

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Guardian, on behalf of Student,<sup>1</sup></b>	)	<b>Room: 2006</b>
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>District of Columbia Public Schools,</b>	)	
	)	
<b>Respondent.</b>	)	<b>Hearing Officer: Michael Lazan</b>

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving a \_\_\_\_\_ year old student who is eligible for services as a student with an Other Health Impairment. (“the Student”).

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on January 30, 2015 in regard to the Student. On February 10, 2015, Respondent filed a response. A resolution meeting was held on February 26, 2015. The resolution period expired on March 1, 2015.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

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<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

On March 2, 2015, this Hearing Officer held a prehearing conference. Joy Freeman-Coulbary, Esq., counsel for Petitioner, appeared. Daniel McCall, Esq. counsel for Respondent, appeared.

A prehearing conference order issued on March 6, 2015 summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date was scheduled for April 7, 2015 in this matter. The HOD was due on April 15, 2015. On April 6, 2015, at 3:03pm, Jocelyn Franklin, Esq. an attorney from the same law firm as Petitioner's counsel, Joy Freeman-Coulbary, Esq., sent the IHO an email asking to adjourn the case for April 7, 2015. This email indicated that Ms. Freeman-Coulbary had been suddenly hospitalized and was unavailable for the hearing. There was no objection to the adjournment from Daniel McCall, Esq., from DCPS. This adjournment was granted by the IHO. Subsequent to this adjournment, by Petitioner's Emergency Amended Motion for Continuance Based upon Medical Emergency filed and dated on April 13, 2015, Ms. Freeman-Coulbary sought a 30 day continuance to try the matter on May 8, 2015, a date when the parties, the witnesses, and the hearing officer were available. DCPS anticipated this motion and objected by email dated April 8, 2015, arguing that the case should have been withdrawn without prejudice and refiled. The Chief Hearing Officer found the rationale proffered by Petitioner to be reasonable and signed an Interim Order on Continuance Motion dated April 14, 2015. The HOD due date was thereby extended 30 days to May 15, 2015.

The case proceeded to hearing on May 8, 2015. This was a closed proceeding. Petitioner was represented by Jocelyn Franklin, Esq. Respondent was represented by Daniel McCall, Esq. Petitioner moved into evidence Exhibits 1-38. Respondent objected to Exhibits 33, 37, and 38 on relevance grounds. These objections were overruled. Exhibits 1-38 were admitted. Respondent moved into evidence Exhibits 1-4. There were no objections. Exhibits 1-4 were admitted.

The parties presented closing statements orally, on the record, after completion of testimony on May 8, 2015.

Petitioners presented as witnesses: Petitioner; Witness A, a clinical psychologist; (expert: clinical psychology); and Witness B, Admissions Director at School B. Respondent presented as witnesses: Witness C, a Special Education Coordinator; Witness D, a psychologist; and Witness E, a social worker.

#### **IV. Credibility**

I found all the witnesses credible in this proceeding. There were no material inconsistencies uncovered in connection to any witness, and all witnesses presented their testimony with reasonable candor.

#### **V. Issues**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did the IEP dated 10/27/14 deny the Student a FAPE because it did not include enough special education hours and has inappropriate goals, an inappropriate description of the Student, and insufficient behavioral supports?

2. Did the IEP dated 10/27/14 require an accompanying Behavior Intervention Plan (“BIP”)? If so, was the Student denied a FAPE?
3. Was the IEP dated 10/27/14 defective because it was not based on an appropriate Functional Behavior Assessment (“FBA”)? If so, was the Student denied a FAPE?
4. Did the IEP dated 10/27/14 contain an inadequate transition plan with inadequate transition services? If so, was the Student denied a FAPE?
5. Did Respondent fail to update the 10/27/14 IEP to address the Student’s lack of progress? If so, was the Student denied a FAPE?

As relief, Petitioner is seeking a Functional Behavior Assessment, Behavior Intervention Plan, a vocational assessment, an appropriate placement, an updated IEP, increased hours outside of general education, and compensatory education or an assessment to determine an appropriate amount of compensatory education.

## **VI. Findings of Fact**

1. The Student is a s                    year old who is eligible for services as a Student with Other Health Impairment. (P-9-1)
2. He is very playful and has a lot of friends. (Testimony of Witness D)
3. He can be very silly, which can be disruptive, but he is easy to redirect. (Testimony of Witness D)
4. The Student is struggling with his schooling and needs to improve his attendance and homework completion. (Testimony of Witness A)
5. He has difficulty organizing his time and being focused. He is easily distracted. (Testimony of Witness A; P-9-9)

6. He has always had difficulty in school. (Testimony of Petitioner)
7. He suffers from asthma and depression. (Testimony of Petitioner)
8. He cuts class a lot. (Testimony of Petitioner)
9. He is a risk taker. He may miss a few assignments to see how it would impact his grade. (Testimony of Witness D)
10. He will fall asleep in the classroom, be late and not turn in assignments. (P-18-2)
11. He is “definitely” is not working to his best potential. He always has a very loose plan of how he can turn around quickly. (Testimony of Witness E)
12. He is able to maintain focus a little bit better if he separates from his peers. (Testimony of Witness E)
13. He needs verbal prompts, redirection, and positive reinforcement in order to increase his class participation and completion of classwork. (P-9-9)
14. Testing of the student in February, 2012 found his cognitive levels to be in the average or low average range except for processing speech, which was in the borderline range, at the 2<sup>nd</sup> percentile. (P-14-3)
15. His standard scores in reading ranged from 86 in oral reading fluency (18<sup>th</sup> percentile) to 107 in psuedoword decoding (68<sup>th</sup> percentile). His standard scores in math ranged from 95 in addition fluency (37<sup>th</sup> percentile) to 81 in math problem solving and numerical operations (10<sup>th</sup> percentile). His standard scores in writing ranged from 101 in spelling (53<sup>rd</sup> percentile) to 86 in spelling comprehension and essay comprehension (18<sup>th</sup> percentile). (P-14-4)

16. He continues to be behind in math, where he needs specialized instruction in the areas of multi-step problems, integers and fractions. He also has difficulty multiplying two by two digits and three by two digits. (P-9-5)

17. He is able to read grade level text and identify the setting, plot and solution. He is able to write in complete sentences and write summaries when given a topic. He has difficulty with answering comprehension questions and making inferences, and he struggles using context clues to determine the meaning of a word. (P-9-6)

18. In writing, his sentences are not clear and organized when answering comprehension questions, he often leaves out words that are pertinent to the meaning of the sentence, and he struggles with writing complete paragraphs that include topic sentences. He has a difficult time writing a paragraph. (P-9-8)

19. He benefits from graphic organizers in writing. (P-9-8)

20. The Student attends School A PCS, where he has been for about 4 years.  
(Testimony of Petitioner)

21. The school is a full-time “inclusion” school, and the student gets push-in support from a special education teacher. (Testimony of Witness B)

22. The school requires its students to wear uniforms. (Testimony of Witness E)

23. The IEP dated January 16, 2013 provided the Student with 15 hours per week of specialized instruction outside general education, with one hour per week of behavioral support services. (P-10-6)

24. For the 2013-2014 school year, at School A PCS, the Student received a final grades of F in World Art and English 9, with C grades in Algebra I, Biology, Spanish I and World History I. (Exh. P-22-3)

25. At IEP meeting was held for the Student on October 27, 2014. (P-9-1)

26. The IEP meeting was attended by the Student, his legal guardian, Witness C, and Witness D. (P-9-1)

27. At the IEP meeting, Petitioner was an active participant. (Testimony of Witness C)

28. The team decided that the IEP was appropriate because he was benefitting from services. There were some behavioral concerns, but these were not considered egregious. (Testimony of Witness C)

29. Behavioral problems include being out of uniform, having sagging pants, wearing an unauthorized jacket, talking or playing during instructional time, and being late to class. (Testimony of Witness C)

30. To address these problems, he meets with his social worker. (Testimony of Witness C)

31. The IEP states that the Student's behavior does not impede his learning or the learning of other children. (P-9-4)

32. The IEP contains math goals, reading goals, writing goals, and emotional, social and behavioral goals. (P-9-9)

33. He is recommended for 15 hours of specialized instruction inside general education, and one hour a week of behavioral support services, a continuation from the January, 2013 IEP. (P-9-11)

34. He is also recommended for reading of test questions in math, science and composition; repetition of directions; simplification of oral directions; oral responses to tests; location with minimal distractions, preferential seating, and small group testing.

(P-9-13)

35. The IEP's Post-Secondary Transition Plan states that the Student has not "solidified" a career interest. It references a vocational assessment from October 28, 2013 which indicates that the Student is interested in becoming a mechanic, business professional or professional basketball player. It also references a career interest inventory which indicates interest in attending a 2 or 4 year college/university or vocational school.

(P-9-15)

36. The generic transition goals relate to participating in collaborative discussions.

37. Transition Services are career/college counseling for eight hours a year and twenty hours of community service.

38. For the first term in the 2014-2015 school year, the Student received two F grades, in Geometry and World history II. He received a C in chemistry, a B in English 10, and an A in French.

39. For the second term, the Student received F grades in Chemistry, Dance and Theater, French I, General Music, and Geometry. He received a C in English 10 and a B in World History II.

40. The Student progressed in all but one of his goals for the first reporting period of the 2014-2015 school year, which ran from August 26, 2014 through October 31, 2014. No progress was reported in the Student's tutoring goal.

41. Overall, this school year, his performance has decreased. He is now failing more classes, and there have been negative behaviors. (Testimony of Witness A)

42. There are some days when he just does not want to go to school. (Testimony of Witness A)

43. His attendance has worsened over the course of the school year. (Testimony of Witness A)

44. The negative behaviors are typical teenager behaviors. (Testimony of Witness C)

45. He is not completing assignments, especially in English and Math. (Testimony of Witness E)

46. Getting him to actually do the work is hard. (Testimony of Witness E)

47. His counseling needs to be increased. It is hard to address all his needs with the current mandate. (Testimony of Witness E)

48. He has made progress on his counseling goals. (Testimony of Witness E)

## **VII. 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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5-E DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate

public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

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. 34 CFR Sect. 300.513(a).

1. The October 27, 2014 IEP.

Petitioner contends that this IEP denied the Student a FAPE because it did not include enough special education hours, has inappropriate goals, an inappropriate description of the Student, and insufficient behavioral supports.

To support this claim, Petitioner presented little testimony. Petitioner herself testified that the Student has always done poorly at school, but provided few specifics and did not indicate that the IEP was the problem. She did express legitimate concerns about the Student’s accelerating behavioral issues and declining grades, but did not state that the Student needed more special education hours, had inappropriate goals, that the IEP was inaccurate, or that there were insufficient behavioral supports in it.

Petitioner also called Witness A, who based her testimony on a document review and a half-hour phone call with the Student. She stated that the Student was a “very nice guy” who was really struggling with his schooling and is “in a rut.” She stated that he realizes that he needs to improve his attendance and homework completion, and that he needs more help. She stated that he said that he has trouble organizing his time and being focused. She said he said that he is easily distracted, which makes it harder for him to complete things at school.

Petitioner argues that this kind of hearsay is sufficient to meet her burden, but I cannot agree. There is no persuasive support for the contention that the bulk of the Student’s difficulties are a function of his disability, which is Attention Deficit Hyperactivity Disorder (“ADHD”). ADHD should not cause a Student to have difficulty attending school, and the record does not establish that the Student’s ADHD keeps him from completing his homework. Moreover, Petitioner suggested that the increased problems with the behavior arose after the creation of the IEP at issue. In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing to Circuit court decisions, the Court found that an IEP should be judged prospectively to avoid “Monday morning quarterbacking.” See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10<sup>th</sup> Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990).

A review of the IEP indicates that it accurately states the Student's learning characteristics and there is no argument that the goals are inappropriate for the Student. The IEP describes the Student's academic levels and describes his behavioral concerns, such as inattentive and off-task behaviors. There are three goals in mathematics, three goals in reading, one goal in written expression, and three goals in emotional, social and behavioral development<sup>2</sup>.

In terms of special education hours, the record does not support a finding of FAPE denial. The Student has shown he is capable of performing in the general education environment with special education push-in services, as is evidenced by his good grades in several courses over the past two years. Petitioner suggests the Student would benefit from pull-out services, but it is never explained why these additional special education hours would help him. The 15 hours of services per week, to be delivered in the inclusion setting at School A PCS is, are a reasonable amount of special education support for this Student.

The behavioral support services in the IEP also were adequate at the time of the IEP creation. The record indicated that services, consisting of one hour per week of what ended up to be counseling, worked fairly well for the student in the previous school year. The IEP also provides for a number of classroom accommodations, including location with minimal distraction, to alleviate the Student's behaviors in class. The IEP

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<sup>2</sup> Several of the goals in the October, 2014 IEP are repeated from the IEP in January, 2013. For instance, Reading Goal 1 states that the Student "will demonstrate academic progress by identifying and using common organizational structures in text, including chronological order, comparison and contrast, cause and effect, logical order, and classification schemes with 80 % accuracy in 4 out of 5 trials with accommodations and modifications." This is the exact same goal as Goal 1 in the January, 2013 IEP. Petitioner did not point this out during testimony or during closing argument.

also suggests to teachers that he should receive verbal prompts, redirection and positive reinforcement. While the Student's behaviors have spiked during the current school year, there is insufficient evidence that, at the time of IEP creation, more behavioral support was needed.

2. FBA/BIP.

Courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA when students have behavioral issues. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . An FBA may not be required if the IEP provides for interventions that meet the Student's needs. A.C. v. Chappaqua Central School Dist., 553 F.3d 165 (2d Cir. 2009)(FBA not needed where IEP provided interventions that would address behavioral needs).

In addition to an FBA, if behavior impedes the student's learning, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). However, a BIP may not be needed if the Student's classroom includes behavioral interventions that would address the Student's behavioral needs. E.Z.-L. v. New York City Department of Educ., 763 F.

Supp.2d 584 (S.D.N.Y. 2011), aff'd 694 F.2d 167 (2d Cir. 2012)(no BIP required where classroom included significant behavioral interventions that would address the Student's behavioral needs).

The record here establishes that many of the Student's behavioral issues, such as attendance issues, tardiness, and failure to provide homework, are not related to his ADHD. There is no testimony, and no evidence, to connect the Student's disability to any such issues. Issues within the classroom, including his tendency to lose focus, are addressed in the IEP, which suggests verbal prompts, redirection, and positive reinforcement in order to increase his class participation and completion of classwork. The testimony from Witness D is that the Student responds well to redirection, and the testimony from Witness D and Witness E suggests that the Student benefits from the counseling that was offered to him. On this record, I cannot find that the failure to write an FBA and BIP warrants a finding of FAPE denial.

3. Transition Plan/Services.

Transition plans create "a coordinated set of activities for a child with a disability" that amounts to a "results oriented process" that is "based on the individual child's needs." 34 C.F.R. Sect. 300.43. The focus of transition services is to "improve the academic and functional achievement of a child with a disability, to facilitate the child's movement from school to post-school activities." Id. Services must be "based on an individual child's needs, taking into account the child's strengths, preferences and interests" and includes instruction, related services, community experiences, employment and other post-school adult living objectives, and "if appropriate" acquisition of daily

living skills and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006)(definition of transition services is written broadly).

As stated by a federal court:

Congress in the IDEA placed "added emphasis on transition services so that special education students leave the system ready to be full productive citizens, whether they choose to go on to college or a job." 150 Cong. Rec. S11653-01, S11656 (Nov. 19, 2004) (Conf. Rep. accompanying H.R. 1350) (Statement of Sen. Dodd). Among its many changes, the IDEA is supposed to "enhance[ ] planning and transition services for children with disabilities," id. at S11655 (statement of Sen. Reed), and "significantly improve[ ] transition services to ensure that students with disabilities are prepared for postsecondary education or employment." Id. at S11659 (statement of Sen. Bingaman).

Carrie I. v. Department of Educ., 869 F. Supp.2d 1225 (D. Haw. 2012).

In the District of Columbia, courts have held that the absence of an adequate transition plan with adequate transition services is not a FAPE violation where the remainder of the IEP is appropriate. As Judge Collyer put it, the absence of a transition plan is "a mere procedural violation." Patterson v. D.C., 965 F. Supp. 2d 126, 131 (D.D.C. 2013)<sup>3</sup>

The Post-Secondary Transition Plan here, and the transition services within, are rather generic. The plan references a vocational assessment from October 28, 2013 which indicates that the Student is interested in becoming a mechanic, business professional or professional basketball player. There is nothing more specific about how the Student might actually become a mechanic or business professional, or how the

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<sup>3</sup> The District of Columbia local government has signaled that transition plans and services are important. The Enhanced Special Education Services Amendment Act of 2014 adds requirements for transition plans, including transitions assessments in IEPs for students age 14 and up, and appropriate measurable postsecondary goals based on age-appropriate transition assessments related to training education, employment, and, where appropriate, independent living skills. These requirements go into effect on July 1, 2016.

Student could possibly become come close to being a professional basketball player. It also references a career interest inventory which indicates interest in attending a 2 or 4 year college/university or vocational school, but there are no steps laid forth to make sure that this Student – who is failing many of his courses – will even graduate high school. The generic transition goals relate to participating in collaborative discussions, goals that could be used for virtually any Student anywhere. Transition Services are career/college counseling for eight hours a year and twenty hours of community service, but it is not clear how those services would relate to the Student’s expressed vocational choices.

Still, there is no testimony at all from the Guardian that this plan caused her any concern, and the Student did not testify at the hearing to express any interest in his future. While the plan is deficient, it must be deemed a procedural violation and not a denial of FAPE.

4. Revision of the IEP.

Petitioner contends that DCPS failed to revise the IEP after the Student met with difficulties in the middle of the school year.

Districts have a duty to revise IEPs as appropriate. Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205, 36 IDELR 153 (N.D. Ill. 2002) The applicable regulations, at 34 CFR Sect. 300.324, provide that a District must revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals, to address the results of any reevaluation, to address information about the child provided to, or by, the parents, to address the child's anticipated needs; or to address other matters.

DCPS points out that the Student's issues were not related to his disability. I would agree the major reasons for his difficulties -- attendance, lateness, and homework-related issues -- are not a function of his disability. The comments in the record, including from Petitioner's own witness, suggest that sometimes he chooses not to go to school. A student cannot intermittently attend and then hope to succeed in school, no matter how excellent the program.

DCPS also points out that the Guardian never requested an IEP meeting to revise the IEP, which was not contested by Petitioner.

It is hard to see how any additional specialized instruction would help the Student at School A PCS. He is already receiving specialized instruction for 15 hours week, which should allow him to be supported in all academic subjects. The record does not support the notion that any other IEP revisions are the answer for this Student. Witness A, Petitioner's only IEP witness other than herself, did not specifically suggest any revisions, nor are any major revisions necessary from a review of the record. There is nothing in the record to suggest that he needs pull-out instruction because he cannot understand the material in class. Pull-out instruction will not help the Student attend, take class seriously, or do his homework.

There is testimony from Witness A that the Student is "in a rut" and from Witness D that the Student would benefit from a change in the location of services, which appears to be accurate. However, I cannot say, on this relatively thin record, that DCPS has denied this Student a FAPE on this or any other ground.

### **VIII. Relief**

As a result of the foregoing, this matter is hereby dismissed with prejudice.

Dated: May 15, 2015

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Jocelyn Franklin, Esq.  
Daniel McCall, Esq.  
OSSE Division of Specialized Education  
[Contact.resolution@dc.gov](mailto:Contact.resolution@dc.gov)  
Chief Hearing Officer

### **X. Notice of Appeal Rights**

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: May 15, 2015

*Michael Lazan*  
Impartial Hearing Officer