

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹
through the Parent,²

Petitioner,

v.

District of Columbia Public Schools

Respondent.

Date Issued: December 15, 2012

Hearing Officer: Virginia Dietrich

Case No: 2012-0691

Hearing Date: 11/29/12 Room 2004

Hearing Date: 12/06/12 Room 2004

2012 DEC 17 AM 8:50

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

Background

Petitioner, the aunt and guardian of [REDACTED] filed a due process complaint notice on October 3, 2012, alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that from the beginning of the 2012-2013 school year until mid-November 2012 when Student could no longer attend his neighborhood public high school because he was detained at a juvenile detention facility, DCPS failed to provide Student with all of the related services and specialized instruction required by Student's full-time Individualized Education Program ("IEP"). Petitioner also alleged that when the IEP Team met on 09/26/12 and developed a new IEP, the IEP was inappropriate for reasons that included (1) improper composition of the IEP team, (2) inappropriate or nonexistent goals, objectives, baselines, and evaluation methods, (3) inappropriate transition plan, and (4) inappropriate reduction of behavioral support services. Thirdly, Petitioner alleged that the public high school where Student enrolled in August 2012 was an inappropriate school placement because Student's

¹ Personal identification information is provided in Appendix A.

² Pursuant to 34 C.F.R. 300.30, "parent" includes a guardian or an individual acting in place of a biological or adoptive parent with whom the child lives.

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09/26/12 IEP could not be implemented there in that the school could not provide Student with full-time specialized instruction outside of general education in a therapeutic milieu.

DCPS denied the allegations and came to the due process hearing willing to place and fund Student at the nonpublic school sought by Petitioner (hereinafter referred to as "Nonpublic School"), and with an offer of 42 hours of independent tutoring to resolve Petitioner's compensatory education claim.

For relief, Petitioner requested a finding of a denial of a FAPE on the issues presented; 20 hours of mentoring services as compensatory education for three months of missed behavioral support services; and 50 hours of tutoring services in reading, written language and mathematics as compensatory education for three months of missed specialized instruction.

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; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed by Petitioner on 10/03/12. This Hearing Officer was assigned to the case on 10/04/12. DCPS filed a response to the complaint on 10/15/12. A prehearing conference took place on 10/25/12 and a Prehearing Order was issued on 10/27/12. The Prehearing Order memorialized the issues and neither party contacted the Hearing Officer to request a modification or correction to the Prehearing Order.

Neither Petitioner or DCPS waived the resolution meeting. The resolution meeting took place on 10/24/12, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The resolution period ended on 11/02/12, the 45-day timeline to issue a final decision began on 11/03/12, and the final decision was due on 12/17/12.

The due process hearing was a closed hearing that took place on 11/29/12 and 12/06/12. Petitioner were represented by Alana Hecht, Esq. and DCPS was represented by Lynette Collins, Esq. Petitioner participated in the hearing in person on 11/29/12 and by telephone on 12/06/12.

Petitioner presented two witnesses: Petitioner; and educational advocate ("advocate") who qualified as an expert in the educational programming for children with special needs.

DCPS elected not to present any witnesses.

Petitioner's disclosures dated 11/21/12, containing a witness list and Exhibits P-1 through P-25, were admitted into evidence without objection. Page 8 of the 03/25/11 IEP was missing from Petitioner's Exhibit P-15. On 12/05/12, the Hearing Officer requested a complete copy of

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the 03/25/11 IEP. It was forwarded to the Hearing Officer on 12/10/12 and is included as part of the administrative record.

DCPS' disclosures dated 11/21/12, containing a witness list and Exhibits R-01 through R-04, were admitted into evidence without objection.

Parties agreed to the following stipulations:

- #1. The educational placement for Student is a nonpublic school.
- #2. Nonpublic School can implement Student's IEP.
- #3. Nonpublic School is an appropriate location of services to implement Student's IEP.

DCPS made the following admissions:

- #1. DCPS is willing to place and fund Student at Nonpublic School once Student becomes available for placement.
- #2. DCPS is willing to offer 42 hours of tutoring by a provider of Petitioner's choice.

Two preliminary matters were raised at the due process hearing. The first preliminary matter was DCPS' oral motion to dismiss the complaint based on Student's current detention at a juvenile detention facility and pending juvenile court proceedings in the Superior Court of the District of Columbia. DCPS argued that DCPS did not have jurisdiction over the Student due to Student's detention and probable commitment to Youth Services Center with possible placement at a residential treatment center. DCPS' motion to dismiss was denied on the record. At the time of the due process hearing, there was no evidence presented by DCPS that DCPS was not the local education agency ("LEA") with responsibility for providing Student with a FAPE.

The second preliminary matter was raised by the Hearing Officer and adopted by Petitioner. At the prehearing conference on 10/25/12, DCPS' Attorney represented that her recusal from the case would be appropriate based on her close relationship with Petitioner. Shortly thereafter, the Hearing Officer was informed that another attorney from the Office of General Counsel would represent DCPS at the due process hearing. At the due process hearing, DCPS' Attorney indicated that upon further reflection on the matter, she didn't believe that her recusal was necessary. The information presented by DCPS' Attorney at the due process hearing was that her cousin who she had raised since three years of age and Petitioner's daughter had been long ago childhood friends, but DCPS' Attorney and Petitioner had not had any contact with each other for the past nine years.

Recusal is required whenever "impartiality" might be questioned." *Liteky v. United States*, 510 U.S., 540, 548 (1994). Courts are reluctant to establish any criteria that automatically must result in recusal. Even where there may be a significant potential for impermissible bias (either actual or by appearance), the recusal determination typically turns on the facts. *In re United States*, 158 F.3d 26 (1st Cir. 1998). Federal courts have not inferred bias or prejudice

when the decision-maker had a prior attorney-client relationship with one of the parties to the dispute. For example, in *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 860-861 (10th Cir. 1999), a judge's representation of some of the defendants in other litigation and his working with some of the defense witnesses, all prior to becoming a judge, were not sufficient to obligate the judge to recuse himself. In *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1165-1166 (5th Cir. 1982), where the judge had represented one of the defendants six years before, the relationship was too remote and too innocuous to warrant disqualification. And, in *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir. 1959), recusal was not warranted where the trial judge had represented defendant in unrelated matters for a four to five year period three to four years earlier. In general, it is unusual for a reviewing court to require recusal when (i) the relationship in question occurred prior to the decision-maker assuming that position and (ii) the subject matter of the case brought before the decision-maker is unrelated to the relationship in question. *Marblehead Public Schools*, 36 IDELR 170 (2002).

Petitioner sought recusal of DCPS' Attorney from the case. DCPS' Attorney had not had any contact with Petitioner for the past nine years. The subject matter of the case was unrelated to the prior relationship between DCPS' Attorney and Petitioner. DCPS' Attorney represented that she could represent her client zealously. Based on the information presented, the Hearing Officer determined, over the objection of Petitioner, that there was no basis for DCPS' Attorney's recusal from the case.

The three issues to be determined in this Hearing Officer Determination ("HOD") are as follows:

Issue #1 – Whether DCPS denied Student a FAPE by failing to implement Student's IEP: specifically, (a) DCPS' initial refusal to allow Student to enroll at the public high school resulted in Student missing all of the special education services prescribed by his 03/25/11 IEP, from 08/27/12 through 09/17/12; (b) DCPS failed to provide Student with all of the 27.5 hours/week of specialized instruction outside of general education, as was required by Student's IEPs, beginning on 09/18/12; and (c) DCPS failed to provide Student with related services consisting of 90 minutes/week of behavioral support services from 09/18/12 through 09/26/12, 30 minutes/week of behavioral support services beginning on 09/27/12, and 1 hour/week of occupational therapy services beginning on 09/18/12.

Issue #2 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on 09/26/12; specifically, (a) the IEP Team was improper due to the lack of an occupational therapist, a general education teacher, and a DCPS representative who was qualified to review and explain data and evaluations; (b) the 09/26/12 IEP was not calculated to provide educational benefit in that it contained inappropriate, vague, undefined, and unattainable goals and objectives, failed to include baselines, and failed to include evaluation methods and present levels of academic performance; (c) the 09/26/12 IEP reduced Student's behavioral support services from 90 to 30 minutes/week without discussion that included Petitioner; and (d) the transition plan is inappropriate because it does not address the severity of Student's disability, it is not based on appropriate transition assessments, it was developed outside of a team meeting and the transition goals are vague and meaningless.

Issue #3 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate school placement/location of services that could implement his 09/26/12 IEP that required full-time services outside of general education in a therapeutic milieu; specifically, the location of services provided by DCPS, i.e., the public high school that Student attends could not provide the amount of specialized instruction outside of general education in a therapeutic milieu.

For relief, Petitioner requested a determination that Student had been denied a FAPE; that DCPS issue a Prior Written Notice to Nonpublic School as soon as Student becomes available for placement; and an award of compensatory education consisting of 20 hours of mentoring services to develop Student's social emotional skills to compensate Student for three months of missed behavioral support services, and 50 hours of independent tutoring in reading, written language and mathematics to compensate Student for three months of missed specialized instruction.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

Findings of Fact

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

#1. Student is a [REDACTED] resident of the District of Columbia with Multiple Disabilities who has been receiving special education services since the first or second grade. Student has lived with Petitioner since Student was ten years old and Petitioner has functioned in the role of Student's guardian since that time.³

#2. During the 2011-2012 school year, Student attended a nonpublic school in the District of Columbia where he had been unilaterally placed by Petitioner.⁴ DCPS was not the local education agency ("LEA") for Student during the 2011-2012 school year.

#3. On the second day of the 2012-2013 school year, i.e., 08/28/12, Petitioner enrolled Student at his neighborhood public high school and DCPS became Student's LEA. At the time of enrollment, Petitioner informed the special education coordinator that Student was a special education student and she presented an incomplete copy of Student's IEP. The portion of the IEP presented by Petitioner, which pertained only to a description of goals and objectives in particular areas of concern, did not indicate the number of hours or type of services or the setting in which the special education services were to be provided.⁵

#4. Petitioner contacted her attorney on 08/29/12 to have a complete IEP sent to the public high school and thereafter called the school many times to inquire about the availability of a class schedule for Student. DCPS received the IEP from Petitioner's legal representative on

³ Petitioner.

⁴ Petitioner.

⁵ Petitioner.

09/10/12.⁶ That IEP, dated 03/25/11, had expired 18 months prior to Student's enrollment. The IEP prescribed 27.5 hours/week of specialized instruction, 60 minutes/week of occupational therapy services and 90 minutes/week of behavioral support services, with all services to be provided outside of general education in a full time therapeutic educational setting.⁷

#5. Student began attending the public high school on 09/17/12 with a class schedule that provided him with three special education classes outside of the general education setting.⁸ Student received classroom instruction in English and in Health Education in a general education setting.⁹ Student had many behavior problems and problems understanding and completing the class work while participating in the general education setting.¹⁰

#6. The IEP Team met on 09/26/12 and reviewed Student's 03/25/11 IEP as well as evaluations provided by Petitioner that had been completed in 2009. The 09/26/12 IEP Team consisted of Student, Petitioner, Petitioner's advocate, the special education teacher who also acted as the local education agency representative, a school psychologist who could interpret assessment results, and a social worker who was the provider of counseling services. There was no general education teacher or occupational therapist present at the meeting.¹¹

#7. All members of the IEP Team agreed that DCPS should provide the same or comparable services that the 03/25/11 IEP prescribed until such time that new evaluations consisting of a comprehensive psychological evaluation and a Functional Behavioral Assessment were completed and reviewed by the IEP Team and a new IEP developed. All members of the IEP Team waived discussion about the goals, baselines, objectives and evaluation methods in the IEP and there was no discussion about a transition plan. The IEP Team agreed to reconvene and substantively discuss the IEP after the new evaluations had been completed.¹² By mutual agreement of all of the members of the IEP Team, no changes were made to the IEP.¹³

#8. On or before 09/26/12, DCPS developed a draft IEP that was to be used as a draft for the development of a new IEP at the 09/26/12 IEP meeting.¹⁴ The 09/26/12 IEP was conspicuously marked as "draft" and it was not to be used as the basis for the provision of services to Student. The IEP Team that included Petitioner and Petitioner's advocate agreed on 09/26/12 that the 03/25/11 IEP would be used as the basis to provide Student with services until such time that new evaluations were completed and reviewed by the IEP Team and the IEP revised as necessary.¹⁵ Shortly after the IEP Team meeting on 09/26/12, Petitioner received a copy of the draft 09/26/12 IEP.¹⁶

⁶ Petitioner, advocate, P-9-2.

⁷ P-15.

⁸ Petitioner, P-6-1, P-10-2, P-11-1.

⁹ P-5-3, P-6-1, P-7-8, P-10-3.

¹⁰ Petitioner.

¹¹ Petitioner, advocate, P-10-3.

¹² Petitioner, advocate, P-10-2, P-11.

¹³ Petitioner, advocate.

¹⁴ P-10, P-12.

¹⁵ Petitioner, advocate.

¹⁶ Advocate

#9. From the first week that Student began attending school until the time that Student was detained at a juvenile detention facility on 11/12/12, Student had absences from school and class on a twice per week basis even though Petitioner sent Student to school every day. Student also received suspensions for his behavior and was sent home from school for his behaviors.¹⁷

#10. DCPS made behavioral support services available to Student at least until the 09/26/12 meeting, but the behavioral support services provider had not seen Student due to Student's unavailability.¹⁸ The record was devoid of information as to whether or not DCPS provided Student with behavioral support services after 09/26/12.

#11. Beginning on 09/21/12 and continuing through the end of October 2012, DCPS offered 60 minutes/week of occupational therapy services to Student except for one occasion when the occupational therapy service provider was not available, and on one occasion when the school was closed due to inclement weather. At all other times, Student was unavailable to receive the services.¹⁹ There was no information in the record about whether or not occupational therapy services were made available to Student in November 2012.

#12. Student has been detained continuously at a juvenile detention facility since 11/12/12.²⁰ The educational services that Student has received there are unknown.²¹

Discussion/Conclusions of Law

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

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

DCPS, as the local education agency, is responsible for providing Student with a free appropriate public education. 34 C.F.R. 300.1, 300.17, 300.101, 5 D.C.M.R. E-3000.1. To that end, DCPS is required to provide Student with specially designed instruction to meet Student's unique needs as defined by an IEP that enables Student to access the general education curriculum and make progress towards achieving annual goals. 34 C.F.R. 300.39, 300.320.

To comply with the overall purpose of the IDEA, all local education agencies (LEA) in the District of Columbia must ensure that all children with disabilities, ages three to twenty-two, who are residents or wards of the District of Columbia, have available to them a FAPE and that the rights of these children and their parents are protected. 34 C.F.R. 300.101, 5 D.C.M.R. E-3000.1.

¹⁷ Petitioner, P-8-2.

¹⁸ P-11-2.

¹⁹ R-2, R-3, P-11-2.

²⁰ Petitioner.

²¹ Advocate.

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005). 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.

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 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).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's IEP: specifically, (a) DCPS' initial refusal to allow Student to enroll at the public high school resulted in Student missing all of the special education services prescribed by his 03/25/11 IEP, from 08/27/12 through 09/17/12; (b) DCPS failed to provide Student with all of the 27.5 hours/week of specialized instruction outside of general education, as was required by Student's IEPs, beginning on 09/18/12; and (c) DCPS failed to provide Student with related services consisting of 90 minutes/week of behavioral support services from 09/18/12 through 09/26/12, 30 minutes/week of behavioral support services beginning on 09/27/12, and 1 hour/week of occupational therapy services beginning on 09/18/12.

At the beginning of each school year, the public agency must have in effect, for each child with a disability within its jurisdiction, an IEP. 34 C.F.R. 300.323.

If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either (1) adopts the child's IEP from the previous public agency; or (2) develops, adopts, and implements a new IEP. 34 C.F.R. 323(e), 5 D.C.M.R. E-3019.5(d).

If a child with a disability transfers from one LEA to another within the District of Columbia, the sending LEA shall provide a copy of the child's records to the receiving LEA, including any IEP for that child, within ten (10) days of receipt of notice of enrollment of the child in the receiving LEA. 5 D.C.M.R. E-3019.5(a).

Student enrolled in a DCPS school on 08/28/12 and DCPS had until 09/05/12 to provide Student with a class schedule containing services that were comparable to those identified in his 03/25/11 IEP. That didn't happen. Student did not get a class schedule and begin school until 09/17/12, despite Petitioner's constant calls to the school inquiring about the availability of a class schedule and despite DCPS receiving a copy of Student's IEP on 09/10/12. As a result of

DCPS' delay in providing Student with a class schedule, Student missed seven days of special education services that consisted of 27.5 hours/week of specialized instruction, and a total of 90 minutes of behavior support services and a total of 60 minutes of occupational therapy services.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

It is well established that not every failure to provide services according to a student's IEP amounts to an IDEA violation, but a material failure to implement an IEP violates the IDEA. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. A showing of educational harm is not required for a material failure to implement the IEP. See *Department of Education, State of Hawaii v. R.F. by Pauline F.*, 57 IDELR 197 (2011).

The Hearing Officer determines that DCPS' failure to provide Student with seven school days of full-time specialized instruction outside of general education, from 09/06/12 through 09/16/12, constituted a material failure to implement the IEP and resulted in Student being denied a FAPE. Student was deprived of an educational benefit. The Hearing Officer determines that DCPS' failure to provide Student with a total of 90 minutes of behavioral support services and a total of 60 minutes of occupational therapy services, over the course of one week's time, was a de minimus failure to implement the IEP and did not result in the denial of a FAPE. Petitioner did not prove harm from this very limited failure to provide behavioral support services and occupational therapy services.

From 09/17/12 until the time that Student was detained at a juvenile detention facility on 11/12/12, DCPS was responsible for providing Student with services comparable to what was required by his 03/25/11 IEP. The evidence revealed that DCPS did not provide Student with specialized instruction outside of general education in English or Health Education for the entire time that Student attended the public high school; a duration of approximately eight weeks. This failure constituted a material failure to implement Student's IEP and resulted in Student being denied a FAPE. Student's IEP specifically mandated instruction outside of the general education setting, yet Student received instruction in a core curriculum class and an elective in the general education setting instead; a setting that Student had great academic and behavioral difficulties in.

The testimony of Petitioner and advocate that Student received specialized instruction outside of general education in two rather than three classes was not credible; their assertions were not based on anything other than review of Student's class schedule. The documentation and all of the testimony of the witnesses supported a finding that Student received specialized instruction outside of general education in three of his classes. Student's many absences from school and class were irrelevant to the Hearing Officer's determination; it was possible but not proven that Student might have been avoiding class due to DCPS' failure to provide services in compliance with the IEP.

Petitioner failed to meet her burden of proof that Student was denied a FAPE due to DCPS' failure to provide Student with 90 minutes/week of behavioral support services from 09/18/12 through 09/26/12, a period of one week. Testimony revealed that at the 09/26/12 IEP Team meeting, the behavioral support services provider stated that he had not yet seen Student; the implication being that Student had not yet made himself available. Besides, Petitioner failed to prove harm from the non-receipt of 90 minutes of behavioral support services. The documentary and testimonial evidence in the record supported a finding that DCPS made behavioral support services available to Student from 09/18/12 through 09/26/12. There was no evidence in the record as to whether or not behavioral support services were made available to Student after 09/26/12. Therefore, Petitioner failed to meet her burden of proof that DCPS failed to provide Student with 30 minutes/week of behavioral support services beginning on 09/27/12.

Petitioner also failed to meet her burden of proof that DCPS failed to provide Student with 1 hour/week of occupational therapy services beginning on 09/18/12. The documentary evidence in the record, consisting of occupational therapy service tracker records, revealed that DCPS made occupational services available to Student as was required by his IEP from 09/21/12 through the end of October 2012. There was no evidence in the record about the provision of occupational therapy services during November 2012. The occupational therapy service tracker records were given greater weight than the testimony of Petitioner and the advocate, who simply testified that someone at the school had told them that the school did not have an occupational therapy service provider. There was no other basis for their assertions that Student did not receive occupational therapy services.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on 09/26/12; specifically, (a) the IEP Team was improper due to the lack of an occupational therapist, a general education teacher, and a DCPS representative who was qualified to review and explain data and evaluations; (b) the 09/26/12 IEP was not calculated to provide educational benefit in that it contained inappropriate, vague, undefined, and unattainable goals and objectives, failed to include baselines, and failed to include evaluation methods and present levels of academic performance; (c) the 09/26/12 IEP reduced Student's behavioral support services from 90 to 30 minutes/week without discussion that included Petitioner; and (d) the transition plan is inappropriate because it does not address the severity of Student's disability, it is not based on appropriate transition assessments, it was developed outside of a team meeting and the transition goals are vague and meaningless.

The IEP Team for each child with a disability must include the parents of the child; a regular education teacher if the child is or may be participating in the regular education environment; a special education teacher of the child; a representative of the public agency who is qualified to provide or supervise the provision of specially designed instruction; a representative of the public agency who is knowledgeable about the general education curriculum; a representative of the public agency who is knowledgeable about the availability of resources of the public agency; and a representative of the public agency who can interpret assessment results. 34 C.F.R. 300.321.

At the IEP meeting on 09/26/12, DCPS had all of the required personnel present with the exception of the general education teacher and the occupational therapist, both of whom were critical to the development of an appropriate IEP because Student was receiving classroom instruction in the general education setting and he was receiving occupational therapy services. Although DCPS violated the IDEA by conducting an IEP Team meeting without the presence of the general education teacher and the occupational therapist, Student was not denied a FAPE as a result. The entire IEP Team that included Petitioner agreed not to discuss any substantive portions of the IEP or make any revisions to the existing 03/25/11 IEP until after new evaluations were completed. Petitioner effectively participated in the decision making process regarding the provision of a FAPE to her child; there was no deprivation of an educational benefit because the IEP already provided for maximum services to Student; and the child's right to a FAPE was not impeded.

Petitioner also failed to prove that the IEP was not calculated to provide educational benefit due to inappropriate, vague, undefined, and unattainable goals and objectives, and the absence of baselines, evaluation methods and present levels of academic performance.

An IEP is a written statement for each child with a disability that includes a statement of the child's levels of academic achievement and functional performance, including a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and a description of how the child's progress toward meeting the annual goals will be measured. For any child age 16 or older, the IEP must also include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills, as well as the transition services need to assist the child in reaching those goals. 34 C.F.R. 300.320.

Student came to the public high school from a nonpublic school where he had been unilaterally enrolled, with an IEP that had been expired for 18 months. At the IEP Team on 09/26/12, all members of the IEP Team, including Petitioner and advocate, agreed not to discuss the specifics of the existing 03/25/11 IEP and not to change anything about the 03/25/11 IEP pending the completion and review of new evaluations. The IEP Team did not discuss a transition plan. The testimony of both Petitioner and advocate on that matter was clear, convincing and uncontroverted that all members of the IEP Team waived the discussion on all substantive portions of the IEP. It was disingenuous for Petitioner to later make a claim that Student was denied a FAPE by DCPS' failure to develop a substantively appropriate IEP on 09/26/12. Petitioner was not deprived of the right to participate in the decision making process because she was present and agreed to wait until evaluations were completed before making any changes to the existing 03/25/11 IEP. Student's right to a FAPE was not impeded; Student's IEP was outdated by 18 months and new evaluations were necessary in order to formulate a service plan for Student.²² Student also was not deprived of an educational benefit; the level of services in the 03/25/11 IEP were already at a maximum level.

²² Advocate credibly testified that this was the proper protocol.

The 09/26/12 IEP was not a finalized IEP and it was not used as a basis for the provision of special education services. Therefore, Petitioner failed to meet her burden of proof that Student's behavioral support services were reduced from 90 minutes/week to 30 minutes/week. It was obvious that the transition plan attached to the draft 09/26/12 IEP received by Petitioner after the 09/26/12 IEP Team meeting was a draft. Both Petitioner and advocate credibly testified that the substantive portions of the IEP, including the goals, objectives and baselines, as well as the transition plan, intentionally were not discussed at the 09/26/12 IEP Team meeting.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate school placement/location of services that could implement his 09/26/12 IEP that required full-time services outside of general education in a therapeutic milieu; specifically, the location of services provided by DCPS, i.e., the public high school that Student attends could not provide the amount of specialized instruction outside of general education in a therapeutic milieu.

DCPS shall place a student with a disability in an appropriate special education school or program. 38 D.C. Code 2651.02(b). Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate secondary school, and are provided in conformity with the IEP. 34 C.F.R. 300.17.

Petitioner failed to meet her burden of proof on this issue. The IEP dated 09/26/12 was a "draft" IEP and was not used as the basis for the provision of special education services to Student. There was no finalized IEP dated 09/26/12 that DCPS was required to implement. Moreover, both Petitioner and advocate credibly testified that there was no discussion about the location of services or an appropriate school placement at the IEP Team meeting on 09/26/12, by the consent of all members of the IEP Team. Both Petitioner and advocate agreed that the location of services discussion would be shelved until after evaluations had been completed and reviewed. DCPS did not violate the IDEA and Student was not denied a FAPE.

Relief

Parties stipulated that the educational placement for Student is a nonpublic school. Parties also stipulated that Nonpublic School can implement Student's IEP and that Nonpublic School is an appropriate location of services to implement Student's IEP. Parties also agreed that Student's next school placement would be Nonpublic School when Student becomes available for placement. The ensuing Order shall reflect the parties' agreement. The Hearing Officer determines that Nonpublic School is an appropriate school placement/location of services to implement Student's IEP.

The Hearing Officer previously determined herein that Student was denied a FAPE by DCPS' failure to provide Student with 27.5 hours/week of specialized instruction for a period of seven school days as well as DCPS' failure to provide Student with specialized instruction in English and in Health Education for a period of eight weeks. These failures constituted a material failure to implement the IEP. If a child is determined eligible for special education services and has been denied a FAPE, then the child is entitled to replacement of educational

services the child should have received in the first place. *Reid v. District of Columbia*, 43 IDELR 32 (2005). “Awards should not be based on the amount of services missed, but rather on the amount of services needed to place the student in the position he would have occupied if the district had fulfilled its FAPE obligations.” *Phillips ex rel. T.P. District of Columbia*, 55 IDELR 101 (D.D.C. September 13, 2010).

Henry v. District of Columbia, 55 IDELR 187 (D.D.C. November 12, 2010), quoting *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005), requires a “fact-specific exercise of discretion” in the computation of the compensatory education award and it is under this premise that this Hearing Officer makes an award of compensatory education. *Henry* clearly indicates that the denial of a FAPE entitles Student to compensatory education and that the Hearing Officer must craft a compensatory education award based on the information in the record, to the extent possible.

There is no way to gauge with a reasonable degree of certainty where Student would have been academically if DCPS had made all of the specialized instruction available to Student that he was entitled to through the proper implementation of his IEP. Student was harmed; he had many behavioral and academic problems while participating in the general education setting. 50 hours of independent tutoring, as proposed by Petitioner, is reasonable under the facts of this case. Student missed at least 50 hours of specialized instruction outside of general education and the tutoring will provide the extra instruction that Student needs to regain his footing in the academic arena.

There was no denial of a FAPE with respect to the lack of provision of behavioral support services and occupational therapy services.

ORDER

(1) DCPS shall issue a Prior Written Notice to Nonpublic School within 20 school days of Student becoming available for placement.²³

(2) No later than 10 business days from the date of this Order, DCPS shall provide Petitioner with a letter of funding for Student to receive 50 hours of tutoring in academics by a provider of Petitioner’s choice.

(3) All other relief is denied.

IT IS SO ORDERED.

²³ The wording of this provision of the Order was discussed with parties at the due process hearing. Both parties agreed that Nonpublic School was an appropriate school placement for Student. DCPS is willing to place and fund Student at Nonpublic School once he becomes available for placement. Due to the uncertainty of Student’s court proceedings, parties agreed that no specific time frame for the issuance of the Prior Written Order by DCPS was the best approach; however, the Hearing Officer allowed a liberal amount of time, with a date certain for DCPS to issue the Prior Written Notice, so that the Order would have some measure of enforceability.

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).

Date: December 15, 2012

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner: (electronically)
Petitioner's Attorney: Alana Hecht, Esq. (electronically)
DCPS' Attorney: Lynette Collins, Esq. (electronically)
DCPS (electronically)
SHO (electronically)