current BIP in place for the student.

On March 28, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement. Given the expedited nature of the case, the 20-school day timeline started to run on March 13, 2013, the day the Complaint was filed, and ends on April 19, 2013. The due process hearing was held on April 19, 2013 therefore the 10-school day timeline for the Hearing Officer Determination (HOD) is May 3, 2013.

On April 4, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on April 5, 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 April 9, 2013, Petitioner filed a Motion to Compel Compliance with Stay Put Protections, alleging that DCPS changed the student's placement from School B to School A as a result of the student's suspension and requesting that the stay put provision be invoked to allow the student to attend School B during the pendency of the Complaint. On April 9, 2013, Respondent filed a Response to Petitioner's Request for Stay Put Protections, arguing that School B was unable to provide adequate behavior support for the student and neither the student's IEP nor the student's educational programming was changed therefore the transfer from School B to School A was a change in location rather than a change in placement.

On April 10, 2013, the Petitioner challenged the relief as outlined in the Prehearing Order. The Petitioner stated that, in the Complaint, the Petitioner also requested the relief of a dedicated aide screening, a social history assessment and that the parent be afforded "a meaningful opportunity in placement determination and opportunity to visit any placement proposals." On April 18, 2013, the Hearing Officer responded that, as relief, the Petitioner was

asking for a dedicated aide therefore questioned why a dedicated aide screening would be necessary; that a social history is a part of a comprehensive psychological, which was included in the listed requested relief; that, by law, the parent is afforded a meaningful opportunity to participate in a placement decisions and therefore Ordering that the parent be afforded a meaningful opportunity to participate in placement decisions would not be an appropriate remedy; placement was not at issue in this case therefore relief regarding placement was not related to any of the issues outlined in the Prehearing Order and would not be appropriate; and the Hearing Officer included all of the relief in the Prehearing Order that was discussed during the Prehearing Conference.

On April 15, 2013, Petitioner filed Disclosures including thirty-seven (37) exhibits and six (6) witnesses.² On April 15, 2013, Respondent filed Disclosures including fourteen (14) exhibits and four (4) witnesses.

The due process hearing commenced at approximately 9:31 a.m. on April 19, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 2-4, 9-13, 15-23, 31 and 34-37 were admitted without objection. Petitioner's Exhibits 1, 24-26 and 30 were not admitted because the proposed exhibits are documents already in the record. Petitioner's Exhibit 5 was not admitted because the exhibit contains counsel's notes and the document is included in the record as Respondent's Exhibit 14. Petitioner's Exhibits 6 and 7 were admitted over Respondent's objections because the exhibits were found to be relevant although seemingly incomplete. Petitioner's Exhibit 8 was not admitted because the exhibit contains counsel's notes, the first page is irrelevant and the following pages are included in other exhibits. Petitioner's Exhibit 14 was admitted over Respondent's objection because the exhibit was found to be relevant. Petitioner's Exhibit 27 was not admitted because the exhibit was found to be irrelevant. Petitioner's Exhibit 28 was admitted over Respondent's objection based on the understanding that Petitioner would provide a copy of the exhibit without counsel's notes. Petitioner's Exhibit 29 was admitted over Respondent's objection because the exhibit was found to be relevant. Petitioner's Exhibit 32 was not admitted because the exhibit was found to be irrelevant. Petitioner's Exhibit 33 was admitted over Respondent's objection, with the note that it would be given very little weight. Respondent's Exhibits 1-14 were admitted without objection.

During the course of the hearing, the Respondent realized that Petitioner's Exhibit 36 was not included in the Disclosure packet sent to the Respondent. Respondent asked that Petitioner's Exhibit 36 not be admitted because it was not disclosed. On April 15, 2013, the Respondent, in writing, objected to Petitioner's Exhibits 1, 5-8, 14, 24-30 and 32-33. At the beginning of the hearing, Respondent's renewed these objections. In Respondent's review of Petitioner's exhibits, it was Respondent's responsibility to note that Petitioner's Exhibit 36 was not included. On neither April 15, 2013 nor the beginning of the hearing did Respondent object to Petitioner's Exhibit 36. Therefore, the Hearing Officer denied Respondent's request not to admit Petitioner's Exhibit 36.

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

Prior to Opening Statements, the Hearing Officer heard from both parties regarding Petitioner's Motion to Compel Compliance with Stay Put Protections. The Hearing Officer concluded that Petitioner's motion was based on the flawed understanding that stay put protections are available when a parent is appealing a decision pursuant to 34 CFR §300.533. The Hearing Officer also explained that it would be inappropriate to return the student to School B during the 10 school-day timeline for which the Hearing Officer has to make a decision for a case involving an appeal of a placement decision under §§300.530(e) and 300.531 or the manifestation determination under §300.530(e). To the extent that the Petitioner was requesting the stay put protections for the IEP Team's decision to transfer the student from School B to School A under a provision other than §§300.530(e) and 300.531, that issue was not outlined in the Prehearing Order as an issue to be determined by the Hearing Officer. Therefore, the Hearing Officer denied Petitioner's Motion to Compel Compliance with Stay Put Protections.

The hearing concluded at approximately 4:57 p.m. on April 19, 2013, 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 failed to complete a triennial reevaluation of the student by February 2013, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS failed to comprehensively evaluate the student in all areas of suspected disability, specifically the student's neurological functioning and the student's speech-language functioning, and if so, whether this failure constitutes a denial of a FAPE?
3. Whether DCPS failed to conduct a manifestation determination after the student was suspended from school for more than 10 days during the 2012-2013 school year, and if so, whether this failure constitutes a denial of a FAPE?
4. Whether DCPS denied the student a FAPE by failing to develop an appropriate individualized education program (IEP) for the student on November 2, 2012, specifically by failing to include an appropriate behavioral intervention plan (BIP), appropriate speech-language goals, appropriate present levels of performance, behavioral supports outside of the general education environment and the services of a dedicated aide?

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. DCPS has not conducted a comprehensive psychological evaluation of the student since 2010. (Stipulated Fact)
3. The student is a bright child whose significant inappropriate behaviors impact his ability to function in the general education environment. (Petitioner's Exhibits 2, 4, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29 and 36; Respondent's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 13 and 14; Advocate's Testimony; Great Aunt's Testimony; Speech-Language Pathologist's Testimony; Case Manager's Testimony)
4. The student's articulation challenges are presented when the student is excited or demonstrating inappropriate behavior. (Great Aunt's Testimony; Speech-Language Pathologist's Testimony; Case Manager's Testimony)
5. When the student is excited or demonstrating inappropriate behavior, the student's rate of speech is very fast, which hinders the student's articulation. (Respondent's Exhibit 12; Great Aunt's Testimony; Speech-Language Pathologist's Testimony)
6. During times when the student is not excited or demonstrating inappropriate behavior, the student has appropriate receptive and expressive language skills and is intelligible. (Petitioner's Exhibits 6 and 10; Respondent's Exhibits 12 and 13; Speech-Language Pathologist's Testimony; Case Manager's Testimony)
7. At the beginning of the 2012-2013 school year, School B provided an aide for the student in an effort to decrease his behavioral outbursts. (Petitioner's Exhibits 18 and 19; Respondent's Exhibit 4; Case Manager's Testimony)
8. The provision of a dedicated aide was not effective in modifying the student's behavior for more than a short period of time. (Petitioner's Exhibits 18 and 19; Respondent's Exhibit 4; Case Manager's Testimony)
9. On September 14, 2012, the student's IEP Team developed a BIP for the student. (Petitioner's Exhibits 7 and 22; Respondent's Exhibit 1)
10. The September 14, 2012 BIP includes intervention strategies from general education and special education teachers to use to address the student's challenges with staying in his assigned area, following directions and appropriately processing difficult/frustrating situations and also lists rewards/reinforcements for appropriate behaviors and consequences for inappropriate behaviors. (Petitioner's Exhibits 6, 7, 18, 19 and 22; Respondent's Exhibits 1 and 4)
11. The student's January 12, 2012 IEP was amended on September 18, 2012 to include the student's BIP. (Petitioner's Exhibit 19; Respondent's Exhibits 2 and 4)
12. The speech-language goals on the student's September 18, 2012 IEP addressed decreasing the student's rate of speech when communicating with peers and adults; producing age-appropriate final consonants; producing the /k/ sound in isolation, syllables and words; producing the /g/ sound in isolation, syllables and words; producing the /s/ sound in isolation, syllables and words; and decreasing rate of

- speech when labeling and describing. (Respondent's Exhibit 2; Speech-Language Pathologist's Testimony)
13. During September-October 2012, DCPS collected informal assessments, and classroom completed by the student. (Respondent's Exhibits 5, 6 and 8; Speech-Language Pathologist's Testimony; Case Manager's Testimony)
 14. In October 2012, the student completed a Fountas & Pinnell assessment. (Respondent's Exhibits 5, 8 and 9; Case Manager's Testimony)
 15. On October 9, 2012, the parent signed a Consent for Initial Evaluation/Reevaluation. (Respondent's Exhibit 3; Case Manager's Testimony)
 16. The October 9, 2012 Consent for Initial Evaluation/Reevaluation specified that DCPS would conduct an FBA. (Respondent's Exhibit 3)
 17. On October 15, 2012, DCPS conducted an FBA of the student. (Respondent's Exhibits 4 and 8)
 18. The October 15, 2012 FBA concluded that the student's September 14, 2012 BIP was ineffective and offered strategies to incorporate into a revised BIP for the student. (Petitioner's Exhibits 18 and 19; Respondent's Exhibit 4)
 19. Beginning on or about October 2012, School B began explaining to the parent that School B was not an appropriate location of services for the student because School B was unable to provide a de-escalation room for the student and was unable to provide the level of behavioral support needed by the student. (Petitioner's Exhibits 6, 7 and 18; Respondent's Exhibit 4; Parent's Testimony; Great Aunt's Testimony; Case Manager's Testimony)
 20. In October 2012, School B sought the assistance of DCPS' Least Restrictive Environment (LRE) Team to identify strategies to benefit the student. (Petitioner's Exhibits 6 and 7; Case Manager's Testimony)
 21. The LRE Team concluded that School B was an inappropriate location of services for the student because School B was unable to provide an appropriate place for the student to deescalate and appropriate behavioral support staff; and that a dedicated aide was not appropriate because that particular strategy had been tried by School B and the student continued to require additional assistance. (Petitioner's Exhibits 6 and 7)
 22. The parent was present for the student's November 2, 2012 IEP Team meeting. (Respondent's Exhibits 8 and 9; Speech-Language Pathologist's Testimony; Case Manager's Testimony)
 23. The Speech-Language Pathologist participated in the student's November 2, 2012 IEP Team meeting. (Petitioner's Exhibit 2; Respondent's Exhibit 9; Speech-Language Pathologist's Testimony)
 24. On November 2, 2012, the student's IEP Team met and reviewed an observation log of the student's adaptive daily living skills from February 2010, student work samples from October 2012, anecdotal notes from the student's teachers, the October 2012 Fountas & Pinnell assessment, the student's sight word log, the student's daily behavior log, running records of the student's reading, an upper case/lower case alphabet assessment conducted in January 2010, the student's writer's notebook entries, shared writing and group practice tasks, observations of the student during writing activities, the student's service related progress notes regarding speech from

- January 2010, discipline data, the student's Social History from December 2009 and the student's October 2012 FBA. (Respondent's Exhibit 8)
25. On November 2, 2012, the student's IEP Team determined that the student continued to be a student with a disability who needs special education and related services and that the student's primary disability of ED impacts his participation in the general education setting in mathematics, reading, written language, communication/speech-language, and emotional/social/behavioral development. (Respondent's Exhibits 8 and 9)
 26. On November 2, 2012, the student's IEP Team reviewed and revised the student's IEP. (Respondent's Exhibit 9)
 27. The speech-language goal in the student's November 2, 2012 IEP addresses maintaining appropriate fluency and articulation when communicating with peers and adults. (Petitioner's Exhibits 2 and 10; Respondent's Exhibits 9, 12 and 13; Speech-Language Pathologist's Testimony)
 28. The student's November 2, 2012 includes speech-language pathology as a consultative service for the student. (Petitioner's Exhibit 2; Respondent's Exhibits 9 and 12; Speech-Language Pathologist's Testimony; Case Manager's Testimony)
 29. The student's November 2, 2012 IEP contains annual behavioral goals for the student and increased the student's time in the smaller, structured environment of the resource classroom. (Petitioner's Exhibit 2; Respondent's Exhibits 2 and 9)
 30. The student's November 2, 2012 IEP prescribes twenty (20) hours per week of specialized instruction outside of the general education setting, two hundred forty (240) minutes per month of behavioral support services within the general education environment, fifteen (15) minutes per month of speech-language consultative services and sixty (60) minutes per month of behavioral support consultative services. (Petitioner's Exhibit 2; Respondent's Exhibit 9)
 31. In December 2012, DCPS' LRE Team provided strategies for the student's IEP Team and suggested School C as an appropriate location of services for the student. (Petitioner's Exhibits 6, 7 and 23; Parent's Testimony; Case Manager's Testimony)
 32. On December 3, 2012, the student's IEP Team revised the student's BIP. (Respondent's Exhibit 10)
 33. The student's IEP Team incorporated the LRE Team's suggested strategies into the revised BIP on December 3, 2012. (Petitioner's Exhibits 6, 7 and 12; Respondent's Exhibit 10)
 34. Following the development and implementation of the student's September 14, 2012 BIP, the student was removed from or refused to participate in the educational environment at least 32 times for a total of approximately 24 hours before the IEP Team revised the student's IEP on December 3, 2012. (Petitioner's Exhibit 29)
 35. In December 2012, School B invited the principal of School C to attend an IEP Team meeting for the student. The School C principal attended a meeting for the student. (Case Manager's Testimony)
 36. In December 2012, the School C principal provided an opportunity for the parent to visit School C. (Great Aunt's Testimony; Case Manager's Testimony)
 37. The parent visited School C on or about December 2012 but rejected the proposed location of services because of the distance of the school from the family's home. (Petitioner's Exhibit 23; Great Aunt's Testimony; Case Manager's Testimony)

38. For the 2012-2013 school year, data in the student's Attendance Summary regarding suspensions and discipline data in the Educator's Handbook regarding student suspensions do not perfectly align. (Petitioner's Exhibit 28; Respondent's Exhibit 14)
39. The student's Attendance Summary indicates that the student was suspended September 17, 2012 – September 19, 2012 (three school days), September 24, 2012 – September 25, 2012 (two school days), December 17, 2012 – December 18, 2012 (two school days) and January 24, 2013 – January 30, 2013 (five school days). (Respondent's Exhibit 14)
40. The Educator's Handbook indicates that the student was suspended September 18, 2012 – September 19, 2012 (two school days) for hitting another student and engaging in throwing artwork at a teacher; two school days, following September 21, 2012 behavior of refusing to sit down, running around the classroom, pulling materials off of the walls, running out of the classroom, attempting to throw a trashcan down the stairs, kicking and punching the teacher and attempting to bite the teacher; two school days in October 2012 for being disruptive, flipping over a table and chairs, kicking a student, kicking the teacher, attempting to bite the teacher and threatening to kill other students; December 17, 2012 – December 18, 2012 (two school days) for fighting with another student; and January 24, 2013 through January 30, 2013 (five school days) for fighting with another student, pouring juice on the hallway floor and throwing a juice container at a student. (Petitioner's Exhibit 28)
41. The student's tenth day of suspension for the 2012-2013 school year occurred during the student's January 24, 2013 five day suspension. (Petitioner's Exhibit 28; Respondent's Exhibit 14; Advocate's Testimony)
42. Following the conclusion of the student's January 24, 2013 five day suspension, the student returned to School B. (Petitioner's Exhibits 3, 4, 9, 10, 11, 13, 14, 15 and 29; Respondent's Exhibits 12, 13 and 14; Parent's Testimony; Great Aunt's Testimony; Case Manager's Testimony)
43. After January 24, 2013, the student was not suspended for any additional days. (Respondent's Exhibit 28; Respondent's Exhibit 14; Parent's Testimony; Case Manager's Testimony)
44. On February 1, 2013, the student was progressing toward all goals, with the exception of his speech-language goal which he had mastered. (Petitioner's Exhibit 10; Respondent's Exhibit 13; Speech-Language Pathologist's Testimony; Case Manager's Testimony)
45. During the 2012-2013 school year, the student received behavioral support services outside of the general education environment. (Petitioner's Exhibits 9, 11, 13, 15; 17; and 29; Case Manager's Testimony)
46. On March 1, 2013, DCPS held a manifestation determination review. (Respondent's Exhibit 11; Parent's Testimony; Great Aunt's Testimony; Case Manager's Testimony)
47. The student's parent and the student's great aunt were present at the March 1, 2013 manifestation determination review. (Respondent's Exhibit 11; Parent's Testimony; Great Aunt's Testimony; Case Manager's Testimony)
48. During the meeting on March 1, 2013, the student's IEP Team determined that the student's behavior was a manifestation of the student's disability. (Respondent's

- Exhibit 11; Parent’s Testimony; Great Aunt’s Testimony; Case Manager’s Testimony)
49. At the March 1, 2013 IEP Team meeting, the student’s IEP Team agreed to change the student’s placement/location of services to School A in order for the student to be in a location which provided an appropriate behavior support program. (Petitioner’s Exhibits 6, 7, 14 and 18; Respondent’s Exhibit 4; Case Manager’s Testimony)
 50. The Parent and the Great Aunt “were not ready” to agree with the IEP Team’s decision without the opportunity to visit School A. (Petitioner’s Exhibit 14; Great Aunt’s Testimony)
 51. The March 1, 2013 Amended IEP includes speech-language pathology as a consultative service for the student. (Petitioner’s Exhibit 4; Speech-Language Pathologist’s Testimony)
 52. During the March 1, 2013 IEP Team meeting, the Great Aunt informed DCPS that the student was dropped on his head a young child. (Great Aunt’s Testimony; Case Manager’s Testimony)
 53. During the March 1, 2013 IEP Team meeting, the parent requested that DCPS conduct a neuropsychological evaluation. (Petitioner’s Exhibit 14; Great Aunt’s Testimony; Case Manager’s Testimony)
 54. The student’s March 1, 2013 IEP Team did not make a determination as to whether or not to conduct the neuropsychological assessment. (Petitioner’s Exhibit 14; Case Manager’s Testimony)
 55. On March 4, 2013, DCPS changed the student’s location of services from School B to School A. (Stipulated Fact)

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

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR §§300.304 through 300.311 if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation. 34 CFR §300.303(a). A reevaluation conducted under paragraph (a) of this section may occur not more than once a year, unless the parent and the public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR §300.303(b).

In the present case, the Petitioner argued that DCPS failed to complete a triennial reevaluation of the student by February 2013 because the student needed "more than an FBA; he needed comprehensive all-around evaluation" to address his behavior. The Respondent argued that the parent signed consent for DCPS to conduct an FBA, as a part of the reevaluation process, in October 2012; the parent did not request any additional formal assessments; DCPS completed the reevaluation process in November 2012; there is no requirement that the reevaluation be conducted at exactly the three-year mark; and the parent attended the meeting where the student was reevaluated.

On October 9, 2012, the parent signed a Consent for Initial Evaluation/Reevaluation. The consent indicated that DCPS would conduct an FBA. On October 15, 2012, DCPS conducted an FBA of the student. During September-October 2012, DCPS collected informal assessments, and work samples completed by the student. In October 2012, the student completed a Fountas & Pinnell assessment.

On November 2, 2012, the student's IEP Team met and reviewed an observation log of the student's adaptive daily living skills from February 2010, student work samples from October 2012, anecdotal notes from the student's teachers, the October 2012 Fountas & Pinnell assessment, the student's sight word log, the student's daily behavior log, running records of the student's reading, an upper case/lower case alphabet assessment conducted in January 2010, the student's writer's notebook entries, shared writing and group practice tasks, observations of the student during writing activities, the student's service related progress notes regarding speech from January 2010, discipline data, the student's Social History from December 2009 and information from the student's October 2012 FBA. Based on these data, the student's IEP Team determined that the student continued to be a student with a disability who needs special education and related services and that the student's primary disability of ED impacts his participation in the general education setting in mathematics, reading, written language,

communication/speech-language, and emotional/social/behavioral development. Further, the student's IEP Team reviewed and revised the student's IEP based on these data. The parent was present for the November 2, 2012 meeting.

Contrary to the Petitioner's assertion that DCPS needed to conduct formalized assessments in order to reevaluation the student, the IDEA and its implementing regulations do not require formalized assessments for this process. 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, an 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).

Although the Petitioner argued that DCPS did not adequately evaluate the student based on his behaviors, DCPS conducted an FBA. 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. 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)).

The Hearing Officer concludes that on November 2, 2012 DCPS used "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" and used "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."

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

Issue #2

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." The Petitioner alleged that DCPS failed to comprehensively evaluate the student in all areas of suspected disability, specifically the student's neurological functioning and the student's speech-language functioning. The Petitioner argued that DCPS should have conducted a neurological evaluation after following the parent's request.

The Great Aunt testified that she made DCPS aware that the student was dropped on his head as a small child during the March 1, 2013 IEP Team meeting. The Case Manager confirmed that the Great Aunt offered this information at the March 1, 2013 IEP Team meeting.

The Prior Written Notice written on March 1, 2013 also notes that the student's family requested a neuropsychological evaluation.

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)). Notwithstanding this standard, the IDEA still requires written parental consent to conduct the reevaluation. *See* 20 U.S.C. § 1414(c)(3).

On March 1, 2013, the student's Great Aunt informed the student's IEP Team that the student had been dropped on his head as a small child. At that meeting, on March 1, 2013, the parent requested a neuropsychological assessment. On March 13, 2013, the parent filed the present Complaint. Only twelve days had elapsed between the parent's request for a neurological evaluation and the filing of the Complaint. Given the negligible amount of time between the parent's request and the filing of the Complaint, the Hearing Officer concludes that the Petitioner's argument that DCPS should have conducted the assessment based on the parent's request is not yet ripe.

First acknowledging the difference between an "evaluation" and an "assessment," the IDEA regulations at 34 CFR §300.503(a)(2) require an LEA to provide written notice when the public agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The Case Manager creditably testified that the student's IEP Team, on March 1, 2013, did not make a determination as to whether or not to conduct the neuropsychological assessment. Given the timing of this Complaint and the issues involved in this individual Complaint, the Hearing Officer concludes that it is reasonable that the student's IEP Team has not made the decision of whether or not to conduct a neuropsychological evaluation based on information shared by the Great Aunt during the student's March 1, 2013 IEP Team meeting.³

Additionally, 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)). Here, again noting the difference between an "evaluation" and an "assessment," as discussed in Issue #1, the Hearing Officer concluded that DCPS conducted a triennial reevaluation of the student on November 2, 2012 based on a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information regarding the student. At that time, based on the data

³ The Hearing Officer suggests that DCPS convene the student's IEP Team as soon as possible to discuss whether or not to conduct the requested assessment and provide the appropriate written notice should the IEP Team determine that the assessment is not necessary to gather relevant functional, developmental and academic information regarding the student.

available to the student's IEP Team, the student was assessed in all areas of his suspected disability. With the exception of the Great Aunt informing the student's March 1, 2013 IEP Team that the student had been dropped on his head as a small child, the student's IEP Team had no reason to suspect that the student had suffered any type of brain injury, trauma or neurological damage which would necessitate a neuropsychological assessment.

The Petitioner also alleged that DCPS failed to comprehensively evaluate the student's speech-language functioning. Throughout the hearing, the Petitioner made multiple references to the student being "exited" from speech-language services. There is no evidence in the record which supports the claim that the student has been exited from speech-language services. The student's November 2, 2012 IEP and March 1, 2013 Amended IEP both include speech-language pathology as a consultative service for the student. In Closing Arguments, the Petitioner argued that a formal speech-language evaluation should have been completed prior to significantly reducing the student's speech-language services.

First, as discussed in Issue #1, DCPS appropriately reevaluated the student on November 2, 2012. The student's IEP Team reviewed past information regarding the student's functioning and current data collected from the student's classroom teachers and services providers. Next, even had a more formalized assessment been necessary, 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").

The student's Great Aunt and Speech-Language Pathologist testified that the student's articulation challenges are presented when the student is excited or demonstrating inappropriate behavior. Specifically, the student's rate of speech is very fast at these times, which hinders the student's articulation. The record indicates that during times when the student is not excited or demonstrating inappropriate behavior, the student has appropriate receptive and expressive language skills and is intelligible. The speech-language goal in the student's November 2, 2012 IEP addresses maintaining appropriate fluency and articulation when communicating with peers and adults, which address the areas of speech-language concern expressed by the student's Great Aunt, the Speech-Language Pathologist and the Advocate. The Parent and the Speech-Language Pathologist participated in the student's November 2, 2012 IEP Team meeting.

The Petitioner presented no evidence of harm the student has suffered by DCPS' failure to conduct a formalized assessment prior to developing the student's November 2, 2012 IEP. The Hearing Officer concludes that, even if a more formalized assessment were necessary, the failure of DCPS to conduct a formalized speech-language assessment 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 the her child or cause a deprivation of educational benefit.

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

Issue #3

The discipline procedures outlined in the IDEA regulations provide that school personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconducts (as long as those removals do not constitute a change in placement under §300.536). After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required in 34 CFR §300.530(d). 34 CFR §300.530(b).

For purposes of removals of a child with a disability from the child's current educational placement under §§300.530 through 300.535, a change of placement occurs if – (1) the removal is for more than 10 consecutive school days; or (2) The child has been subjected to a series of removals that constitute a pattern – (i) Because the series of removals total more than 10 school days in a school year; (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR §300.536(a).

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 CFR §300.530(e)(1). This process is known as a manifestation determination review. *See* 34 CFR §300.530(e).

If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must either conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or if a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and return the child to the placement from which the child was removed, unless the parent and LEA agree to a change of placement as part of the modification of the behavioral intervention plan. 34 CFR §300.530(f). If the LEA, the parent, and the relevant members of the

child's IEP Team determine that the conduct in question was the direct result of the LEA's failure to implement the student's IEP, the LEA must take immediate steps to remedy those deficiencies. 34 CFR §300.530(e)(3).

In the present matter, for the 2012-2013 school year, data in the student's Attendance Summary regarding suspensions and discipline data in the Educator's Handbook regarding student suspensions do not perfectly align. The student's Attendance Summary indicates that the student was suspended September 17, 2012 – September 19, 2012 (three school days), September 24, 2012 – September 25, 2012 (two school days), December 17, 2012 – December 18, 2012 (two school days) and January 24, 2013 – January 30, 2013 (five school days). The Educator's Handbook indicates that the student was suspended September 18, 2012 – September 19, 2012 (two school days) for hitting another student and engaging in throwing artwork at a teacher; two school days, following September 21, 2012 behavior of refusing to sit down, running around the classroom, pulling materials off of the walls, running out of the classroom, attempting to throw a trashcan down the stairs, kicking and punching the teacher and attempting to bite the teacher; two school days in October 2012 for being disruptive, flipping over a table and chairs, kicking a student, kicking the teacher, attempting to bite the teacher and threatening to kill other students; December 17, 2012 – December 18, 2012 (two school days) for fighting with another student; and January 24, 2013 through January 30, 2013 (five school days) for fighting with another student, pouring juice on the hallway floor and throwing a juice container at a student.

Despite the fact that the data contained in the two separate documents do not perfectly align, the Hearing Officer concludes that in January 2013, the student had been subjected to a series of removals which constituted a pattern because the series of removals totaled more than 10 school days during the 2012-2013 school year, the child's behavior was substantially similar to the child's behavior in previous incidents and because of the similar length of each removal. Since the removals constituted a pattern of removals, a change in placement occurred therefore DCPS should have held manifestation determination review within 10 school days of the January 24, 2012 suspension. DCPS did not hold a manifestation determination review within 10 school days of the January 24, 2013 suspension. The student did not receive any additional suspensions after January 24, 2013.

Although DCPS did not conduct a manifestation determination review within 10 school days of the decision to change the child's placement (i.e. subject the student to a series of removals which totaled more than 10 school days) on or about January 24, 2013, DCPS did hold a manifestation determination review on March 1, 2013. The student's parent and the student's great aunt were present at the March 1, 2013 manifestation determination review. During the meeting on March 1, 2013, the student's IEP Team determined that the student's behavior which prompted the "change in placement" was a manifestation of the student's disability.

The issue, as outlined in the Prehearing Order, is, "Whether DCPS failed to conduct a manifestation determination after the student was suspended from school for more than 10 days during the 2012-2013 school year?" As requested relief for the alleged denial of FAPE for failing to conduct a manifestation determination is for the Hearing Officer to find that the student's behavior was a manifestation of his disability. The record, including exhibits and

testimony, is clear that DCPS conducted a manifestation determination on March 1, 2013. Likewise, the record, including the exhibits and testimony, is clear that the student's IEP Team determined that the student's behavior was a manifestation of his disability.

Although DCPS held a manifestation determination review for the student, DCPS did not hold the manifestation determination review within 10 school days of the decision to change the child's placement (i.e. subject the student to a series of removals which totaled more than 10 school days), on or about January 24, 2013. Had DCPS held the manifestation determination within 10 school days, DCPS would have had to either conduct an FBA, unless the LEA had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the child; or if a BIP already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and return the child to the placement from which the child was removed. *See* 34 CFR §300.530(f).

Although DCPS did not hold the manifestation determination review within 10 school days of the decision to change the child's placement (i.e. subject the student to a series of removals which totaled more than 10 school days), the student's IEP Team had conducted an FBA before the behavior that resulted in the change in placement, had recently modified the student's BIP and, following the suspension, returned the student to the placement from which he was removed. Additionally, the student did not receive any additional suspensions after January 24, 2013 and continued to receive the specialized instruction and related services at School B as indicated on his November 2, 2012 IEP. Therefore, the Hearing Officer concludes that DCPS' failure to conduct the manifestation determination within 10 school days of the decision to change the placement of the child (i.e. subject the student to a series of removals which totaled more than 10 school days), was a procedural violation.

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. The parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child was not significantly impeded since she participated in the delayed manifestation determination review and since her request, that the behavior be found to be a manifestation of the student's disability, was accorded during the meeting. Since the student did not receive additional suspensions after the January 24, 2013 suspension, the procedural inadequacy only impeded the child's right to a FAPE or caused a deprivation of educational benefit to the extent that the student should have received special education and related services during the January 24, 2013 removal.

First, a change in placement based on a series of removals that constitute a pattern is considered a change in placement, in part, because the series of removals total *more* than 10 school days in a school year. *See* 34 CFR §300.536(a) (emphasis added). The student's series of removals totaled either 12 or 13 days. There is no requirement that the suspension be stayed pending the outcome of the manifestation determination review. To the extent the DCPS had to provide services for the student during the one or two days of suspension beyond the time period

which defined the pattern of removals, the student would have missed as few as four or as many as eight hours of specialized instruction and as few as zero or as many as sixty minutes of behavioral support services. The student's behavioral support services Service Trackers indicate that the student missed 30 minutes of behavioral support services on January 28, 2013 and that the service provider attempted to "make-up" the time on January 30, 2013 however the student had not yet returned from suspension.

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

The Hearing Officer concludes that DCPS' failure to provide four or eight hours of specialized instruction and 30 or 60 minutes of behavioral support services was a *de minimis* failure. On the student's February 1, 2013 IEP Progress Report, the student was progressing toward all goals, with the exception of his speech-language goal which he had mastered. Therefore, DCPS' failure to timely conduct the student's manifestation determination review did not constitute a denial of a FAPE.

The Petitioner also argued that the IEP Team's decision to transfer the student from School B to School A was a "change in placement." The Hearing Officer notes that Petitioner's claim is predicated on the contention that the IEP Team's decision to transfer the student from School B to School A following the March 1, 2013 IEP Team meeting was the "change in placement" that was prohibited by IDEA regulations at 34 CFR §300.530(f). The Hearing Officer disagrees with the Petitioner's interpretation of "change in placement" as defined in 34 CFR §300.536(a). The "change in placement" which prompted the manifestation determination review was the series of removals which constituted a pattern of removals not the IEP Team's decision to find an appropriate placement/location of services for the student after the student had been returned to the placement from which he was removed as contemplated by 34 CFR §300.530(f).

Beginning on or about October 2012, School B began explaining to the parent that School B was not an appropriate location of services for the student because School B was unable to provide a de-escalation room for the student and was unable to provide the level of behavioral support needed by the student. The student's October 15, 2012 FBA also concluded

that School B was an inappropriate location of services for the student. School B then sought the assistance of DCPS' LRE Team to identify strategies to benefit the student. In December 2012, DCPS' LRE Team provided strategies for the student's IEP Team and suggested School C as an appropriate location of services for the student. The student's IEP Team incorporated the LRE Team's suggested strategies into a revised BIP on December 3, 2012 and invited the principal of School C to attend an IEP Team meeting for the student. The School C principal attended a meeting for the student in December 2012 and provided an opportunity for the parent to visit School C. The parent visited School C on or about December 2012 but rejected the proposed location of services because of the distance of the school from the family's home.

At the March 1, 2013 IEP Team meeting, the student's IEP Team agreed to change the student's placement/location of services to School A in order for the student to be in a location which provided an appropriate behavior support program. The Parent and the Great Aunt "were not ready" to agree with the IEP Team's decision without the opportunity to visit School A.

The Hearing Officer concludes that the student's transfer from School B to School A did not constitute the "change in placement" which prompted the manifestation determination review. For at least five months, DCPS attempted to identify a location of services for the student which would provide the student with a de-escalation room and appropriate behavioral supports which were not available at School B. Although there is no evidence that during the student's March 1, 2013 manifestation determination review the student's IEP Team discussed whether the student's conduct in question was the direct result of the LEA's failure to implement the student's IEP, DCPS took an immediate step to remedy the deficiencies in the student's location of services, namely, the lack of a de-escalation room and appropriate behavioral supports. *See* 34 CFR §300.530(e)(3). Additionally, the Comments to the Federal Regulations note that even when behavior is found to be a manifestation of a child's disability, a change in placement that is appropriate and consistent with the child's needs may be implemented subject to the parent's procedural safeguards regarding prior notice, mediation, due process and pendency. 71 Federal Register 46540:46721 (14 August 2006). The parent has the right to challenge the change in placement/location of services from School B to School A however that issue is not before the Hearing Officer in the present matter.

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

Issues #4

The Petitioner alleged that DCPS failed to develop an appropriate IEP for the student on November 2, 2012, specifically by failing to include an appropriate BIP, appropriate speech-language goals, appropriate present levels of performance, behavioral supports outside of the general education environment and the services of a dedicated aide.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). The program must be implemented in the LRE. 20 U.S.C. § 1412(a)(5); 34 CFR §§300.114(a)(2), 300.116(a)(2). For an IEP to be "reasonably calculated to enable the child to receive educational

benefits,” it must be “likely to produce progress, not regression.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Behavioral Intervention Plan

On September 14, 2012, DCPS developed a BIP for the student. The BIP includes intervention strategies from general education and special education teachers to use to address the student’s challenges with staying in his assigned area, following directions and appropriately processing difficult/frustrating situations. The BIP also lists rewards/reinforcements for appropriate behaviors and consequences for inappropriate behaviors. The student’s January 12, 2012 IEP was amended on September 18, 2012 to include the student’s BIP. The record suggests that the student’s September 14, 2012 BIP was also included in the student’s November 2, 2012 IEP.

Between the development and implementation of the student’s September 14, 2012 BIP and the student’s November 2, 2012 IEP Team meeting, the student was suspended September 18, 2012 – September 19, 2012 (two school days) for hitting another student and engaging in throwing artwork at a teacher; two school days, following September 21, 2012 behavior of refusing to sit down, running around the classroom, pulling materials off of the walls, running out of the classroom, attempting to throw a trashcan down the stairs, kicking and punching the teacher and attempting to bite the teacher; and two school days in October 2012 for being disruptive, flipping over a table and chairs, kicking a student, kicking the teacher, attempting to bite the teacher and threatening to kill other students. Additionally, between the development and implementation of the student’s September 14, 2012 BIP and the student’s November 2, 2012 IEP Team meeting, DCPS conducted an FBA which concluded that the student’s September 14, 2012 BIP was ineffective and offered strategies to incorporate into a revised BIP for the student. The student’s BIP was not revised until December 3, 2012.

Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041. On November 2, 2012, the student’s IEP Team was aware of the fact that the student’s September 14, 2012 BIP was ineffective however the IEP Team did not revise the student’s BIP. Following the development and implementation of the student’s September 14, 2012 BIP, the student continued to demonstrate significant inappropriate and unsafe behaviors, received six days of suspension and was removed from or refused to participate in the educational environment at least 32 times for a total of approximately 24 hours before the IEP Team revised the student’s IEP on December 3, 2012. Therefore, the Hearing Officer concludes that the student’s November 2, 2012 IEP was not reasonably calculated to provide educational benefit to the student by not including an appropriate BIP.

Speech-Language Goal

The Petitioner argued that the speech-language goal on the student’s November 2, 2012 IEP was inappropriate because the student’s previous IEP contained five goals and the goals were not mastered therefore the student’s November 2, 2012 IEP should have contained five goals. While the Petitioner argued that the student’s November 2, 2012 IEP should have

contained the “five” goals in the student’s previous IEP, the student’s September 18, 2012 IEP actually contains eight speech-language goals however two of the goals are duplicative of two other goals.

The speech-language goals on the student’s September 18, 2012 IEP addressed decreasing the student’s rate of speech when communicating with peers and adults; producing age-appropriate final consonants; producing the /k/ sound in isolation, syllables and words; producing the /g/ sound in isolation, syllables and words; producing the /s/ sound in isolation, syllables and words; and decreasing rate of speech when labeling and describing. The speech-language goal in the student’s November 2, 2012 IEP addresses maintaining appropriate fluency and articulation when communicating with peers and adults. The student’s Great Aunt and the Speech-Language Pathologist testified that the student is able to speak fluently but tends to “clutter” his words when he is excited or having difficulty controlling his behavior. The Advocate, although not qualified as a speech-language expert, testified that she noted that the student appeared to “be behind” in fluency and articulation.

The Hearing Officer concludes that the speech-language goal in the student’s November 2, 2012 IEP addresses the areas of speech-language concern expressed by the student’s Great Aunt, the Speech-Language Pathologist and the Advocate. The Petitioner presented no evidence of any other area of speech-language concern for the student. Therefore, DCPS did not deny the student a FAPE by failing to include appropriate speech-language goals on the student’s November 2, 2012 IEP.

Present Levels of Performance

On November 2, 2012, the student’s IEP Team met and reviewed an observation log of the student’s adaptive daily living skills from February 2010, student work samples from October 2012, anecdotal notes from the student’s teachers, the October 2012 Fountas & Pinnell assessment, the student’s sight word log, the student’s daily behavior log, running records of the student’s reading, an upper case/lower case alphabet assessment conducted in January 2010, the student’s writer’s notebook entries, shared writing and group practice tasks, observations of the student during writing activities, the student’s service related progress notes regarding speech from January 2010, discipline data, the student’s Social History from December 2009 and the student’s October 2012 FBA. Based on the data reviewed, the IEP Team updated the present levels of performance on the student’s IEP. The academic present levels of performance on the student’s November 2, 2012 IEP offer significantly more information than the present levels of performance on the student’s September 18, 2012 IEP. On November 2, 2012, present levels of performance were added for the student’s written language and social/emotional/behavioral functioning.

The Petitioner argued that the present levels of performance on the student’s November 2, 2012 IEP were inappropriate because they were based on an outdated psychological assessment and the present levels of performance lack grade level equivalencies, leaving room for interpretation. The Hearing Officer is not persuaded by these arguments. First, the present levels of performance were not based on an outdated psychological assessment. The record clearly indicates that the present levels of performance were based on current data from student work samples, observations, assessments and anecdotal information from the student’s teachers.

Next, there is no requirement that present levels of performance include grade level equivalencies. The Hearing Officer concludes that the present levels of performance on the student's November 2, 2012 IEP provide plain and understandable descriptions of the student's level of functioning, strengths and needs for each area of concern on November 2, 2012 and were appropriate for the student.

Behavioral Supports

The Petitioner alleged that the student's November 2, 2012 IEP was inappropriate because the IEP did not contain behavioral supports outside of the general education environment for the student. The student's November 2, 2012 IEP prescribed 240 minutes per month of behavioral support services within the general education setting and 60 minutes per month of consultative behavioral support services.

The record is clear that the student is a bright child whose significant inappropriate behaviors impact his ability to function in the general education environment. The Case Manager creditably testified that the prescription of behavioral support services within the general education environment on the student's November 2, 2012 IEP was most likely a typographical error and that the student's IEP Team intended for the student to receive behavioral support services outside of the general education environment. The Case Manager testified that the student received behavioral support services outside of the general education environment as intended by the student's November 2, 2012 IEP Team. This testimony was not refuted. The Case Manager's testimony is also supported by the Service Trackers included within the record which indicate that the student was receiving one-on-one and small group counseling outside of the general education environment.

The Hearing Officer agrees with the Petitioner's contention that the student required behavioral support services outside of the general education environment on his November 2, 2012 IEP. However, the Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to include behavioral support services outside of the general education environment on the student's November 2, 2012 IEP because DCPS provided the prescribed behavioral support services outside of the general education environment, as intended by the student's IEP Team, rather than behavioral support services within the general education environment as indicated on the student's IEP.⁴

Dedicated Aide

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)).

⁴ The Hearing Officer suggests that DCPS convene an IEP Team meeting for the student, or follow appropriate procedures to amend the student's IEP, as soon as possible to correct this typographical error.

The Petitioner alleged that the student's November 2, 2012 IEP was inappropriate because it did not provide for a dedicated aide for the student. Prior to the development of the student's November 2, 2012 IEP, DCPS conducted an FBA on October 15, 2012. The FBA acknowledged that DCPS had provided an aide for the student in an effort to decrease his behavioral outbursts however this strategy was not effective in modifying the student's behavior for more than a short period of time.

The student's November 2, 2012 IEP Team reviewed data from the October 15, 2012 FBA, the student's discipline data and data obtained from behavior observations. The team also discussed the outcome of the implementation of the student's BIP and behavioral support services. Additionally, the IEP Team discussed the results of an FBA conducted in 2011 which noted that the student functioned well one-on-one in a structured setting. The student's IEP Team developed annual behavioral goals for the student, prescribed behavioral support services outside⁵ of the general education environment and through consultation for the student and increased the student's time in the smaller, structured environment of the resource classroom.

Additionally, in October 2012, School B sought the assistance of DCPS' LRE Team to identify strategies to address the student's behavior and to offer an opinion as to whether the student was in need of a more restrictive environment. DCPS' LRE Team concluded that the location of services was inappropriate for the student because School B was unable to provide an appropriate place for the student to deescalate and appropriate behavioral support staff; and that a dedicated aide was not appropriate because that particular strategy had been tried by School B and the student continued to require additional assistance.

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an "education ... designed according to the parent's desires") (citation omitted). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. The Hearing Officer concludes that DCPS' failure to include a dedicated aide in the student's November 2, 2012 IEP did not render the IEP inappropriate. The Advocate testified that a dedicated aide "may" have helped the student and the Great Aunt testified that she "would think he would benefit" from a dedicated aide. The Petitioner presented no other evidence which supports the contention that a dedicated aide was necessary for the student. In fact, the record indicates that School B tried the strategy of a dedicated aide for the student and the strategy was ineffective.

The Petitioner met its burden with respect to Issue #4, specifically in that DCPS denied the student a FAPE by failing to include an appropriate BIP in the student's November 2, 2012 IEP.

⁵ As explained, while the student's November 2, 2012 IEP prescribed behavioral support services within the general education environment, the Hearing Officer concludes that this is a typographical error and the student's IEP Team intended to prescribe behavioral support services outside of the general education environment and provided the behavioral support services outside of the general education environment.

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 November 2, 2012, the date that the student’s IEP Team failed to develop an appropriate BIP for the student. The end point of the denial of FAPE is December 3, 2012, the date an updated BIP was developed for the student.

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 November 2, 2012 – December 3, 2012, the student was suspended six days and was removed from or refused to participate in the educational environment at least 32 times for a total of approximately 24 hours. During the six days of suspension, the student did not receive four hours per day of specialized instruction and may have missed up to one hour of behavioral support services.

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. Since the student’s behavior, rather than the student’s academic functioning, impacts his educational performance, 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 ten hours to compensate for the specialized instruction missed by the student and 12 hours of behavior support services to assist the student in learning strategies to follow directions and appropriately process difficult/frustrating situations.

ORDER

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

1. Issues #1, #2 and #3 are **dismissed** with prejudice.
2. That DCPS provide a total of 10 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 August 26, 2013.
3. That DCPS provide a total of 12 hours of independent behavioral support services, at a rate not to exceed OSSE's established rate for this service, to be completed by November 1, 2013.
4. 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: April 28, 2013


Hearing Officer