

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

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

OSSE  
Student Hearing Office  
April 08, 2014

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Student, <sup>1</sup>	Date Issued: April 7, 2014
Petitioner,	IHO: Michael Lazan
v.	
District of Columbia Public Schools,	
Respondent.	

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

This matter comes before the undersigned Hearing Officer on Petitioner’s Notice of Due Process Complaint (“Complaint”) received by Respondent on January 22, 2014. This IHO was appointed to hear this matter shortly thereafter, on January 24, 2014. Respondent filed a Response to the Complaint on January 28, 2014, denying the allegations in the Complaint.

On February 5, 2014, a resolution meeting was held. The parties did not resolve the matter and did not agree to shorten the resolution period. The resolution period expired on February 21, 2014. The HOD was due on April 7, 2014.

A Prehearing Conference was held on March 6, 2014. A Prehearing Conference Summary and Order was issued on March 8, 2014.

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<sup>1</sup> Personal identification information is provided in Appendix A.

A hearing date was set for March 26, 2014. This was a closed hearing.

Petitioner entered into evidence exhibits 1-22; Respondent entered into evidence exhibits 1-10. Petitioner presented as witnesses: Petitioner; Witness A, the Student's Guardian Ad Litem; Witness B, a Psychologist; and Witness C, Admissions Coordinator, School D. Respondent presented: Teacher A, the Student's current special education teacher; Teacher B, the Student's former special education teacher; Witness D, a Special Education Coordinator at School C; and Witness E, a social worker. Briefs were presented to this IHO on April 1, 2014.

### **JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **ISSUES**

As identified in the prehearing conference order, the issues to be determined are as follows:

1. Did the Student require a more restrictive setting than was recommended in the November 5, 2013 IEP, including a full-time special education day school, with goals designed to address the Student's adaptive living issues? If so, did DCPS deny the Student a FAPE?
2. Did the Student require a BIP in connection to his November 5, 2013 IEP? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to implement the Student's IEP at Coolidge Senior High School for the current school year? If so, did DCPS deny the Student a FAPE?

4. Did DCPS fail to assess the Student in all areas of suspected disabilities in connection to the November 5, 2013 IEP? If so, did DCPS deny the Student a FAPE?

5. Did DCPS offer the Student an inappropriate placement following the November 5, 2013 IEP meeting? If so, did DCPS deny the Student a FAPE?

### **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. The Student is eligible for services as a student with multiple disabilities. (P-6-1)

2. The Student had a difficult childhood. The Student's parents have both been incarcerated on multiple occasions.

3. He has had significant behavioral issues at the group home,

6. The Student has attentional issues. (Testimony of Witness B)

7. The Student's triggers included frustration with work and difficulties with peers.  
(Testimony of Teacher A)

8. The Student is diagnosed with Mood Disorder NOS, ADHD-Combined Type, and Cannabis Abuse. (P-2-13)
9. The Student does not take his Attention Deficit Hyperactivity (“ADHD”) medication all the time. (Testimony of Petitioner)
10. The Student does not take to change well. (Testimony of Teacher A)
11. The Student is in the average range in terms of cognitive ability. (P-2-4)
12. The Student has a significant problem in reading comprehension. (Testimony of Teacher B)
13. The Student is embarrassed by his disabilities. (Testimony of Witness B)
14. The Student requires an Functional Behavior Assessment (“FBA”) to address aggression. (Testimony of Witness B)
15. The Student wants to be a part of the entire student body at a school. (Testimony of Witness A)
16. Testing from October 20, 2011 on the Woodcock Johnson Tests of Achievement-3 revealed standard scores of 78 in oral language (low), 91 in broad reading (average), and 82 in broad math (low average). (P-2-4)
17. The Student’s November 15, 2012 IEP recommends 27.5 hours of specialized instruction with 240 minutes per month of behavioral support services. (P-7-7)
18. The Student’s Behavior Intervention Plan (“BIP”) dated January 19, 2012 recommends modeling, preferential seating, use of personal timers, free time, use of verbal praise, a daily token/point system, classroom leadership opportunities, addressing inappropriate behaviors immediately, redirection to task, denial of points and privileges, and a “buddy” teacher system. (P-8-1)

19. The BIP is written to address the Student's issues with respect to tone of voice, following classroom rules, remaining in his seat, and walking out of class. (P-8-1)

20. For the 2012-2013 school year, the Student attended School A. There were about 300 children at School A. There were general education students at this school. There were 10 students in the class. There were 2 teaching assistants in the class, and a behavior technician that pushed into the classroom for 50 percent of the day. There also was a social worker that pushed into the classroom for 50 percent of the day. There were "floating" aides in the school for extra help. He would get 1:1 instruction in class. He had tutors at School A. They had a "chill zone" where they could cool him down. Students would tease him because of his appearance. His hair would be messy, his shoes were untied, and he was poorly groomed. (Testimony of Petitioner, Teacher A; R2-2; R-6-1)

21. At the school, "systems" were in place to help him stay in class. He was able to verbalize when he was having difficulty. (Testimony of Teacher A)

22. The Student maintained a C average at School A. He received B grades in English Language Arts, Math, and Science. It took him awhile to adjust the School A. He did better the second year. His reading improved at the school. The Student made progress on goals, but not on his adaptive goals. He accepted instruction at the school. Still, he was suspended often at the school. (Testimony of Petitioner, Teacher A; R2-2; R-6-1)

23. Testing conducted in August, 2013 on the Woodcock Johnson, Tests of Achievement-3 found the Student to have a broad reading score of 87 (low average), a broad math score of 81 (low average), and a broad written language score of 91 (average). (P-2)

24. BASC-2 testing conducted in August, 2013 (as derived from Teacher A) found that the Student is in the clinically significant range in terms of School Problems, Adaptive Skills, Adaptability, Social Skills, and Functional Communication. (P-2-8)

25. BASC-2 testing conducted in August, 2013 (as derived from Teacher B) found that the Student was in the clinically significant range in terms of externalizing problems, hyperactivity, and aggression. (P-2-9)

26. On ADHD-T testing conducted in August 2013, the Student's scores were commensurate with previous testing indicating ADHD. (P-2-11)

27. The Student has attended School B for the 2013-2014 school year. (Testimony of Petitioner)

28. At School B, the academic work is done in the morning, and a review of the work is done in the afternoon, with career exploration work, self-advocacy work, watching documentaries, and "playing games." There is an instructional aide and a behavior technician in the class. There is a behavioral points system that is used for the Student. The Student will be sent to a de-escalation room if he is not responding. (Testimony of Teacher B)

29. A computer program called PLATO is used once a week for the Students at School B, largely for assessment. (Testimony of Teacher B)

30. The Student's BIP was implemented at School B through breaks, rewards and consequences. (Testimony of Teacher B)

31. An observation in October, 2013 by Witness A indicated that the Student came to school late, made inappropriate noise in class, was defiant, got into a conflict with a peer, gave up on work, cursed in class, was escorted out of class, and then got into another altercation in the hallway. He refused to come back into the class. (P-2-11-12)

32. Students are often late to the Student's class. The Student consistently arrives late for class. (Testimony of Teacher B)

33. The Student will run off and try to lose the class aide during class. (Testimony of Teacher B)

34. The Student has not made any progress in reading comprehension for 2013-2014. (Testimony of Teacher B)

35. The Student gets too comfortable in class and forgets that the teacher is not his peer. (Testimony of Teacher B)

36. The Student is not doing well in his current class at School B. His grade point average is poor and he does not respond to the computer curriculum. The Student is not learning many new skills at the school. The Student has engaged in behavioral problems at the school, including fighting, cutting class, and being disengaged in class. He has been suspended at the school. He is not always available at the school for counseling. The Student sometimes cannot be found. He will invade the personal space of the teacher, refuse to do classwork, and get into arguments with students. (Testimony of Petitioner, Witness A, Witness B, Witness E, Teacher B)

37. The Student did not like the board games that are played in the classroom and does not like the PLATO computer program that is used in the class. (Testimony of Teacher B)

38. At the November 15, 2013 IEP meeting, the Student indicated how frustrated he was, how he did not like the computer system and was not getting enough direct instruction. The team discussed that the Student did not like the class, felt the work was too easy, and was continuously late. The Student indicated that he wanted more of a typical high school experience. An FBA was requested by the Petitioner at this meeting. (Testimony of Witness A; R-5-1-2)

39. The November 15, 2013 IEP contains goals in regard to mathematics, reading, written expression, adaptive and emotional, social and behavioral development. In regard to emotional, social, and behavioral development, goals relate to improving frustration levels, recognizing when he is the instigator, distinguishing between appropriate and inappropriate solutions, developing coping skills, identifying positive traits about himself, describing his perceptions of his ideal self, and improving friendships by recognizing social cues, body language, and interpreting verbal feedback. Adaptive goals relate to exhibiting proper grooming and hygiene, demonstrating knowledge of nutrition, weight, grooming, and tying shoelaces. (P-6-7-8)

40. The IEP indicates that the Student is showing regression in terms of his behavior, especially in terms of redirection and verbalizing his feelings. It indicates that impulsivity, frustration levels and poor interactions are having a negative impact on his academic performance. It also indicates that he has had tremendous improvement with his academic performance and behavioral concerns because of the smaller class size. 240 minutes per month of behavioral support services are recommended, with 26 hours per week of specialized instruction. (P-6-1-10)

41. The Student does not need to work on tying shoelaces. (Testimony of Witness B)

42. The Student's grades for the first term in 2013-2014 were F in Algebra, Extended Literacy, Environmental Science and Spanish; D in self-advocacy; and C in World History. (P-13-2)

43. For the second term, the Student received F in Algebra, Extended Literacy, D in Spanish, C in English, Environmental Science, World History, and C+ in self-advocacy. (R-3)

44. No progress was reported on solving equations in math, reading comprehension, and identifying and summarizing key details of text. (R-4-1-4)

45. The BES classes at School C have a teacher, a behavior technician, and a paraprofessional. Social workers, occupational therapists, speech and language therapists, psychologists are available at the program. There is a token system, where students gain points throughout the day. (Testimony of Witness D)

46. School C is too big a school setting for the Student. (Testimony of Petitioner)

47. School D is a nonpublic school in Maryland with 184 children, primarily students with emotional disturbance. Class sizes are no more than 12. The classes include a teacher, program assistant, and a social worker. All teachers are certified. There are 6 crisis counselors who manage the halls, provide crisis counseling, mediation, monitor time-outs, monitor students who are re-entering the program due to suspension. There is staff in the hallways to make sure that Students do not wander off. There are “pods” for the students to de-escalate. There are 18 social workers at the school. There is a speech and language pathologist at the school and an occupational therapist at the school. An FBA and BIP are completed for every student by a program team consisting of a program assistant and a social worker. Data is collected in connection to each Student. A level system is in place to track behavior. There is a points system that is used to provide incentives to the Students. A student advisory committee meets weekly for an hour, led by two therapists. There is a “three bell” system that is designed to allow students to transition appropriately between classes. If students are having difficulty, they will be placed in a program with 4 students and 2 teachers which offers more support and less transition. 12 percent to 14 percent of the students in this program are transitioned to a less restrictive environment. (Testimony of Witness C)

48. I found all the witnesses credible in this proceeding.

### **CONCLUSIONS OF LAW**

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

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

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court 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." Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 C.F.R. Sect. 300.513(a).

Petitioner contends that the District did not conduct sufficient assessments in connection to this IEP, that the IEP did not provide a restrictive enough setting, that the IEP goals were not adequate in regard to adaptive behavior, that the IEP did not come with a corresponding BIP. Petitioner also contends that the placement here was inappropriate.

1. The IEP.

The record reveals that the Student was performing poorly in the BES program at School B during the first few months of the 2013-2014 school year. The Student was failing most of his classes and the Student's behaviors in this connection were bordering on extreme. The Student cursed in class, was consistently late, fought with peers, got into the teacher's personal space, refused to complete work, and was suspended a number of times. Especially concerning was the fact that the Student could not be found sometimes. Observations of the classroom by a psychologist and by the Student's Guardian ad Litem revealed an unstructured setting where the Student was disrespectful and noncompliant. The Student made no progress in reading comprehension during this time, even though reading comprehension is an area of weakness for the Student.

At the review, the Student revealed his discontent with the classroom. The Student indicated that he did not like the program, especially the fact that there was a computer program used in the program and that the program included "games." The Student expressed his wish for

a different setting. The Student has indicated that he wants to be more connected to the main population in the school, suggesting that the segregated nature of the BES program bothers him.

Nevertheless, the review did not provide the Student with a materially different IEP or a different setting. The only change to the services in the IEP was a reduction in special education hours to the Student. There were no interventions placed in the IEP to address any of the Student's behavioral issues, including his tendency to elope, his aggressive physical behavior, and his disrespectful behavior to peers and adults. The IEP goals do not directly and specifically address the Student's tendency to elope, his physical aggressiveness, and his disrespectful attitude towards peers and adults.

Under the circumstances, to this IHO, it would have been appropriate for the team to change and/or increase the intensity of the Student's services and to change and/or increase the behavioral supports that were to be provided to the Student. Clearly, the existing program was not working. By keeping the Student's educational program the same despite poor performance, Respondent denied the Student a FAPE.<sup>2</sup>

## 2. FBA/BIP

Courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA for a child with behavioral problems. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)( in ruling the District failed to provide an FBA/BIP for a Student,

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<sup>2</sup> In regard to the claim that the Student's adaptive goals were inappropriate, the record suggests that the adaptive goals relating to the tying of shoelaces was a mistake made by the team, which meant to indicate that the Student needed to work on keeping his shoelaces tied. I do not agree that this mistake is material enough to be considered a deprivation of FAPE. All of the other elements in the adaptive goals are appropriate.

court stated that “the quality of a student’s education is inextricably linked to the student’s behavior”); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . The FBA should focus on the antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at \*9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at \*19 (S.D.N.Y. 2011). The information gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children. Harris, 561 F.Supp. 2d at 68.

In addition to an FBA, if the behavior of a student impedes the student’s learning or the learning of other students, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). According to DCMR Sect. 5-3007.3, if a student’s behavior impedes the child’s learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

The record here indicates that Respondent did not initiate an FBA even though the school had little control over the Student’s behaviors and no clear idea on the antecedents to the behaviors. This is so even though Petitioner requested an FBA at the IEP meeting. Further, Respondent did not update the Student’s BIP even though the BIP dates from January, 2012 and was unsuccessful in modifying the Student’s behavior in the 2013-2014 school year. The

slender BIP from January, 2012 clearly needed to be updated. The one page BIP is generic and could be applicable to virtually any student. The BIP does not suggest specific interventions to address some of the Student's most severe behavioral issues, including his tendency to elope, his aggressive physical behavior, his disrespectful behavior to peers and adults, his arriving late in class, his inclination to invade the teacher's personal space, and his work refusal.

Respondent contends that the Petitioner presented no evidence of the inappropriateness of the current BIP. On the contrary, the record is replete with references to misbehavior, including physical aggression, elopement, work refusal, tardiness, and a manifestly disrespectful attitude towards staff and peers. There can be no question that this sort of behavior had a serious impact on the Student's academics. The failure to assess the Student's behaviors through an FBA, and the failure to develop a meaningfully revised BIP, denied the Student a FAPE.

### 3. Placement.

Courts hold that school districts may designate schools for students as long as the District assigns a school that may appropriately implement a Student's IEP. T.Y. v. New York City Department of Educ., 584 F.3d 412 (2d Cir. 2009). Although the LEA has the discretion with respect to the location of services, that discretion cannot be exercised in such a manner to deprive a Student of a FAPE. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

Here, the District's choice of placement for the Student included continued designation of the BES program at School B as the Student's location of services. However, it was clear by the time of the November, 2013 IEP that the BES program at School B was inappropriately structured for this Student. The BES program is apparently structured in such a way that Students are not strictly disciplined for actions that would ordinarily be deemed inappropriate in

a classroom. For instance, lateness is apparently tolerated at this program, where most students arrive late. Even if a Student is 30 minutes late, the Student may not miss any work. Teachers do not know where the students are all the time. Even if a student rips up his work in class – as this Student did on at least one occasion -- there may be no discipline meted out to the Student. Teacher A indicated that when the Student ripped up a test in class, it was “an improvement” because the Student went on to take the test.

All this worked to the Student’s disadvantage. The Student cursed in class, fought with his peers, was disrespectful to the teacher and peers, eloped, and was sometimes could not be found. Compounding matters, the Student simply refused to use the PLATO computer program, which is used by the program as an important assessment tool. As stated by the Student himself at the November, 2013 review, the Student did not like the school, did not respect the program, was noncompliant with the teacher of this program, eloped, felt the work was too easy, and felt the program was not sufficiently like a typical school. Accordingly, the Student’s grades were very poor in the first term. The Student also made no progress on many of his IEP goals. The Student made no progress in the area of reading comprehension. Nevertheless, Respondent kept the Student remained at School B in the BES program for the second term.<sup>3</sup> Accordingly, I find that Respondent denied the Student a FAPE by placing him at the BES program at School B after the November, 2013 IEP meeting.

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<sup>3</sup> I do not find that Respondent failed to implement the IEP, as alleged by Petitioner. “Failure to implement” claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23, 31, 32 (D.D.C. 2012)(holding no failure to implement where District’s school setting provided ten minutes less of specialized instruction per day than was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007). There is no showing that Respondent failed to implement the IEP at School B. Petitioner’s argument, that School B employed the PLATO program throughout the school day, was convincingly rebutted by Teacher A.

4. Remedy.

Petitioner asserts that appropriate relief in this matter is to order placement of the Student at School D, a non-public school in Maryland. Petitioner also asserts that the Student should receive compensatory education for the period of FAPE deprivation, which I calculate as the date of the IEP to the present.

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” 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. Id. at 12.

The record indicates that the program at School D would provide the Student with more intensive educational services than the Student received in the BES program at School B. The school is small, with 184 children, with class sizes are no more than 12. There are only 76 children in the high school. The classes include a teacher, program assistant, and a social worker. All teachers are certified. There are 6 crisis counselors who manage the halls, provide crisis counseling, mediation, monitor time-outs, monitor students who are re-entering the program due to suspension. There is staff in the hallways to make sure that Students do not

wander. There are “pods” for the students to de-escalate. There are 18 social workers at the school. An FBA and BIP are completed for every student. Data is collected for each Student. A level system is in place to track behavior. There is a points system that is used to provide incentives to the Students. A student advisory committee meets weekly for an hour, led by two therapists. There is a “three bell” system that is designed to allow students to transition appropriately between classes. If students are having difficulty, they will be placed in a special program with 4 students and 2 teachers with less transitioning. 12 percent to 14 percent of the students in this program are transitioned to a less restrictive environment.

Respondent opposes this request, contending that the BES program at School C would be a good fit for this Student. Respondent contends that the program would provide the Student with an appropriate level of behavioral interventions, and is located in its own area within a traditional high school. Respondent indicates that it has social workers, psychologists, and a worker from the Department of Mental Health for students. Petitioner indicates that the Student would get exposure to non-disabled peers in this program.

Applying the Branham factors, I find that the Student has severe behavioral problems that require interventions beyond those provided by the BES program, whether at School B or School C. The program at School D provides specific special education behavioral supports that have not been tried before for this Student. There are 6 crisis management staff at School B that manage the halls, provide crisis counseling, monitor time-outs, and mentor students who are re-entering the program. There are no less than 18 social workers for social and emotional support, and a three bell system that will allow the student to transition appropriately between classes. These intense interventions – especially the interventions relating to the hallways -- are

particularly important for this Student, who requires monitoring in the classroom and when leaving the classroom.

Additionally, at School D, a behavior “level” system is used, and there is a student advisory committee that meets every week. Consistent with what the Student received earlier at School A, this is a school that has a small student population, with only 76 students in the high school. Each Student gets an FBA and a BIP to address behavioral issues. These are written by a program team consisting of a teaching assistant and a social worker. Data is taken on each student by all staff. These are new interventions that have not been tried in the BES program.

I have considered whether the BES program at School C would be a good fit for this Student. However, the record does not especially differentiate between the BES program at School C and the BES program at School B except for the fact that the BES program at School C does not include the PLATO computer program. The record indicates that the Student needs more structure and support than is offered in the BES program, which did not provide sufficient monitoring for this Student. It is also relevant to note that the Student does not seem to benefit from a large school setting, such as at School C. The Student also does not respond to the approach of the BES program, where academic work is done in the morning, and a review of the work is done in the afternoon, with career exploration work, self-advocacy work, watching documentaries, in addition to playing board games.

An important question here is whether School D is the least restrictive environment for the Student. A parental placement need not be the least restrictive environment for a Student. N.T. v. District of Columbia, 839 F. Supp.2d 29, n.3 (D.D.C. 2012). Still, it is appropriate for this IHO to assess whether this placement is the Student's LRE. Id., at 34-36 (affirming an HOD denying a tuition award on, inter alia, LRE grounds, notwithstanding a finding of FAPE denial)

Maintaining a less restrictive placement at the expense of educational benefit or safety is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994). Indeed, a recent Circuit court decision underscores that even where the student does not exhibit significant emotional issues, a self-contained placement can be deemed appropriate. C.L v. Scarsdale Union Free Sch. Dist., 2014 WL 928906 at \*8-\*12 (2<sup>nd</sup> Cir. March 14, 2014).

Here, the District has attempted the BES program with this student, without success. The record indicates that the proposed parental placement would provide the Student with more intense support, and more structure, than the BES placement would provide. The record further indicates that the Student's severe behaviors require a change from the BES program. Respondent does not propose any other schools for this Student, whose behaviors are disruptive to himself, to his peers, and to his teachers as well. Under the circumstances, this IHO finds that School D is an appropriately restrictive setting for this Student. This IHO will therefore award tuition payment for the Student at School D for the remainder of the 2013-2014 school year.

Petitioner also seeks compensatory education for the period of FAPE denial. One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services. . . to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should

have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524. Specifics regarding the type of relief sought may not be required by Courts if witnesses have identified where the Student was before FAPE denial, where the Student should be after FAPE denial, the number of hours of compensatory education needed for the Student, and what program would get the student where he should be, and what it would consist of. Cousins v. District of Columbia, 2012 WL 3090265 (D.D.C. 2012).

Petitioner proposes that the Student be awarded 49.5 hours of compensatory tutoring, and 14 hours of mentoring. Petitioner's proposal was presented by Witness B, a psychologist who reviewed the Student's records, considered the period of time that the Student was denied a FAPE, and calculated a remedy premised on a clinical analysis of the amount of services that might be necessary to make up for the FAPE deprivation. However Witness B's analysis of the Student's compensatory education needs rests in part on a false premise, i.e. that the PLATO program constitutes 25 percent of the Student's school time at School B. Accordingly, I will reduce the proposed award of 49.5 hours of compensatory tutoring by one third, to 33 hours of academic tutoring. I find that this award is a reasonable and appropriate remedy for the FAPE

deprivation here and is consistent with the Reid standard. In regard to the 14 hours of mentoring, I find this relief unconnected to the FAPE deprivation since there is no claim that the Student did not receive his behavioral support services. Accordingly, I will deny this request.

## **ORDER**

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by its IEP meeting of November 15, 2013, the resultant IEP, and the placement recommendation including the location of services at School B;
2. Respondent is directed to pay tuition for the Student at School D for the remainder of the 2013-2014 school year. Respondent may request proof of attendance prior to payment of such tuition;
3. Respondent is directed to pay for 33 hours of compensatory education by a special education teacher for the Student. Services shall be completed by the end of the 2014-2015 school year.

Dated: April 7, 2014

*Michael Lazan*  
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 USC §1415(i).

Date: April 7, 2014

*Michael Lazan*  
Impartial Hearing Officer