

District of Columbia
 Office of the State Superintendent of Education
 Office of Review and Compliance
 Student Hearing Office
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OSSE
 Student Hearing Office
 July 05, 2013

Confidential

Parent on behalf of the Student ¹ , Petitioners, v. District of Columbia Public Schools (“DCPS”) And Cesar Chavez Public Charter School (“School A”) Respondent. Case #	HEARING OFFICER’S DETERMINATION Hearing Date: June 19, 2013 <u>Representatives:</u> Counsel for Petitioner: Shaw Ullman, Esq. et al ² University Legal Services 220 I Street, NE Washington, DC. 20002 Counsel for DCPS: Tanya Joan Chor, Esq. Assistant Attorney General 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 June 19, 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 was in _____ grade during school year (“SY”) 2012-2013 at a District of Columbia Public Charter School (“School A”) where he has attended since September 2012 until School A suspended him on April 11, 2013, and announced its intention to expel him. DCPS serves as the Local Educational Agency (“LEA”) for School A for IDEA matters.

The student resides with his parent in the District of Columbia and has been determined to be a child with a disability under IDEA with a disability classification of emotional disability (“ED”).

The student has been diagnosed with anxiety disorder NOS (not otherwise specified), depression NOS, attention deficit hyperactivity disorder (“ADHD”), and oppositional defiant disorder (ODD). According to the student’s April 2012 Woodcock-Johnson III assessment, his academic skills are within the high average range and his broad mathematic scores are superior.

The student’s individualized educational program (“IEP”) when the complaint was filed prescribed 3 hours per day of specialized instruction outside general education and 2 hours per month of behavioral support services outside general education. The student’s least restrictive environment (“LRE”) is an inclusion setting where he spends most of the school day in general education with non-disabled peers.

From the time the student began attending School A at the start of SY 2012-2013 the student displayed behavioral difficulties including fighting and physical aggression toward peers that have resulted in disciplinary action by School A including suspensions.

On February 15, 2013, Petitioner formally requested that School A conduct a functional behavior assessment (“FBA”) and create a behavior intervention plan (“BIP”). School A indicated that a FBA and BIP had already been completed in January 2013.

On April 11, 2013, the student engaged in a physical assault on another student in the hallway of the school. Following this incident School A sent the student’s parent a notice of the school’s intent to expel the student for the April 11, 2013, incident.

On April 17, 2013, School A convened a manifestation determination review (“MDR”) regarding the April 11, 2013, incident. The student’s parent participated in the meeting along with her legal representatives. The team determined the student’s behavior in assaulting the student on

April 11, 2013, was not a manifestation of his disability. Following the April 17, 2013, MDR meeting School A moved forward with expelling the student.

On April 19, 2013, Petitioner filed the current complaint alleging, inter alia, that the MDR determination was inappropriate, that DCPS and School A did not timely conduct a FBA and BIP nor consult with the student's IEP team in developing the BIP and inappropriately used disciplinary actions including suspensions to address the student's in school behaviors rather than develop and implement appropriate behavior interventions.

Petitioner seeks as relief: An order from the Hearing Officer directing DCPS to fund compensatory education in the form of independent tutoring and psychological consulting services by an independent behavior specialist to assist respondents in developing and implementing the student's BIP and providing counseling/coaching to the student and training to the parent and School A staff.

DCPS counsel filed a response to the complaint on April 29, 2013. DCPS denied all alleged denials of a FAPE to the student. DCPS asserted, inter alia, that the April 17, 2013, MDR determination was proper and School A decided that it was proceeding with the student's expulsion from School A.

The resolution meeting was held May 9, 2013. The resolution meeting was not successful in resolving the disputes. The parties did not agree to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on May 20, 2013, and ends, and the Hearing Officer's Determination ("HOD") is due on July 3, 2013.

On May 16, 2013, the Hearing Officer convened the hearing on the issues raised in the complaint that were subject to expedited hearing. On May 31, 2013, the Hearing Officer issued a HOD in the expedited hearing concluding DCPS/School A had denied the student a FAPE.³

On May 20, 2013, the Hearing Officer convened a pre-hearing conference on the remaining issues alleged in the complaint. On May 29, 2013, the Hearing Officer issued a pre-hearing conference order in which, among other things, the issues to be adjudicated in the second hearing were certified.

On June 10, 2013, Petitioner's counsel filed a motion for a decision on the remaining issues in this case based upon the Hearing Officer's findings and conclusion that the student had been denied a FAPE and requesting that the second hearing be limited to determining the appropriate remedy.

³ The Hearing Officer ordered the following as remedy in the HOD:

1. The April 17, 2013, MDR determination regarding the student's April 11, 2013, behavior is hereby reversed and DCPS/School A shall, within five (5) school days of issuance of this Order return the student to School A.
2. DCPS/School A shall within fifteen (15) school days of the issuance of this Order provide and fund an independent FBA at the OSSE approved rate and within fifteen (15) school days of its receipt of the independent FBA convene an IEP meeting for the student and develop an updated BIP for the student.

On June 13, 2013, DCPS counsel filed an opposition to Petitioner's motion. And on June 13, 2013, Petitioner submitted a written reply to Respondent's opposition.

The Hearing Officer heard oral argument on the motion and opposition at the outset of the June 19, 2013, hearing and as a result issued an oral ruling on the motion. Petitioner did not agree to withdraw the remaining issues in the complaint and solely adjudicate a remedy based upon findings and conclusions made in the first HOD. Petitioner sought findings and conclusions on the remaining issues. Because there had been no determination of all facts relating to the remaining issues and no stipulation by the parties as to facts and/or issues that remained to be adjudicated, the Hearing Officer ruled that Petitioner would have to move forward and present evidence and meet the burden of persuasion on the remaining issues. Thus, the Hearing Officer denied Petitioner's motion and the hearing on the remaining issues proceeded.

THE ISSUES ADJUDICATED:

1. Whether DCPS/School A denied the student a free and appropriate public education ("FAPE") by failing to provide the student specialized instruction and/or related services prescribed by his IEP during the periods of in-school and out of school suspensions between the October 2, 2012, MDR and the date the due process complaint was filed.
2. Whether DCPS/School A denied the student a FAPE by failing to have FBA and BIP in place for the student within a reasonable time following the October 2, 2012, MDR.
3. Whether DCPS/School A violated 5-E DCMR § 3003.6(a); and/or 20 U.S.C. § 1414(d)(1)(B) by failing to involve the student's parent in IEP team determinations regarding the student's FBA and BIP when they were developed in January 2013.
4. Whether DCPS/School A violated 20 U.S.C. § 1414(c)(1)(B) and/or 34 C.F.R. § 300.305(a) and denied the student a FAPE by inappropriately relying on punitive measures to address the student's behavioral issues and failing to adequately consider whether amendments to the student's IEP, and/or FBA and/or BIP were necessary to enable the student to meet his IEP goals.
5. Whether DCPS/School A violated 5-E DCMR § 3002.3(e) &/or (f) and denied the student a FAPE by failing to review the student's IEP in an effort to assist the student achieve his IEP goals, objectives or benchmarks.
6. Whether DCPS/School A denied the student a FAPE by failing to provide the student as related services the following:
 - Direct behavioral interventions;
 - Teacher and staff coaching and training;
 - Mobilizing community resources;
 - Coordinating with non-school providers; and
 - Additional supports and services to be recommended in the IEE report

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-74 and Respondent's Exhibit 1-89) that were all admitted into the record and are listed in Appendix A. The witnesses are listed in Appendix B.

FINDINGS OF FACT:⁴

1. The student is age _____ in _____ grade at a District of Columbia Public Charter School, School A, where he has attended since September 2012 until School A suspended him on April 11, 2013, and announced its intention to expel him. (Petitioner's Exhibit 55)
2. The student resides with his parent in the District of Columbia and has been determined to be a child with a disability under IDEA with a disability classification of ED. (Respondent's Exhibit 27-2)
3. The student has been diagnosed with anxiety disorder NOS, depression NOS, ADHD and ODD. (Petitioner's Exhibit 2-2)
4. According to the student's April 2012 Woodcock-Johnson III assessment, his academic skills are within the high average range and his broad mathematic scores are superior. (Respondent's Exhibit 23-2)
5. The student's IEP when the complaint was filed prescribed 3 hours per day of specialized instruction outside general education and 2 hours per month of behavioral support services outside general education. (Petitioner's Exhibit 23-6)
6. The student's LRE is an inclusion setting where he spends most of the school day in general education with non-disabled peers. (Petitioner's Exhibit 23-7)
7. Since he began attending School A at the start of SY 2012-2013, the student has displayed behavioral difficulties including fighting and physical aggression toward peers that have resulted in disciplinary action by School A including suspension from school. (Parent's testimony, Petitioner's Exhibits 27-1, 28-1, 29-1)
8. On October 4, 2012, School A held a MDR to consider whether the student's behavior of fighting on September 26, 2012, was a manifestation of his disability. The MDR team determined the behavior was a manifestation of his disability and was not the result of School A's failure to implement the student's IEP. (Petitioner's Exhibit 30-1)
9. The student was suspended again on December 4, 2012, for "arranging for others to

⁴ 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 by more than one party separately the Hearing Officer may only cite one party's exhibit.

assault a student.” A MDR was held for that incident and the team determined the behavior was a manifestation of his disability and was not the result of School A’s failure to implement the student’s IEP. (Petitioner’s Exhibits 35-1, 36-1)

10. On February 21, 2013, School A for the first time provided the parent, through counsel, with an FBA and a BIP dated January 7, 2013. (Petitioner’s Exhibit 44-1)
11. The student continued to experience behavior problems following the creation of the BIP, and yet no changes were made to the BIP. (Petitioner’s Exhibits 45; 47; 51; 52; 55)
12. On March 21, 2013, School A held another MDR for an incident that occurred on March 20, 2013 for the student’s failure to comply with school rules and staff instructions. The student’s behavior was determined by the team to be a manifestation of his disability and not the result of School A’s failure to implement the student’s IEP. (Petitioner’s Exhibit 52-1)
13. On April 11, 2013, the student engaged in a physical assault on another student in the hallway of the school. Following this incident School A sent the student’s parent a notice of the school’s intent to expel the student for this April 11, 2013, incident. (Petitioner’s Exhibit 55)
14. The student wrote an account of the incident in which he described being derided by the other student and becoming angry and grabbing the student and throwing him to the floor. The other student then got up and walked away. (Petitioner’s Exhibit 66)
15. On April 17, 2013, School A convened a MDR regarding the April 11, 2013, incident. The student’s parent participated in the meeting along with her legal representatives. The team determined the student’s behavior in assaulting the student on April 11, 2013, was not a manifestation of his disability. In addition to the parent, the participants included the student, the student’s regular education teacher, his special education teacher, two DCPS psychologists, the school social worker, the parent’s counsel, an independent psychologist participated by telephone, and the school’s vice principal for discipline. The team members were split on whether the student’s behavior was a manifestation of this disability and the decision came down to the vice principal making the final decision that the student’s behavior was not a manifestation of his disability. (May 31, 2013, HOD, Petitioner’s Exhibits 58-2, 59-1)
16. An in-school video monitor captured video of the incident showing the student grabbing and throwing the other student and the actions of a number of students in the hallway in the moments prior and after the incident occurred. The video was available to and viewed by the MDR team when it made its determination. (May 31, 2013, HOD, Respondent’s Exhibit 55)
17. On the afternoon of April 11, 2013, the student felt teased by a student with whom he had had conflict earlier that day. Unable to control his emotions, the student "grabbed

[the other student and] threw him" against a wall. (May 31, 2013, HOD, Petitioner's Exhibits 66; Respondent's Exhibit 55)

18. At the meeting the parent presented the team with a letter from the student's psychiatrist explaining that as a result of recent changes to his medication. The letter stated that student "may continue to have difficulties managing stress, teasing by peers, and other triggers for behavioral problems." (Petitioner's Exhibit 57).
19. Following the April 17, 2013, MDR meeting School A moved forward with expelling the student. (Respondent's Exhibit 56)
20. An independent psychologist engaged by the student's parent interviewed the student and reviewed his records gave the following assessment of the student: the student's has a hostility bias, which means that he misperceives innocent actions as hostile and reacts according to that misperception. The student also has mood lability, which means he can go from being calm to upset in a short period of time. The student's disability manifests itself, inter alia, through peer aggression and hostility to authority figures. (May 31, 2013, HOD, Petitioner's Exhibit 2)
21. There were repeated incidents in the last few years of the student's aggression towards others. While the incidents vary from verbal to physical, from peers to adults, one constant is [the student's] behavior is erratic... "mood and behavior can vary greatly from day to day." The psychologist pointed out that data collection is critical to ensuring that the student's current IEP interventions are appropriate and effective. In his review of the student's record he saw no record that the School A staff documented and monitored the student's behaviors to determine what interventions were effective or that School A was coordinating with the student's mother or the student's non-school providers to make sure behavior intervention were consistent and tracked inside and outside of school. (Witness 1's testimony, Petitioner's Exhibit 2-1))
22. The psychologist conducted observations of the student at School A and concluded that the student does better in a classroom when there are clear expectations, routines and structure. The student responds poorly and even becomes defiant when a classroom is unfocused and/or chaotic. As a result the psychologist recommended that the student be in a classroom that has a consistent behavioral system. He recommended consultation be provided to the student and School A staff by a skilled behaviorist working with and coaching the student before, during and after his more challenging classes. (Witness 1's testimony, Petitioner's Exhibit 2-3, 2-5)
23. The psychologist concluded that the one to one talk therapy that is currently in the student's IEP is unlikely to be an effective intervention for the student. Instead of being pulled out of the classroom for one on one counseling the psychologist recommended the student's behavior interventions be incorporated into his everyday life and that all adults who work with the student be instructed on how to implement and monitor the behavior intervention for the student. (Witness 1's testimony, Petitioner's Exhibit 2-3, 2-5)

24. Having a behavioral consultant visit School A for two to three hours each week during the Fall semester of SY 2013-2014 to consult with teachers, staff and the student is an appropriate course of action to make immediate impact and improvement in the student's in-school behavior. (Witness 1's testimony, Petitioner's Exhibit 73-5)
25. The student has had behavior difficulties that have manifested at school for a number of years and at his previous school prior to him attending School A. However, the behavioral supports the student is getting at School A have been far less effective than those used at his previous DCPS school. At School A the staff has had difficulty being able to deescalate the student's behaviors before they become more severe. The student's previous school involved the parent more in developing strategies to address the student's behaviors. (Parent's testimony)
26. As he did during previous school years the student has struggled with peer conflict at School A. In response to the student's in school behaviors, School A staff continued to discipline the student for his behaviors rather than conduct the FBA and create the BIP and repeatedly called the student's parent to come to school to handle the student's behaviors at school. (May 31, 2013, HOD, Petitioner's Exhibits 32-1; 35-1; 38-1, 13-7; 17-2, 26-2, 5, 10, 13, 15; 27; 28; 29; 31; 32; 38; 45)
27. The student received no specialized instruction on days he was suspended from School A. He missed some specialized instruction on days he was required to arrive to class late after a re-entry conference; and he missed some afternoon instruction particularly in math, when he was informally and formally sent home early for behavior. School A provides academic instruction on Mondays, Wednesdays, and Fridays for 6 hours 20 minutes between 8:23 am and 3:30 pm (A Days") School A provide academic instruction on Tuesdays and Thursdays for 5 hours 20 minutes between 8:23 am and 3:13 p.m. (B Days. The student missed all academic instruction, including specialized instruction for 45 days that he was suspended, totaling at least 240 hours. The student missed at least 12 counseling sessions including two 60-minute sessions in the May after he was suspended from School A and has not returned. (Petitioner's Exhibits 68-19, 74-1, 74-2, 74-3, 74-4, 74-5, 74-6, 74-7)
28. Because the student has missed so many days of school due to suspensions he has suffered academically and fallen behind and is failing math which is usually his best subject. He has missed approximately 45 school days due to suspensions at school A during SY 2012-2013. (Parent's testimony)
29. After the student was suspended from School A he attended his neighborhood DCPS school on an interim basis and did not return to School A by the end of SY 2012-2013 despite the May 31, 2013, HOD ordering him back. His parent felt there were only a few weeks of school left and she preferred to seek and have in place the appropriate behavioral supports for the student that might be obtained in the second hearing before he returned to School A. The student has been in general education classes at his interim placement. Because of all the school days and instruction the student missed during the

time he was wrongly suspended from School A the parent believes the student would benefit from independent tutoring to assist him meeting his sixth grade requirements and to be ready for seventh grade at the start of SY 2013-2014. Based upon his academic performance in the past the student would need three hours on independent tutoring per week for three months, for a total of 36 hours of independent tutoring. (Parent's testimony)

30. DCPS provides behavior support services with behavior specialists for students with behavioral difficulties. DCPS can implement an independent FBA and can conduct classroom observations and can provide staff to provide intervention services to students in non-public and/or charter schools. DCPS can provide assistance on intervention strategies to parents and school staff. DCPS can fund independent tutoring and routinely authorizes these services to be provided to students or can include tutoring services in a student's IEP to be provided by DCPS personnel. (Witness 2'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. ⁵ *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

⁵ 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.

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 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/School A denied the student a free and appropriate public education (“FAPE”) by failing to provide the student specialized instruction and/or related services prescribed by his IEP during the periods of in-school and out of school suspensions between the October 2, 2012, MDR and the date the due process complaint was filed.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student missed all academic instruction, including specialized instruction for 45 days that he was suspended, totaling at least 240 hours.

The evidence demonstrates based upon the parent’s credible testimony and the documentation Petitioner presented in the record that during the period of the student’s suspensions during SY 2012-2013 the student missed 240 hours of instruction during the time he was suspended.⁶ DCPS presented no witness who refuted this testimony or the documentation that Petitioner presented on the student’s missed services. Consequently, the Hearing Officer concludes that Petitioner sustained the burden of proof on this issue.

ISSUE 2: Whether DCPS/School A denied the student a FAPE by failing to have FBA and BIP in place for the student within a reasonable time following the October 2, 2012, MDR.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that no FBA or BIP were developed immediately following the October 4, 2013, MDR.

The evidence demonstrates that the first time the student was suspended and a MDR was held was October 4, 2012. It was determined at the MDR that the student’s behavior was a manifestation of his disability. The evidence also demonstrates that School A did not conduct a FBA or develop a BIP for the student until January 2013. The evidence indicates that the student was suspended again in December 2012 prior to the BIP being developed.⁷ Although this evidence does not make it certain, it is reasonable to conclude from the evidence that had a BIP been in place the student may not have engaged in the behavior that led to the December 2012 incident. DCPS presented no witness that refuted the parent’s testimony about the resulting harm to the student from his repeated suspensions or refuted the documentation that indicated that the FBA and BIP were not promptly developed. Consequently, the Hearing

⁶ FOF #s 27, 28

⁷ FOF #s 8, 9, 10

Officer concludes that the failure to conduct a FBA and develop a BIP promptly after the student's October MDR violated 34 C.F.R. 300.530(f)(1)⁸ and denied the student a FAPE.

ISSUE 3: Whether DCPS/School A violated 5-E DCMR § 3003.6(a)⁹; and/or 20 U.S.C. § 1414(d)(1)(B) by failing to involve the student's parent in IEP team determinations regarding the student's FBA and BIP when they were developed in January 2013.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student's BIP that School A developed was not developed by an IEP team that included the student's parent.

The evidence demonstrates that on December 4, 2012, a MDR was held at which it was determined the student's behavior was a manifestation of his disability. It appears from the evidence that School A conducted a FBA and a BIP but not immediately following that MDR and evidence demonstrates¹⁰ based on the previous findings that the parent did not participate in the development of the FBA or BIP as is required. DCPS presented no evidence to refute this. It appears that the student continued to engage in behaviors following the development of that FBA/BIP that resulted in his suspensions and this is sufficient evidence of harm to the student and a violation of substantive rights that rise to the level of a denial of a FAPE.

ISSUE 4: Whether DCPS/School A violated 20 U.S.C. § 1414(c)(1)(B) and/or 34 C.F.R. § 300.305(a) and denied the student a FAPE by inappropriately relying on punitive measures to address the student's behavioral issues and failing to adequately consider whether amendments to the student's IEP, and/or FBA and/or BIP were necessary to enable the student to meet his IEP goals.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that School A inappropriately relied upon discipline to address the student's behaviors.

⁸ 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--

(1) Either--

(i) 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

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

⁹ 3003.6 Parental Participation

(a) The LEA shall take the steps set out in subsections (b) through (h) of this section to ensure that one or both of the parents of the child with a disability are present or are afforded an opportunity to attend and participate at all meetings of the IEP team.

¹⁰ FOF #s10, 11, May 31, 2013, HOD

The evidence, based on the parent's testimony,¹¹ demonstrates that School A repeatedly suspended the student for his behaviors and was slow to conduct an FBA and develop a BIP and as a result the student was harmed by missing a significant amount of school and instruction. DCPS presented no evidence in refutation. Consequently, the Hearing Officer concludes that the Petitioner sustained the burden of proof on this issue.

ISSUE 5: Whether DCPS/Chavez violated 5-E DCMR § 3002.3(e) &/or (f) and denied the student a FAPE by failing to review the student's IEP in an effort to assist the student achieve his IEP goals, objectives or benchmarks.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

Although there was unrefuted testimony by Witness 1 and the parent as to School A's failure to adequately address the student's behavioral issues, there was no specific evidence from which the Hearing Officer could conclude that School A never reviewed the student's IEP in an effort to assist the student achieve any of his IEP goals. Consequently, the Hearing Officer concludes that the Petitioner did not sustain the burden of proof on this issue.

ISSUE 6: Whether DCPS/Chavez denied the student a FAPE by failing to provide the student with related services the following:

- Direct behavioral interventions;
- Teacher and staff coaching and training;
- Mobilizing community resources;
- Coordinating with non-school providers; and
- Additional supports and services to be recommended in the IEE report

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

Petitioner presented a credible expert who gave recommendations on interventions for this student and techniques that can be used by School A that have proven effective with other students and/or generally used in his experience to address the types of behaviors this student demonstrates. However, there is a huge difference between a stated recommendation of services and techniques and the presentation of sufficient evidence and proof that this student's IEP, without the recommended services, is inappropriate.¹² Consequently, the Hearing Officer concludes that because these services were not included in the services provided to this student under his IEP, there was no resulting denial of FAPE.

¹¹ FOF # 25

¹² 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. West*, 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").

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner proposed that in addition to the relief already provided in the May 31, 2013, HOD, that the Hearing Officer order Respondents to fund an independent consultant chosen to implement the findings and recommendations of the independent FBA, and provide psychological services to support and enhance the student's behavioral interventions in the home and at school.

Petitioner also requested compensatory education to assist the student with catching up to his peers following the substantial amount of class time he missed as a result of Respondents' use of discipline, rather than behavioral interventions.

The evidence demonstrates that student would benefit from tutoring to assist him in making up the missed instruction as a result of inappropriate removals from School A during SY 2012-2013. The Hearing Officer finds reasonable, based on the parent's testimony¹³, that 3 hours of tutoring for three months is sufficient to compensate for this loss and put the student in the place he would have been had not missed instruction and services. Consequently, the Hearing Officer directs Respondents to provide the student in the Order below the requested independent tutoring.

In addition, based on the recommendation of Witness 1, the Hearing Officer also concludes from the evidence presented¹⁴ that the student would be adequately compensated (for counseling services the student missed during the times he was inappropriately removed from school during SY 2012-2013 and as a result of him not being promptly provided a FBA and BIP to effectively address his behavioral issues) by independent counseling that can be used by Petitioner to assist in student counseling/coaching, parental training and/or consultation with the student's school staff.

ORDER:

DCPS/School A shall within thirty (30) calendar days of the issuance of this Order provide and fund the following services as compensatory education for the denials of FAPE to the student

¹³ FOF #29

¹⁴ FOF #s 23, 24

determined in this HOD: 36 hours of independent tutoring and 36 hours of independent counseling at the DCPS/OSSE prescribed rates.

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: July 3, 2013