

**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 04, 2013

PETITIONERS,
on behalf of STUDENT,¹

Date Issued: December 3, 2013

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the “Petitioners” or “PARENTS”), 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 their Due Process Complaint, Petitioners allege that Respondent District of Columbia Public Schools (“DCPS”) has denied Student a free appropriate public education (“FAPE”) by failing to develop an appropriate Individualized Education Program (“IEP”) for the 2013-2014 school year, by failing

¹ Personal identification information is provided in Appendix A.

to ensure the Parents' participation in development of the IEP and by making an unsuitable educational placement of Student.

Student, an AGE young man, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on September 20, 2013, named DCPS as respondent. On October 7, 2013, the parties met for a resolution session and did not reach an agreement. The 45-day time period for issuance of this Hearing Officer Determination started on October 21, 2013. On October 11, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on November 20, 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. The Petitioners appeared in person, and were represented by PETITIONERS' COUNSEL. DCPS was represented by PROGRESS MONITOR and by DCPS' COUNSEL.

At the beginning of the due process hearing on November 20, 2013, the Hearing Officer noted that Student had reached the age of majority after the due process complaint was filed and that, pursuant to 5E DCMR § 3023.1, the Parents' rights under the IDEA should have transferred to Student. Petitioners' counsel represented that on October 28, 2013, Permanent General Guardianship of the person of Student was granted to MOTHER and STEPFATHER by the Superior Court of the District of Columbia and that the Parents had all the powers and duties set forth in D.C.Code Sec. 21-2-47 (a) and (b). *See* Exhibit P-22 (Letters of Guardianship). The Hearing Officer determined, therefore, that the Petitioners continue to act as the "parents" of Student, as defined by the IDEA, and are responsible for making educational decisions for him. *See* 34 CFR § 300.30(b)(2).

Petitioners called as witnesses Stepfather, CLINICAL PSYCHOLOGIST, VOCATIONAL EXPERT, SCHOOL B EDUCATION DIRECTOR, Student and EDUCATIONAL ADVOCATE. DCPS called as witnesses SCHOOL A ADMINISTRATIVE HEAD and Progress Monitor. Petitioners' Exhibits P-1 through P-45 were admitted into evidence without objection, with the exception of Exhibit P-22, which was admitted over DCPS' objection and Exhibits P-11, P-18, P-25 and P-30 through P-36 which were not introduced, and P-21, to which DCPS' objection was sustained. DCPS' Exhibits R-1 through R-24 were admitted without objection, with the exception of Exhibits R-11 through R-17, which were admitted over Petitioners' objections. Counsel for both parties made opening statements.

On November 22, 2013, the Hearing Officer reconvened the hearing, on the record, to receive closing arguments. The parties' attorneys appeared by telephone. At the request of Petitioners' counsel, the parties were granted leave until November 25, 2013 to file post-hearing written submissions. Only Petitioners' Counsel filed a post-hearing submission.

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 DCPS' September 6, 2013 IEP denies Student a FAPE because it lacks annual goals for reading, writing and mathematics, lacks appropriate Speech-Language ("S/L") goals and lacks an appropriate transition plan;
- Whether DCPS denied Student a FAPE by adopting the September 6, 2013 IEP without ensuring the Parents were able to fully participate in the development of all aspects of the IEP;
- Whether DCPS' location assignment of Student at School A for the 2013-2014 school year is an unsuitable placement/location of services.

For relief, Petitioners seek an order for DCPS to convene Student's IEP team to revise, as appropriate, his September 6, 2013 IEP and for DCPS to fund Student's private placement at School B for the remainder of the 2013-2014 school year.

PRIOR ADJUDICATION

These same parties appeared before Impartial Hearing Officer Coles B. Ruff on July 24 and 25, 2013 in a related proceeding, Case No. 2013-0289, concerning Student. The issue for determination in the prior case was whether DCPS failed to provide Student an appropriate IEP and placement following a May 3, 2013 IEP meeting and for the 2013-2014 school year. In his August 7, 2013 Hearing Officer Determination (the "August 7, 2013 HOD"), Hearing Officer Ruff found, *inter alia*, that Student's instruction at School A had been sufficiently modified for Student to access the general education curriculum and meet the requirements with accommodations to satisfy all academic requirements to graduate with a regular high school diploma. Notwithstanding, Hearing Officer Ruff further found that as of the date of the due process hearing, Student was still not ready to graduate and exit special education. In the August 7, 2013 HOD, Hearing Officer Ruff ordered DCPS, *inter alia*, to convene Student's IEP team to revise Student's IEP to include appropriate social/emotional and transition goals and for DCPS to provide Student the "appropriate social/emotional and transition and functional remedial academic services, pursuant to his IEP . . . through the first semester of SY 2013-2014." August 7, 2013 HOD (Exhibit P-37).

FINDINGS OF FACT

For purposes of the present case, the parties have stipulated, on the record, that this Hearing Officer may adopt, at his discretion, relevant findings of fact made by Hearing Officer Ruff in the August 7, 2013 HOD, except for Finding No. 8. Accordingly, I adopt the following

Findings of Fact from the HOD:

A. The student is a special education student who resides with his parents in the District of Columbia. In the 2012-2013 school year, the student attended School A with DCPS funding. The student was diagnosed with an intellectual disability in 2001 and at one point carried that disability classification on his IEP. His subsequent IEP classified him as Multiple Disabilities (“MD”) including Other Health Impairment (“OHI”) and Speech and Language Impairment (“SLI”). (Finding No. 1.)

B. The student was scheduled to graduate 12th grade from School A at the end of SY 2012-2013 with a regular high school diploma, until an IEP team determined on May 3, 2013, that the student was not prepared socially to graduate high school and needed services at least through Extended School Year (“ESY”) 2013. (Finding No. 2.)

C. In March 2013, an independent comprehensive psychological evaluation was conducted of the student, that DCPS funded pursuant to a consent order issued in April 2013. The evaluator determined the student had borderline intellectual abilities and extremely low adaptive functioning and a high probability of Autism, based upon rating scales provided by the student’s parents. The evaluator also determined the student was operating academically between fifth and seventh grade, with his reading passage comprehension level at mid third grade. The evaluator recommended the student be placed in a structured vocational training program with therapeutic components to assist him in developing independent living skills and to help remediate his academic, behavioral and social/emotional deficits. (Finding No. 3.)

D. At the May 3, 2013 IEP meeting, the team reviewed the independent evaluation and a recent speech language evaluation and agreed to change the student’s disability classification from MD to Autism. The student’s parents agreed that the student’s IEP would be

changed to reflect the new disability classification. (Finding No. 4.)

E. At the May 3, 2013 IEP meeting, the team also agreed that the student needed continued social/emotional development and transition to prepare him to ultimately graduate high school at some point in the future. The meeting notes state: “[the student’s] IEP will be updated with an appropriate transition plan to include the transition coordinator and RSA and/or DDS and goals focusing on independent living skills, *i.e.*, job search, public transportation, self-care skills, etc. that will prepare him to be more independent and progressive after high school.” (Finding No. 5.)

F. The May 3, 2013 meeting notes also state: “DCPS proposed that the student was not prepared socially to graduate and needed to work during ESY an the regular school to make sufficient progress towards new social and emotional goals and transition goals in preparation to graduate next year. The parents and the MDT team agreed. [The student] will attend ESY to work on new IEP goals the MDT will reconvene at the end of ESY to determine progress. The [School A] EDU Team will create goals to include Autism spectrum disorder. DCPS/[School A] will send home by certified mail the drafted IEP. The parents will agree or disagree to the IEP and notify DCPS if it is ok to finalize.” (Finding No. 6. [*sic*])

G. On May 13, 2013, DCPS issued a prior written notice of amendment of the student’s IEP to change the student’s disability classification and issued an amended IEP dated May 13, 2013 with the disability classification change only. The notice stated that the parents agreed to amend the IEP to change the classification without an IEP team meeting. (Finding No. 7.)

H. While at School A, the student has made progress on his IEP goals and has been provided accommodations and modifications to enable him to access the general education

curriculum. With the accommodations School A provides, the student is able to generally read at an eighth grade level. Given the student's disability and academic deficits, he has been provided access and exposure to the general education curriculum and has met the requirements according to School A and DCPS standards to receive a high school diploma. The student has earned the grades he has received during his 12th grade year at School A and was on track to graduate high school with the rest of his School A class in June 2013. (Finding No. 9.)

I. Since attending School A, the student has been on a high school diploma track and not a certificate track as were the other students in his senior class at School A. The student had average academic functioning relative to his classmates. However, socially the student was functioning below average relative to his classroom peers. All the students in his class, except the student, graduated high school at the end of SY 2012-2013. (Finding No. 10.)

J. At School A, the student earned sufficient Carnegie units to qualify for high school graduation at the end of SY 2012-2013. There are other programs that are available to the student in the community that will prepare him to function independently. However, the student is unable to access these programs, that are administered through other agencies other than DCPS, unless and until he is exited from special education and is no longer attending high school. (Finding No. 11.)

K. The student was disappointed by not being able to graduate and he lost his academic momentum and his affinity for School A and its staff. Since the student has met the academic standards for graduation, the School A staff believe it is best for him is to reach out to the other agencies that can provide him life skills development to assist him in making the transition beyond high school. (Finding No. 12.)

L. It is not certain whether an additional year of academic instruction will make any significant difference in the student's functioning. The student has significant deficits and is unlikely to be able to reach grade level in academic functioning within any reasonable time. (Finding No. 13.)

M. The student has significant social and communication and functional academic deficits that indicate that he is currently not ready to function independently and he is in need of continued services to enable him to acquire needed skills to be able to safely navigate in environment outside his home and school. (Finding No. 14.)

N. The student's parents have been concerned for some time that the student is not functioning academically consistent with the excellent grades that he has received since attending School A. At home is unable to complete some of the academic work that his younger siblings are able to perform. The student's parents do not believe the student actually earned the grades he received at School A but was simply given the credits. They believe the student does not have sufficient functional skills to be exited from special education. The student's parents understood from the May 3, 2013 meeting that the student would continue in special education for at least another year at an appropriate placement for SY 2013-2014 to gain sufficient social/emotional and transition skills and that an appropriate IEP with those services would be developed following the meeting. (Finding No. 15.)

O. The student has felt demoralized since not being allowed to graduate and lost motivation to attend school after the May 3, 2013 meeting. The parents called DCPS transportation at the start of ESY and were informed that the student was not scheduled for transportation services for the summer. The parents were never contacted and told that the student should attend School A during the summer 2013. Consequently, he did not attend ESY at

School A. The student has not had the benefit of social skills development and the student has missed valuable time toward acquiring the social emotional and transition skills he needs to be a productive citizen in society. (Finding No. 16.)

Evidence from the November 20, 2013 Hearing

After considering all of the evidence adduced at the hearing in the present case on November 20, 2013, as well as the arguments of counsel, this Hearing Officer's additional Findings of Fact are as follows:

1. Student attended School A for 6 years, through the 2012-2013 school year. Student had a good relationship with staff at School A. He was never violent at school. He never had a problem participating at School A. Testimony of Stepfather. At School A, Student was friendly. He was inquisitive and liked to read. He never had behavior issues and had good rapport with staff. Student made progress at School A in the curriculum he was presented with. Accommodations for Student were made based upon his abilities and disabilities. Testimony of Administrative Head.

2. At School A, Student had been receiving all A's and B's and for several years, Parents had concerns that Student's grades were being "padded." Testimony of Stepfather. In September 2013, Parents had Student evaluated by Educational Advocate, who concluded that Student did not know a lot of functional things. She told Parents that Student was "in no way" ready to graduate from high school. Testimony of Educational Advocate. Around May 2013, Student stopped attending School A after the dispute arose as to whether he should graduate at the end of the 2012-2013 school year. Testimony of Stepfather. Ultimately, School A and DCPS acceded to the Parents' demand that Student not be "graduated" in spring 2013. However, because it remained unresolved whether Student would continue to receive special

education and related services in the 2013-2014 school year, Parents filed their prior due process complaint in Case No. 2013-0289. August 7, 2013 HOD.

3. On September 6, 2013, DCPS convened a Multidisciplinary Team (“MDT”) meeting at DCPS’ offices. The purpose of the meeting was to revise Student’s May 13, 2013 IEP to comply with the August 7, 2013 HOD. Both Parents, their Educational Advocate, Petitioners’ Counsel and representatives of DCPS and School A participated. Exhibit R-7, Testimony of Progress Monitor.

4. At the September 6, 2013 meeting, the MDT team developed transitional goals for Student. The team did not consider academic goals. Educational Advocate participated in the development of the transitional goals and did not express any disagreement with the goals. After completion of the discussion about transition for Student, Progress Monitor stated that Student would attend School A. Testimony of Educational Advocate.

5. Stepfather became angry and very disruptive at the September 6, 2013 MDT meeting, insisting that staff from School A should not be at the meeting and that he was not going to send Student back to School A. At one point Educational Advocate “stepped” Stepfather out into the hallway to try to calm him down. Stepfather returned to the meeting, but when he became belligerent and loud again, Educational Advocate told Stepfather it would be best if he left the meeting. She whispered to Mother that it would be best if she went and met with Stepfather. Both Parents then left the meeting. Educational Advocate remained for the rest of the meeting. Testimony of Educational Advocate.

6. At the MDT meeting on September 6, 2013, the MDT team worked on the revised IEP for Student. (the “September 6, 2013 IEP”). The Academic goals from Student’s May 13, 2013 IEP for Mathematics, Reading and Written Expression are copied on the September 6,

2013 IEP, but the revised IEP recites for all of the Academic goals and most of the Communication/Speech and Language goals, “This goal is not being proposed at this time.” Exhibit P-16. There was no discussion about academic goals at the September 6, 2013 MDT meeting because Student had already completed the academic curriculum by the end of the 2012-2013 school year. Testimony of Progress Monitor.

7. The September 6, 2013 IEP includes only one ongoing S/L goal for Student:

To improve his executive functioning skills, Student will demonstrate the ability to problem-solve about functional activities of daily living both socially and academically with 80% accuracy.

Exhibit P-16.

8. The September 6, 2013 IEP continued Student’s Special Education and Related Services from his May 13, 2013 IEP including 27.15 hours per week of Specialized Instruction, 1 hour per week of Speech-Language Pathology, and 45 minutes per week of Occupational Therapy. Behavioral Support Services were increased from 30 minutes per week to 60 minutes per week. All services were to be provided in an Outside General Education Setting. Exhibit P-16.

9. The September 6, 2013 IEP’s Post-Secondary Transition Plan was revised to add a series of short term goals directed toward post-secondary employment. The MDT team included goals focused on job search and post-secondary education. The IEP also includes services to assist Student in exploring career options. His Long Range Goals, that, upon graduation, Student will complete on the job training, develop job skills and pursue a career in the field of retail were not changed from his prior IEP. The revised IEP omits any goals or services to address other independent living skills such as using public transportation, self-care skills, etc. The IEP provides that Student would receive one hour per week of transition services.

Exhibit P-16.

10. At the September 6, 2013 MDT meeting, Educational Advocate did not object to the proposed special education and related services discussed by the MDT team. Testimony of Educational Advocate.

11. On September 10, 2013, DCPS Compliance Case Manager sent Petitioners' Counsel an email which attached a September 6, 2013 letter informing the Parents that the location of services for implementation of Student's IEP for the 2013-2014 school year would continue to be School A. Exhibit R-6.

12. Parents have declined to send Student back to School A. In the current school year, they have engaged Educational Advocate to provide tutoring services to Student geared toward academic remediation and development of transitional skills. Testimony of Stepfather, Testimony of Educational Advocate.

13. The present due process complaint was filed on September 20, 2013. On October 15, 2013, DCPS convened Student's IEP team for an IEP annual review meeting. DCPS made attempts to have the Parents attend, both in writing and by telephone, but they never responded. At the October 15, 2013 IEP meeting, the IEP team "pretty much kept the IEP the same" as the September 6, 2013 revised IEP. Testimony of Progress Monitor.

14. School A is able to implement the September 6, 2013 IEP including the transition aspects and remedial academics. (Administrative Head testified that the school could implement the October 15, 2013 IEP which is essentially unchanged from the September 6, 2013 IEP.) School A's transition coordinator and transition assistant would be available to work with Student on transition skills and life skills, such as public transportation and doing laundry. A D.C. Rehabilitative Services Administration ("RSA") counselor would be brought in to

interview Student with regard to services provided by that agency. Student's resource teacher at School A and the school reading resource teacher would be able to work with Student on remedial academic skills. Testimony of Administrative Head.

15. School B is a separate special education day school, grades K through 12, in suburban Maryland, that primarily serves children and adolescents with emotional/ behavioral disorders and Autism Spectrum Disorder ("ASD") disabilities. There are 60-65 students in the high school program. Student's brother has attended School B for a number of years. Student recently "shadowed" classes at School B and the school staff has concluded that School B could meet his needs. The school has no other students who, like Student, have already completed all requirements for a regular high school diploma. School B's preliminary plan for Student is to provide him with remedial reading instruction twice a day, remedial "real world" math instruction, and instruction in social skills and job-transition skills. School B would expect to revise Student's IEP to enhance the post-secondary transition section. Testimony of Education Director.

16. School B has a current certificate of approval from the D.C. Office of the State Superintendent of Education ("OSSE"). The annual tuition is approximately \$51,000 for a 233-day program. At School B, Student would not have interaction with non-disabled peers.

Testimony of Education Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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 Petitioners 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 overarching dispute between the parties in this case is whether DCPS has denied Student a FAPE by continuing his placement at School A. The specific issues certified for decision concern DCPS' implementation of Hearing Officer Ruff's August 7, 2013 HOD. Pursuant to that HOD, DCPS convened Student's MDT team to revise his IEP on September 6, 2013. Petitioners contend that the September 6, 2013 IEP is inappropriate because it lacks annual goals for reading, writing and mathematics, lacks appropriate S/L goals and lacks an appropriate transition plan. In addition, the Parents claim that DCPS adopted the September 6, 2013 IEP without ensuring that they were able to fully participate in the program's development. Lastly, Parents contend that School A is an unsuitable placement/location of services to implement the September 6, 2013 IEP.

1. ALLEGED INAPPROPRIATENESS OF SEPTEMBER 6, 2013 IEP

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

reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). The IEP issues asserted by Petitioner in this case concern both prongs of that inquiry.

Parents' Opportunity to Participate in Development of IEP

Petitioners contend that DCPS failed to comply with the IDEA's procedures because the Parents were not able to fully participate in the development of the September 6, 2013 IEP. This claim is without merit. Parental participation in IEP formulation is undoubtedly a hallmark of the IDEA. *See, e.g., A.I. ex rel. Iapalucci*, 402 F.Supp.2d at 164 (noting that procedural violations that seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in a denial of a FAPE). Here, however, Parents, in person and by their representatives, Educational Advocate and Petitioners' Counsel, fully participated in the September 6, 2013 meeting at which Student's IEP was revised. Both parents attended the meeting and they only left (at the instance of Educational Advocate) after Stepfather became belligerent and loud. Educational Advocate remained for the entire meeting. Educational Advocate gave input, which the MDT team took, in the discussion of IEP goals and Educational Advocate did not register any objections at the meeting to the revised IEP.

Although DCPS and the MDT team did not yield to Stepfather's insistence at the MDT meeting that Student not be assigned back to School A, Parents undoubtedly had an opportunity to participate, in a meaningful way, in the formulation process for the September 6, 2013 IEP. *Cf. Hawkins v. District of Columbia*, 692 F.Supp.2d 81, 84 (D.D.C.2010) (Right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions.) I find that Parents have not shown that DCPS failed

to ensure their right to participate in the development of the September 6, 2013 IEP.

Academic and S/L Goals

Petitioners argue that the September 6, 2013 IEP is inappropriate because the IEP lacks annual academic goals for reading, writing and mathematics and lacks appropriate S/L related services goals. The IDEA requires that every IEP must include,

A statement of measurable annual goals, including academic and functional goals designed to—

(A) 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

(B) Meet each of the child’s other educational needs that result from the child's disability.

34 CFR § 300.320(a)(2). The Act does not require goals to be written for each specific discipline. *See* Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46662 (August 14, 2006). Parents are correct that the September 6, 2013 MDT team intentionally excluded annual goals for reading, writing and mathematics from the IEP, because the team members were focusing, in compliance with the August 7, 2013 HOD, on Student’s transition to post-school activities. In the August 7, 2013 HOD, Hearing Officer Ruff had found that at School A, Student had been provided access and exposure to the general education curriculum and had met the requirements, according to School A and DCPS standards, to receive a high school diploma. I find that, having already met the requirements for a regular high school diploma, Student no longer had “needs . . . to enable [him] to be involved in and make progress in the general education curriculum.” Therefore, the MDT team’s decision to omit annual goals for academics in the September 6, 2013 IEP did not make the IEP inappropriate.

With regard to Student's speech and language needs, the IEP includes only one S/L goal:

To improve his executive functioning skills, Student will demonstrate the ability to problem-solve about functional activities of daily living both socially and academically with 80% accuracy.

This goal appears to track the mandate of the August 7, 2013 HOD to develop an IEP to prepare Student for his post-secondary school life. Further, at the MDT meeting, Educational Advocate did not request additional S/L goals for Student. Therefore, I find that Parents have not shown that including only this S/L goal in the IEP was inappropriate or failed to meet Student's S/L needs.

Transition Plan

The Petitioners also contend that the September 6, 2013 IEP is deficient because it lacks an appropriate transition plan. The IDEA requires that for students 16 or older, the IEP must include—

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR § 300.320(b). In the August 7, 2013 HOD, Hearing Officer Ruff found that at a May 3, 2013 IEP meeting, the IEP team agreed that Student's IEP would be "updated with an appropriate transition plan to include the transition coordinator and RSA and/or DDS and goals focusing on independent living skills, *i.e.*, job search, public transportation, self-care skills, etc. that will prepare him to be more independent and progressive after high school." (Finding No. 5.) Hearing Officer Ruff further found that "[t]he evidence of this case clearly demonstrates that the student's current IEP does not include the goals and services the IEP team determined after reviewing recent evaluations were necessary to confer upon the student educational benefit

and prepare him for post-secondary life.” August 7, 2013 HOD, p. 8. Hearing Officer Ruff ordered that Student’s revised IEP must include “appropriate social/emotional and transition goals” and that DCPS provide Student the “appropriate social/emotional and transition and functional remedial academic services, pursuant to his IEP.”

When Student’s MDT team met on September 6, 2013 to implement Hearing Officer Ruff’s order to revise Student’s IEP, the MDT team included, in the Post-Secondary Transition Plan section of the IEP, goals focused on job search and post-secondary education. The revised IEP also includes services to assist Student in exploring career options. However the IEP omits any goals or services to address the other independent living skills – public transportation, self-care skills, etc. – referenced in the August 7, 2013 HOD. I find therefore that the September 6, 2013 IEP’s transition plan does not meet the requirements of the August 7, 2013 HOD or the IDEA’s requirements for transition services to assist Student to reach postsecondary goals related to independent living skills.” *See* 34 CFR § 300.320(b), *supra*.

In *Patterson v. District of Columbia*, 2013 WL 4736233, 3-4 (D.D.C. Sept. 4, 2013), U.S. District Judge Collyer recently observed that Courts have held that, where the IEP as a whole confers an educational benefit, an inadequate transition plan does not amount to denial of a FAPE:

Plaintiffs have not demonstrated that A.P. was denied a FAPE because the temporary imposition of the inadequate 2012 Transition Plan was a mere procedural violation that did not affect A.P.'s substantive rights. “An IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006) (emphasis in original); accord *C.M. v. Bd. of Educ.*, 128 F. App’x 876, 881 (3d Cir.2005) (“[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive patents of their participation rights are actionable.”); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533–34 (4th Cir.2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligation.”); see also 34 C.F.R. § 300.513(a)(1) (determination of whether a child received a FAPE must be based on substantive grounds). Courts have held

that where the IEP as a whole confers an educational benefit, an inadequate transition plan does not amount to denial of a FAPE. *See, e.g., Sinan L. v. Sch. Dist. of Philadelphia*, 293 F. App'x 912, 914–15 (3d Cir. Sept.24, 2008) (transition plan that was “left largely blank” did not violate IDEA); *A.D. v. New York City Dep't of Educ.*, Civ. No. 12–2673, 2013 WL 1155570, at *11 (S.D.N.Y. Mar. 19, 2013) (a “sparse” transition plan did not invalidate the IEP or amount to denial of a FAPE).

Id. Here the September 6, 2013 IEP, with full-time Specialized Instruction services and additional related services, would undoubtedly, as a whole, confer educational benefit on Student. Moreover, Parents’ Educational Advocate participated in developing the goals for the September 6, 2013 IEP and did not object to the omission of more comprehensive independent living skills goals and services. Furthermore, Parents elected not to enroll Student in school for the 2013-2014 school year because of their unwillingness for Student to return to School A. Petitioners have not shown that the September 6, 2013 IEP transition plan, though inadequate, actually caused Student any substantive harm or loss of educational opportunity. I find therefore that the failure to provide Student an appropriate transition plan in the September 6, 2013 IEP did not result in a denial of FAPE.²

2. SUITABILITY OF SCHOOL A

Parents contend that School A is an unsuitable placement/location of services to implement the September 6, 2013 IEP. Once an IEP is developed, the government must also ensure that the student is provided an appropriate placement “based on the child’s IEP.” 34 C.F.R. § 300.116. *Hinson ex rel. N.H. v. Merritt Educational Center* 579 F.Supp.2d 89, 103 -104 (D.D.C. 2008). Under the IDEA, an appropriate location of services is one which can implement a student’s IEP and meet his specialized educational and behavioral needs. *James v.*

² Notwithstanding my finding that Student was not denied a FAPE by the inadequate transition plan, I strongly recommend, but do not order, that DCPS convene Student’s IEP team to fully consider Student’s transition needs in light of the findings in this decision and the August 7, 2013 HOD, and revise, as appropriate, his IEP.

District of Columbia, 2013 WL 2650091, 4 (D.D.C. Jun. 9, 2013). Perfect compliance with a student’s IEP in determining an appropriate placement is not required. A placement is appropriate if the school is capable of “substantially implementing” the IEP. *Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (citing *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000)).

Student’s September 6, 2013 IEP provides that he will receive 27.15 hours per week of Specialized Instruction, 1 hour per week of Speech-Language Pathology, 60 minutes per week of Behavioral Support services and 45 minutes per week of Occupational Therapy. School A is a special private school for children with disabilities, which Student previously attended for six years. According to the testimony of Administrative Head, which I found credible, School A is able to implement the September 6, 2013 IEP. School A’s transition coordinator and transition assistant would be available to work with Student on transition skills and life skills, such as public transportation and doing laundry. A D.C. Rehabilitative Services Administration (“RSA”) counselor would be brought in to interview Student with regard to services provided by that agency. Student’s resource teacher at School A and the school reading resource teacher would be able to work with Student on remedial academic skills. I find, therefore, that School A is able to implement the September 6, 2013 IEP and to meet Student’s specialized educational and behavioral needs as set out in the August 7, 2013 HOD.

Petitioners’ Counsel contends that School A is inappropriate for Student because it had failed him for years. The basis for this “failure” claim is that although Student received good grades at School A, and was on track to graduate with a regular D.C. high school diploma in June 2013, Educational Advocate and Clinical Psychologist found in their 2012-2013 school year assessments that Student was, as Educational Advocate testified, “in no way” ready to graduate. Whether Student was denied a FAPE when he attended School A is not an issue in this

hearing. However, in Case No. 2013-0289, Hearing Officer Ruff did not find that School A had failed Student. Mr. Ruff found, to the contrary, at School A Student made progress on his IEP goals and that given the Student's disability and academic deficits, he had been provided access and exposure to the general education curriculum at School A and had met the requirements to receive a regular D.C. high school diploma. I find, therefore, that School A is not an inappropriate placement due to having failed Student in the past.

Over the course of the Parents' dispute with DCPS, both in the present case and in Case No. 2013-0289, Parents have developed an antipathy to School A. Stepfather testified that the Parents had thought they were "done with" School A. He testified that he challenged the September 6, 2013 MDT team with, "Do you actually think we would put [Student] back in the hands of [School A]?" Stepfather's comments and his conduct at the September 6, 2013 MDT meeting suggest that the Parents seek a "veto" over school choice, rather than "input"—a power the IDEA clearly does not grant them. *See T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 420 (2nd Cir. 2009).

Unfortunately, the Parents' perspective has been absorbed by Student, who has concluded, incorrectly, that at School A, he did not learn anything at all. Student testified at the due process hearing that he did not want to return to School A. A child's fear or hostility towards a particular placement can render the placement inadequate if it is sufficiently severe to interfere with the child's ability to receive educational benefits. *See, e.g., J.W. ex rel. K.W. v. Contoocook Valley School Dist.*, 154 F.Supp.2d 217, 232 (D.N.H. 2001); *Greenbush Sch. Comm. v. Mr. and Mrs. K.*, 949 F.Supp. 934, 942–43 (D.Me.1996) ("This is not a child who simply does not like his school or his peers. James has a gripping fear that accompanies him throughout his day at Dunn. The Court finds that James's fear of the Dunn school would prevent him from receiving an educational benefit if his IEP were implemented at that school." *Id.*)

However, in this case, until the dispute arose over whether Student would graduate from School A in May 2013, Student had a good relationship with the staff at School A and never had a problem participating in the school's program. I conclude therefore that notwithstanding Student's current wish not to return to School A, he would be likely to receive educational benefit if his revised IEP were implemented at that location.

Petitioners also contend that they were denied input into the school placement decision because DCPS had predetermined School A as the location of services for Student before the September 6, 2013 MDT meeting. While the IDEA requires a student's parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not "explicitly require parental participation in site selection." *James, supra* at 3 (quoting *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003)). Here, Student's "educational placement" consists of the educational program described in the September 6, 2013 IEP. *See White, supra*, 343 F.3d at 379 ("'Educational placement,' as used in the IDEA, means educational program—not the particular institution where the program is implemented."); *Roher v. District of Columbia*, Civ. A. Nos. 89-2425, 89-2503, 1989 WL 330800, at *3 (D.D.C. Oct. 11, 1989) (" '[P]lacement' refers to the overall educational program offered, not the mere location of the program."). Petitioners' Counsel cites *Letter to Veazey*, 37 IDELR 10 (OSEP 2001) for the contrary position that Parents must participate in site selection. This is a misreading of the Office of Special Education Program's guidance. In *Letter to Veazey*, OSEP wrote that in all cases, the parents have the right to be members of the group that decides the educational placement of their child. However, OSEP added the caveat that,

It is important to point out that if the public agency, for example, has two or more equally appropriate locations that meet the child's special education and related services needs, the assignment of a particular school or classroom may be an administrative determination, provided that determination is consistent with the placement team's decision. . . .

Id. Petitioners have not shown that Student's assignment back to School A was in any way not consistent with the MDT team's September 6, 2013 decisions regarding Student's educational program.

Parents and their advocates did participate actively in the September 6, 2013 IEP meeting, which revised Student's IEP goals and continued his full-time, outside of general education, placement. DCPS made the administrative determination that School A would be the institution where Student's revised IEP would be implemented. I conclude that Student's continued assignment to School A was an LEA location decision which did not require involvement of Parents or Student's IEP team. Therefore, DCPS' predetermination of the site selection was not a denial of FAPE.

SUMMARY

In this case, I have found that Parents have not met their burden of proof to show that Student was denied a FAPE by DCPS' selection of School A to implement Student's IEP or by the omission of academic or S/L goals in Student's September 6, 2013 IEP. I have found that the omission of adequate goals and transition services in the September 6, 2013 IEP to appropriately address Student's independent living skills was a procedural violation of the IDEA, which has not actually caused Student any substantive harm or loss of educational opportunity. Petitioners have not shown that Student was denied a FAPE by the procedural violation.

ORDER

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

All relief requested by Petitioners herein is denied.

Date: December 3, 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).