

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
December 8, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: December 6, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “Petitioner” or “MOTHER”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that DCPS has denied Student a free appropriate public education (“FAPE”) by not offering her an appropriate Individualized Education Plan (IEP) and a full-time residential placement, as well as by failing to comply with the IDEA’s procedural requirements.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 22, 2014, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 23, 2014. The parties met for a resolution session on October 7, 2014 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on October 23, 2014. On October 20, 2014, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on November 17, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SCHOOL COUNSELOR and by DCPS' COUNSEL.

The Petitioner testified and called as witnesses CHILD PSYCHIATRIST, SOCIAL WORKER, EDUCATIONAL ADVOCATE, SCHOOL PLACEMENT SPECIALIST, RESIDENTIAL SCHOOL ACADEMIC DIRECTOR and RESIDENTIAL SCHOOL CLINICAL DIRECTOR. DCPS called as witnesses SCHOOL PSYCHOLOGIST, School Counselor, BEHAVIORAL HEALTH PSYCHOLOGIST and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1 through P-57 and DCPS' Exhibits R-1 through R-10 were admitted into evidence without objection. At the request of both attorneys, the parties were granted leave until November 25, 2014 to file post-hearing written argument. Counsel for both parties filed post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the October 20, 2014

Prehearing Order:

- Whether DCPS has denied Student a FAPE by not complying with its child-find obligations during the 2013-2014 and 2014-2015 school years;
- Whether DCPS has denied Student a FAPE by failing to timely evaluate her for special education eligibility;
- Whether DCPS has denied Student a FAPE by failing to develop an appropriate IEP and a suitable educational placement for her;
- Whether DCPS has denied Student a FAPE by refusing to provide her a placement in a therapeutic residential school that can meet her special education needs;
- Whether DCPS has denied Student a FAPE by failing to evaluate her in all areas of suspected disability including failing to conduct a psychiatric evaluation, a social history, and a functional behavioral assessment and failing to develop a behavior intervention plan; and
- Whether DCPS has denied Student a FAPE by failing to convene an MDT/IEP meeting to review reports from the independent therapist and the independent psychiatrist and failing to review her hospital records.

At the beginning of the due process hearing, Petitioner withdrew an additional issue, alleging failure to provide her access to Student's education records.

For relief, Petitioner requests that DCPS be ordered to fund Student's placement at Residential School and to convene Student's IEP team with qualified personnel to review Student's reports and assessments, to develop an IEP that provides for full-time special education services in a therapeutic residential school, to include, in addition, family counseling and individual counseling, transportation for the parent to participate

in family therapy at the residential school, and transportation for home visits; and that DCPS be ordered to fund an independent social history and functional behavioral assessment working with personnel at the therapeutic residential school who shall develop a comprehensive behavior intervention plan for review by the IEP team.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments and legal memoranda of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where she resides with Mother. Testimony of Mother.
2. Student is eligible for special education and related services under the primary disability classification Emotional Disturbance (ED). Exhibit R-9. The initial eligibility determination was made at CITY HIGH SCHOOL on June 18, 2014. Exhibit P-55.
3. Student, who was adopted by Mother as an infant from overseas, has been in mental health therapy since she was in third grade. Exhibit P-10.
4. Student has a history of self-injurious behaviors. She receives outpatient psychiatric services provided by Psychiatrist and therapy services provided by Social Worker. However, her appearance for scheduled appointments is irregular. Testimony of Psychiatrist, Testimony of Social Worker. Student's mental health diagnosis is Mood Disorder, Not Otherwise Specified (NOS). Exhibit P-5. Student's symptomatology includes depression, suicidal ideation, cutting, difficulties with impulse control, poor judgment, high risk behaviors, stealing, experimentation with drugs, sexual acting-out and frequently skipping school. Exhibit P-6.
5. Student was hospitalized three times in 2013 and two times in 2014 due to

suicidal ideation and self-injurious behaviors. Exhibits P-8, P-10, P-21.

6. Student is currently enrolled in City High School. Until her first year in high school, Student's grades fell within the Average to Above Average range. Student's grades dropped during the 2012-2013 school year. For the year she earned three F's, three D's, a C in physical education and a Pass in Internship. She repeated the grade for the 2013-2014 school year. Her final grades for that year were 6 F's and 2 C's. For the 2012-2013 school year, Student was absent from school for 45.5 days. For the 2013-2014 school year, Student was absent for 98 days. Exhibits P-7, P-33.

7. On November 25, 2013, a paralegal from PRIOR LAW FIRM contacted Assistant Principal by email to request that Student be evaluated for special education and related services, including a comprehensive psychological evaluation and a functional behavioral assessment (FBA). Exhibit P-39. In that email, the paralegal also requested copies of, or an appointment to view, Student's education records. Prior Law Firm received no response to the request. Testimony of Educational Advocate. On February 11, 2014, Prior Law Firm faxed a letter request to the principal at City High School repeating the request for copies of, or an appointment to view, Student's education records. Exhibit P-40.

8. In March 2014, Mother informed Educational Advocate that School Psychologist had contacted her about conducting an assessment of Student. On March 19, 2014 Educational Advocate wrote School Psychologist that it was imperative that the evaluations be completed quickly. Testimony of Educational Advocate, Exhibit P-41.

9. School Psychologist completed a confidential psychological evaluation report of Student after April 24, 2014. (The report is not dated. School Psychologist testified that she prepared the report approximately the first week of April 2014.

However, the report states that Student was observed in geometry class on April 24, 2014. Hence, I find that the report was completed after that date.) School Psychologist administered a battery of cognitive, education and social/behavioral tests. On cognitive testing, the Reynold Intellectual Assessment Scales (RIAS), Student's scores were Average for all indices. On academic functioning tests, the Woodcock-Johnson Tests of Academic Achievement (WJ-III), Student's fluency with academic tasks fell within the Very Superior range. Her academic skills fell within the Superior range and her ability to apply academic skills fell within the Average range. Exhibit P-7.

10. To assess Student's overall behavior, School Psychologist administered the Behavior Assessment System for Children, Second Edition (BASC-2) to Student, Mother, and Student's science and English teachers. Based upon the responses of Mother and the teachers, School Psychologist reported that Student was At-Risk for Internalizing problems, that Student generally maintained high levels of depression, that she often appeared sad and often demonstrated a negative/pessimistic attitude toward things. Within the school setting, Student often appeared worried or nervous about real and imagined problems. Her teachers also rated her At-Risk for somatization. Based upon information obtained from interviews, School Psychologist reported that it was highly likely that Student experienced somatization and anxiety as a symptom of her depressive states. School Psychologist reported that based upon Student's responses on the Clinical Assessment of Depression (CAD) assessment, Student also had lost interest in activities that were once enjoyable and had little interest in her daily routines. The data also suggested that Student experienced school problems characterized by attention and learning problems, that she can become inattentive very easily and that she lacks the necessary motivation to make consistent

academic progress. On her BASC-2 self-rating scale, Student rated herself At Risk for the Emotional Symptoms Index and for Inattention/Hyperactivity. The Emotional Symptoms Index is the BASC-2's most global indicator of serious emotional disturbance, particularly internalized disorders such as depression. School Psychologist reported that an analysis of Student's Inattention/Hyperactivity composite score suggested that she is able to maintain self-control in the classroom, but has great difficulty maintaining necessary levels of attention. For her classroom observation of Student, School Psychologist used the Scales for Assessing Emotional Disturbance – Second Edition (SAED-2). The observation data suggested that, compared to her peers, Student evidenced fewer intervals of on-task behavior, and significantly more intervals of an Inability to Learn, Relationship Problems, Inappropriate Behavior and Unhappiness or Depression. School Psychologist concluded, *inter alia*, that Student's mood and behavior substantially limited or reduced her ability to access classroom learning and hindered her academic motivation and progress. She reported that the BASC-2 scales supported symptoms associated with Major Depressive Disorder and/or Bipolar Disorder and that additional information would be needed to make a definitive diagnosis of either disorder. Exhibit P-7.

11. On April 30, 2014, School Psychologist informed Mother by email that the psychological report for Student was complete. The school provided a copy of the evaluation to Mother and Prior Law Firm on May 13, 2014. Exhibit P-41.

12. In March and April 2014, School Psychologist made requests to Mother for Student's mental health records and for permission to speak to Student's mental health workers. Mother withheld her consent. Testimony of School Psychologist. School Counselor made multiple requests to Mother for Student's mental health and

hospitalization records. Until September 2014, Mother did not provide the records or authorize City High School to contact the hospitals or Student's private therapists.

Testimony of School Counselor, Exhibit P-44.

13. A special education eligibility committee meeting for Student was convened on June 18, 2014 at City High School. The eligibility team determined that Student was eligible for special education and related services under the primary disability classification ED. Exhibit P-56. An IEP team meeting was convened to develop Student's initial IEP. This IEP identified Annual Goals for Emotional, Social and Behavioral Development and would have provided Student two hours per week of Specialized Instruction in the General Education setting and 90 minutes per month of Behavioral Support Services. Exhibit P-1. Mother withheld her consent to implement the IEP and the IEP was not implemented. Testimony of School Psychologist. The two hours per week of Specialized Instruction were not intended as instruction time for Student, but as time for Student's case manager to provide case support to Student and her teachers. Testimony of Assistant Principal.

14. On August 19, 2014, a new attorney for Petitioner, Petitioner's Counsel, notified Assistant Principal that she represented Mother. In her August 19, 2014 email, Petitioner's Counsel forwarded a report from Social Worker stating that Student required a full-time placement in a residential school. Petitioner's Counsel reported that Mother disagreed with the spring 2014 psychological evaluation conducted by DCPS and requested that DCPS authorize an Independent Educational Evaluation (IEE) psychological evaluation of Student. Petitioner's Counsel also requested that DCPS conduct a psychiatric evaluation or fund an IEE psychiatric evaluation. Petitioner's Counsel stated that the June 18, 2014 IEP proposed for Student was not appropriate and

requested that an IEP meeting for Student be convened as soon as possible. Petitioner's Counsel repeated her request for an IEP meeting for Student by emails to Assistant Principal on August 27, 2014 and September 9, 2014. Exhibit P-43.

15. From August 31, 2014 to September 8, 2014, Student was hospitalized in the District of Columbia due to increased impulsivity, high risk and aggressive behaviors. Her discharge diagnoses were Depressive Disorder NOS and Post Traumatic Stress Disorder (PTSD) by history. Exhibit P-57. Student returned to school on September 9, 2014, but immediately resumed her pattern of school and class absences. Exhibits R-1, P-46.

16. Student's current diagnosis by Psychiatrist, is primarily Depression NOS, with atypical features, and attachment issues. When Student feels very depressed, to escape from her problems, she physically flees. These flights have become much more frequent since Mother suffered a heart attack a couple of years ago. Testimony of Psychiatrist.

17. Petitioner's Counsel filed the due process complaint in this case on September 22, 2014. The parties met for a resolution session on October 7, 2014. At that meeting DCPS offered an IEP that contained the same provisions for two hours per week of Specialized Instruction and 90 minutes per month of Behavioral Support Services, provided in the June 18, 2014 IEP. Exhibit R-3.

18. Residential School has sites in Utah and North Carolina. The Utah site is a 36-bed residential facility serving 13 to 18 year old female students. Most of the students at the Utah site have depression. Other students suffer from attachment disorder, Attention Deficit Hyperactivity Disorder, sexual acting-out, PTSD and Mood

Disorder. Some 50 percent of students at the Utah site have IEPs. Testimony of Academic Director.

19. All students at Residential School receive therapy every day, primarily from psychologists and social workers. Each student is also seen by a contract psychiatrist. The school provides dialectical behavior therapy and cognitive behavior therapy. It specializes in therapy for trauma, attachment disorder, suicidal ideation, drug use, running away and struggling in school. Students at Residential School receive three hours per week of individual and family therapy and more than 15 hours per week of group therapy. Testimony of Clinical Director.

20. Residential School's Utah site follows Utah state academic requirements for high school graduation and the common core math curricula. Its teachers are all licensed and certified in the subject content area. The Utah site has six teachers, including a special education certified teacher, who teaches a study strategies class. The school specializes in credit recovery provided through independent study. Testimony of Academic Director.

21. The tuition at Residential School Utah site is \$340 day (approximately \$61,200 – assuming an average, 180 day, school year). There is also a \$1,500 enrollment fee. Residential School does not hold, and has not applied for, a Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Academic Director.

22. Clinical Director at Residential School has reviewed Student's mental health and education records and believes that Student is appropriate for the program and would benefit from it. Student has been accepted into the program. The program is currently at capacity. Student would be offered the next available opening, whether in

Utah or North Carolina. Testimony of Clinical Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

A. Child-Find

Did DCPS deny Student a FAPE by not complying with its child-find obligations during the 2013-2014 and 2014-2015 school years?

Did DCPS deny Student a FAPE by failing to timely evaluate her for special education eligibility?

Petitioner's Prior Law Firm requested DCPS to evaluate Student for special education eligibility by an email sent November 25, 2013 to the City High School special education coordinator. The request followed a 10-day hospitalization of Student in October 2013 for suicidal ideation, depressed mood and self-harming behaviors. City High School School Counselor and the Student Support Team had knowledge of Student's mental health issues. Yet, DCPS did not conduct the psychological evaluation of Student until April 2014 and did not complete the initial eligibility determination process until June 18, 2014. Petitioner contends this lapse of over six months in

completing the initial eligibility evaluation of Student violated the IDEA's child-find requirement and District of Columbia law. I agree.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). Under the Act's child-find requirement, the District must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (citing *Reid*); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." *Id.* (quoting D.C. Code § 38–2561.02(a)). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013). I find that DCPS violated the IDEA and D.C. Code § 38-2561.02(a) by not completing its initial eligibility evaluation of Student by March 25, 2014, that is, within 120 days from November 25, 2013, when it received Mother's initial referral.

DCPS' failure to ensure that Student was timely evaluated for eligibility for special education services was a procedural violation of the IDEA. *See, e.g., Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233, 44 IDELR 127 (D.C.Cir. 2004) (Failure to

timely conduct initial eligibility evaluation). Procedural violations of the IDEA which result in loss of educational opportunity to the Student are actionable. *See, e.g., Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). On June 19, 2014, the City High School eligibility committee determined, belatedly, that Student is a “child with a disability” in need of special education and related services. *See* 34 CFR § 300.08. Had City High School made that determination by March 25, 2014, as required by District law, Student should have begun receiving IEP services weeks before the end of the school year. I find, therefore, that DCPS’ failure to ensure that Student was timely evaluated, following the parent’s November 25, 2013 referral, resulted in a loss of educational opportunity to Student and was a denial of FAPE.²

Compensatory education is the equitable remedy devised by the courts for child-find violations. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 62 (D.D.C.2011). The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if she had received the required special education services, and the type and amount of services that would place the student in the same position she would have occupied but for the LEA’s violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir. 2005). In the instant case, Petitioner’s Counsel gave notice at the beginning of the due process hearing that Petitioner was withdrawing her request for compensatory education until Student is provided an appropriate educational placement. Accordingly, without prejudice to any claim hereafter for compensatory education for Student, I do not order DCPS to provide

² Student, having been identified by DCPS, on June 18, 2014, as a child with a disability, the child-find obligation did not arise again in the 2014-2015 school year.

Student compensatory education.

B.

Appropriateness of June 18, 2014 IEP and Placement

Did DCPS deny Student a FAPE by failing to develop an appropriate IEP and a suitable educational placement for her?

Did deny Student a FAPE by refusing to provide her a placement in a therapeutic residential school that can meet her special education needs?

June 18, 2014 IEP

Following the determination by Student's multidisciplinary team on June 18, 2014 that Student was eligible for special education and related services due to her ED disability, City High School proposed an IEP which would provide Student two hours per week of Specialized Instruction in the general education setting and 90 minutes per month of Behavioral Support Services. The Specialized Instruction hours were intended as case management services to Student and her teachers – not as instructional services. Petitioner contends that the services and educational placement offered Student in the June 18, 2014 IEP were inappropriate. I agree.

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 243, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “

more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “ ‘cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.’ ”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report³ at 11 (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). . . .

An IEP, nevertheless, need not conform to a parent’s wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (IDEA does not provide for an “education . . . designed according to the parent’s desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. See, e.g., *Aaron P. v. Dep’t of Educ., Hawaii*, No. 10–574, 2011 WL 5320994, at *32 (D.Hawai’i Oct. 31, 2011) (while “sympathetic” to parents’ frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); see also *D.S. v. Hawaii*, No. 11–161, 2011 WL 6819060, at *10 (D.Hawai’i Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

K.S., 962 F.Supp.2d at 220-222.

When the June 18, 2014 IEP was developed, the severity of Student’s emotional disability and mental health issues was well known to the City High School staff on her IEP team. In her psychological evaluation report, which she presented to the IEP team,

³ U.S. Magistrate Judge Kay’s Report and Recommendation, June 10, 2013

School Psychologist wrote,

Soon after she began middle school, [Student] was diagnosed with depression. At the time, several changes were taking place in [Student's] life such as transitioning from a small to big school; her mother's heart attack during her 8th grade school year; and, the onset of puberty. [Mother] reports that [Student's] therapists compared that time in her life as "the rug being pulled out from under her." This was the onset of perceptible abandonment issues as well. . . . This is [Student's] second year at City High School. According to a referral form for mental health services submitted in October 2013, [Student] has a history of skipping classes, isolating herself from peers, suicidal thoughts and feelings, and what appeared to be self-mutilation (burns on arm). According to [Student], she has been seeing both a psychologist and psychiatrist for many years, and is currently taking Prozac [*sic*] and Clonidine. [Student] reports that therapy is intended to address anger problems and depression. [Student] reports past suicidal thoughts, and expressed to the examiner that she had suicidal thoughts a few days before the evaluation. She has been hospitalized four times within the past 10 months for depressive episodes, self-mutilation (cutting), and an aspirin overdose. Her most recent hospitalization occurred in February 2014.

Exhibit P-7.

The impact of Student's mental health issues on her academic progress was also well documented. Until her first year in high school, Student's grades fell within the Average to Above Average range. Student's grades dropped during the 2012-2013 school year. For the year she received three F's, three D's, a C in physical education and a Pass in Internship. She was not promoted to the next grade. Even though Student repeated the grade for the 2013-2014 school year, her final marks were 6 F's and 2 C's. Student missed 45.5 days of school in the 2012-2013 school year and was absent for 98 days in the school year preceding the June 18, 2014 IEP meeting. As School Psychologist informed the IEP team in her psychological evaluation report that there was evidence to support that Student's mood and behavior hindered her academic motivation and progress and observations and supporting data suggested "that conflict and distress are the major source" of Student's academic difficulties.

After considering School Psychologist's report, as well as information from

Mother, Student's teachers, and other data, the June 18, 2014 IEP team offered Student only 90 minutes per month of Behavioral Support Services and two hours per week of case management services. Educational Advocate, who was qualified as an expert in development of IEPs, opined that the June 18, 2014 IEP was not appropriate to address the behaviors that impeded Student's learning – not attending school and risky behaviors – because aside from 90 minutes per month of Behavioral Support Services, the IEP provided no special education, related services, aides, program modifications or other supports to get Student to attend school and desist from risky behaviors. I found Educational Advocate's opinion on this issue, which was not rebutted by DCPS, to be credible. I conclude that given the severity of Student's emotional disability and the overwhelming effect it was having on her educational progress, all of which was known to the June 18, 2014 IEP team, the services offered in the initial IEP – two hours per week of Specialized Instruction for case management support and 90 minutes per month of Behavioral Support Services – were clearly not “reasonably calculated to confer educational benefits” on Student, *see Rowley, supra*, 458 U.S. at 207, 102 S.Ct. 3034, or to enable Student “to be involved in and make progress in the general education curriculum.” *See* 34 CFR § 300.320(a)(4).

IEP Placement

Petitioner also contends that DCPS denied Student a FAPE by failing to provide for a residential placement in the June 18, 2014 IEP. Because, I have determined in this decision that DCPS' June 18, 2014 IEP was not reasonably calculated to confer educational benefits on Student, it follows that the IEP, including Student's placement in the general education setting, must now be revised by Student's IEP team. However, the measure and adequacy of an IEP can only be determined as of the time it is offered

to the student. *See S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008). The reports of Social Worker and Psychiatrist, who asserted that Student needed a full-time residential placement, were provided to DCPS weeks after the June 18, 2014 IEP meeting, when Petitioner's Counsel became involved in the case. Obviously, Student's IEP team did not have the benefit of Psychiatrist's and Social Worker's reports and, until September 2014, Mother also withheld her permission for DCPS to obtain records from Student's other mental health providers.

Under the IDEA's least restrictive environment mandate, DCPS is required to provide Student with a free appropriate public education in "the least restrictive environment," 34 CFR § 300.114(a), and to educate her, "to the maximum extent appropriate," with children who are not disabled, 20 U.S.C. § 1412(a)(5). *See Honig v. Doe*, 484 U.S. 305, 320-321, 108 S.Ct. 592, 603 (1988). "Conformity with the dictates of IDEA . . . requires that . . . "To the maximum extent appropriate, children with disabilities [] . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Pinto v. District of Columbia* 2014 WL 4809841, 5 (D.D.C.Sept. 29, 2014), citing 20 U.S.C. § 1412(a)(5)(A). In this case, Petitioner has not shown that from the information available to DCPS as of June 2014, the IEP team could have concluded that a residential placement was the least restrictive environment for Student. Therefore, the decision of the June 18, 2014 IEP team not to offer Student a full-time residential placement was not a denial of FAPE.

C.

Failure to Evaluate and to Review New Information

Did DCPS deny Student a FAPE by failing to evaluate her in all areas of suspected disability including failing to conduct a psychiatric evaluation, a social history, and a functional behavioral assessment and failing to develop a behavior intervention plan?

Did DCPS deny Student a FAPE by failing to convene an MDT/IEP meeting to review reports from the independent therapist and the independent psychiatrist and by failing to review her hospital records?

Petitioner also contends that DCPS denied Student a FAPE by failing to evaluate her in all areas of suspected disability and by failing to convene Student's IEP team to review Student's mental health providers' reports, forwarded to DCPS in August and September 2014.

School Psychologist conducted a psychological evaluation of Student in April 2013. To determine whether that evaluation was "appropriate," I must consider whether DCPS adequately gathered functional, developmental and academic information about Student's needs to determine her eligibility in all areas of suspected disability and whether the evaluation was sufficiently comprehensive to identify all of Student's needs. *See South Kingstown School Committee v. Joanna S.*, 2014 WL 197859, 8 (D.R.I. Jan. 14, 2014), citing 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1–3); 34 CFR. § 300.304(b)(1–3), (c)(4, 6); and state regulations. School Psychologist reviewed Student's education records, conducted interviews and a classroom observation and administered a battery of tests and rating scales to determine Student's levels of cognitive, academic and social-emotional functioning. The tests and scales administered included the Reynolds Intellectual Assessment Scales (RIAS), the Woodcock-Johnson Tests of Academic Achievement - Third Edition (WJ-III), the Behavior Assessment System for Children, Second Edition (BASC-2), the Clinical

Assessment for Depression (CAD), the Conners' Rating Scale, Third Edition, the Behavior Rating Inventory of Executive Function (BRIEF) and Scales for Assessing Emotional Disturbance - Second Edition (SAED-2). At the due process hearing, Petitioner offered no evidence that the information gathered by School Psychologist was not adequate to determine Student's special education eligibility in all areas of suspected disability or that School Psychologist's evaluation was not sufficiently comprehensive to identify all of Student's needs.

Neither has Petitioner shown that DCPS denied Student a FAPE by failing to convene an IEP meeting to review the reports provided in August and September 2014 from Student's psychiatrist and therapist or by failing to review her hospital records, also provided in September 2014. Petitioner is correct that DCPS is required under the IDEA to convene an IEP meeting to review the reports and hospital records provided by the parent. *See* 34 CFR § 300.324(b) (An LEA must ensure that the IEP team reviews the student's IEP periodically and revises the IEP, as appropriate, to address, *inter alia*, information about the Student provided to, or by, the parent.) However, the IDEA does not set a time frame within which an LEA must reconvene the IEP team to review new information provided by the parent. In an analogous context, the U.S. District Court for the District of Columbia has held that after receiving a request for a special education reevaluation from a student's parent, that "[r]evaluations should be conducted in a reasonable period of time, or without undue delay, as determined in each individual case." *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005) (citation and internal quotations omitted). Following the principle in *Herbin*, when a parent provides new information about her child and requests an IEP team meeting, DCPS must ensure that the IEP team is convened in a reasonable period

of time, or without undue delay.

In this case, Petitioner's Counsel forwarded the additional information from Student's mental health providers to Assistant Principal on August 19 and September 4, 2014. Student's latest hospital records were provided at a later date. Petitioner filed her due process complaint on September 22, 2014, only some 18 days after providing Student's hospital records and Psychiatrist's report to DCPS. I find that Petitioner has not shown that DCPS' not convening Student's IEP team to review the new information, during this interval, constituted undue delay.

Remedy

Having found that Student was denied a FAPE by DCPS' June 18, 2014 IEP, which was not reasonably calculated to confer educational benefits, I turn to Petitioner's requested remedy, DCPS funding for Student to attend Residential School.

i. Residential Placement

The IDEA creates a statutory preference and expressly mandates that handicapped or disabled children be educated in the least restrictive environment to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5); 34 CFR § 300.114. Notwithstanding, the IDEA does provide for residential placement if such a placement is necessary to meet the child's individual educational needs. *See, e.g.*, 34 CFR § 300.104. If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. *Id.*

Federal courts deciding IDEA residential placement cases have generally held that the test for whether a child's placement in a residential program is educational, and therefore reimbursable under the Act, focuses on whether the child's residential

placement is “necessary for educational purposes.” *State ex rel. Support of Robert H.*, 257 Wis.2d 57, 69, 653 N.W.2d 503, 508 - 509 (Wis.2002) (quoting *Butler v. Evans*, 225 F.3d 887, 893 (7th Cir.2000), (citing *Tennessee Dep’t of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir.1996) (a residential placement is appropriate and free only if it “is necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process”); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir.1990) (analysis focuses on whether a residential placement “may be considered necessary for educational purposes”); *Burke County Bd. of Educ.*, 895 F.2d at 980 (the IDEA covers residential placement only if such placement is “essential for the child to make *any* educational progress at all”) (emphasis in original) (citing *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir.1983), and *Matthews v. Davis*, 742 F.2d 825, 829 (4th Cir.1984)); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C.Cir.1985) (determination of whether the IDEA requires residential placement turns on whether full-time residential placement is necessary for educational purposes); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 693 (3rd Cir.1981) (only a residential placement that is “a necessary predicate for learning” is covered by the IDEA).

In *McKenzie v. Smith*, *supra*, the D.C. Circuit adopted a test, first enunciated by the Third Circuit Court of Appeals in *Kruelle*, *supra*, for determining whether a parent is entitled to reimbursement for making a private residential placement. In *Kruelle*, an intellectually disabled child, who was unable to speak and not toilet trained, was found to need extensive, around-the-clock, care as part of his FAPE. The *Kruelle* test focuses on whether a child’s medical, social, or emotional problems are “inextricably intertwined” with the learning process. “To determine whether a residential placement

is appropriate, a court must analyze ‘whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.’” *McKenzie v. Smith, supra*, 771 F. 2d at 1534, quoting *Kruelle, supra*, 642 F.2d at 693.) Under this test, if a hearing officer cannot segregate a child’s medical, social, or emotional problems from the learning process, the school district must be ordered to reimburse the parents for the private residential placement.

In a decision “on all fours” with the present case, *Independent School Dist. No. 284 v. A.C., by and through her Parent, C.C.*, 258 F.3d 769 (8th Cir.2001), the Eight Circuit, citing, *inter alia*, *McKenzie v. Smith, supra*, found that a student’s behavior problems were not segregable from the learning process. The student, A.C., did not have any significant neurocognitive impairment, but had a variety of emotional and behavioral problems. A.C.’s school-related problems included classroom disruption, profanity, insubordination, and truancy. Outside of school, she used alcohol and illegal drugs, was sexually promiscuous, repeatedly ran away from home, was thought to have forged checks, and was hospitalized three times for threatening or attempting suicide. The lower court described A.C.’s problems as “social and emotional in nature,” and concluded from this that they were “separable from the learning process.” Overturning that decision, the Eighth Circuit held that “if the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it. What should control our decision is not whether the problem itself is “educational” or “non-educational,” but whether it needs to be addressed in order for the child to learn.” *Id.* at 777. *See also Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir.1997)

(residential placement appropriate in light of student's "stalled academic performance" and the determination that the student's "debilitating emotional problems could only be properly addressed in a highly structured residential setting"); *Taylor v. Honig*, 910 F.2d 627, 632–33 (9th Cir.1990) (student placed in special educational school to treat severe emotional disturbance that was interfering with his ability to learn).

The Eighth Circuit's analysis of the facts in *A.C.* is instructive for the instant case:

[T]he record here does not permit the conclusion that A.C.'s behavior problems are separable from the learning process. The IEE evaluator made quite clear her judgment that A.C. will not receive educational benefit unless her emotional and behavioral problems are dealt with. The school psychologist from her old district, drawing on over two years of that district's experiences with her, said that "[f]or any placement to be successful, there will need to be the ability to exert sufficient control while providing a therapeutic approach." . . . This is not a case where the correction of behavioral and emotional problems is merely desirable in order to improve a student's performance: at the time of her hearing, which occurred at the end of her tenth-grade year, A.C. had completed only nine of the 32 credits required for graduation, although she is of average intelligence and has no learning disability. Both hearing officers found that A.C.'s truancy and disruptiveness had substantially prevented her from receiving educational benefit. . . . The remaining question, then, is whether A.C. can reasonably be expected to make academic progress outside of a residential program. If we regard this as an educational question, there appears to be a consensus in the negative. A.C.'s treating psychologist, her IEE evaluator, her old district's school psychologist, her mother, and both state hearing officers all have reached the conclusion that a residential placement is necessary in order for A.C. to get an education.

Id., 258 F.3d at 777-778.

The factual parallels in the instant case to the *A.C.* decision are striking. Here, the problems of Student, like those of A.C. are not cognitive in nature. Student had Average cognitive assessment scores and Average to Very Superior scores on the academic achievement tests. However, Student's truancy and emotional withdrawal when in school have substantially prevented her from receiving any educational benefit during the last three school years. In school year 2012-2013, Student received mostly

D's and F's. Although she repeated the grade in school year 2013-2014, Student still failed all of her core courses. Following the Eight Circuit's analysis in *A.C.*, the remaining question in the instant case is whether Student can reasonably be expected to make academic progress outside of a residential program. Petitioner's experts, Psychiatrist and Social Worker both testified unequivocally – and without rebuttal from DCPS – that she cannot. Psychiatrist opined that Student absolutely requires a residential school, because unless you can address her emotional issues, you cannot address her educational needs. Social Worker opined that even a therapeutic day school would not be successful for Student because, due to her poor impulse control and poor judgment, Student would continue to run away. None of DCPS' witnesses refuted these opinions. I conclude that Petitioner has demonstrated that Student's social and emotional problems are not segregable from the learning process and that a full-time residential placement is necessary for Student for educational purposes. *See McKenzie v. Smith, supra*, 771 F. 2d at 1534.

Appropriateness of Placement at Residential School

Petitioner requests that I order DCPS to fund Student's placement at Residential School. However, under District of Columbia law, a hearing officer may make a placement in a nonpublic special education school or program that lacks a valid Certificate of Approval from OSSE only if the hearing officer has determined that:

- (A) There is no public school or program able to provide the student with a free appropriate public education; and
- (B) There is no nonpublic special education school or program with a valid Certificate of Approval that meets the requirements of subsection (a)(2) of this section.

D.C. Code § 38-2561.03(b)(2). The requirements of subsection (a)(2) are that the

nonpublic special education school or program to which the student has been referred:

- (A) Has been approved by the SEA in accordance with § 38-2561.07;
- (B) Can implement the student's IEP; and
- (C) Represents the least restrictive environment for the student.

Id., § 38-2561.03(a)(2).

Residential School does not have, and has never applied for a Certificate of Approval from OSSE. There are more than 20 nonpublic residential treatment centers and psychiatric residential treatment facilities which have been approved by OSSE for students of Student's age who have emotional disabilities. *See Exhibit P-50.* Petitioner called School Placement Specialist to testify about why she recommended Residential School for Student over all of the OSSE-approved schools. She testified that she did not consider any of the OSSE-approved schools appropriate for Student because none of the approved schools limited admissions to older adolescent girls and because many of the OSSE-approved schools accept students, who unlike Student, have cognitive disabilities such as Autism Spectrum Disorders and Intellectual Disabilities.

I found School Placement Specialist's rejection of all of the OSSE-approved residential facilities unpersuasive. The IDEA does not require DCPS to place Student at a school where all of the students have similar age, sex or disability profiles. The Act only requires that the educational placement made by an LEA be "reasonably calculated to enable the child to receive educational benefits," that is, "sufficient to confer some educational benefit upon the handicapped child." *See Dawkins by Dawkins v. District of Columbia*, 1989 WL 40280, 3 (D.C.Cir. Apr. 24, 1989), quoting *Rowley, supra*, 458 U.S. at 200, 207. A placement is appropriate if the school is capable of "substantially implementing" the IEP. *Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (citing *Houston Independent School District v. Bobby R.*, 200 F.3d 341

(5th Cir.2000)). *Cf. Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1988) (Proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the IDEA.) School Placement Specialist also testified that Student does not specifically need placement at a psychiatric residential treatment facility because medical intervention is not necessarily recommended for Student. However, Petitioner's expert, Psychiatrist, testified to the contrary that Student needs a very intensive intervention plan, including weekly sessions with both her psychiatrist and her therapist.

I find that Petitioner has not established that none of the OSSE-approved nonpublic special education schools or programs would be able to implement a full-time residential IEP for Student. Accordingly, because Residential School lacks a valid Certificate of Approval from OSSE, pursuant to D.C. Code § 38-2561.03(b)(2), I deny Petitioner's request that I order DCPS to fund Student's placement at Residential School.⁴

ORDER

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

1. Within 20 business days of entry of this order, DCPS shall convene Student's IEP team to consider the additional information provided by the parent, including the reports from Psychiatrist and from Social Worker, Student's hospitalization records and any other relevant data, and to revise, as appropriate,

⁴ Because I find that DCPS should not be ordered to fund Student's placement at Residential School because the program does not have an OSSE Certificate of Approval, I do not reach the inquiry of whether the private program would be appropriate for Student under the *Branham* analysis for prospective placements. See *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005).

Student's IEP. DCPS shall ensure that the revised IEP provides for Student's immediate placement at an appropriate, full-time, residential special education program that serves students with emotional disabilities;

2. DCPS shall fund the costs of the residential program including Student's tuition, room and board, transportation, non-medical care and other covered expenses, in conformity with 34 CFR § 300.104 and OSSE policy;

3. This order is without prejudice to Petitioner's right, if any, to seek compensatory education relief hereafter for DCPS' failure to timely evaluate Student for special education eligibility following the parent's November 2013 referral; and

4. All other relief requested by the Petitioner herein is denied.

Date: December 6, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).