

On April 3, 2013, a Prehearing Conference (“PHC”) was held to discuss and clarify the issues and requested relief, and a Prehearing Order (“PHO”) was issued on April 9, 2013. At the PHC, the parties agreed to schedule the due process hearing for April 23, 2013, and if necessary, April 25, 2013. On April 17, 2013, the parties filed their five-day disclosures, as required.²

The Due Process Hearing was held in Hearing Room 2004 on April 23, 2013. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-55.

Respondent’s Exhibits: R-1 through R-4.

In addition, the following Witnesses testified on behalf of each party:

Petitioner’s Witnesses: (1) Parent-Petitioner; (2) Ms. Lisa DeBeauville (Educational Advocate); and (3) Dr. Sharon Lennon, Newlan Educational Services, LLC (Comp Ed Expert).³

Respondent’s Witnesses: DCPS presented no witnesses. .

The parties presented oral closing statements on the record at the conclusion of the April 23, 2013 hearing session.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer’s Determination (“HOD”) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513,

² April 16, 2013, was a D.C. Government holiday, and the parties agreed that four (4) business days prior to the hearing would be sufficient notice in this case. *See Prehearing Order*, ¶ 4.

³ Without objection, Dr. Lennon was qualified as an expert in compensatory education services in special education. Petitioner also proffered Ms. DeBeauville as an expert in “special education programming.” DCPS offered to stipulate to a more limited scope of expertise, but Petitioner declined. The Hearing Officer then exercised his discretion to decide that the witness was not qualified to provide any relevant expert opinion that would assist the trier of fact in this case, for the reasons stated on the record. *See Appropriate Standard Practices*, § 9. B.; *Fed. R. Civ. P. 702*.

and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* (“SOP”). The HOD deadline is May 8, 2013.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination at hearing were:

- (1) **Failure to Provide Appropriate IEP (2011-12 School Year)** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) for the Student while attending Sousa Middle School from **December 2011 to June 2012**, in that the IEPs dated Dec. 2011 and April 2012 failed to **address his significant emotional needs and/or provide behavior management supports**?

> As part of this claim, Petitioner also alleges that DCPS should have conducted a **functional behavioral assessment (“FBA”)** and developed a **behavior intervention plan (“BIP”)** to update the IEPs as appropriate in light of negative impacts in the school setting.

- (2) **Failure to Provide Appropriate IEP (2012-13 School Year)** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) for the Student while attending Anacostia SHS from **August 2012 to present**, in that the IEPs dated April 2012 and March 2013 failed to **address his significant emotional needs and/or provide behavior management supports**?

> Similarly, as part of this claim, Petitioner alleges that DCPS should have conducted an FBA and developed a BIP to update the IEP as appropriate in light of negative impacts in the school setting.

- (3) **Failure to Provide Appropriate Placement** — Has DCPS denied the Student a FAPE by failing to provide an appropriate educational placement, in that his least restrictive environment (“LRE”) is a **full-time therapeutic setting** where both his academic deficits and his behavior concerns can be addressed?

- (4) **Failure to Provide Access to Educational Records** — Has DCPS failed to provide parent access to records, including past evaluations, discipline records, and/or behavior logs?

> Petitioner alleges that this failure constitutes a procedural violation that has had one or more of the substantive effects listed in 34 CFR 300.513 (a) (2). *See Complaint, p. 13.*

> At the PHC, counsel for both parties agreed to try to work together to resolve this issue prior to the disclosure date. Petitioner’s counsel sent DCPS’ counsel a list of records parent wished to obtain, but the issue was not fully resolved.

- (5) **Failure to Provide Needed Related Services in IEPs** — Did DCPS deny the Student a FAPE by failing to provide **occupational therapy (“OT”) and speech/language pathology (“SLP”) services** as part of the December 2011 and April 2012 IEPs, as recommended in December 2011 evaluations?

In his Complaint, and as discussed at the PHC, Petitioner requested that DCPS be ordered to: (a) fund private placement with transportation; (b) conduct or fund an FBA and reconvene a MDT meeting to develop a BIP; (c) fund independent SLP and OT evaluations; (d) amend the IEP to include at least 30 minutes per week of SLP and at least 30 minutes per week of OT services; and (e) award appropriate compensatory education services for the denials of FAPE. *See Complaint; Prehearing Order*, ¶ 6.

At the outset of the due process hearing, Petitioner withdrew his request for private placement relief (item (a) above) based on DCPS' issuance of a Prior Written Notice ("PWN") dated April 19, 2013, placing the Student at Petitioner's proposed Private School, effective immediately. This also had the effect of mooted Issue 3, at least prospectively.⁴

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. Student is a _____ old student who resides in the District of Columbia with Petitioner. *Pet. Test.*
2. Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. His primary disability is Intellectual Disability or "ID" (also known as Mental Retardation), and he has received services since the 2d grade. *See P-20; Pet. Test.* In addition to his ID classification, Student has a history of behavior problems and psychiatric hospitalizations resulting from threatening behaviors toward others. *See Pet. Test.; P-24 – P-34.*
3. During the 2011-12 school year, Student attended his DCPS neighborhood middle school ("Middle School") and completed the 8th grade. During the 2012-13 school year, Student has attended his DCPS neighborhood high school ("High School"), where he is in the 9th grade.

⁴ The day before the scheduled due process hearing, DCPS filed a motion for summary adjudication based on the 4/19/2013 PWN, asserting that it had provided the placement relief requested in the Complaint. Petitioner opposed the motion, and the Hearing Officer denied the motion for the reasons stated on the record at hearing. The PWN did not moot or affect Petitioner's other issues and items of requested relief under paragraphs (b) through (e) above.

4. On or about November 30, 2011, while Student was attending Middle School, DCPS issued a Prior Written Notice (“PWN”) proposing to conduct an updated evaluation of Student, to include academic and emotional testing, in order to determine Student’s educational needs. *P-14*.
5. On or about December 1, 2011, DCPS issued an Occupational Therapy Assessment Report, which assessed Student in the areas of visual perception, visual motor integration, and fine motor dexterity skills. *P-52*. Student demonstrated average fine motor skills, below average visual motor integration skills, and low visual perceptual skills. *Id.*, p. 7. See also *P 16-7* (12/21/2011 Evaluation Summary) (Student “demonstrates age appropriate fine motor dexterity skills for manipulation of classroom-based tools,” but “exhibits challenges with visual motor integration and visual perceptual skills as noted during academic based activities”). The OT evaluation further found that due to his ID classification, “there is a direct impact on learning and classroom participation noted by his challenges with written outcomes, written expression, math calculation as well as his ability to read.” *P 52-7*. DCPS’ Evaluation Summary Report went on to conclude that Student “will continue to require the [OT] support in order to achieve successful outcomes within the academic environment.” *P 16-16*.
6. On or about December 13, 2011, DCPS issued a Comprehensive Psychological Evaluation Report. *P-53*. The evaluation included the Vineland Adaptive Behavior Scales (“Vineland”) to assess personal and social sufficiency skills functioning and the Wechsler Intelligence Scale for Children IV (“WISC-IV”). Student’s general cognitive ability was found to be within the Extremely Low range of intellectual functioning, as measured by the Full-Scale IQ. See *P-53*, pp. 3-4 (FSIQ composite score = 46). The evaluation further found (*inter alia*) that Student’s communication skills and socialization skills were moderately low; that he was struggling with rudimentary math skills and had extremely low achievement scores in that area; and that he also scored in the low range in reading and written expression. *Id.*; see also *P-16* (Evaluation Summary Report); *P-18* (Broad Math GE 1.4; Broad Reading GE 2.1).
7. In addition, the 12/13/2011 Comprehensive Psychological Evaluation found that Student “needs help with his behavioral impulses, anger management and self-esteem to increase his chances of successfully accessing the general education setting.” *P 16-8*.

8. On or about December 17, 2011, DCPS issued a Speech and Language Evaluation Report. *P-51*. The evaluation was conducted to determine his current communication levels and the need to continue services in that area. *P 51-1*. The results of the evaluation showed strengths in articulation, voice, fluency and pragmatics, but also weaknesses in language and vocabulary. *P 51-7*. His weaknesses were found to “cause problems across the curriculum in English, language art, math, science, and reading comprehension.” *Id*; see also *P 16-4*. “Receptively, he identifies simple related word[s] with difficulty explaining their relationships.” *P 51-7*. “Expressively, [Student] has difficulty retelling verbal messages.” *Id*.
9. Overall, the Speech/Language Evaluation concluded that Student’s “communication levels have maintained consistency over the years with no significant gains.” *P 51-7*. DCPS’ Evaluation Summary Report repeated this same conclusion, and then added the following sentence: “Services are not warranted at this time.” *P 16-5*. No further explanation was provided.
10. On or about December 19, 2011, his MDT met and developed an IEP, which provided 25 hours per week of specialized instruction and 30 minutes per week of behavioral support services in an Outside General Education setting. See *P 15-9*. The IEP included annual goals in Mathematics, Reading, and Written Expression, as well as Emotional, Social and Behavioral Development. *Id.*, pp. 2-8. No other related services were provided in the IEP, including SLP and OT services.⁵
11. On or about April 12, 2012, the Student’s MDT met and developed an IEP, which continued the same services -- *i.e.*, 25 hours per week of specialized instruction and 30 minutes per week of behavioral support services in an Outside General Education setting. See *P 23-8*.
12. In early May 2012, Student was hospitalized at the Psychiatric Institute of Washington (“PIW”) for a period of two weeks following an incident in which he threatened the Middle School principal. He was discharged May 18, 2012, returned home with outpatient mental health services, and was able to complete the 8th grade at Middle

⁵ Under prior IEPs, Student received 30 minutes per week of SLP services and 30 minutes per week of OT services. See, *e.g.*, *P 19-8*; see also *P-41*, *P-42* (SLP and OT Service Trackers). These services were discontinued in the December 2011 IEP.

School. *See P-34; Pet. Test.*⁶ Petitioner testified that after his release from PIW, Student “calmed down pretty good” for the rest of the 2011-12 school year. *Pet. Test.*

13. Between September and December 2012, Student experienced additional behavioral incidents and resulting suspensions at High School, including for verbal and physical altercations with other students. *See P-24 – P-28; Pet. Test.*
14. In late November 2012, Student received further inpatient psychiatric treatment at Children’s National Medical Center after threatening his siblings and having altercations with his sister that spilled over into the school setting. *See P-32; P-33; Pet. Test.* Student was also suspended for 10 school days for this same incident. *Id.*
15. On or about December 7, 2012, Petitioner through counsel sent a letter to High School Principal requesting access to Student’s educational records. *P-1.* There is no record of a similar written request having been made to Middle School. Petitioner subsequently received access to records located at High School, but complained that he had not received copies of all records that may be located at Middle School.
16. In early January 2013, DCPS convened a manifestation determination review (“MDR”) meeting and determined that a 12/05/2012 behavioral incident was a manifestation of Student’s disability. *See P-30.* Student’s advocate requested that DCPS conduct an FBA, but no FBA has yet been conducted. *See EA Test.; Pet. Test ; P-22* (advocate meeting notes).⁷
17. On or about March 22, 2013, while this proceeding was pending, DCPS convened an annual IEP review meeting for Student and increased his behavioral support services to 60 minutes per week. *P 20-9.*
18. On or about April 19, 2013, shortly before the due process hearing, DCPS issued a Prior Written Notice (“PWN”) proposing a change of placement for Student to Private School, which Petitioner also proposed as a remedy in his five-day disclosures. DCPS will provide all funding and transportation effective immediately. At hearing, the parties

⁶ The 5/18/2012 Discharge Summary also refers to a previous hospitalization in February 2012, when DCPS reportedly referred Student for inpatient stabilization. *P 34-2.*

⁷ While this proceeding was pending, DCPS held a further MDR meeting in which it found that a March 15, 2013 incident also was a manifestation of the Student’s disability. *See P-31.*

stipulated and agreed that this proposed placement provides the therapeutic environment required to implement Student's IEP and is otherwise appropriate.

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. "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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). The Hearing Officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

A. General Legal Background

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207). “[A]n individualized education program (“IEP”) is a snapshot, not a retrospective. In striving for “appropriateness,” an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993) (citations omitted). *See also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (same); *Adams v. State of Oregon*, 195 F. 3d 1141, 1149 (9th Cir. 1999) (same). In the event of challenge, the issue of whether an IEP is appropriate is a question of fact for hearing. *See, e.g., S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

“Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP.” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). Moreover, statutory law in the District of Columbia requires that “DCPS shall place a student with a disability in an appropriate special education school or program” in accordance with the IDEA. D.C. Code 38-2561.02 (b). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming “placement based on match between a student’s needs and the services offered at a particular school”).

Educational placement under the IDEA must be “based on the child’s IEP.” 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116. The IDEA requires each public agency to ensure that “[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled,” and that “removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412 (a) (5); 34 C.F.R. §300.114 (a) (2). *See also* 5-E DCMR §3011.1; *e.g., Daniel R.R. v. El Paso*, 874 F.2d 1036 (5th Cir. 1989).

As the statute and regulations indicate, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. See 34 C.F.R. § 300.17(d). In order to constitute a denial of FAPE, however, courts have held that the aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). See also *Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. 2011) ("Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*"); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d at 76 (failure to implement claims require "contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements").

B. Issues/Alleged Denials of FAPE

For the reasons discussed below, the Hearing Officer concludes as follows: On **Issue 1**, Petitioner failed to meet his burden of proof. On **Issue 2**, Petitioner met his burden of proof in part. On **Issue 3**, Petitioner failed to meet his burden of proof retrospectively. (The parties have stipulated that this placement issue has been mooted prospectively by the 4/19/2013 PWN.) On **Issue 4**, Petitioner failed to meet his burden of proof. On **Issue 5**, Petitioner met his burden of proof.

Issue 1: 2011-12 School Year – Emotional/Behavioral Supports

As noted above, an IEP must be reasonably calculated to confer meaningful educational benefits on the disabled child. Petitioner failed to prove by a preponderance of the evidence that more than 30 minutes per week of counseling services needed to be included in the December 2011 and April 2012 IEPs in order to provide educational benefit, based on the information available to the MDT/IEP teams at the time they were created. Student's psychiatric hospitalizations and disciplinary problems in school largely occurred after the development of

these IEPs. Petitioner also did not challenge any of the Social, Emotional, and Behavioral goals in these IEPs.

Nor did Petitioner prove that DCPS unlawfully failed to conduct an FBA for the Student over the course of the 2011-12 school year. There is no evidence that DCPS unreasonably refused a parental request for an FBA during that time period. *Cf. Harris, supra.* Moreover, the evidence shows that much of Student's behavioral concerns involved home-based problems with family members.

Issue 2: 2012-13 School Year – Emotional/Behavioral Supports

By the middle of the 2012-13 school year, however, DCPS was clearly on notice that Student's emotional and behavioral issues in school had worsened and were adversely affecting his education, especially during the first semester of the 2012-13 school year at High School. *See Findings*, ¶¶ 12 -14. In addition, DCPS had recently convened an MDR meeting and determined that Student's behaviors were a manifestation of his disability. *Id.*, ¶ 15. Pursuant to the IDEA, this determination should have triggered an FBA, *see* 34 C.F.R. 300.530(f), which Student's advocate also specifically requested be conducted to address the problematic behaviors. *EA Test.*

Had DCPS done so in a timely manner, DCPS would have been able to use the results to develop an effective BIP as part of the March 2013 IEP, in addition to increasing Student's counseling services to 60 minutes per week. The failure to develop and incorporate a BIP rendered the IEP inappropriate and resulted in a denial of FAPE to Student as of March 2013. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008) (“The FBA is essential to addressing a child's behavioral difficulties, and as such, it plays an integral role in the development of an IEP.”); 34 C.F.R. § 300.324 (a) (2) (in case of child whose behavior impedes learning, IEP Team must “consider use of positive behavioral interventions and supports, and other strategies, to address that behavior”).

Issue 3: Failure to Provide Appropriate Placement

As noted above, DCPS must offer placement in an appropriate school or program that can fulfill the requirements set forth in an appropriate IEP, and must ensure that its placement decision is made in conformity with the Least Restrictive Environment (“LRE”) provisions of

the IDEA. *See* D.C. Code 38-2561.02 (b); *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (D.C. Cir. 1985); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008).

In this case, Petitioner did not prove by a preponderance of the evidence that Middle School was unable to implement the requirements of the December 2011 or April 2012 IEPs, that Student was not placed in his LRE at Middle School, or that DCPS otherwise failed to meet its placement obligations during the 2011-12 school year. Petitioner also did not prove that DCPS failed to place Student into an appropriate school or program for the start of the 2012-13 school year, when DCPS offered placement at High School. Based on the information then available to the agency, High School was able to implement the requirements of the April 2012 IEP, and an Outside General Education setting within a regular DCPS school was still considered the LRE for Student. Moreover, after Student was discharged from PIW in May 2012, he was cleared to return to school and successfully completed the _____ at Middle School. His June 2012 IEP progress reports shows progress, including with regard to emotional, social, and behavioral development. *See R-4*.

During the 2012-13 school year, updated information has become available concerning Student's behavioral and emotional struggles at High School, which has now resulted in DCPS' review and determination of an alternative placement for Student. The evidence suggests that DCPS might have moved more quickly with respect to this issue, so that placement options could have been considered by the IEP Team at least by the annual meeting in March 2013. A prompt FBA following the January 2013 MDR (*see* Issue 2 above) could have assisted in this effort. However, this potential failure involves less than one month (3/22/2013 to 4/19/2013) while this proceeding was pending and the parties appear to have continued to engage in the post-complaint resolution process. Under the circumstances, the Hearing Officer does not find that this relatively brief delay resulted in a denial of FAPE to Student, who has now been placed into a therapeutic environment at the Private School selected by Petitioner for the remainder of the 2012-13 school year and prospectively into the next school year.

Issue 4: Failure to Provide Access to Educational Records

IDEA regulations provide that each agency “must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [IDEA].” 34 C.F.R. §300.613 (a). “The agency must comply with a request

without unnecessary delay and before any meeting regarding an IEP, or any hearing” *Id.* This right also includes the “right to have a representative of the parent inspect and review the records.” *Id.* §300.613 (b) (3).

At hearing, Petitioner’s counsel stated that the records parent believes he has not been provided consist primarily of disciplinary records and PIW referral documents from the 2011-12 school year at Middle School. However, the original December 2012 written request for access submitted by Petitioner’s counsel was addressed only to the High School Principal, and there is no evidence that DCPS responded to this request in an untimely manner. *See P-22; EA Test.* Nor does there appear to be any evidence that DCPS has refused to permit Petitioner or his representative to inspect and review all available educational records at either High School or Middle School (where the records of interest may reside). Moreover, the records access rights granted to parents under the IDEA do not ensure the discovery or production of any particular category of documents.

Finally, even assuming *arguendo* that Petitioner has shown a procedural violation of the IDEA in this respect, Petitioner has not demonstrated that such violation has had one or more of the substantive effects specified in 34 C.F.R. 300.513 (a) (2), as alleged in the Complaint. Accordingly, the Hearing Officer concludes that Petitioner has failed to meet his burden of proof on this issue.

Issue 5: Failure to Provide SLP and OT Services in IEPs

Under the IDEA, “related services” are defined as any “supportive services as are required to assist a child with a disability to benefit from special education,” and expressly “include ***occupational therapy services*** and ***speech-language pathology services.***” 34 C.F.R. § 300.34 (a), (6), (15) (emphasis added). In this case, Petitioner claims that the December 2011, April 2012, and March 2013 IEPs were not reasonably calculated to provide the Student with meaningful educational benefit because they failed to include the related services of OT and SLP, which Student had received under prior IEPs. The Hearing Officer agrees.

The December 2011 OT evaluation revealed that (a) Student continued to exhibit challenges with visual motor integration and visual perceptual skills, (b) such challenges directly impacted his learning and classroom participation in multiple academic areas, and (c) as a result, Student continued to require OT support to benefit from special education. *See Findings*, ¶ 8; *P*

51-7; P 16-7, -16 (Evaluation Summary Report). Accordingly, DCPS denied Student a FAPE by discontinuing his OT related services.⁸

Similarly, the December 2011 Speech/Language evaluation indicated that (a) Student continued to present weaknesses in language and vocabulary, (b) his weaknesses “cause problems across the curriculum in English, language art, math, science, and reading comprehension”,⁹ and (c) as a result, Student requires continued SLP support to benefit from special education. *See Findings*, ¶ 8; P 52-7; P 16-7 (Evaluation Summary Report).

Accordingly, I conclude that DCPS denied Student a FAPE by discontinuing his SLP related services as well.¹⁰

C. Appropriate Relief

The IDEA authorizes the Hearing Officer to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Based on the evidence presented at the due process hearing, the findings and conclusions above, and relevant equitable considerations, the Hearing Officer concludes that the relief set forth below is appropriate to address the violations and denials of FAPE found herein. Petitioner shall be authorized to conduct an independent FBA, and DCPS shall be ordered (a) to include 30 minutes per week each of SLP and OT services in the Student’s IEP, at least until the next annual review meeting; and (b) to provide compensatory education services, as specified herein.

⁸ The Hearing Officer is unable to ascertain DCPS’ reasons for discontinuing these services, since DCPS offered no MDT meeting notes into evidence, and no DCPS team members testified regarding development of the IEPs. Petitioner also testified that he did not recall any discussion about this at the December 2011 MDT meeting.

⁹ “Receptively, he identifies simple related word[s] with difficulty explaining their relationships,” while “[e]xpressively, [Student] has difficulty retelling verbal messages.” P 51-7.

¹⁰ A passing reference in DCPS’ Evaluation Summary Report suggests that DCPS may have determined that SLP services were no longer warranted because Student was not making progress in this area. *See P 16-5* (noting Student’s “communication levels have maintained consistency over the years with no significant gains. Services are not warranted at this time.”). However, there appears to be scant evidence to support this conclusion, and no further explanation has been provided.

Compensatory education is one of the equitable remedies available to a hearing officer, exercising his authority to grant “appropriate” relief under IDEA. 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.’” *Reid v. District of Columbia*, 401 F. 3d 516, 521 (D.C.Cir. 2005) (quotations omitted). Compensatory education is fact-specific relief designed to compensate a student for the educational benefits of which he or she was deprived. *See, e.g., Gill v. District of Columbia*, 751 F. Supp. 2d 104, 110-12 (D.D.C. 2010); *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008). An IDEA petitioner generally has the burden of proposing a well-articulated plan demonstrating what it is he wants and the reasoning why his request would ameliorate the denial of FAPE, although a court or hearing officer ultimately must determine what is equitable. *Gill, supra*. *See also Reid*, 401 F. 3d at 523-24 (“compensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student”).

In this case, the Hearing Officer has determined that DCPS denied the Student a FAPE by failing to provide OT and SLP related services in his IEP since December 19, 2011.¹¹ DCPS thereby deprived the Student of the educational benefits of these related services for approximately the past 16 months. Petitioner has shown that this has caused educational harm to the Student that entitles him to an award of compensatory education reasonably designed to compensate the Student for these deprived educational benefits. *See Pet. Test.; EA Test.; Lennon Test.; P-54* (compensatory education proposal).

Without the necessary OT and SLP support, Student’s unaddressed weaknesses adversely affected his ability to access the curriculum across multiple academic areas. *See* discussion under Issue 4 above. As a result, Student appears to have made little if any academic progress over the relevant period of time. For example, Student’s December 2011 Woodcock-Johnson testing measured both his Broad Reading and Reading Fluency as 2.1 GE (compared to his actual

¹¹ DCPS also failed to conduct an FBA and develop a BIP between January and March 2013, but the Hearing Officer concludes that this failure is adequately remedied by granting Petitioner an independent FBA and ordering DCPS to convene an MDT meeting to develop a BIP and revise the IEP based on the FBA. In addition, DCPS has already increased Student’s IEP counseling services to 60 minutes per week effective March 22, 2013, which will assist in addressing his behavioral issues.

grade level of 8.3). *P 18-2*. Over a year later, in February 2013, Student was found to be reading at a 2.25 GE. *See P 20-4* (PLOPs in March 2013 IEP, based on 2/22/2013 testing). Thus, in over 14 months, Student improved by only about a month of GE in Reading. Similarly, Student's December 2011 Woodcock-Johnson academic achievement scores in Broad Math and Math Calculation Skills were 1.4 GE and 1.5 GE, respectively. *P 18-2*. Again over a year later, Student scored at a 1st grade level in independent computational skills on a 1/25/2013 Brigance Computational Skills test. *P 20-2*.¹²

In the OT area, Student continues to struggle with deficits in visual motor integration and visual perceptual skills, and he has difficulty consistently incorporating compensatory strategies on his own. As Petitioner's written proposal and witness testimony describe, the OT therapist can work with Student to increase his writing skills and bolster other strategies and techniques developed during regular sessions. *See P-54; Pet. Test.; EA Test.; Lennon Test.* The OT compensatory sessions will be able to provide repetition, practice, drills, and consistent incorporation of strategies from one session to the next. *P 54-6*.

Similarly, the additional hours of SLP services should be designed to address Student's continued weaknesses in language and vocabulary, which directly impact his academic performance. And 1:1 academic tutoring should focus on areas of deficit that failed to improve significantly during the period of missed related services, including math, reading and written expression designed to achieve his IEP goals.

In sum, based on all the available evidence, the Hearing Officer concludes that 25 hours of independent OT services, 25 hours of independent SLP services, and 50 hours of individual academic tutoring are necessary and sufficient to provide the educational benefits that likely would have accrued from the related services that the Student missed between December 2011 and the present. The Hearing Officer believes these services are fact-specific and are well suited to remedy the specific harm suffered by the Student. The remedy is supported by the record evidence, including the testimony of Petitioner's three witnesses and the substantial documentary evidence adduced at hearing, as summarized herein.

¹² While DCPS should not be held responsible for the effects of non-attendance due to psychiatric hospitalizations and/or suspensions prior to the January 2013 manifestation determination, these academic achievement data points – roughly before and after removal of the OT and SLP services – are nevertheless instructive in approximating the harm likely caused at least in part by the denial of FAPE over the past 16 months.

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, the stipulations of the parties at hearing, and the entire record herein, it is hereby **ORDERED**:

1. Within **30 calendar days** of this Order (*i.e.*, by **June 7, 2013**), Respondent District of Columbia Public Schools (“DCPS”) shall amend the Student’s individualized education program (“IEP”) dated March 22, 2013, as follows:
 - (a) In the “**Related Services**” section of the IEP, add “**Occupational Therapy**” **Services** in an Outside General Education setting for at least thirty (30) minutes per week; and develop and incorporate appropriate annual goals in the area of “**Motor Skills/Physical Development**,” consistent with prior IEPs and this HOD;
 - (b) In the “**Related Services**” section of the IEP, add “**Speech-Language Therapy**” **Services** in an Outside General Education setting for at least thirty (30) minutes per week; and develop and incorporate appropriate annual goals in the area of “**Communication/Speech and Language**,” consistent with prior IEPs and this HOD.
2. Petitioner shall be authorized to obtain a **functional behavior assessment** of the Student independently, at the expense of DCPS and consistent with DCPS’ publicly announced criteria for independent educational evaluations (“IEEs”). The assessment shall be completed within the next **forty-five (45) calendar days**. Upon completion of the assessment, Petitioner shall promptly submit a copy of the written report(s) of evaluation to DCPS.
3. Within **30 calendar days** of the submission of the report(s) of assessment specified in Paragraph 2 above, Respondent DCPS shall convene a meeting of the Student’s MDT/IEP Team to (a) review the assessment report(s); (b) review any other updated information concerning the Student’s academic and behavioral progress under his IEP; (c) review and revise, as appropriate, the goals and services in the IEP in the area of Social, Emotional, and Behavioral Development; (d) develop a written behavioral intervention plan for the Student.
4. As **compensatory education**, Respondent DCPS shall pay for **25 hours** of speech/language pathology services, **25 hours** of occupational therapy services, and **50 hours** of one-to-one academic tutoring services for the

Student. The services shall be performed by qualified independent providers of Petitioner's choice at hourly rates not to exceed the current established OSSE approved rates in the District of Columbia for such services. Unless the parties agree otherwise, these services shall be completed by no later than **May 8, 2014**.

5. Any delay in meeting any deadline in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.
6. Petitioner's other requests for relief in his Due Process Complaint filed February 22, 2013, are hereby **DENIED**; and
7. The case shall be **CLOSED**.



Impartial Hearing Officer

Dated: May 8, 2013

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).