**DISTRICT OF COLUMBIA**
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
**STUDENT HEARING OFFICE**

OSSE STUDENT HEARING OFFICE 2010 APR -5 AM 8: 27

| | | |
|---|---|---|
| **STUDENT,**[1] **By and through PARENT,** | ) | |
| | ) | **Case No.** |
| ***Petitioner,*** | ) | |
| **v** | ) | **Bruce Ryan, Hearing Officer** |
| **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** | ) | **Hearing: March 5, 8 and 24, 2010** **Decided: April 2, 2010** |
| ***Respondent.*** | ) | |

# HEARING OFFICER DETERMINATION

## I. PROCEDURAL BACKGROUND AND RECORD

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.,* and its implementing regulations. The Complaint was filed January 14, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns a year old student (the "Student") who resides in the District of Columbia, currently attends his DCPS neighborhood school (the "School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") in that (1) DCPS has failed to place the Student in an appropriate school or develop an appropriate individualized education program ("IEP"), and (2) DCPS has failed to provide a dedicated aide in a timely manner as called for by the current IEP. More specifically, with respect to the first claim, Petitioner alleges that "the IEP is inappropriate because it does not provide a sufficient level of services to address her severe educational and emotional needs."

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

*-01* (Complaint), p. 3, ¶ 9. Petitioner asserts that the Student "needs a full-time or close to full-time IEP and placement"; and that the School "is not an appropriate school for her because the school does not have appropriate classes geared to meet her unique needs." *Id.*, pp. 3-4, ¶¶ 9, 12.

DCPS filed a Response to the Complaint, which asserts (*inter alia*) that the Student's IEP and educational placement are appropriate, because (a) the placement provides the Least Restrictive Environment, (b) it is closest to her home and is the school the Student would attend if she were not disabled, and (c) the IEP and placement are reasonably calculated to provide, and have provided, educational benefit to the Student. DCPS' Response also asserted that the dedicated-aide provision in the IEP was a "clerical error" that is unsupported by any data.

The statutory resolution period ended as of January 28, 2010, because the parties agreed in writing that no agreement was possible and that the case should proceed to a due process hearing. *-05* (Due Process Complaint Disposition). The 45-day timeline under the IDEA began the day after this event. *See* 34 C.F.R. §300.510 (c)(2).

A Prehearing Conference ("PHC") was held on February 24, 2010, and a Prehearing Order was issued the same date, which discussed and clarified the issues and requested relief. *See Prehearing Order* (Feb. 24, 2010), ¶ 6. Initial five-day disclosures were thereafter filed by both parties as directed, on or about February 26, 2010, and supplemental disclosures were filed on March 17, 2010. Petitioner elected for the hearing to be closed.

The Due Process Hearing was held in three sessions, on March 5, 8 and 24, 2010. The third session was held in response to Petitioner's "Motion to Present Evidence That Arose As Hearing Was Concluding," filed on March 8, after the second hearing session had ended but before submission of written closing statements. The Motion indicated that an incident had occurred at the school on March 8, a few hours after the hearing concluded, which Petitioner asserted was relevant to the issues in this case. After hearing argument, the Hearing Officer granted the Motion so as to permit an additional hearing session to be held on March 24 for the purpose of presenting testimony and documentary evidence on the subject of the incident described in a March 8, 2010 suspension notice issued to Petitioner *-38*). *See Memorandum*

*Opinion and Order*, Case No. issued March 15, 2010.[2] As reflected in a separate Order dated March 14, 2010, Petitioner's unopposed motion for continuance of the hearing was also granted to accommodate the recessed and reconvened hearing pursuant to *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"), §402 (B)(11), on the schedule agreed to by both parties. Accordingly, the deadline for issuance of the Hearing Officer Determination ("HOD") was extended to April 2, 2010. *See Memorandum Opinion and Order*, March 15, 2010, at p. 2, ¶ 2.

During the hearing, the following Documentary Exhibits were admitted into evidence:

**Petitioner's Exhibits**: **·01; ·03; -05 through -32; ·37; 38.**[3]

**DCPS' Exhibits**: **DCPS-01 through DCPS-09.**

During the hearing, the following Witnesses testified on behalf of each party:

**Petitioner's Witnesses**: (1) the Student; (2) the Parent-Petitioner; (3) the Student's Educational Advocate; and (4) (Senior Director, School of Prince George's County).

**DCPS' Witnesses**: (1) the Special Education Coordinator ("SEC") at the School; (2) the Special Education Teacher at the School; (3) School Counselor; and (4) the School Psychologist.

Following the hearing, both parties submitted written closing statements/arguments on March 29, 2010.

This decision constitutes the Hearing Officer's Determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*.

---

[2] The Hearing Officer determined that this incident may be relevant to the issues in this case, that each party was entitled to a meaningful opportunity to present evidence and cross-examine witnesses on this topic, and that an additional hearing session was necessary and appropriate to ensure that the due process hearing served as an effective mechanism for resolving the present dispute. *Letter to Anonymous,* 23 IDELR 1073, 23 LRP 3438 (Sept. 1, 1995). This evidence arose only after the initial hearing sessions had concluded, and thus could not have been presented there. *E.g., Schaffer v. Weast,* 554 F.3d 470 (4th Cir. 2009). Moreover, because written closing statements had not yet been presented, the hearing record had not closed under *SOP, Section 700.4. See Memorandum Opinion and Order*, Case No. March 15, 2010, at p. 2, ¶ 1.

[3] Petitioner's Exhibits 02, ·04, and ·33 through 36 were withdrawn; and Exhibits -03, ·12 through 15, and 17 were admitted over DCPS' objections. All other Exhibits were admitted without objection.

## II. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner, along with the pleadings filed by both parties, resulted in the following issues being presented for determination at hearing (*Prehearing Order,* Feb. 24, 2010, ¶ 6):

> *(1)* ***Inappropriate IEP and placement*** — Whether DCPS has denied the Student a FAPE during the 2009-10 school year by failing to provide her with an appropriate IEP and appropriate placement/location. (As discussed and agreed at the PHC, Petitioner's inappropriate IEP and inappropriate placement claims are substantially identical, with Petitioner claiming that the Student needs a "full-time or close to full-time IEP and placement," outside the general education setting. *-01*, ¶¶ 9, 12.)
>
> *(2)* ***IEP implementation/dedicated aide*** — Whether DCPS has denied the Student a FAPE during the 2009-10 school year by failing to provide her with a full-time dedicated aide in a timely manner pursuant to the IEP.

As relief, Petitioner requests that DCPS be ordered or agree (1) to provide a dedicated aide within one school day or fund one privately; (2) to provide funding and transportation to attend another public or non-public school that can provide an appropriate full-time placement and educational benefit; (3) to convene an MDT meeting within 10 days to revise the IEP and determine placement; and (4) to award reasonable compensatory education. *-01,* p. 5. [4]

## III. FINDINGS OF FACT

1. The Student is a year old student who resides in the District of Columbia, currently attends his DCPS neighborhood school, and has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

2. The Student's current IEP was developed by the Student's Multi-Disciplinary Team ("MDT") on or about October 19, 2009. *See -01; -20.* The Student's primary disability under the IEP is Emotional Disturbance ("ED"). *Id.* The IEP provides two hours per week of specialized math instruction in the general education setting and one hour per week of

[4] Petitioner's counsel stated at the PHC that he intended to present a sufficient evidentiary showing to support compensatory education relief in accordance with the requirements of *Reid v. District of Columbia,* 401 F.3d 516 (D.C. Cir. 2005). *See Prehearing Order,* Feb. 24, 2010, ¶ 6. However, such evidence was not presented at hearing; nor does Petitioner argue any entitlement to compensatory education in her Closing Statement. *See Petitioner's Closing Statement,* filed March 29, 2010.

behavioral support services outside general education. *-20,* p. 4. The IEP also states that it provides for the full-time support of a dedicated aide in the general education setting. *Id.*

3. During the 2007-08 school year, the Student attended school in North Carolina, while living with relatives. In the spring of 2009, she was moved by her family to live in a group home due to behavioral issues. *See Parent Test.*

4. During the 2008-09 school year, the Student attended public school in Prince George's County, Maryland, while living with her sister. She had a series of behavioral problems at school resulting in suspensions and other disciplinary matters. Prince George's County initiated the special education process under the IDEA, but an IEP apparently was never developed. *Parent Test.; SEC Test.*

5. In August 2009, the Student enrolled at the School for the beginning of the 2009-2010 school year. When she enrolled, the Parent presented a packet of information to the School consisting of some school records and a psychological evaluation dated April 22, 2008. The Parent also told the staff at the School about the Student's educational history in Maryland. *See Parent Test.; SEC Test.; -21.* [5] ]

6. The April 2008 psychological assessment had found, *inter alia*, that the Student "has significant externalizing behaviors, and has difficulties with oppositional and defiant behaviors." It noted that "[h]er acting out behavior may be encouraged by poor peer choices and internalized anger," and that "[t]here is also some suggestion of an underlying mood problem being externalized as anger." *21,* p. 6. The evaluator's diagnostic impressions included Attention-Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder. *Id.* The report recommended continued outpatient psychotherapy, exploring the appropriateness of anti-depressant medication, and consideration of adjustments to her school environment that would encourage academic success. *Id.*, p. 7.

7. At the time the Student enrolled at the School, she did not have a current IEP. DCPS also did not have sufficient first-hand information to determine the severity of the Student's emotional issues in a school setting when she enrolled. Nor had DCPS received copies

[5] According to the 4/22/08 confidential psychological evaluation report, the Student had been referred for assessment due to a "history of disruptive behavior at home and school, as well as multiple school suspensions." *-21*, p. 1. Her background history included in utero exposure to illicit drugs (crack cocaine) and significant parental difficulty managing her behavior. *Id.*

of the suspension notices from the prior school year. *See SEC Test.; Parent Test.* However, based on the Parent's report and at her request, DCPS temporarily placed the Student in the self-contained classrooms where ED students were educated, while the initial eligibility/IEP process was being conducted during the beginning of the 2009-10 school year. *Id.*

8. In late September 2009, the Student was hospitalized for a couple of weeks at the "after an increase in irritability, oppositionality [sic], and aggressive behavior over the last month." *-23* (Psychiatric Report from dated Oct. 7, 2009), p. 1. Upon discharge, the PIW psychiatric report noted a diagnosis of Oppositional Defiant Disorder-Severe, ADHD, and Mood Disorder, and "recommended that [the Student] be designated as emotionally disabled, and that she be placed in a full time ED school placement." *Id.,* pp. 1-2.

9. On or about October 19, 2009, DCPS convened an MDT/IEP Team meeting, the purpose of which was stated to be to "update Student's IEP [and] services needed." *-20*, p. 1. The SEC indicated that the Student "had been evaluated and had tested high academically." *Id.* The team then discussed emotional issues the Student was experiencing, her progress to date in the ED program, and the services needed by the Student. *Id.,* pp. 1-3. The team agreed to the contents of the IEP, and the Parent signed it. *Id.,* pp. 1, 4. Specifically, with regard to the school placement/location, the SEC stated that the School "is a full service school which will provide extensive behavior/support as well as interventions for student to be successful in school"; and the Parent "stated that she is pleased with the program here at [the School]...." *Id.,* pp. 3-4. With respect to a dedicated aide, the MDT meeting notes indicate that "[t]he team agreed upon student receiving dedicated aide." *Id.,* p. 3.

10. The team agreed to delay the implementation of the IEP as written until the end of the second advisory to allow for a transition from the restrictive setting where the Student was being provisionally educated to the less restrictive setting indicated on the October 2009 IEP. *20* (10/19/09 meeting notes)*; SEC Test.* This decision was communicated to the Parent and she did not object. *Id.* [6]

[6] The Hearing Officer finds that the SEC's testimony on this and other aspects of DCPS' efforts to develop an appropriate educational program for the Student was more credible than any conflicting testimony of the Student or Parent.

11. On or about October 23, 2009, the Student was suspended for 10 days for fighting with another student. While on suspension, the Student showed up on school grounds without permission, which was also a violation of school rules. *See -09; SEC Test.; Student Test.; Parent Test.* According to the SEC, this prompted the School to give the Student more time to adjust to the less restrictive, general education environment. *Id.*

12. As a result, until approximately January 2010, DCPS provided the Student with essentially full-time specialized instruction in the "ED Cluster" of the School, notwithstanding the more limited requirements of the 10/19/09 IEP. In January 2010, the Student's class schedule at the School was changed to include some self-contained classes and some general education classes. *SEC Test.*

13. On or about February 23, 2010, DCPS issued its latest Report to Parents on Student Progress, which indicated that the Student is exhibiting "poor behavior" in Social Studies and Science, and has had "excessive absences" and "is failing" in English. *-37; see also Student Test.* In addition, the Parent testified that she receives frequent calls from School staff about behavioral concerns. *Parent Test.*

14. On March 8, 2010, shortly after the second hearing session, the Student engaged in inappropriate behavior at the School for which she has received a 45-day suspension from DCPS. *-38; SEC Test.; Student Test.* Specifically, the Student acted out in an aggressive manner when told to go to her correct class by the Special Education Coordinator. The Student continued to act out aggressively when confronted by a security guard at the School, and at one point even hit the guard. A police officer assigned to the School intervened and handcuffed the Student until the Parent arrived. While handcuffed, the Student continued to yell obscenities. *Id.; see Petitioner's Closing Statement,* p. 4. The DCPS School Psychologist testified that, in his opinion, the March 8 behavioral incident was a manifestation of the Student's disability. *Psychologist Test.*

15. It is undisputed that the Student has not been provided a dedicated aide at any time during the 2009-10 school year. *See DCPS Closing Argument,* p. 9.

16. The Student has recently been accepted into The School in Beltsville, Maryland. *See 03; White Testimony.* is a non-public school which offers a full-

time, self-contained, special education program serving mostly ED students in middle school and high school. *Id.* Many of the students enrolled at are District of Columbia public school students who are placed there pursuant to either DCPS placement or HODs. *Id.*

## IV. DISCUSSION AND CONCLUSIONS OF LAW

### A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see *Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement, as well as failures to implement an IEP.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The normal standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

### B. Issues/Alleged Denials of FAPE

3. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to carry her burden of proof on Issue (1), but that Petitioner has met her burden of proof on Issue (2).

***Issue (1): Inappropriate IEP and Placement***

4. Under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson v. District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit."). The issue of whether an IEP is appropriate is a question of fact. *See, e.g., S.H. v. State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003).

5. Whether an IEP is appropriate, moreover, "can only be determined as of the time it is offered for the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.*,993 F. 2d 1031, 1040 (3d Cir. 1993). An appropriate IEP does not guarantee results. "Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207 ).[7]

6. Similarly, a child's educational placement must be "reasonably calculated" to confer educational benefit. *Board of Education v. Rowley*, 458 U.S. 176 (1982). The placement also is required to be based upon the child's IEP, and to be in conformity with the least restrictive environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114 – 300.116; DCMR §§ 5-3011, 5-3013. *See also O.O. v. District of Columbia,* 573 F. Supp. 2d 41, 53 (D.D.C. 2008) ("Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP."); *Roark v. District of Columbia,* 460 F. Supp. 2d 32 (D.D.C. 2006).

7. In this case, Petitioner alleges that "the IEP is inappropriate because it does not provide a sufficient level of services to address her severe educational and emotional needs. She needs a full-time or close to full-time IEP and placement." *01.* Petitioner also claims that the School "is not an appropriate school for her because the school does not have appropriate classes geared to meet her unique needs." *Id.* Petitioner does not allege that the IEP contains insufficient goals or is missing any other specific, required element. Thus, Petitioner's inappropriate IEP and inappropriate placement claims are essentially the same, as discussed and agreed at the PHC. *See Prehearing Order, ¶* 6. [8]

---

[7] *See also Town of Burlington v. Department of Education,* 736 F.2d 773, 788 (1st Cir. 1984); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)) (affirming the district court decision not to "Monday-morning quarterback the school system" by finding evidence created two years after an administrative hearing dispositive of the appropriateness of the IEP at issue in the administrative hearing).

[8] The Hearing Officer notes that the Complaint does not present any claim that DCPS failed to properly implement the services in the current IEP (other than the dedicated aide under Issue 2 below), including any issues regarding informal "placement" of the Student in self-contained classes in the ED cluster. Nor does it raise any evaluation, eligibility process, or other procedural issues relating to the 2009-10 school year. It is axiomatic that Petitioner may

8. Based on the information considered by the MDT/IEP Team as of October 2009, the IEP appears to have been reasonably calculated to provide meaningful educational benefit, and the placement was capable of implementing the IEP. As DCPS' Closing Argument details (at pp. 2-4), the IEP accurately reflects the Student's academic needs at that time. The October 2009 Woodcock-Johnson III Tests of Achievement that DCPS conducted demonstrated that the Student was functioning well above grade level in all areas related to reading and writing. *See DCPS-06.* Thus, it is undisputed that the Student did not need specialized instruction in reading and written expression. *See SEC Test.; Teacher Test.; DCPS-02.* Moreover, while the report clearly raised a cautionary flag, the Student's emotional and behavioral issues appear not to have manifested themselves in school so as to interfere with her ability to access the general education curriculum at that time.[9]

9. As DCPS argues, an educational program and placement determined by the MDT to be appropriate in October 2009 generally should not be found to be inappropriate based on information and events occurring several months later, which the IEP Team has not yet had an opportunity to review. On the other hand, a "child's educational needs at the time of trial may be relevant in determining the child's needs at the time of disputed events," *Schoenbach v. District of Columbia,* 309 F. Supp. 2d 71, 82-83 (D.D.C. 2004). Thus, the Hearing Officer has considered the other evidence Petitioner has presented to the effect that the Student "wanders the halls of the school and skips many of her classes," as well as the incident and disciplinary action that took place on March 8, 2010, which Petitioner claims demonstrate the need for a full-time IEP and placement. *Petitioner's Closing Statement,* pp. 6-7. On balance, however, the Hearing Officer concludes that Petitioner has not shown that the Student required a full-time or close to full-time IEP and placement outside the general education setting, ***at the time the IEP was developed***.

10. Essentially the same reasoning applies to the evidence that the Student continued to receive instruction within the self-contained ED cluster, and "apparently did well in the ED-

---

not raise issues at the due process hearing that were not raised in the due process complaint. *See* 34 C.F.R. § 300.511(d).

[9] The hospitalization that occurred shortly before the development of the IEP had resulted from an event that occurred in Petitioner's home, rather than in school. *See Parent Test.; SEC Test.*

cluster classes," for a period of time after the IEP was developed. *Id.*, p. 7.[10] The conclusion Petitioner draws from this evidence is that the Student "needs more services out of a general education setting." *Id.* Assuming this is an appropriate conclusion, the proper way to proceed at present is for DCPS to convene an MDT meeting so that the team can review the updated information from the 2009-10 school year and determine what, if any, changes should be made in the IEP and/or placement to better address the Student's needs, including behavioral and emotional issues. For example, the SEC testified that it may be appropriate to increase behavioral support services to at least two hours per week. *See SEC Test.*

11. Accordingly, for the reasons discussed above, the Hearing Officer concludes that DCPS has not been shown to have denied a FAPE to the Student under Issue (1), but that the MDT/IEP Team should now promptly meet to review and revise, as appropriate, the IEP based on all updated information.

***Issue (2): IEP Implementation/Dedicated Aide***

12. The evidence shows that DCPS failed fully to implement the 10/19/09 IEP by failing to provide the Student with the full-time dedicated aide required under the IEP during the 2009-2010 School Year. The notes from the October 19, 2009 IEP show that the team intended for the Student to receive a dedicated aide,[11] which both parties agree has not been provided.

13. DCPS' only apparent explanation for this failure is that "[u]nfortunately, DCPS' policy regarding the provision of a dedicated aide changed shortly after the Student's IEP was developed," and that "[b]ased on those new guidelines, DCPS decided not to provide a dedicated aide to the Student." *DCPS' Closing Argument,* p. 10 (*citing SEC Test.).* However, this explanation cannot excuse the failure to provide services clearly called for in the Student's IEP.

---

[10] As noted in the Findings, the 10/19/09 IEP meeting notes indicate that the IEP Team agreed to delay the implementation of the IEP as written until the end of the second advisory to allow for a transition from the restrictive setting where the Student was being provisionally educated to the less restrictive setting indicated on the October 2009 IEP. *See Findings, ¶ 10; CH-20; SEC Test.; Psychologist Test.* Although Petitioner cites this as evidence that the initial IEP was wrong when formulated, the team appears to have made an appropriate decision to maintain continuity in the Student's educational programming while increasing her exposure to more challenging curriculum and her nondisabled peers. It was also done to accommodate Petitioner's request. *See DCPS' Closing Argument*, p. 8, *citing Devries v. Fairfax County Sch. Board,* 882 F.2d 876, 878 (4th Cir. 1989) ("[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a requirement of the Act.")

[11] DCPS' original assertion in its Response that the dedicated-aide provision in the IEP was a "clerical error" appears to have been abandoned at hearing, in the face of the unambiguous MDT meeting notes.

The team that met and developed the October 2009 IEP decided that the Student required the assistance of a dedicated aide, and DCPS has not taken any appropriate action subsequently to review and change the IEP. DCPS did not convene a meeting of the team (including the Parent) in order to revise the IEP; nor did it issue any prior notice removing the aide from the IEP. DCPS also has not presented any documentary evidence in this case regarding its accepted "guidelines" for dedicated aides, or in what respect the criteria was changed following the 10/19/09 MDT meeting, much less how the initial or revised criteria applied to the Student's particular situation. *See generally Petitioner's Closing Statement,* pp. 4-6.

14. The available evidence suggests that the MDT/IEP Team decided to put in place a dedicated aide to help successfully transition the Student to a less restrictive, general education environment. *See* note 10, *supra; In re Student with a Disability,* 110 LRP 7507 (SEA Va. Oct. 21, 2009) ("providing one-on-one assistant enables the school to meet the mandates of LRE under 20 U.S.C. 1412(a)(5)(A)"). While DCPS argues that Petitioner failed to prove that the Student was harmed by not having a dedicated aide, the evidence indicates that an aide may have been needed to redirect the Student and otherwise to help ensure that she could benefit from the general education environment, especially given the unpredictability and impulsivity of her behavior. *Id.; see, e.g., Psychologist Test.* The evidence also shows that this failure may have contributed to an increase in academic and behavioral problems, including the March 8 incident, which has produced a 45-day suspension and resulting significant educational detriment. *See 37; 38; Student Test.; Parent Test; SEC Test.*

15. In sum, the Hearing Officer concludes that the aspect of the IEP not followed in this case (*i.e.,* the dedicated aide provision) was "more than a *de minimus* failure"; it was "substantial or significant," or in other words the deviation from the IEP's stated requirements was "material." *Catalan v. District of Columbia,* 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. V. Bobby R.,* 200 F. 3d 341, 349 (5th Cir. 2000). As a result, the deviation caused a deprivation of educational benefit to the Student. *See id.;* 34 C.F.R. §300.513(a)(2). This failure to fully implement the IEP constitutes a denial of FAPE to that extent. *See* 34 C.F.R. 300.17(d).

### C. **Appropriate Relief**

16. Having found a denial of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

17. In this case, Petitioner primarily argues that the Student requires a full-time IEP and placement at the School in Beltsville, Maryland *See Petitioner's Closing Statement,* p. 11. Alternatively, Petitioner requests that the Hearing Officer "order DCPS to convene an MDT meeting to revise the IEP ..., determine an appropriate placement..., and award a dedicated aide for the times that she is in a general education setting or transitioning between such settings." *Id.* The Hearing Officer has determined that only the latter form of relief would be appropriate at this time.

18. In *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the Court of Appeals listed six considerations relevant to whether a particular private placement is appropriate. These considerations are: (1) "the nature and severity of the student's disability"; (2) "the student's specialized educational needs"; (3) "the link between those needs and the services offered by the private school"; (4) "the placement's cost"; (5) "the extent to which the placement represents the least restrictive educational environment; and (6) "[b]ecause placement decisions implicate equitable considerations, ... courts [and hearing officers] may also consider the parties' conduct." 427 F.3d at 12 (citing cases). Applying these factors here, the Hearing Officer concludes that Petitioner has not shown that a full-time, out-of-general education placement at would be appropriate and warranted for the Student at this time.

19. First, none of Petitioner's witnesses credibly testified to the nature and severity of the Student's disability, while the DCPS School Psychologist testified that the Student has a mild emotional disability. *Psychologist Test.* Second, none of Petitioner's witnesses credibly testified to the Student's specialized education needs. Director, Mr. White, did not have access to the Student's records during his testimony and had not observed the Student in a classroom setting. His conclusions were largely generic and not specific to the Student's strengths, weaknesses, needs or progress, basically indicating that because the Student has

emotional issues and an IEP, she should attend *White Test.* It is therefore unclear from the record how can or will meet the Student's specialized educational needs.

20. The third *Branham* factor is "the link between those needs and the services offered by the private school." 427 F.3d at 12. Here, Petitioner did not establish that the Student's mild emotional disability necessarily requires complete segregation from her nondisabled peers. On the other hand, the DCPS School Psychologist testified that such a placement would be inappropriate for the Student because that placement would not provide her with sufficient opportunities to excel academically. *Psychologist Test.* Rather, he testified that a placement with only emotionally disturbed student would mean that teachers would spend more time on classroom management and therefore less time on the academic curriculum, and that this would be harmful to the Student. *Id.*

21. With respect to the remaining factors, Petitioner has not shown that the placement represents the least restrictive educational environment capable of meeting the Student's special education needs, or that the placement's cost is appropriate for a Student with a mild disability who has derived educational benefits from her local school. *See DCPS' Closing Argument,* pp. 13-14. In addition, while not determinative, the parties' conduct weighs slightly against the award of a private placement at this time, since the evidence suggests that the School has tried to accommodate parental requests in structuring the Student's initial educational program based on the best available information, and would do so again. *Cf. Forest Grove School District v. T.A.,* No. 08-305, __U.S.__ (June 22, 2009), slip op. at 16 ("In considering the equities, courts [and hearing officers] should generally presume that public-school officials are properly performing their obligations under IDEA.")

22. Based on the discussion above and the evidence presented at the due process hearing, the Hearing Officer will grant a form of Petitioner's alternative requested relief, as set forth in the accompanying Order below.

## V. ORDER

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

1. Within **20 school days** of this Order, *i.e.,* by **April 30, 2010**, DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members, including the Parent. At that meeting, DCPS shall: (a) review all updated information concerning the Student's unique needs that result from her disability, including recent emotional and/or behavioral issues, as well as her progress and performance in various settings during the 2009-10 school year including class attendance issues; (b) review and revise, as appropriate, the Student's IEP to meet those unique needs; and (c) discuss and determine an appropriate school placement and location.
2. In revising the Student's IEP, DCPS shall ensure that it provides not less than two (2) hours per week of behavioral support services for the remainder of the 2009-10 school year.
3. In accordance with the Student's October 19, 2009 IEP, DCPS shall immediately provide a **dedicated aide** for the Student (or fund one privately) during the times when she is in a general education setting or transitioning between special education and general education settings, unless and until the IEP is properly amended by the team to remove this provision, after appropriate consideration and justification.
4. Petitioner's other requests for relief shall be, and hereby are, **DENIED**.
5. This case shall be, and hereby is, **CLOSED.**

***IT IS SO ORDERED.***

Dated: April 2, 2010

Impartial Hearing Officer

## NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).