

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

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

OSSE
Student Hearing Office
February 04, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: February 3, 2014
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
District of Columbia Public Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the guardian old male Student, filed a due process complaint notice on October 24, 2013, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that DCPS failed to implement Student’s Individualized Education Program (“IEP”) at two different schools during the 2013/14 school year (“SY”); that DCPS failed to provide Student with a location of services that could fully implement Student’s IEP during the 2013/14 SY; that DCPS failed to complete a psychiatric assessment as requested by Petitioner in order to determine whether Student required a more restrictive educational setting; and that DCPS failed to provide to Student with a more restrictive educational setting that included a separate special education day school.

DCPS took the position that Petitioner offered no evidence that DCPS failed to implement Student’s IEP at School A; that Petitioner enrolled Student at School A on her own volition; that DCPS was implementing Student’s IEP at the location of services it provided, i.e., School B; that Student was adjusting well both behaviorally and academically at School B; and that Student was receiving educational benefit at School B, thereby negating the need for a more restrictive setting in a special education day school.

¹ Personal identification information is provided in Appendix A.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations; and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on 10/24/13. This Hearing Officer was assigned to the case on 10/25/13. DCPS timely filed a response to the complaint on 11/01/13 and made no challenges to jurisdiction.

Neither Petitioner nor DCPS waived the resolution meeting. The resolution meeting took place on 11/12/13, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period ended on 11/23/13, the 45-day timeline to issue a final decision began on 11/24/13 and the final decision was due by 01/07/14.

A prehearing conference took place on 11/15/13. A Prehearing Order was issued on 11/16/13. At the prehearing conference, the Hearing Officer granted Petitioner permission to amend the complaint. See 34 C.F.R. 300.508(d)(3)(ii). On 11/21/13, Petitioner filed an Amended Administrative Due Process Complaint Notice. DCPS filed a Response to Parent’s Amended Administrative Due Process Complaint Notice on 11/29/13 and made no challenges to jurisdiction. An Order on Timeline Adjustment was issued on 11/30/13, indicating that the timelines pursuant to 34 C.F.R. 300.510 began anew with the filing of the amended complaint. The second 30-day resolution period ended on 12/21/13, the second 45-day timeline to issue a final decision began on 12/22/13 and the amended final decision due date was 02/04/14.

As a result of the filing of the amended complaint, a second prehearing conference took place on 12/16/13. The Amended Prehearing Order, issued on 12/17/13, delineated all of the issues and relief requested by Petitioner.

The due process hearing was a closed hearing that took place on 01/14/14. Petitioner was represented by Roberta Gambale, Esq. DCPS was represented by Steven Rubenstein, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person, but was excused at the luncheon recess in order to receive Student from the school bus.

On 01/10/14, DCPS timely filed formal objections to Petitioner’s Disclosure Statement. Petitioner filed a formal response to DCPS’ objections on 01/13/14. DCPS’ objections were addressed orally on the record at the due process hearing.

Petitioner’s Disclosure Statement, dated 01/07/14, contained a list of nine (9) witnesses and documents P-1 through P-47. Petitioner brought a redacted copy of P-7 to the hearing and

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DCPS withdrew its objection to P-7, P-15, P-24 through P-29, P-33 through P-41, and P-42, were all admitted into evidence over DCPS' objection. The rest of Petitioner's documents were admitted into evidence without objection. DCPS also objected to the testimony of Petitioner's witnesses #6 and #7, on the basis that a description of their expected testimony was not provided in the disclosures. Petitioner argued that the witnesses' testimony about the scope of the nonpublic school's program, was not only generic, it was also provided by Petitioner at the prehearing conference and incorporated into the Prehearing Order. The Hearing Officer ruled that although the Prehearing Order stated that the disclosure statements of the party controlled with respect to evidence presented at the due process hearing, the anticipated testimony of the Petitioner's witnesses #6 and #7 was so generic that non-disclosure was not prejudicial to DCPS. The testimony of Petitioner's witnesses #6 and #7 was allowed into evidence over DCPS' objection. The remainder of Petitioner's witness list was admitted into evidence without objection.

DCPS' Disclosure Statement, dated 01/07/14, contained a witness list of seven (7) witnesses and documents R-01 through R-22. DCPS' Disclosure Statement was admitted into evidence without objection.

Respondent's Attorney provided all parties with a copy of DCPS' calendar for school year 2013-14. The Hearing Officer took judicial notice of it.

Parties declined to engage in settlement discussions at the beginning of the due process hearing.

Petitioner presented the following six (6) witnesses in her case in chief: (1) Petitioner; (2) Petitioner's expert in clinical and school psychology ("Petitioner's clinical and school psychology expert"); (3) educational advocate ("advocate"); (4) community based intervention worker ("CBI worker"); (5) representative from Petitioner's proposed school placement ("School C representative"); and (6) Student's peer support worker/parent advocate ("peer support worker").

DCPS presented the following three (3) witnesses: (1) Special education teacher and LEA representative at School B ("LEA representative"); (2) Expert in school psychology ("DCPS' school psychology expert"); and (3) Student's special education teacher in math and science/special education case manager at School B ("Teacher").

The four issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether DCPS denied Student a FAPE by failing to implement Student's Individualized Education Program ("IEP") during the 2013/2014 school year at both School A and School B; specifically, (1) Student's 05/23/13 IEP that required 31 hours/week of specialized instruction and 240 minutes/month of behavioral support services, with all services outside of general education, was not implemented in that (a) Student was provided with all services within the general education setting, and (b) 240 minutes/week of behavioral support services was not provided at all; all while Student attended School A from the beginning of the 2013/2014 school year through 09/17/13; (2) Student's 09/17/13 IEP was not implemented in that (a) IEP services

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of 27.5 hours/week of specialized instruction outside of general education were provided within the general education setting, (b) 240 minutes/week of behavioral support services was not provided at all, (c) the dedicated aide required by the IEP was not provided at all; and (d) the Behavior Intervention Plan (“BIP”) that was part of the IEP was either not implemented or ineffectively implemented; all while Student attended School A from 09/17/13 through 10/15/13; and (3) Student’s 09/17/13 IEP was not fully implemented at School B from 10/16/13 through the time of the filing of the amended complaint (11/21/13) in that (a) two classes (Physical Education and Library Science) were provided within the general education setting, (b) the BIP was not implemented in a meaningful way in that DCPS did not provide trained crisis intervention staff to help Student deescalate while taking the “breaks” required as part of the BIP, and (c) the dedicated aide was not provided until 10/24/13, and then provided on an inconsistent basis thereafter.

Issue #2 – Whether DCPS denied Student a FAPE by failing to provide a location of services that was able to fully implement Student’s 05/23/13 IEP and 09/17/13 IEP during the 2013/14 school year; specifically, the location of services designated by DCPS, i.e., School B (a) could not and did not provide all specialized instruction in a self-contained classroom from 10/16/13 through the time of the filing of the amended complaint, (b) did not provide the services of a dedicated aide from 10/16/13 through 10/24/13 and then provided it on an inconsistent basis thereafter, and (c) could not and did not effectively implement the BIP that was part of the 09/17/13 IEP.

Issue #3 – Whether DCPS denied Student a FAPE by failing to conduct a reevaluation of Student’s educational need for a more restrictive educational setting, following Petitioner’s written request on 11/07/13 and oral request to the IEP Team on 11/12/13; specifically, DCPS refused to conduct the psychiatric assessment that Petitioner believed was necessary to determine Student’s mental and emotional status, in light of Student’s history of 15 psychiatric hospitalizations, two of which were partially precipitated by school events that occurred during the 2013/14 school year.

Issue #4 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate educational placement from 10/24/13 until the amended complaint was filed on 11/21/13; specifically, Student requires (a) an IEP with a more restrictive educational setting (a separate special education day school)² and a safety plan that includes the continuous services of a dedicated aide, and (b) a location of services other than School B that can implement an IEP with a safety plan and a more restrictive setting.

Petitioner sought the following relief: a finding that DCPS had denied Student a FAPE on the issues presented; DCPS to fund Student at School C, which is a separate special education day school with a therapeutic component; DCPS to provide the services of a dedicated aide at school who can provide 1:1 continuous supervision of Student throughout the day; DCPS to fund an independent psychiatric assessment and reconvene to review the assessment and determine Student’s need for a more restrictive educational placement; DCPS to develop a safety plan to address Student’s behaviors that put himself and others at risk and incorporate the safety plan into Student’s IEP; if the IEP team decides that Student requires a residential placement, DCPS

² At the due process hearing, Petitioner withdrew her request for an IEP that provided for a residential placement.

to begin the residential placement process; and compensatory education consisting of independent tutoring and counseling to compensate Student for DCPS' failure to provide appropriate specialized instruction and behavioral support services per Student's IEPs, since the beginning of the 2013/14 SY.

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

Findings of Fact

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

#1. Student is thirteen years old and a resident of the District of Columbia. Petitioner is Student's aunt and guardian.³ At all relevant times, Student was a child with a disability.⁴

#2. Student began the 2013/14 SY at School A. Petitioner enrolled Student at School A on her volition because it was a neighborhood school. The DCPS school that Student attended the previous school year closed at the end of the 2012/13 SY.⁵

#3. Student began the 2013/14 SY with an IEP dated 05/23/13 that classified Student with an Emotional Disturbance and prescribed the following services: 31 hours/week of specialized instruction and 240 minutes/month of behavioral support services, with all services to be provided outside of general education. The IEP required a full time placement in a program for students with Emotional Disabilities.⁶ The 05/23/13 IEP did not provide for the services of a dedicated aide.⁷ When Petitioner enrolled Student at School A, she provided School A with a copy of Student's IEP.⁸

#4. Student also began the 2013/14 school year with a Behavioral Intervention Plan ("BIP") dated 09/21/12 that prescribed the following interventions: Student to go to a cool off area (designated area in school building) or "safe zone" (cleared room with mats) to deescalate before his behavior becomes uncontrollable; use of behavior charts to promote positive and on-task behavior; communication with parents by phone regarding his behaviors; discussions with Student about the behaviors after the behaviors occur; taking breaks from challenging or non-preferred tasks; Student to choose a reinforcer such as a leisure activity, book or drawing of choice; and earning school bucks as part of school wide behavior plan.⁹ During the short time that Student attended School A, School A tried to diffuse Student's behavior by talking with him, allowing him to eat food, offering him a quiet place to deescalate, and rewarding him for positive behavior.¹⁰ The 09/21/12 BIP was not part of Student's 05/23/13 IEP or 09/17/13 IEP.¹¹

³ Petitioner.

⁴ Petitioner, P-1, P-9.

⁵ Petitioner.

⁶ P-1-7, P-1-8.

⁷ P-1-10.

⁸ Petitioner.

⁹ P-2-1, P-2-2.

¹⁰ P-7.

#5. Student's behavioral maladjustment to School A's educational environment was documented during the first week of the 2013/14 school year. Student was disruptive, interfered with safe transport, was a danger to himself and others, impeded educational progress, interfered with instruction, caused property damage, intimidated others, and was suspended from school.¹² School A conducted a formal Functional Behavioral Assessment ("FBA") during the first two weeks of September 2013, which included two classroom observations.¹³ The data from the FBA, i.e., classroom observations and feedback from teachers and caregivers, was used to formulate a BIP that contained modifications to the environment to effect changes in Student's behavior.¹⁴ School A drafted a BIP on 09/17/13¹⁵ and finalized it on 09/26/13.¹⁶

#6. As early as the 11th day of the 2013/14 SY, i.e., on 09/10/13, School A had documented the need for Student to be in a full time placement for students with an Emotional Disturbance and the need for him to have a dedicated aide.¹⁷ At that time, Student's academic performance was on grade level.¹⁸ Five school days later, School A convened an IEP Team and developed an IEP for Student. The 09/17/13 IEP classified Student with an Emotional Disturbance and prescribed 27.5 hours/week of specialized instruction and 240/minutes month of behavioral support services, with all services to be provided outside of general education and in a full time placement in a program for students with Emotional Disabilities. The IEP also provided for the services of a dedicated aide.¹⁹

#7. At the meeting on 09/17/13, Petitioner was informed by School A that School A couldn't implement Student's 05/23/13 IEP because it could not provide Student with services in a self-contained classroom.²⁰ Despite knowing that School A could not implement Student's IEP, Petitioner informed School A that she intended to keep Student there.²¹ At the meeting, School A through DCPS, informed Petitioner that public School B could implement Student's IEP. After the meeting on 09/17/13, Petitioner went to School B. Although Petitioner was able to enroll Student that day, she declined to do so. Petitioner enrolled Student a few days later and Student began attending School B on 10/16/13.²² Student was hospitalized while he attended School A. As a result, Student only attended School A for about two (2) weeks.²³

#8. School B materially implemented the services in Student's 09/17/13 IEP. School B provided services to Student in a full time, self-contained behavioral support classroom populated only by students with IEPs and disability classifications of Emotional Disturbance and

¹¹ P-1.

¹² P-4-1, P-7, P-12-5.

¹³ P-12-5.

¹⁴ P-42-6.

¹⁵ P-12-1.

¹⁶ P-13-1.

¹⁷ P-8-1.

¹⁸ P-12-5.

¹⁹ P-9-7, P-9-8.

²⁰ Petitioner, R-2-4, R-3-1.

²¹ P-2-4.

²² Petitioner.

²³ Petitioner.

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Intellectual Disabilities.²⁴ The classroom staff consisted of a special education teacher, an educational aide, a behavior technician and Student's 1:1 dedicated aide. Student's classroom had five (5) students, including Student.²⁵ The classroom was very structured, with clear expectations and rewards and consequences program.²⁶ Although Student's class at School B shared the lunchroom with other students, Student's class was segregated together and the behavior technician and educational aide sat with Student's class during lunch.²⁷ Although Student's elective classes of physical education and computer/library were taught by a general education teacher, there were no other general education students in the classroom.²⁸ Student's dedicated aide, Student's classroom aide and educational aide were all present during the elective classes.²⁹

#9. Student's 09/26/13 BIP provided for a cool down area for Student to deescalate, positive phone calls home, agreements for rewards based on following desired behaviors, discussions with Student following behaviors, and Student to choose a reinforcer such as leisure activity, book or drawing.³⁰ The 09/26/13 BIP was implemented by School B. The behavior support classroom that Student participated in provided all of requirements of the BIP.³¹ The BIP was not incorporated as part of Student's 09/17/13 IEP.³²

#10. Student successfully adjusted behaviorally at School B. Although Student had two major meltdowns when he first began attending School B and was taken to the quiet room to deescalate, thereafter his problem behaviors mainly consisted of crying when he couldn't have his way. Initially, Student had difficulty transitioning between breaks and class work at School B, but after that he experienced only minor meltdowns that were successfully handled by the dedicated aide. Student needed frequent breaks and got them. At School B, Student was not aggressive and his behavior was manageable. His behavior did not require removal from the classroom.³³ Student's BIP was in place.³⁴ As long as Student was academically challenged, received frequent breaks and knew what to expect, Student's behavioral outbreaks were minimal.³⁵ Student's teachers collected behavioral data on Student on a daily basis and the data was used as the basis of a points and rewards system that rewarded Student for his consistent, positive behaviors.³⁶ On two occasions, Student won a reward for having the highest number of points.³⁷

²⁴ Student's teacher.

²⁵ Teacher, LEA representative.

²⁶ Teacher, LEA representative.

²⁷ Teacher.

²⁸ LEA representative.

²⁹ Teacher.

³⁰ P-13.

³¹ Teacher, LEA representative.

³² P-9.

³³ Teacher, LEA representative.

³⁴ DCPS school psychology expert, Teacher, LEA representative.

³⁵ Teacher.

³⁶ Teacher, LEA representative.

³⁷ Teacher.

#11. School B provided Student with a dedicated aide on or about 10/24/13,³⁸ and consistently on a daily basis thereafter. Student is fond of his dedicated aide. Student's dedicated aide assists Student with his behavioral needs, coaches him through behavior escalations, helps keep him on task with academics, assists in the assessment of when Student needs breaks, assures that Student travels in the school safely, and travels with Student to all elective classes and lunch. During the day, when the dedicated aide is on a break, the classroom educational aide is present to attend to any behavioral difficulties that might emerge from Student.³⁹

#12. Currently, Student is performing well academically at School B. Student has no problems retaining and recalling information. He is able to accelerate faster than his classroom peers in academics; he uses an electronic program that lets him accelerate according to his needs in math and science; and he has no difficulty reading and comprehending. Student's only difficulty is with writing, which he doesn't like.⁴⁰ Student's grade report from the first term of the 2013/14 SY reflected an "A" in English, Reading, History, and Math, and a "B" in Science, Computer Skills, and Health and Physical Education.⁴¹ At the time of the first term grade report on 11/01/13, Student was proficient in reading and advanced in math, per a standardized District of Columbia academic achievement assessment.⁴²

#13. On 11/07/13, Petitioner sent a written request to School B for a psychiatric assessment to be conducted.⁴³ Petitioner's initial request for a psychiatric assessment was based on her seeking a residential placement for Student.⁴⁴ The request referenced a hospitalization that occurred following a school incident where Student made a suicide gesture on the bus with a belt.⁴⁵ The circumstances warranting a psychiatric assessment, i.e., that a child's behavior is unmanageable despite interventions,⁴⁶ does not exist for Student. Other than two major incidents when Student first began attending School B, Student's behavioral outbreaks have been minor and manageable.

#14. From a school's perspective, a psychiatric assessment is used to diagnose emotional, behavioral or development disorders and determine educational impact.⁴⁷ DCPS completed a very comprehensive psychological reevaluation and issued a written report on 12/16/13 that included social-emotional functioning and behavior testing, cognitive and achievement testing results and educational implications.⁴⁸ DCPS' comprehensive psychological reevaluation is sufficient to determine Student's educational needs. Student does not need a psychiatric assessment in order to determine Student's educational programming or needs.⁴⁹

³⁸ Peer support worker, Teacher.

³⁹ Teacher.

⁴⁰ Teacher.

⁴¹ R-12.

⁴² R-4-3.

⁴³ P-17-1.

⁴⁴ DCPS school psychology expert, P-17, P-18-1.

⁴⁵ Petitioner.

⁴⁶ Petitioner's clinical and school psychology expert.

⁴⁷ P-42, DCPS school psychology expert.

⁴⁸ P-21-7, P-21-21.

⁴⁹ DCPS school psychology expert.

Student has adjusted well both academically and behaviorally at School B. Student does not need a more restrictive educational placement. Student's current educational placement at School B is appropriate, both academically and behaviorally.⁵⁰

Conclusions of Law

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

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

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's Individualized Education Program ("IEP") during the 2013/2014 school year at both School A and School B; specifically, (1) Student's 05/23/13 IEP that required 31 hours/week of specialized instruction and 240 minutes/month of behavioral support services, with all services outside of general education, was not implemented in that (a) Student was provided with all services within the general education setting, and (b) 240 minutes/week of behavioral support services was not provided at all; all while Student attended School A from the beginning of the 2013/2014 school year through 09/17/13; (2) Student's 09/17/13 IEP was not implemented in that (a) IEP services of 27.5 hours/week of specialized instruction outside of general education were provided within the general education setting, (b) 240 minutes/week of behavioral support services was not provided at all, (c) the dedicated aide required by the IEP was not provided at all; and (d) the Behavior Intervention Plan ("BIP") that was part of the IEP was either not implemented or ineffectively implemented; all while Student attended School A from 09/17/13 through 10/15/13; and (3) Student's 09/17/13 IEP was not fully implemented at School B from 10/16/13 through the time of the filing of the amended complaint (11/21/13) in that (a) two classes (Physical Education and Library Science) were provided within the general education setting, (b) the BIP was not implemented in a meaningful way in that DCPS did not

⁵⁰ DCPS school psychology expert.

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provide trained crisis intervention staff to help Student deescalate while taking the “breaks” required as part of the BIP, and (c) the dedicated aide was not provided until 10/24/13, and then provided on an inconsistent basis thereafter.

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, and each public agency must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP. 34 C.F.R. 300.323(c)(2), 5 D.C.M.R. E-3002.3(d).

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

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

A party challenging the implementation of an IEP must show more than a de minimus 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. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *Catalan et al., v. District of Columbia*, 478 F Supp 2^d 73 (2007), 47 IDELR 223.

Petitioner failed to offer any evidence that DCPS failed to provide Student with behavioral support services while Student attended School A from the beginning of the 2013/14 school year through 10/15/13; therefore, Petitioner failed to meet her burden of proof on that aspect of the issue. However, there was reliable evidence in the record that School A could not provide Student with specialized instruction outside of general education, in a self-contained classroom, as was required by Student’s IEP. This was a material failure to implement Student’s IEP at School A.

The Hearing Officer determines that although School A did not comply with the requirements of the IDEA to implement Student’s IEP and it was a material failure to implement the IEP, Student was not denied a FAPE by the actions or inactions of DCPS. Petitioner failed to meet her burden of proof on that aspect of the issue. Petitioner enrolled Student at School A on

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her own volition. Petitioner's statement that School A told Petitioner upon enrollment that School A could implement Student's IEP was not believed by the Hearing Officer. Petitioner was inconsistent on many aspects of her testimony, and overall she was not a credible witness. When formally advised that School A could not implement Student's IEP because it couldn't provide services in a self contained classroom, Petitioner elected to keep him there anyway despite the opportunity to enroll Student in School B, a school that could implement Student's IEP.

What is clear from the record is that within the first two weeks of Student attending School A, School A embarked on a formal course of trying to cope with Student's maladaptive behaviors. School A conducted a FBA and developed a BIP rather quickly. School A convened a formal IEP meeting within the first three weeks of the school year and told Petitioner that School A was not capable of implementing Student's IEP.

Petitioner also failed to provide any concrete proof that DCPS failed to implement Student's IEP by failing to implement Student's 09/21/12 BIP at School A. During the short time that Student attended School A, School A tried to diffuse Student's behavior by talking with him, allowing him to eat food, offering him a quiet place to deescalate, and rewarding him for positive behavior. Moreover, there was no evidence in the record that the BIP had to be implemented as part of Student's IEP.

The Hearing Officer determines that DCPS' failure to provide Student with a dedicated aide from 09/18/13 until 10/24/13 was not a material failure to implement the IEP. The services of a dedicated aide were added to Student's IEP on 09/17/13, the same day that Petitioner was told that School A could not implement Student's IEP. Petitioner opted to keep him there anyway.

The Hearing Officer determines that Petitioner failed to meet her burden of proof that DCPS denied Student a FAPE by failing to implement any part of Student's IEP from the beginning of the 2013/14 school year through 10/15/13.

The Hearing Officer also determines that Petitioner failed to meet her burden of proof that DCPS denied Student a FAPE by failing to implement Student's IEP at School B. Although arguably there was a deviation from the requirements of the IEP when School B provided specialized instruction to Student by a general education teacher in his elective classes of physical education and computer/library, the classes were provided outside of the general education setting, as required by the IEP, as no general education students populated those classes. The Hearing Officer determines that the deviation, if any, was not a material deviation. Student received Bs in those courses. Moreover, Student's 1:1 dedicated aide and the classroom educational aide were present in those classrooms and could provide whatever educational assistance was needed. Student was not denied an educational benefit nor was his right to a FAPE impeded by receiving his elective courses from a general education teacher in a self-contained classroom with other special education students.

The Hearing Officer determines that Student's 09/26/13 BIP, although not formally a part of Student's IEP, was fully implemented at School B. Student had a dedicated aide who assisted

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him throughout the day with behavior management. The dedicated aide assisted with behavior deescalating when necessary, assisted Student by determining when breaks were necessary, set time limits for Student to transition back to work, accompanied Student on his breaks, and assisted Student with all academic and behavioral services throughout the day. Student's BIP was fully implemented by his dedicated aide who successfully provided behavior management services. The classroom also utilized a rewards system to promote positive behavior.

Student began attending School B on 10/16/13. The dedicated aide was provided to him on or about 10/24/13. Student was without a dedicated aide for approximately four school days, but he received the services of a dedicated aide on a consistent basis thereafter. The Hearing Officer determines that DCPS' failure to provide Student with an aide for this short amount of time was not a material deviation from the IEP and did result in the denial of a FAPE. Once the aide was in place, Student began thriving. His behavior was manageable and didn't require removal from the classroom. He received A's and B's by the end of the term. No educational harm was shown.

The greatest weight was given to the testimony of Student's teacher, who was most familiar with what was happening in the classroom on a daily basis. Her testimony was entirely credible. She was forthright with information and did not hesitate to say that Student's electives were taught by a general education teacher.

In summary, Petitioner failed to meet her burden of proof that Student was denied a FAPE on any aspect of Issue #1.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide a location of services that was able to fully implement Student's 05/23/13 IEP and 09/17/13 IEP during the 2013/14 school year; specifically, the location of services designated by DCPS, i.e., School B (a) could not and did not provide all specialized instruction in a self-contained classroom from 10/16/13 through the time of the filing of the amended complaint, (b) did not provide the services of a dedicated aide from 10/16/13 through 10/24/13 and then provided it on an inconsistent basis thereafter, and (c) could not and did not effectively implement the BIP that was part of the 09/17/13 IEP.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

Petitioner failed to meet her burden of proof on the second issue. The Hearing Officer has already determined herein that: School B provided all of Student's academic instruction in self-contained, behavioral support classrooms; that School B provided Student with a dedicated aide on a daily and consistent basis since 10/24/13; and School B effectively implemented Student's BIP.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to conduct a reevaluation of Student's educational need for a more restrictive educational setting, following Petitioner's written request on 11/07/13 and oral request to the IEP Team on 11/12/13;

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specifically, DCPS refused to conduct the psychiatric assessment that Petitioner believed was necessary to determine Student's mental and emotional status, in light of Student's history of 15 psychiatric hospitalizations, two of which were partially precipitated by school events that occurred during the 2013/14 school year.

A public agency must ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation. A reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is necessary. 34 CFR 300.303.

The public agency must also ensure that the child is assessed in all areas related to the suspected disability, including if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. 300.304.

Petitioner failed to meet her burden of proof that Student was denied a FAPE by DCPS' failure to conduct a psychiatric assessment of Student following Petitioner's written request on 11/07/13.

Student's current educational placement meets his educational needs and is appropriate. Student is doing well both academically and behaviorally with the IEP services provided by School B. Student's emotional, social and behavioral functioning is known through a current comprehensive psychological evaluation. Student's behavior is not unmanageable despite interventions. Moreover, Student has been under continuous psychiatric care at least since February 2013. A psychiatric assessment is not necessary for appropriate educational programming for Student. Moreover, Petitioner withdrew her request for an IEP that provides for a residential placement.

The fourth issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate educational placement from 10/24/13 until the amended complaint was filed on 11/21/13; specifically, Student requires (a) an IEP with a more restrictive educational setting (a separate special education day school) and a safety plan that includes the continuous services of a dedicated aide, and (b) a location of services other than School B that can implement an IEP with a safety plan and a more restrictive setting.

For an IEP to be appropriate, it must be "reasonably calculated to enable the child to receive educational benefits." *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176, 206-207 (1982).

Each public agency must ensure that (1) to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled, and (2) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114.

Petitioner failed to meet her burden of proof on the fourth issue. There was no reliable evidence in the record that Student needed a more restrictive educational setting, such as a separate day school. The people who worked with and observed Student at School B all agreed that Student was flourishing with the current programming being provided to Student by School B. Student had adjusted well both academically and behaviorally. Student had the continuous services of a dedicated aide. Student's BIP was being implemented. Student's report card was populated with As and Bs. Student's IEP was appropriate and he was receiving educational benefit from its implementation at School B.

ORDER

Petitioner failed to meet her burden of proof on all of the issues presented.

This complaint is **DISMISSED WITH PREJUDICE**.

All requested relief is denied.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

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

Date: February 3, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:
Petitioner: (U.S. mail)
Petitioner's Attorney: Roberta Gambale, Esq. (electronically)
DCPS' Attorney: Steven Rubenstein, Esq. (electronically)
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