

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
December 30, 2013

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

Date Issued: December 28, 2013

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Student Hearing Office
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or Mother) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (“FAPE”) by failing to provide appropriate programming for Student and a suitable placement in the 2011-2012, 2012-2013 and 2013-2014 school years.

¹ Personal identification information is provided in Appendix A.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 15, 2013, named DCPS and PCS-2 as respondents. On October 28, 2013, the parties met for a resolution session but did not reach an agreement. The 45-day time period for issuance of this Hearing Officer Determination started on November 15, 2013. On November 13 and 19, 2013, the Hearing Officer convened telephone prehearing conferences with counsel to discuss the hearing date, issues to be determined and other matters. On November 22, 2013, I granted PCS-2's motion to be dismissed as a party respondent. On November 15, 2013, counsel for DCPS filed a motion to dismiss certain claims in Petitioner's due process complaint, as time-barred by the two-year statute of limitations. *See* 20 U.S.C. §1415(f)(3)(C). I denied the motion.

The due process hearing was convened before the undersigned Impartial Hearing Officer on December 4, 5 and 6, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner appeared in person, and was represented by Petitioner's COUNSEL and CO-COUNSEL. DCPS was represented by DCPS' COUNSEL.

Prior to the hearing, DCPS filed a motion to dismiss one issue identified in the Prehearing Order, "Whether DCPS denied the student a FAPE in the 2011-12 school year by failing to ensure that his teachers for high school diploma track courses were content certified." At the due process hearing, Petitioner's Counsel did not oppose the motion and I granted DCPS' motion to dismiss the teacher certification issue.

At the hearing, Petitioner's Counsel proffered evidentiary stipulations, jointly agreed to by the parties, which I accepted.

Mother testified, and called as witnesses PCS-2 SPECIAL EDUCATION TEACHER, NONPUBLIC SCHOOL ADMISSIONS DIRECTOR, LEA REPRESENTATIVE, FATHER, PCS-2 SOCIAL WORKER, DCPS SPEECH-LANGUAGE PATHOLOGIST, and EDUCATION COORDINATOR. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-75 were admitted into evidence without objection, with exception of Exhibits P-9, P-10 and P-24 which were admitted over DCPS' objections and P-62 which was not offered. DCPS' Exhibits R-1 through R-12 were admitted without objection with the Exceptions of Exhibits R-4, R-5 and R-11, which were not offered. Joint Exhibits JT-1 and JT-2 were admitted without objection. Only counsel for Petitioner made an opening statement. Counsel for both parties made closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether Student was denied a FAPE by his 2011-2012 IEPs which failed to meet his alleged requirement for full-time special education programming in an outside of general education setting;
- Whether DCPS failed to implement Student's 2011-2012 IEPs because the school did not implement the math goals identified in the IEPs and because the school staff failed to take reasonable and necessary steps to connect with Student to enable him to benefit from the counseling and speech language services in his IEP;
- Whether DCPS denied Student a FAPE in the 2011-2012 school year by failing to conduct a functional behavioral assessment and develop an appropriate behavior intervention plan;
- Whether Student was denied a FAPE by his 2012-2013 IEPs which failed

to meet his alleged requirement for full-time special education programming in an outside of general education setting;

- Whether DCPS denied student a FAPE in the 2012-2013 school year by failing to conduct a functional behavioral assessment and develop and implement an appropriate behavior intervention plan in a timely fashion;
- Whether DCPS has denied Student a FAPE in the 2013-2014 school year by failing to offer a suitable placement/location of services to implement the full-time special education programming, including appropriate vocational programming, specified in the October 2013 IEP; and
- Whether DCPS has denied Student a FAPE by failing to offer appropriate vocational programming after development of his May 2013 IEP.

An additional issue, whether DCPS denied Student a FAPE in the 2011-2012 school year by failing to ensure that his teachers for high school diploma track courses were content certified, was dismissed at the beginning of the due process hearing.

For relief Petitioner seeks DCPS funding for Student's private school placement at Nonpublic Placement and an award of compensatory education.

FINDINGS OF FACT

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

1. Student, an AGE young man, resides with Father's friend in the District of Columbia. Testimony of Mother.

2. Student is eligible for special education and related services under the Primary Disability classification Emotional Disturbance ("ED"). When Student was in middle school, his disability classification was identified as Specific Learning Disability ("SLD"). Previously, his disability classification had been Intellectual Disability ("ID").
Stipulation of Parties.

3. Student has received special education services since he was in the third

grade. Exhibit P-15. For the 2007-2008 school year, Student was enrolled in PCS-1. For the 2009-2010 and 2010-2011 school years, he was enrolled at CITY PUBLIC SCHOOL. For the 2011-2012 school years, Student was enrolled in CITY HIGH SCHOOL. Since the beginning of the 2012-2013 school year, he has been enrolled at PCS-2. Testimony of Education Coordinator.

4. Education Coordinator, who works for a non-profit housing agency, has an educational background in special education and learning disabilities. She has worked with Student and his family for about 8 years. She has been assisting with school issues for Student off-and-on throughout this period. Testimony of Education Coordinator. This witness appeared to be knowledgeable and concerned about Student's educational needs and I found her to be a credible witness.

5. Student's IEP at PCS-1 provided that he would receive 26 hours per week of Specialized Instruction, one hour per week of psychological services and one hour per week of Speech Therapy. Exhibit P-23. Student fared terribly at PCS-1. Testimony of Education Coordinator.

6. At City Public School, Student was placed at first in a full-time, outside of general education, program for mentally retarded (the preferred term now is "intellectually disabled") children. Education Coordinator believed that Student did okay with that program, but she was not too involved at that time. Testimony of Education Coordinator.

7. At a January 20, 2011 IEP meeting at City Public School, when Student was in eighth grade, Student's Specialized Instruction Services were reduced to 15 hours per week, in the General Education setting, and he was provided 120 minutes per month each of Speech-Language Pathology and Behavioral Support Services, outside General

Education. Mother and Education Coordinator attended the IEP meeting. They noted their disagreement with the IEP, because the program only provided special education support in math and language arts and they believed he continued to need special education support in all subjects. Exhibit P-25, Testimony of Education Coordinator.

8. On Woodcock-Johnson III achievement tests administered before the January 11, 2011 IEP meeting, Student, who was then in the middle of his eighth grade year, had scored grade equivalency levels of 2.3 in Broad Math, 1.9 in Reading, and 4.4 in Written Expression. Exhibit P-25.

9. In Student's January 20, 2011 IEP, it was reported that Student showed improvement in his social emotional growth and in terms of dealing with anger and peer pressure. Exhibit P-25.

10. Student matriculated to City High School for the 2011-2012 school year. A January 17, 2012 progress report reported that Student made "No Progress" on any of his IEP academic goals due to excessive absences. Exhibit R-6. City High School convened an IEP team annual review meeting on January 12, 2012, which Mother did not attend. Student was reported to not be achieving academically because of his poor classroom attendance as well as his behavioral issues. For Present Levels of Educational Performance in the Emotional, Social and Behavioral Development Area of Concern, the IEP team reported that Student was not going to class and was spending a lot of time wandering the halls. His academics were suffering greatly and he continued to show no signs of wanting to change. He was reported as "easily influenced by inappropriate peer behaviors and presents to be the problem not wanting to be involved with solution." He was also reported to have serious home challenges which were impacting his academic performance. Exhibit P-26.

11. The January 12, 2012 IEP team reduced Student's Specialized Instruction Services to ten hours per week, all in the General Education setting. His Speech-Language and Behavioral Support Services were not changed. Exhibit P-26.

12. With the assistance of Education Coordinator, Mother succeeded in obtaining another meeting for Student at City High School on February 14, 2012. Student's court-appointed attorney, the school social worker, Mother, Education Coordinator and the school assistant principal attended this meeting. Education Coordinator understood that this was not a Multidisciplinary Team (MDT) meeting or an IEP meeting. Although the school staff refused to change Student's January 12, 2012 IEP, the staff decided it would be best for Student to be placed in SPECIAL EDUCATION TEACHER'S self-contained class for the rest of the school year to work on his basic skills. Special Education Teacher took Student under his wing to work on preparing him for a general education setting the following year. In Special Education Teacher's classroom, Student received 20 hours of Specialized Instruction per week. Things worked much better for Student in Special Education Teacher's class. He received a lot of attention, had a positive relationship with the teacher and was able to receive some educational benefit. Although Student's IEP stated that he was on the DCPS high school diploma track, he could not earn credits toward graduation in Special Education Teacher's class. Testimony of Education Coordinator.

13. On February 28, 2012, a follow-up educational meeting for Student was convened to see how things were going. Mother and Education Coordinator again requested that Student be placed in a full-time special education program where Student would have the opportunity to earn credits toward a high school diploma. DCPS was not willing to change his IEP placement. Testimony of Education

Coordinator. For the entire 2011-2012 school year, Student earned four credits, none of which were in core academic courses. Exhibit P-67.

14. In late April or May 2012, Mother and Education Coordinator learned that Student was not receiving his IEP speech-language services. The speech-language provider did not coordinate with Special Education Teacher to arrange sessions, so the services were, for the most part, not provided. Testimony of Education Coordinator, Exhibit R-4. The DCPS Service Tracker forms reflect that from February 1, 2012 through the end of the school year, the speech-language provider met with Student for only three 30 minute sessions. Exhibit JT-1.

15. Mother decided that she would not send Student back to City High School for the 2012-2013 school year because of what Student had been through the preceding year. She first enrolled Student in ALTERNATIVE HIGH SCHOOL. Student did not “make the cut” at Alternative High School because he did not get to school on time during the first week. Testimony of Mother.

16. Mother heard an announcement on the radio about 2012-2013 school year openings at PCS-2. She went to visit the school and met with the principal and a staff member. They told Mother what the school would do for Student and that there were not so many students in the classroom. Mother thought the school would be good for Student. Testimony of Mother.

17. On September 24, 2012, PCS-2 convened an IEP meeting for Student. Mother and Education Coordinator attended. The PCS-2 case manager stated that, based on a recent assessment, Student was at a 3.6 grade level equivalent in reading and 2.0 in math. Student was placed in transition classes, which did not offer credits toward a high school diploma. Mother was told that, depending on Student’s progress, he could

transition into high school diploma credit classes in January 2013. Exhibit P-29. The PCS-2 September 24, 2012 IEP provided that Student would receive 12 hours per week of Specialized Instruction in the General Education setting and 30 minutes per week each of Speech Language Pathology and Behavioral Support Services outside General Education. Exhibit P-28. This was the maximum Specialized Instruction services which PCS-2 could offer. Testimony of Education Coordinator.

18. At the September 24, 2012 IEP meeting, Student's science teacher stated that there were no behavior issues. His math teacher stated that Student was easily distracted, but was able to do the work when given help. Exhibit P-29.

19. On December 12, 2012, PCS-2 convened an IEP Eligibility Team meeting for Student, which Mother and Education Coordinator attended. Student's case manager reported that in a recent assessment, Student's grade level equivalents for reading and math had declined to 2.6 and 2.0 respectively. It was reported that Student was often tardy arriving in class, did not participate, often put his head on his desk, walked out of class without permission, used profanity and clowned with other Students. Exhibit P-30.

20. On January 31, 2013, the PCS-2 eligibility team reconvened. A DCPS psychologist had recently completed a psychological reevaluation of Student. Student was reported to have failing grades. The DCPS psychologist reported that based on her evaluation, Student continued to qualify for special education under the SLD classification. At this meeting, the PCS-2 school social worker reported that she had started an FBA of Student. Exhibit P-31.

21. Student's IEP team at PCS-2 reconvened on May 16, 2013. Parent, Education Coordinator and Petitioner's Counsel attended the meeting. There was

discussion at the meeting about a recent disciplinary incident for which Student had been suspended. The May 16, 2013 IEP team increased Student's Specialized Instruction services to 16 hours per week, all in the General Education setting. For Related Services, the team provided 90 minutes per week of Speech-Language Pathology and 60 minutes per week of Behavioral Support Services. Student's IEP projected exit category was changed from high school diploma to "H.S. Certificate at age 21." At this meeting, a BIP was developed for Student. The record does not establish whether Student's FBA was completed before his BIP was developed. Exhibit P-34, P-37.

22. On June 12, 2013, Student's IEP team reconvened at PCS-2 to review a court-ordered psychological evaluation of Student. At that meeting, Student's primary disability classification was changed from SLD to ED. Exhibits P-40, P-41.

23. The May 16, 2013 PCS-2 IEP transition plan provided that Student would join and attend summer internship programs through the Bridges Program and the Rehabilitation Services Administration (RSA). Exhibit P-34. According to Education Coordinator, Student missed four days of the PCS-2 summer program and was confused over whether he was allowed to return to complete the program. Testimony of Education Coordinator, Exhibit P-58.

24. On August 20, 2013, Student's IEP team reconvened at PCS-2 to conduct a Manifestation Determination Review concerning at May 7, 2013 disciplinary incident. The DCPS Representative determined that the incident was a manifestation of Student's disability. The DCPS representative also stated that because Student's prior IEP had "coded" him as SLD, the IEP and behavior intervention plan (BIP) did not appropriately address his needs. He stated it was DCPS' position that PCS-2 had failed to properly

implement Student's IEP. Petitioner's Counsel stated that the family wished to pursue a full-time placement for Student and did not support his return to PCS-2. Exhibit P-42.

25. In the summer of 2013, the Special Education Coordinator at PCS-2 completed an FBA of Student which resulted in adoption of a revised BIP on August 27, 2013. Exhibit R-2.

26. On September 23, 2013, DCPS Speech Pathologist conducted a comprehensive speech and language reassessment of Student. She reported that it appeared that there was sufficient evidence that there had been no measurable progress with consistently available speech and/or language related services for Student. Exhibit P-22.

27. On October 11, 2013, Student's IEP team reconvened at PCS. At this meeting, the IEP team, including DCPS, agreed that Student required full-time Specialized Instruction outside General Education. In addition, the October 11, 2013 IEP provides for 90 minutes per week of Speech-Language Pathology and 60 minutes per week of Behavioral Support Services. Exhibit P-51. This was the first time that DCPS agreed that Student required full-time special education services, since before January 2011 when he was enrolled at City Public School. Testimony of Education Coordinator.

28. PCS-2 provides only inclusion special education services and is not capable of implementing the October 11, 2013 IEP. Testimony of PCS-2 Special Education Teacher.

29. Student has been accepted at Nonpublic School, a special education day school in suburban Virginia. Nonpublic School accepts students with most IDEA recognized disabilities, including ED and SLD. Nonpublic School operates a therapeutic program. All of its Student are on LEA-funded IEPs. Nonpublic School has a current

certificate of approval from the D.C. Office of the State Superintendent of Education (OSSE). The school provides students access to psychologists and therapist throughout the school day. Classroom size is a maximum of 9 students staffed by a lead teacher, a co-teacher and a behavior facilitator. Testimony of Admissions Director.

30. Nonpublic School operates a point-system behavior incentive program. All students receive group counseling once a week and individual counseling is available to Students as an IEP related service. Nonpublic School has speech-language pathologists on staff to provide services as required by a student's IEP. Testimony of Admissions Director.

31. The annual tuition at Nonpublic School is approximately \$55,000 per year. Testimony of Admissions Director.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

The issues raised by the Petitioner in this case can be grouped for analysis in three categories:

A. Failure to Meet Student's Need for a Full-Time Special Education Placement

- Whether Student was denied a FAPE by his 2011-2012 IEPs which failed to meet his alleged requirement for full-time special education programming in an outside of general education setting;
- Whether Student was denied a FAPE by his 2012-2013 IEPs which failed to meet his alleged requirement for full-time special education programming in an outside of general education setting;
- Whether DCPS has denied Student a FAPE in the 2013-2014 school year by failing to offer a suitable placement/location of services to implement the full-time special education programming, including appropriate vocational programming, specified in the October 2013 IEP.

B. Failure to Address Behavior Issues

- Whether DCPS denied Student a FAPE in the 2011-2012 school year by failing to conduct a functional behavioral assessment and develop an appropriate behavior intervention plan;
- Whether DCPS denied student a FAPE in the 2012-2013 school year by failing to conduct a functional behavioral assessment and develop and implement an appropriate behavior intervention plan in a timely fashion;

C. Failure to Implement 2011-2012 IEP's

- Whether DCPS failed to implement Student's 2011-2012 IEP's because the school did not implement the math goals identified in the IEP's and because the school staff failed to take reasonable and necessary steps to connect with Student to enable him to benefit from the counseling and speech language services in his IEP;

D. Transition/Vocational Programming

- Whether DCPS has denied Student a FAPE by failing to offer appropriate vocational programming after development of his May 2013 IEP.

A.

STUDENT'S NEED FOR A FULL-TIME SPECIAL EDUCATION PLACEMENT

Since at least 2008, when Student attended PCS-1, until January 2011, Student had always been placed in a full-time special education program. In January 2011, the IEP team at City Public School cut back Student's Specialized Instruction to 15 hours per

week and changed his placement to the General Education setting. The reason for this change in services is not explained in the hearing evidence. On his Woodcock-Johnson III achievement tests administered before the change, Student, who was then in the middle of his eighth grade year, had scored grade equivalency levels of 2.3 in Broad Math, 1.9 in Reading, and 4.4 in Written Expression. When Mother learned about the change to Student's IEP placement, she promptly objected, arguing that he needed special education support in all subjects. Mother has continued, through the present, to press Student's need for full-time special education services. Unable to persuade Student's IEP team to provide more services to Student, Mother enrolled Student at PCS-2 for the 2012-2013 school year, where he has continued to flounder. Finally, in October 2013, DCPS agreed that Student needed full-time, outside of General Education, special education services. But, as of the due process hearing date, DCPS had not identified a school to implement Student's full-time IEP.

The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The minimum 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.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. The IDEA 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 (internal quotations and citations omitted.) Congress, however, “did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Whether Student’s January 20, 2011 IEP, which ended his full-time special education placement, was appropriate is not, *per se*, at issue in this case because that IEP was developed more than two years before the parent filed her due process complaint on October 15, 2013. *See* 34 CFR § 300.507(a)(2) (The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.) But the IDEA requires that a student’s IEP team revises his IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the Student provided by the parent, the Student’s anticipated needs and other matters. *See* 34 CFR § 300.324(b). By January 2012, Student’s IEP team had data that showed that Student was not making progress on his IEP goals in the General Education setting. In a January 17, 2012 IEP Progress Report, Student was reported to have made “No Progress” on any of his IEP academic annual goals. Notwithstanding, on January 12, 2012, the City High School IEP team further reduced Student’s Specialized Instruction

services to 10 hours per week, all in the General Education setting. In an unusual twist, from late January 2012 through the end of the school year, City High School special education staff disregarded Student's IEP and provided all of his instruction, except for physical education, in a self-contained classroom. Although Student's IEP stated that he was on a DCPS high school diploma track, the self-contained classroom program he was provided did not offer credits toward graduation.

I find that beginning in January 2012, DCPS denied Student a FAPE by failing to ensure that his IEP team revised his IEP to address his complete lack of progress toward his annual goals and in the general curriculum and his recognized need for a full-time special education placement. The District's refusal in 2012 to revise Student's IEP to conform to his actual placement in a full-time self-contained classroom defies explanation. After the 2011-2012 school year, faced with the District's refusal to provide Student an IEP which was reasonably calculated to provide educational benefits, Mother removed Student from City High School and enrolled him at PCS-2. Unfortunately, PCS-2, which did not offer full-time special education programming, did not provide Student sufficient support to permit the him to benefit educationally. I conclude that Petitioner has met her burden of proof to establish that since January 2012, DCPS had denied Student a FAPE by failing to offer him an IEP and a placement reasonably calculated to enable Student to receive educational benefits and, since October 2013, by failing to identify a placement that is capable of implementing Student's October 11, 2013 full-time IEP.

B.
FAILURE TO ADDRESS BEHAVIOR ISSUES

Petitioner alleges that DCPS also denied Student a FAPE, since the 2011-2012

school year, by failing to appropriately address his behavior issues. The IDEA requires the IEP team, in the case of a child whose behavior impedes the child's learning or that of others, to consider the use of positive behavioral supports, and other strategies to address that behavior. *See* 34 CFR § 300.321(a)(2)(i). Whether a child needs positive behavioral interventions and supports is an individual determination that is made by each child's IEP Team. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46683 (August 14, 2006). A functional behavioral assessment (FBA) "is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C. 2008)

In Student's January 20, 2011 IEP, it was reported that Student showed improvement in his social emotional growth and in terms of dealing with anger and peer pressure. A year later, in his January 12, 2012 IEP, it was reported that Student was not going to class and, when he was in class, he was not focused and/or was disruptive. The IEP team wrote that Student "presents to be a problem not wanting to be involved with solution." Although City High School did not develop a behavior intervention plan (BIP) for Student at that time, Student was placed (contrary to his IEP) in a nearly full-time self-contained classroom for the rest of the school year and, according to Education Coordinator, did "okay." Petitioner has not shown that Student was denied a FAPE by his IEP team's not adopting positive behavioral supports and other strategies to address his behavior issues in the 2011-2012 school year.

After Student moved to PCS-2 for the 2012-2013 school year, Student's behavior does not appear, at first, to have impeded his learning. At a September 24, 2012 IEP meeting, Student's science teacher stated that there were no behavior issues. His math

teacher stated that Student was easily distracted, but was able to do the work when given help. But, by December 2012, Student's behavior had resurfaced as a concern. At a December 13, 2012 IEP meeting, it was reported that Student was often tardy arriving in class, often put his head on his desk, walked out of class without permission, used profanity and clowned with other Students. The PCS-2 IEP team apparently agreed to put a BIP in place for Student. At a January 31, 2013 eligibility team meeting, the PCS-2 school social worker reported that she had started an FBA of Student. On May 16, 2013 at Student's next IEP meeting, a BIP was developed for him. The record does not establish whether Student's FBA was completed before his BIP was developed. In the summer of 2013, the Special Education Coordinator at PCS-2 completed an FBA of Student which resulted in adoption of a revised BIP on August 27, 2013.

I find that by December 2012, Student's PCS-2 IEP team recognized that his behavior impeded his learning, and thus, the IDEA obliged Student's IEP team at least to consider whether to implement a behavioral intervention plan. The evidence establishes that the IEP team did consider behavior intervention at the December 13, 2012 IEP meeting. In the months that followed, the PCS-2 IEP team developed at least two BIPs for Student. Thus, PCS-2 appears to have complied with the IDEA's procedural requirements concerning BIPs. Petitioner has not shown that the BIPs developed by PCS-2 for Student were inappropriate or substantively deficient. *See Williams ex rel. Williams v. Milwaukee Public Schools*, 2012 WL 1205124, 6 (E.D.Wis. Apr. 11, 2012) (The IDEA does not specify any substantive requirements for behavioral intervention plans.) I conclude, therefore, that Petitioner has not established that Student was denied a FAPE by the District's failing to conduct an FBA or develop an appropriate BIP for him.

C.
FAILURE TO IMPLEMENT 2011-2012 IEPs AT CITY HIGH SCHOOL

Petitioner alleges that during the 2011-2012 school year, after Student was removed from his IEP general education placement to a self-contained classroom, City High School failed to implement the math goals in Student IEPs and failed to ensure that he received his counseling and speech language related services. For failure-to-implement claims, the U.S. District Courts in this circuit have adopted the standard articulated by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). *See Turner v. District of Columbia*, 2013 WL 3324358, 7 (D.D.C. July 2, 2013). In *Bobby R.*, the court held:

[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.

Id., 200 F.3d at 349.

I find from the hearing evidence that City High School failed to implement substantial and significant provisions of Student's January 12, 2012 IEP. The IEP included annual goals for mathematics for Student to be able to solve math problems and to simplify numerical expressions. In the self-contained classroom where Student was placed for the rest of the 2011-2012 school year, Special Education Teacher used Sudoku puzzles to teach math to his students. The teacher told Education Coordinator that he was not working with Student's IEP math goals. Petitioner also alleges that City High School failed to consistently provide Student his IEP speech-language and behavioral support services after he was moved to the self-contained classroom. I find that the hearing record does not establish whether City High School endeavored to

provide Student his January 12, 2012 IEP behavioral support services. The record does establish that City High School failed to implement Student's speech-language services. Under the IEP, Student was supposed to receive 120 minutes per month of Speech-Language Pathology. Education Coordinator testified that after Student moved to the self-contained classroom, the speech-language provider did not coordinate with Special Education Teacher to arrange to pick up Student for his sessions. The DCPS Service Trackers reflect that from February 1, 2012 through the end of the school year, the speech-language provider met with Student for only three 30 minute sessions. I conclude, therefore, that after the January 12, 2012 IEP was adopted, DCPS failed to provide Student some 400 hours of speech-language services required by his IEP. Petitioner has shown more than a *de minimis* failure by the District to implement all elements of Student's IEP.

D.
TRANSITION/VOCATIONAL PROGRAMMING

Petitioner alleges that after Student's May 16, 2013 IEP was adopted by the PCS-2 IEP team, DCPS denied Student a FAPE by failing to offer appropriate vocational programming in summer 2013. Vocational education is a component of the transition services plan which must be a part of every IEP after a child turns 16. *See* 34 CFR §§ 300.43, 300.321(b). As with other parts of an IEP, the transition services plan must meet the *Rowley* standard of being "reasonably calculated to enable the child to receive educational benefits." *Lessard v. Wilton Lyndeborough Coop. School Dist.*, 518 F.3d 18, 27-28 (1st Cir. 2008), quoting *Rowley, supra*, 458 U.S. at 207. The May 16, 2013 PCS-2 IEP transition plan provided that Student would join and attend summer internship programs through the Bridges Program and the Rehabilitation Services Administration

(RSA). According to Education Coordinator, Student missed four days of the PCS-2 summer program and was confused over whether he was allowed to return to complete the program. The frequency of Student's school attendance in summer 2013 and the reasons for his absences is unclear from the evidence. Based upon the record before me, I find that Petitioner has not met her burden of proof to establish that the District failed to offer Student appropriate vocational programming that was reasonably calculated for Student to receive educational benefits or that after May 16, 2013, PCS-2 failed to offer Student the vocational programming specified in his IEP.

REMEDY

A. Private Placement at Nonpublic School

“Where a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’”

Wirta v. District of Columbia, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is “prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA.” *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 11 (D.C. Cir.2005).

In this decision, I have found that since January 2012, DCPS has denied Student a FAPE by failing to provide him a full-time, outside of General Education, special education placement. Although on October 11, 2013, Student's IEP was revised to provide for his full-time special education placement, as of the due process hearing date, DCPS had not identified an appropriate new placement for Student. A private school placement award is, therefore, proper under the IDEA, provided the education offered

by the private school is reasonably calculated to enable Student to receive educational benefits.

Placement awards must be tailored to meet the child's specific needs. *Branham, supra*, at 9. To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

1. Nature and Severity of Student's Disability

The undisputed evidence in this case establishes that Student's primary disability is ED and that he requires full-time special education programming in an outside-of-general education setting.

2. Student's Specialized Educational Needs

According to Education Coordinator, Student requires a full-time special education program in a safe and protected environment. He requires constant behavioral intervention and support. Because the behavior of other nondisabled students exacerbates Student's behavior problems and creates anxiety for him, he should not be in an environment where he interacts with nondisabled peers. Student also needs to be placed with a peer group at his age level.

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

Nonpublic School is a full-time therapeutic special education day school. Classroom size is a maximum of 9 students, with a 3:1 student to teacher ratio.

Nonpublic School provides its students access to psychologists and therapist throughout the school day. All students are on a behavior incentive program. All students receive group counseling once a week and individual counseling is available to Student pursuant to his IEP. At Nonpublic School, Student would be assigned to a classroom of students, who like him, are all aged 17 or older. Nonpublic School also has speech-language pathologists on staff to provide the speech-language services required by Student's IEP.

4. Cost of Placement at Private School

Non-Public School holds Certificate of Approval from the OSSE. The tuition is around \$55,000 per year. DCPS offered no evidence that tuition expenses at this private school are higher than costs at other OSSE-approved therapeutic day schools which serve ED students.

5. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. Roark ex rel. Roark v. District of Columbia, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; DCMR tit. 5, § 3011 (2006)). The unrebutted testimony in the present case established that Student requires a full-time education program in a small school environment and that interaction with nondisabled peers exacerbates Student's behavioral problems. DCPS has not identified a viable, appropriate alternative placement to Non-Public School, where Student would benefit from interaction with non-disabled peers. *See Board of Educ. of Murphysboro Community Unit School Dist. No. 186 v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1168 (7th Cir.1994) (Court not required to locate another school that would satisfy the least restrictive alternative requirement based on the entire pool of schools available, but rather was required simply to determine whether that one

available choice would provide an appropriate education.)

Based upon the foregoing, I conclude that the education that would be provided to Student by Nonpublic School is reasonably calculated to enable him to receive educational benefits and that this private placement is proper under the IDEA.

B. Compensatory Education

Petitioner also seeks an award of compensatory education as compensation for the educational harm, allegedly suffered by Student, as a result of DCPS' denial of FAPE since the 2011-2012 school year. "The IDEA gives [hearing officers] 'broad discretion' to award compensatory education as an 'equitable remedy' for students who have been denied a FAPE." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir.2005). (quoting *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)). The 'ultimate award' must 'provide the educational benefits that likely would have accrued from special education services' that the school district 'should have supplied in the first place.' *Id.* at 524. A compensatory award must 'rely on individualized assessments' after a 'fact-specific' inquiry. *Id.* 'In formulating a new compensatory education award, the hearing officer must determine what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.' *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C.2006) (quoting *Reid*, 401 F.3d at 527)." *Turner v. District of Columbia*, 2013 WL 3324358, 10 (D.D.C. July 2, 2013).

In this decision, I have found that DCPS has denied Student a FAPE since January 2012 by failing to provide him an appropriate IEP with full-time special education services outside of General Education, and by failing to consistently

implement Student's IEP speech-language services from January 2012 through the end of that school year. (I have also found that the District failed to implement the January 12, 2012 IEP team's decision to retain Student in the General Education setting. However that failure may have mitigated the harm resulting from the IEP team's decision not to provide Student a full-time outside of General Education placement.)

Petitioner has proposed a compensatory education plan for Student devised by Education Coordinator (Exhibit P-69). She recommends an award including professional driving instruction, a work-study job, tutoring for work-force development, and speech and language instruction. For speech-language compensatory services, Education Coordinator recommended that Student receive 18 hours of speech-language services to compensate for the IEP services he was not provided at City High School. In her testimony Education Coordinator explained that she recommended this "modest" amount of services based upon what she felt Student could be persuaded to attend – not upon the much higher number of sessions Student missed at City High School. I concur that this is an appropriate remedy to compensate student for missed speech-language services and I will order DCPS to provide these additional services.

Unfortunately on the record before me, I have no basis for determining what further compensatory education remedy would be warranted for the District's failure, after January 2012, to provide Student an appropriate IEP with full-time special education services, or what additional services Student needs "to elevate him to the position he would have occupied absent the school district's failures." *See Anthony, supra*, 463 F.Supp.2d at 44. The difficulty with the rest of Education Coordinator's compensatory education proposal is that however meritorious the plan, most of it – driving instruction, work-study and work-force tutoring – does not correlate to the

educational benefits that likely would have accrued if DCPS had provided Student the full-time special education program it “should have supplied in the first place.”

Therefore, I decline to order further compensatory education relief. *See Gill v. District of Columbia*, 770 F.Supp.2d 112, 113 (D.D.C.2011) (Plaintiffs have not persuaded the Court that they have a program that would compensate student for an educational loss, if any, he suffered.)

ORDER

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

1. DCPS shall fund Student’s enrollment at Nonpublic School for the remainder of the 2013-2014 school year, beginning the first day of school after the Winter Break, or, if later, the first day that Nonpublic School is able to admit Student, such funding to include costs for speech-language and behavioral support related services and transportation;

2. As compensatory education, DCPS shall provide Student 18 hours of additional 1:1 speech language services, to be completed by the end of the 2013-2014 school year. DCPS shall coordinate these speech-language services with Nonpublic School’s administration to assure that the services are delivered at a time and place that does not interfere with Student’s instruction at Nonpublic School; and

All other relief requested by the Petitioner in this matter is denied.

Date: December 28, 2013

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

NOTICE OF RIGHT TO APPEAL

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