

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

OSSE
Office of Dispute Resolution
December 2, 2014

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
)	
<i>Petitioner,</i>)	
)	
v.)	
)	Date Issued: December 1, 2014
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on September 18, 2014 by Petitioner (Student’s father²), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On September 29, 2014,³ Respondent filed its Response, denying that Respondent denied Student a free appropriate public education (“FAPE”). The Hearing Officer Determination (“HOD”) in this matter is due December 2, 2014.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) by telephone on October 9, 2014, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by October 24, 2014 and that the DPH would be held on

¹ Personal identification information is provided in Appendix A.

² Prior to summer 2014, Student’s mother had custody of Student. Therefore, when “Parent” or “Petitioner” is used in reference to events prior to summer 2014, those words refer to Student’s mother.

³ The Response had been due on September 28, 2014, which fell on a Sunday. Opposing counsel did not object to the Response being filed on the next business day.

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October 31, 2014 and November 6, 2014. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued October 9, 2014.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-53 were admitted without objection. Respondent’s exhibits R-1 through R-10 were admitted without objection.

Petitioner called the following witnesses at the DPH:

- (a) Petitioner/Parent
- (b) Student
- (c) Paralegal
- (d) Senior Educational Advocate
- (e) Academic Credit Recovery Director
- (f) Nonpublic Special Education Coordinator

Respondent did not call witnesses at the DPH.

Petitioner gave an oral closing argument, and Respondent rested on the evidence.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate individualized education program (“IEP”) in May 2013. The DPC raises the following issues with respect to the appropriateness of the May 2013 IEP:
 - (1) whether the May 2013 IEP provided for sufficient specialized instruction in an out-of-general education setting to provide meaningful benefit to Student;
 - (2) whether the May 2013 IEP provided sufficient behavioral support or whether, instead, the number of hours of behavioral support Student was slated to receive was reduced without justification;
 - (3) whether the May 2013 IEP failed to include a behavioral intervention plan, although DCPS should have known from January 2013 that Student required such a plan to assist him in managing his behavior;
- (b) Whether DCPS denied Student a FAPE by changing his educational placement at the beginning of the 2013-2014 school year to the District High School 1/Special Program without a team decision or the parent’s involvement.

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- (c) Whether DCPS denied Student a FAPE by failing to revise Student's IEP once DCPS recognized at the start of the 2013-2014 school year that Student needed a full-time special education program.
- (d) Whether DCPS denied Student a FAPE by failing to implement his IEP while he was in District High School 1/Special Program.
- (e) Whether DCPS denied Student a FAPE in November 2013 by failing to include the parent or the team in the decision to remove Student from District High School 1/Special Program, despite Student's progress.
- (f) Whether DCPS denied Student a FAPE at the May 21, 2014 IEP meeting by failing to create an appropriate IEP for Student. The DPC raises the following issues with respect to the appropriateness of the May 2014 IEP:
 - (1) whether the May 2014 IEP provides for sufficient specialized instruction in an out-of-general education setting to provide meaningful benefit to Student.
 - (2) whether the May 2014 IEP fails to provide sufficient behavioral support in order for Student to receive a FAPE.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding in Petitioner's favor on all issues in the DPC;
- (b) an Order that within ten school days of a decision in this matter, DCPS convene an IEP/MDT meeting to review Student's IEP and to revise it to reflect a minimum of 27.5 hours of specialized instruction outside the general education setting, and a minimum of one hour per week of behavioral support services outside the general education setting;
- (c) an Order that DCPS reimburse Nonpublic School for any and all costs associated with educating Student, including transportation, that were incurred during the time that Student was unilaterally placed at Nonpublic School, until Student's IEP is revised and a Prior Written Notice issued to Nonpublic School or another appropriate educational placement and location of services.
- (d) an Order that DCPS place and fund Student at Nonpublic School or another appropriate location of services within ten days of a decision in the matter, and that DCPS issue a Prior Written Notice to Parent memorializing this placement within ten days of a decision in this matter;
- (e) an Order that DCPS fund transportation for Student to and from Nonpublic School or other appropriate placement, for as long as Student attends the school;
- (f) compensatory education in the form of three hours of academic credit recovery under the direction of Academic Credit Recovery Program, 100 hours of tutoring to facilitate success with the academic credit recovery program classes; transportation to and from the academic credit recovery program; and 100 hours of mentoring by an independent provider of Parent's choice.

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FINDINGS OF FACT

1. Student resides with his father (“Parent”/“Petitioner”) in Washington, D.C.⁴

2. Student was determined eligible for special education and related services on September 20, 2011 under the classification of Other Health Impairment (“OHI”).⁵ He has been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), Mood Disorder, Oppositional Defiant Disorder, and Persistent Depressive Disorder.⁶

Student’s Recent School Enrollment History

3. Student attended District High School 1, District High School 2 and District Public Charter School from the start of the 2012-2013 school year until January 2013.⁷

4. Student returned to District High School 1 from January 2013 through the end of the 2012-2013 school year.⁸

5. From the beginning of the 2013-2014 school through approximately November 2013, Student attended a specialized program run by District High School 1 (“District High School 1/Special Program”).⁹ This specialized program within District High School 1 (“District High School 1/Main Campus”) was housed in a separate building and had smaller classes, with a later start time, than the rest of the school. A special education teacher was one of two teachers assigned to each class in the special program.¹⁰

6. District High School 1/Special Program was comparable to a full-time special education program.¹¹

7. District High School 1/Special Program was a better fit for the needs associated with Student’s disability than had been District High School 1/Main Campus or the other high school settings in which Student had previously received services, because District High School 1/Special Program provided Student a smaller classroom setting isolated from most distractions, where he could get to know his teachers.¹²

⁴ Testimony of Parent.

⁵ P-28-1; R-8-1.

⁶ P-49-18.

⁷ P-48-4.

⁸ P-48-4.

⁹ Testimony of Senior Educational Advocate.

¹⁰ Testimony of Senior Educational Advocate.

¹¹ Respondent does not concede that District High School 1/Special Program was a special education program, as Petitioner asserts that it was. Based on the available record (e.g, testimony from Senior Educational Advocate, and descriptions of the program as included in Student’s May 2014 IEP), and absent any evidence to the contrary, the Hearing Officer concludes that District High School 1/Special Program was comparable to/essentially a full-time special education program.

¹² Testimony of Senior Educational Advocate; P-28-3; R-8-8.

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8. In approximately November 2013, DCPS returned Student to District High School 1/Main Campus, where he attended through the end of the 2013-2014 school year.¹³

9. From the start of the 2014-2015 school year through the present time, Student has been attending Nonpublic School, where Parent unilaterally placed him.¹⁴

IEPs

10. Student's current¹⁵ individualized education program ("IEP") is dated May 21, 2014 and calls for Student to receive ten hours per week of special education services inside the general education setting (five hours in mathematics and five hours in reading), and 90 minutes of behavioral support services per month outside the general education setting.¹⁶

11. Student's May 7, 2013 IEP likewise called for Student to receive ten hours per week of special education services inside the general education setting (five hours in mathematics and five hours in reading), and 90 minutes of behavioral support services per month outside the general education setting.¹⁷

12. Student's May 9, 2012 IEP also called for Student to receive ten hours per week of special education services inside the general education setting (five hours in mathematics and five hours in reading); however, it called for Student to receive 120 minutes of behavioral support services per month outside the general education setting, rather than 90 minutes per month.¹⁸

Academic Performance

13. Student received mostly failing grades in the 2012-2013 and 2013-2014 school years.¹⁹

Attendance and Behavior, and School Interventions

14. Student had a high absence rate during the 2013-2014 school year, missing well over 100 days.²⁰ His absences were in part due to his asthma,²¹ in part due to him not being permitted in the school building some days because he lacked the necessary school

¹³ P-48-4.

¹⁴ Testimony of Parent; Testimony of Senior Educational Advocate; Testimony of Nonpublic Special Education Coordinator.

¹⁵ The only May 2014 IEP offered into evidence at the DPH is marked "Draft," and indicates that annual review of Student's IEP had occurred approximately a month prior on April 24, 2014. Since both parties disclosed the same IEP, and since no other IEP from 2014 was disclosed by either party, and no evidence was offered to indicate that this is not Student's current IEP, the Hearing Officer accepts the May 21, 2014 IEP as Student's current IEP for purposes of this HOD.

¹⁶ P-28-10; R-8-10.

¹⁷ P-22-8.

¹⁸ P-10-7.

¹⁹ P-34; R-10.

²⁰ R-1; R-4. R-10-1.

²¹ R-1-1; testimony of Senior Educational Advocate.

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identification,²² and in part due to him becoming overwhelmed and having difficulty remaining in class and remaining focused in class²³ due to his disability.

15. DCPS developed a “Student Attendance Support Plan” for Student in November 2013 (signed by Student, but not by Parent), indicating Student was missing so much school due to health issues and lack of motivation; designating personnel to monitor his attendance; and stating that Student was to report to school on time and complete a daily monitoring sheet,²⁴ but lacking specific strategies to aid Student with achieving better attendance, and lacking strategies specific to Student’s disability.

16. Student has long history of difficulty managing his anger at school, chronic truancy, distractibility, and disruptive behavior such as leaving class without permission and, on at least one occasion in March 2013, making threats in school.²⁵

17. On June 13, 2013, DCPS completed a detailed functional behavior assessment²⁶ for Student for the first time, and on June 14, 2013, DCPS created a detailed behavior intervention plan²⁷ for Student. Each report outlined specific strategies for assisting Student with improving his behavior and attendance.

Evaluation Recommendations

18. Student requires a therapeutic school environment with a low student-teacher ratio, due to his distractibility, academic, anger, aggression and truancy issues.²⁸

²²Testimony of Senior Educational Advocate.

²³ Testimony of Student.

²⁴ R-3.

²⁵ Testimony of Senior Educational Advocate; R-6; P-13; P-15; P-17; P-20; P-35; P-47.

²⁶ P-7.

²⁷ P-6.

²⁸ See P-46-12 & P-46-13/May 31, 2011 Independent Comprehensive Psychological Evaluation (“[Student’s] difficulties with ADHD and emotional regulation are consistent and enduring, he will require specialized instruction services on a full-time basis. Specialized instruction should be aimed at helping him to attend to class lessons, and to focus on all aspects of his academics (Reading, Mathematics, and Written Expression). See also, Initial IEP from September 21, 2011 at P-7-3 (“Services will need to be therapeutic in nature, due to his difficulties with aggression, and anger, and his long-standing problems with academics.”) (IEPs from subsequent years include similar language); see also P-46-13/May 31, 2011 Independent Comprehensive Psychological Evaluation (“[Student] would benefit from a highly structured academic setting with low student/teacher ratio where he can get the individual attention he requires to success academically.”); see also P-49-21/Independent Comprehensive Psychological Evaluation (“[Student’s] learning, emotional and behavioral problems indicate that he continues to require placement in a therapeutic school intended for students with an Emotional Disturbance and ADHD. In light of [Student’s] emotional dysregulation, his history of truancy, suspected bullying (victim), and the progress which he appears to be making at [Nonpublic School], it is recommended that he stay at [Nonpublic School].”). There was no evidence at the DPH of an evaluation contradicting these recommendations.

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Unilateral Placement

19. Petitioner sent to DCPS a letter notice of unilateral placement on August 12, 2014, indicating that Student was about to start ninth grade for the third time, that he had not made any progress, citing many of the same issues raised in the DPC underlying the instant action, asserting that DCPS had denied Student a FAPE, and stating that Petitioner would be placing Student at Nonpublic School if Respondent had not provided Student what Petitioner considered to be an “appropriate placement” by the start of the 2014-2015 school year (more than ten days away as of the time the letter was sent).²⁹

20. On August 20, 2014, prior to the start of the 2014-2015 school year, DCPS sent a written response to Petitioner’s letter notice of unilateral placement, indicating that Student had an appropriate placement, that his current location of services (District High School 1/Main Campus) was his least restrictive environment, and that if Parent chose to enroll Student at Nonpublic School, DCPS would consider Student parentally placed and would not fund the placement.³⁰

Nonpublic School

21. Nonpublic School is a small, full-time special education school, with therapeutic services and vocational training for its students (grades 9-12), who can earn high school diplomas at the school. There are 4-6 students per class, and a behavioral support team including dedicated aids and a licensed social worker.³¹

22. Student began attending Nonpublic School at the beginning of the 2014-2015 school year, via parental unilateral placement.

23. Student has made attendance, academic and behavioral progress in the more restrictive environment of Nonpublic School, and has benefited from accommodations such as being able to take frequent breaks when he has trouble sitting still in class, and being able to speak with a social worker most any time he needs to during the school week, in addition to his scheduled one hour per week of behavioral support.³²

24. Nonpublic School is included on the Office of State Superintendent for the District of Columbia’s (“OSSE”) list of approved nonpublic day schools.³³ Nonpublic School’s daily tuition rate has been approved by OSSE.³⁴

25. Nonpublic School has not billed Parent for Student’s tuition since he began attending the school, but has allowed him to attend in anticipation of being reimbursed by DCPS as an outcome of this current litigation.³⁵

²⁹ P-37; testimony of Paralegal.

³⁰ P-38-1.

³¹ Testimony of Nonpublic Special Education Coordinator.

³² Testimony of Nonpublic Special Education Coordinator; testimony of Parent; testimony of Senior Educational Advocate; testimony of Paralegal.

³³ P-53.

³⁴ Testimony of Nonpublic Special Education Coordinator.

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Academic Credit Recovery Program

26. Academic Credit Recovery is a private program that enables students to earn Carnegie units (academic credits toward a diploma) that they missed/lost during the regular school year.³⁶

27. Academic Credit Recovery Program relies on a combination of a computer program through a DCPS approved vendor, and an on-site special education teacher to help students work through the credit recovery curriculum. Students can work at their own pace.

28. Student could qualify for Academic Credit Recovery Program, and could earn approximately three credit hours in approximately 100 hours, given his regular class load and considering the needs associated with his disability.³⁷

29. Academic Credit Recovery Program is accessible by way of the Metro public transportation system.

CONCLUSIONS OF LAW

“Based solely upon 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 FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer’s determination of whether a child received a FAPE must be based on substantive grounds. 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 student’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 C.F.R. 300.513(a).

1. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP in May 2013.

Pursuant to the IDEA, in order to provide a FAPE to a student, “[t]he IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school

³⁵ Testimony of Nonpublic Special Education Coordinator.

³⁶ Testimony of Academic Credit Recovery Program Director.

³⁷ Testimony of Academic Credit Recovery Program Director; testimony of Senior Educational Advocate.

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complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefit. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). Petitioner does not allege procedural violations with respect to the May 7, 2013 IEP, but asserts that the IEP was not reasonably calculated to enable Student to receive educational benefit because it: (A) provided insufficient hours of specialized instruction in an outside-the-general education setting, (B) reduced Student's number of hours of behavioral support, and (C) failed to include a behavioral intervention plan.

A. Whether the May 2013 IEP provided for sufficient specialized instruction in an out-of-general education setting to provide meaningful benefit to Student.

In order to provide a FAPE, a local education agency ("LEA") needs to provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The Supreme Court has held that the standard in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. IDEA does not require LEAs to provide services sufficient to maximize each child's potential. *Id.* at 198 (internal quotations and citations omitted). However, Congress "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.* 774 F.2d 629, 636 (4th Cir.1985).

In this instance, Student's 2012 and 2013 IEPs offered essentially the same level of services (except that behavioral support was reduced in 2013), though Student was failing most of his classes and not making academic progress. The IEP did not provide for any hours of academic instruction outside the larger general education setting that Student found to be distracting and overwhelming, due to his disability. Maintaining largely unchanged IEP service hours for Student under these circumstances fails to meet the *Rowley* "basic floor of opportunity" standard, particularly since an independent comprehensive psychological evaluation as far back as May 2011 recommended full-time special education service hours for him as an accommodation for him due to his ADHD, difficulties with emotional regulation, and other manifestations of his disability. Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012); *Hunter v. District of Columbia*, 2008 WL 4307492, 10 (D.D.C. Sept. 17, 2008), citing *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is likely to produce progress, not regression.") (citations omitted); *Danielle G. v. N.Y. City Dept. of Educ.*, 2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) ("A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity greater than mere trivial advancement."). Student's high number of absences almost certainly contributed to his lack of academic progress.

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However, here there is a nexus between Student's truancy and his disability, as reflected in his evaluations, by language included in his IEPs, and by the fact that when in smaller, more specialized settings such as District High School 1/Special Program and Nonpublic School, Student has performed better.

Petitioner met his burden of proving that Student was denied a FAPE when the May 2013 IEP did not include sufficient hours of specialized instruction outside the general education setting to provide meaningful benefit to Student.

B. Whether the May 2013 IEP provided sufficient behavioral support or whether, instead, the number of hours of behavioral support Student was slated to receive was reduced without justification.

When a child's behavior impedes the child's learning or that of others, the IDEA requires the child's IEP team to consider the use of positive behavioral supports and other strategies to address the behavior. *See* 34 CFR § 300.321(a)(2)(i). Whether a child needs positive behavioral interventions and supports is an individual determination that is made by each child's IEP Team. *See* Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46683 (August 14, 2006).

In this case, Student had a consistent history of behavior problems that impacted his learning and that of others, and resulted in a suspension in March 2013. Given the persistence of his behavioral challenges, the Hearing Officer does not conclude that a reduction in the amount of behavior behavioral support he was to receive, as reflected on his May 2013 IEP, was reasonable.

Petitioner met his burden of proving that Student was denied a FAPE when the May 2013 IEP did not include sufficient behavioral support for Student, but rather reduced these hours without justification.

C. Whether the May 2013 IEP failed to include a behavioral intervention plan, although DCPS should have known from January 2013 that Student required such a plan to assist him in managing his behavior.

Petitioner contends that the May 7, 2013 IEP was deficient because it did not include a behavior intervention plan ("BIP"). As stated above, the IDEA requires the student's IEP team to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior that is impeding the student's learning or that of others. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). A student's IEP must take into account and be designed to meet the unique needs of the student, and it must be "regularly revised in response to new information regarding the child's performance, behavior, and disabilities." *Suggs v. District of Columbia*, 679 F. Supp. 2d 43 (D.D.C. 2010), citing 20 U.S.C. §§ 1414(b)-(c). However, while the *Suggs* court held that a student's IEP must be updated to account for a student's behavior when it interferes with the student's ability to access his education, IDEA does not require that a full BIP necessarily be included within the student's IEP. *See, e.g., School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006).

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Student's May 2013 IEP acknowledged Student's on-going behavior and discipline problems, and identified some strategies needed to address them.³⁸ Team members at a school to which Student had just recently returned shared their observations about the attendance and behavioral challenges that were interfering with Student's ability to access his education, as well as some strategies that could help Student transcend these behaviors. Additionally, DCPS conducted a full functional behavioral assessment and put in place a detailed BIP a little over a month after the development of Student's May 7, 2013 IEP. Even if it would have been ideal for the BIP to have been prepared ahead of the May 7, 2013 IEP team meeting and incorporated directly into the IEP, the IHO does not find the trajectory of the events – (1) IEP team at the school to which Student had returned approximately five months prior met, shared observations and strategies regarding Student's behavior and attendance, which they included in Student's IEP; (2) full behavioral assessment was conducted for Student shortly after the IEP meeting; and (3) a BIP was in place for Student a little over a month after the meeting – to rise to the level of a denial of FAPE.

Petitioner did not meet his burden of proving that Student was denied a FAPE when the May 2013 IEP failed to include a behavior intervention plan.

II. Whether DCPS denied Student a FAPE by changing his educational placement at the beginning of the 2013-2014 school year to District High School 1/Special Program without a team decision or Parent's involvement.

At the DPH, Petitioner did not object to the fact that Student spent time in District High School 1/Special Program. In fact, Petitioner indicated that District High School 1/Special Program was actually a better fit for Student than the other educational settings in which DCPS had placed him. However, Petitioner objected to Student being changed from District High School 1/Main Campus to District High School 1/Special Program without DCPS having convened a team meeting in which Parent could be involved in helping to make that decision.

With respect to "placement" in the forward looking sense of determining where a student will receive future educational services, "[w]hile the IDEA requires a student's parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not 'explicitly require parental participation in site selection.'" *James v. District of Columbia* 2013 WL 2650091, 3 (D.D.C. Jun. 9, 2013), quoting *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003); *See, also, Roher v. District of Columbia*, Civ. A. Nos. 89–2425, 89–2503, 1989 WL 330800, at 3 (D.D.C. Oct.11, 1989) ("'[P]lacement' refers to the overall educational program offered, not the mere location of the program."). DCPS is obligated to match each child with a disability with a school capable of fulfilling the child's IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991).

³⁸For example, though the services provided do not reflect this recommendation, the May 2013 IEP states that Student's "[s]ervices will need to be therapeutic in nature, due to his difficulties with aggression, and anger, and his long-standing problems with academics. [Student] would benefit from a highly structured academic setting with low student/teacher ratio where he can get the individual attention he requires to succeed academically." P-22-3. The IEP also indicated, for example, that "Student responds to and would benefit from consistent redirection and verbal reinforcement in a non threatening manner." P-22-6.

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Here, the evidence demonstrates that District High School 1/Special Program was more restrictive than what Student's IEP called for, and was essentially a full-time, standalone special education program. The failure to include Parent in the decision to move Student from the less restrictive setting of District High School 1/Main Campus to the more restrictive setting of District High School 1/Special Program was a procedural violation of IDEA. However, Petitioner concedes that Student benefitted from the more restrictive environment of District High School 1/Special Program. In fact, Petitioner would have preferred that Student remained in the special program rather than being moved back to District High School 1/Main Campus. A procedural violation of IDEA only rises to the level of a denial of FAPE 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 C.F.R. 300.513(a). Here, Parent was denied the opportunity to participate in the decision-making process; however, in this instance, the denial was not "significant" in the sense that the decision to move Student to District High School 1/Special Program happened to more closely reflect the level of services Parent wanted Student to receive. Additionally, Student's right to a FAPE was not impeded while he was in the special program, nor was he deprived of educational benefit during this time.

Petitioner did not meet his burden of proving that DCPS denied Student a FAPE by moving Student to District High School 1/Special Program without Parent's involvement.

III. Whether DCPS denied Student a FAPE by failing to revise Student's IEP once DCPS recognized at the start of the 2013-2014 school year that Student needed a full-time special education program.

Pursuant to the IDEA, DCPS must ensure that a student's IEP Team revises the IEP, as appropriate, to address any lack of expected progress toward the IEP annual goals and in the general education curriculum. 34 CFR § 300.324(b). "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program; the nature and effects of the child's disability have not been adequately monitored; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties." *See Suggs, supra* at 51-51 (citations omitted.) Student was not making expected progress with the services called for by his May 7, 2013 IEP, which were the same services called for in his previous IEP (except that his behavioral support was reduced). At the start of the 2013-2014 school year, DCPS briefly placed Student in a special program at his high school that was essentially a full-time special education program and Student made slightly more progress in that environment; yet, Student's IEP was not revised to reflect the fact that he needed a full-time out of general education setting. Because Student's IEP did not specify that he needed full-time hours, DCPS was able to move him from District High School 1/Special Program back to District High School 1/Main Campus without maintaining his full-time outside of general education hours. The failure to update Student's IEP was a procedural violation that (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; and (iii) caused a deprivation of educational benefit.

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Petitioner met his burden of proving that DCPS denied Student a FAPE by failing to revise Student's IEP once it recognized at the start of the 2013-2014 school year that Student needed a full-time special education program.

IV. Whether DCPS denied Student a FAPE by failing to implement his IEP while he was in District High School 1/Special Program.

While Student was in District High School 1/Special Program, he was receiving essentially full-time outside of general education service hours, though his IEP called for only ten hours per week of specialized instruction, and specified that those hours were to be provided inside the general education setting. In reviewing failure-to-implement claims, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir. Sept. 11, 2007). In this instance, Student was in a more restrictive environment while in District High School 1/Special Program than Student's IEP called for, which was a material deviation from Student's IEP. Petitioner concedes that District High School 1/Special Program was a better fit for Student than was District High School 1/Main Campus. Nevertheless, where an LEA's failure to implement is material (not merely *de minimus*), courts have held that the standard for determining whether there has been a denial of FAPE is not whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

Student's case is not one in which he was provided more hours of specialized instruction inside the general education setting than his IEP called for. Rather, Student received essentially full-time outside the general education setting hours while in District High School 1/Special Program, when his IEP called for him to receive ten hours of specialized instruction inside the general education setting. This constitutes a material difference between what Student's IEP called for and what he actually received, because "[p]roviding more hours outside of general education setting is . . . not an acceptable alternative for supported hours inside the general education setting." *Id.*

Plaintiff met his burden of proving that DCPS denied Student a FAPE by failing to implement his IEP while he was in District High School 1/Special Program.

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V. Whether DCPS denied Student a FAPE in November 2013 by failing to include Parent or the team in the decision to remove Student from the District High School 1/Special Program, despite Student's progress.

As stated in section II above, “[w]hile the IDEA requires a student’s parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not ‘explicitly require parental participation in site selection.’” *James v. District of Columbia* 2013 WL 2650091, 3 (D.D.C. Jun. 9, 2013), quoting *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003). As was the case with respect to the issue raised in section II above, the failure to include Parent in the decision to move Student from the more restrictive placement of District High School 1/Special Program to the less restrictive setting of District High School 1/Main Campus, represented a procedural violation of IDEA. However, unlike in section II above, this procedural violation rises to the level of a denial of FAPE, because not only did it significantly impede Parent’s right to participate, but it also caused Student a deprivation of educational benefit; therefore, impeded Student’s right to a FAPE. Student received fewer services than he had demonstrated a need for once he was moved from District High School 1/Special Program back to District High School 1/Main Campus.

Petitioner met his burden of proving that DCPS’ failure to include Parent in the decision to move Student from District High School 1/Special Program to District High School 1/Main Campus constituted a denial of FAPE.

VI. Whether DCPS denied Student a FAPE at the May 21, 2014 IEP meeting by failing to create an appropriate IEP for Student.

Pursuant to the IDEA, in order to provide a FAPE to a student, “[t]he IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA’s procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). Petitioner does not raise procedural violations with respect to the May 2014 IEP, but asserts that it was not reasonably calculated to enable Student to receive educational benefit because it: (A) provided insufficient hours of specialized instruction in an outside-the-general education setting, (B) failed to provide sufficient behavioral support.

A. Whether the May 2014 IEP provides for sufficient specialized instruction in an out-of-general education setting to provide meaningful benefit to Student.

As stated in section I(A) above, providing a FAPE necessitates that the LEA provide “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176,

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203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In this instance, Student's 2012, 2013 and 2014 IEPs offered essentially the same level of services (except that behavioral support was reduced in the two most recent years), though Student was not making academic progress and failing most of his classes. Maintaining largely unchanged IEP services for Student under these circumstances fails to meet the *Rowley* "basic floor of opportunity" standard, particularly since an independent comprehensive psychological evaluation as far back as May 2011 recommended full-time special education service hours for him as an accommodation for his disability and diagnoses.

Petitioner met his burden of proving that DCPS denied Student a FAPE when the May 2014 IEP did not include sufficient hours of specialized instruction outside the general education setting to provide meaningful benefit to Student.

B. Whether the May 2014 IEP fails to provide sufficient behavioral support in order for Student to receive a FAPE.

As stated above, when a child's behavior impedes the child's learning or that of others, the IDEA requires the child's IEP team to consider the use of positive behavioral supports and other strategies to address the behavior. Student's behavior and attendance continued to significantly impede his learning during the 2013-2014 school year, under an IEP wherein the number of minutes of behavioral support he was receiving had been reduced (from 120 minutes per month in the 2012 IEP to 90 minutes per month in the 2013 IEP). The 2014 IEP offers no justification for keeping the number of minutes of behavioral support at the reduced level from 2013, and the undersigned does not find the decision to maintain the reduced levels to be reasonably calculated to provide Student educational benefit.

Petitioner met his burden of proving that DCPS denied Student a FAPE when the May 2014 IEP did not include sufficient behavioral support in order for Student to receive a FAPE.

Request for Placement at Non-Public School

An order for DCPS to fund a placement at Nonpublic School is part of the relief Petitioner seeks for those issues on which a denial of FAPE was found. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

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a. Nature and Severity of Student's Disability

Student's disability is severe. He has ADHD and emotional issues that impair his learning. Student has long standing history of trouble managing his anger at school, chronic truancy, distractibility, and disruptive behavior such as leaving class without permission and, on at least one occasion in March 2013, making threats in school.

b. Student's Specialized Educational Needs

Student requires a therapeutic school environment with a low student-teacher ratio, due to his academic, anger, aggression, truancy issues.

c. Link between Student's Needs and the Services Offered by Private School

Nonpublic School is a small, full-time special education school, with therapeutic services and vocational training for its students (grades 9-12), who can earn high school diplomas at the school. There are 4-6 students per class, and a behavioral support team including dedicated aids and a licensed social worker. Student has benefitted from accommodations offered at Nonpublic School such as being able to take frequent breaks when he has trouble sitting still in class, and the ability to speak with the school social worker on a regular basis (scheduled and unscheduled). Student is making academic, attendance and behavioral progress at Nonpublic School.

d. Cost of Placement at Private School

Nonpublic School is on the list OSSE approved day schools, and its costs have been approved by OSSE.

e. Extent to Which Private School Represents Least Restrictive Environment

IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006), citing 20 U.S.C. § 1412(a)(5), 34 CFR § 300.550, D.C. Regs. tit. 5, § 3011 (2006). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Id.*, citing 34 C.F.R. § 300.552(d). Student is easily distracted due to his ADHD and other diagnoses. He needs a small class environment where he can get to know his teachers and will be regularly prompted to stay on task. He benefits from an environment that is both highly structured, and that accommodates his disability by incorporating frequent breaks and having staff on hand to supervise and redirect when he has difficulty remaining seated and inside the classroom. Student's attendance, behavior and academic performance have improved in the more restrictive setting of Nonpublic School. The more restrictive setting of District High School 1/Special Program also benefitted Student more than his general education setting. Student requires a more restrictive environment than a general education setting.

Based on the *Branham* factors discussed above, the program at Nonpublic School is reasonably calculated to address Student's ADHD and other diagnoses, as well as his behavioral, emotional and academic challenges. Accordingly, Nonpublic School is an appropriate placement for Student.

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Compensatory Education

IDEA gives hearing officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. The award must “provide the educational benefits that likely would have accrued from special education services” that the school district “should have supplied in the first place.” *Id.* at 524. A compensatory education award must “rely on individualized assessments” after a “fact specific” inquiry. *Id.* “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010), quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527. *See also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10-11 (D.D.C. July 2, 2013).

Here, Petitioner claims Student was harmed by not having an appropriate IEP (full-time, out of general education setting) for the past two school years. As discussed above, the IHO has concluded that Student’s May 2013 and May 2014 IEPs were inappropriate. Student had more services than his IEP required while he was placed in District High School 1/Special Program during the first part of the 2013-2014 school year; however, he was not able to complete the semester and earn credits while in that program. Student has been attending a full-time, special education day school since the beginning of the 2014-2015 school via unilateral parental placement. Student’s 2012 IEP is not at issue in this litigation. The IHO, therefore, concludes that the appropriate period of harm to be remedied is the 2013-2014 school year.

Toward that end, Petitioner’s request for three hours of academic credit recovery is reasonable to place Student back where he would have been had he had a full-time IEP throughout the 2013-2014 school year. Additionally, the request for three hours of academic credit recovery realistically takes into account what Student’s schedule and abilities can accommodate, while allowing him time to continue making progress with his current curriculum.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. Within 15 business days from the issuance of this decision, DCPS shall reconvene Student’s MDT/IEP team to review and revise Student’s IEP to reflect a minimum of 27.5 hours of specialized instruction outside the general education setting, a minimum of one hour per week of behavioral support services outside the general education setting, and any other necessary related services;
- B. DCPS shall reimburse Nonpublic School for any and all reasonable and/or necessary costs associated with educating Student, incurred from the time Student was unilaterally placed at Nonpublic School at the start of the 2014-2015, until Student’s IEP is revised and a Prior Written Notice is issued placing Student at Nonpublic School or another appropriate school setting;
- C. DCPS shall place Student at Nonpublic School or another appropriate school setting within 20 business days of a decision in the matter;

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- D.** DCPS shall provide compensatory education to Student in the form of three hours of academic credit recovery under the direction of Academic Credit Recovery Program, and shall provide public transportation fare cards or other appropriate transportation services for Student to get to and from the program.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: December 1, 2014

/s/ NaKeisha Sylver Blount
Impartial 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).