

**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
July 21, 2014

STUDENT, ¹)	
through the PARENT,)	
)	Date Issued: July 21, 2014
<i>Petitioner,</i>)	
)	Hearing Officer: NaKeisha Sylver Blount
v.)	
)	
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

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

PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on May 7, 2014, on behalf of the Student, a resident of the District of Columbia, by Petitioner, the Student’s guardian, against Respondent, District of Columbia Public Schools (“DCPS”).

On May 7, 2014 the undersigned was appointed as the Impartial Hearing Officer (“IHO”). On May 15, 2014, Respondent filed its timely Response, denying that Respondent denied the Student a free appropriate public education (“FAPE”).

The parties held a Resolution Meeting was held on May 21, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on June 6, 2014.

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

The 45-day timeline for this Hearing Officer Determination (“HOD”) began to run on June 6, 2014 and will conclude on July 21, 2014.

The undersigned IHO held a Pre-hearing Conference (“PHC”) by telephone on June 2, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by Tuesday, June 17, 2014 and that the Due Process Hearing (“DPH”) would be held on June 24-25, 2014. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued June 2, 2014.

Petitioner’s disclosures were timely filed on June 17, 2014. Respondent’s disclosures were also timely filed on June 17, 2014. At the DPH, the following documentary exhibits were admitted into evidence without objection: P-1 through P-22 and R-1 through R-7. The following exhibits were admitted over the Petitioner’s objection: R-8 through R-11.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Parent’s Educational Advocate;
- (b) IEE Evaluator (Expert in the area of school psychology and assessment);
- (c) Non-Public Admissions Director (Admissions Director, Non-Public School);
- (d) Student.

The following witnesses testified on behalf of Respondent at the DPH:

- (a) DCPS Resolution Specialist;
- (b) General Education Teacher, District Elementary School;
- (c) DCPS School Psychologist (Expert in school psychology - specifically in conducting, reviewing and interpreting psychological and educational evaluations and making educational recommendations for students).

The parties gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to provide the student with an IEP² reasonably calculated to provide the student with an educational benefit.
- (b) Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate educational placement.
- (c) Whether DCPS denied the student a FAPE by failing to implement the student’s (April 2014) IEP.
- (d) Whether DCPS denied the student a FAPE by failing to follow proper procedures in determining the student’s educational placement, LRE and location of services.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that DCPS denied the student a FAPE by failing to provide the student with an appropriate educational placement.
- (b) an Order that within five school days or five business days (whichever is first) DCPS reconvene the student’s MDT/IEP team to review and revise the student’s IEP to reflect his receipt of no less than 27.5 hours of specialized instruction outside the general education setting, in a full time special education, separate day school.
- (c) an Order that DCPS place and fund the student at Non-Public School or other appropriate special education day program, and provide the student with transportation services, beginning with the 2013-2014 school year during Extended School Year, and continuing for the 2014-2015 and the 2015-2016 school years.³

² Counsel for the Petitioner clarified on the record during the DPH that the IEP dated April 28, 2014 is the IEP at issue in this action.

³ The DPC included a request for an order of compensatory education in the form of one-on-one tutoring to occur outside the school setting at a place and location to be agreed upon by the parent and by DCPS. The details of Petitioner’s proposed compensatory education were not emailed to the hearing officer and opposing counsel by the deadline set out in the PHO; therefore, pursuant to the PHO, Petitioner’s request for compensatory education is deemed waived. However, the hearing officer continues to have authority to award appropriate relief, which may include compensatory education consistent with a fact-specific analysis, to the extent that there is a finding of a denial of FAPE. 20 U.S.C. 1415(i)(2)(C); see also *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) and *Diatta v. Dist. of Columbia*, 319 F.Supp. 2d 57, 64 (D.D.C 2004).

FINDINGS OF FACT

Jurisdictional Facts

2. The Student resides with his grandmother/guardian, the Petitioner (“Parent”), in Washington, D.C.⁵

3. The Student has been determined to be eligible for special education and related services under the IDEA.⁶

Background

4. From his earliest days of elementary school, the Student has struggled to acquire basic skills.⁷ The Student has struggled considerably during his time at his current school, District Elementary School.⁸

5. The Student has ADHD and also some cognitive impairments.⁹ He struggles to learn even in a perfect learning environment.¹⁰ He learns at a much slower pace than his peers and needs intensive educational supports.¹¹ High noise levels and distractions can be disruptive to him.¹² The Student should have counseling to help manage his attention and mood.¹³ Despite his severe educational deficits, the Student is not intellectually deficient or emotionally disturbed.¹⁴

6. Unlike in the previous school year, the Student did not exhibit significant behavioral problems during the 2013-2014 school year.¹⁵ The Student has not exhibited recent problems interacting with his non-disabled peers.¹⁶ The Student continued, however, to have problems maintaining attentiveness and staying on track.¹⁷

7. It would not be appropriate to put the Student, who does not have behavioral problems, into a classroom with students with behavioral problems, or to put the Student in a classroom with students with severe intellectual disability, which he does not have.

⁴ Testimony of Parent’s Educational Advocate.

⁵ Testimony of Parent’s Educational Advocate.

⁶ P-7.

⁷ R-5-1.

⁸ R-5-1.

⁹ Testimony of DCPS School Psychologist.

¹⁰ Testimony of DCPS School Psychologist.

¹¹ Testimony of DCPS School Psychologist.

¹² Testimony of DCPS School Psychologist.

¹³ Testimony of DCPS School Psychologist.

¹⁴ Testimony of DCPS School Psychologist.

¹⁵ Testimony of General Education Teacher.

¹⁶ Testimony of Educational Advocate; testimony of General Education Teacher.

¹⁷ Testimony of General Education Teacher.

Hearing Officer Determination

Academic Performance

8. According to his IEP progress notes, the Student has been making progress on his IEP goals;¹⁸ however, the Student has not been making meaningful academic progress from year to year. Rather, to the extent the Student has made any academic progress, it has been small, incremental progress.¹⁹ The Student was performing on a first and second grade level in fourth grade, and continued to perform on a first and second grade level in fifth grade during the 2013-2014 school year,²⁰ despite the Student having been retained in the second grade. (Absent the retention, the Student would be a rising seventh grader rather than a rising sixth grader).²¹

9. The Woodcock Johnson III was administered to the Student in June 2013 and again in March 2014.²² The Student scored in the lowest range (“very low”) in broad reading and broad written language in both 2013 and 2014. In broad math, the Student went from a score in the “low” range in 2013 down to a score in the “very low” range in 2014.

10. To the extent that “specials” (elective courses such as art and music) involve reading, the Student struggles with them in the general education setting.²³

11. Physical education is the Student’s favorite school subject,²⁴ and it is healthy for his self-esteem to participate in this subject where he performs well.²⁵

Special Education and Related Services

12. The Student’s general education teacher (same in fifth grade as in fourth grade) employed a number of interventions in an effort to assist the Student with accessing the curriculum.²⁶ A City Year Worker worked in the general education classroom during the 2013-2014 school year. The City Year Worker was not present in the room specifically to work with the Student; however, the general education teacher would often ask the City Year Worker to give the Student extra assistance. The Student did better when working in small groups of 5-7 students, led by the City Year Worker.²⁷

13. The Student’s special education teacher worked with the Student inside his general education classroom from approximately 9:00-noon each school day during the 2013-2014 school year.²⁸

¹⁸ R-1 and R-2.

¹⁹ Testimony of DCPS School Psychologist.

²⁰ Testimony of General Education Teacher.

²¹ Testimony of Parent’s Educational Advocate; P-10-4.

²² P-7.

²³ Testimony of Student.

²⁴ Testimony of the Student; Testimony of IEE Evaluator.

²⁵ Testimony of IEE Evaluator.

²⁶ R-5-1.

²⁷ Testimony of General Education Teacher.

²⁸ Testimony of General Education Teacher; testimony of Parent’s Educational Advocate.

Hearing Officer Determination

14. The Student was pulled out of the general education classroom for reading support with the reading specialist for approximately 30 minutes each school day during the 2013-2014 school year.²⁹

Educational Evaluations and Recommendations

15. On August 2, 2013, a Confidential Psychological and Educational Evaluation was conducted on the Student to aid in educational planning for the Student.³⁰ Among the evaluation's recommendations was that the Student "be placed in a small class size to allow for individualized attention and instruction. A small classroom environment that is physically structured to minimize stimulus overload could be particularly helpful."³¹

16. On March 19, 2014 and March 25, 2014, the Student received a valid³² independent educational evaluation ("IEE").³³

17. The IEE contained fourteen recommendations, including that the Student receive intensive special education services in all academic areas, and that the Student participate in an extracurricular activity (for example sports) that is fun and where he can excel, in order to facilitate self-esteem.³⁴ The IEE indicated that in order to gain meaningful educational benefit, the Student would need a great deal of prompting, regular assistance with sounding out words, and support with remaining on task, due to his ADHD.³⁵

18. A DCPS school psychologist reviewed the IEE in a written report dated April 29, 2014 and noted that the report provided very good data that can be useful in making educational plans for the Student.³⁶ The school psychologist concurred with all the recommendations in the IEE and indicated that the Student will need intensive remedial support going forward into middle school in order to access the curriculum.³⁷ The school psychologist made four recommendations additional to those in the IEE, including that the Student should receive specialized instruction in core academic subjects in the general education classroom with the assistance of a special education teacher.³⁸ In light of the Student's lack of progress in the general education setting over the past two years, the IHO does not credit the recommendation that continuing to provide the Student specialized instruction in the general education setting would enable the Student to receive meaningful educational benefit.

April 2014 IEP and IEP Meeting

19. On April 28, 2014, an IEP meeting was convened to review the IEE and to review/revise the Student's IEP as appropriate. The Student's hours of specialized instruction

²⁹ Testimony of General Education Teacher.

³⁰ P-10-1.

³¹ P-10-19.

³² Testimony of DCPS School Psychologist; R-5.

³³ Testimony of Parent's Educational Advocate.

³⁴ P-9-7.

³⁵ Testimony of IEE Evaluator.

³⁶ R-5-1.

³⁷ R-5-4.

³⁸ R-5-5.

Hearing Officer Determination

were increased from 15 to 25 hours per week inside the general education setting. Pursuant to an HOD dated November 1, 2013, the IEP also calls for the Student to receive one hour per day of intensive reading support by the reading specialist assigned to his school outside the general education setting.³⁹ Additionally, it calls for 90 minutes per month of behavioral support services outside the general education setting.⁴⁰

20. The Student's disability classification is "Other Health Impairment" (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder).⁴¹

21. For the upcoming 2014-2015 school year, DCPS felt that the Student's IEP could be implemented in a self-contained, non-categorical classroom (with students of varying disabilities) inside a general education school. Parent and the Parent's Educational Advocate felt that the Student needed, instead, to be placed in a full-time special education school.⁴² The IHO concludes that the Student needs a full-time, special education school for the 2014-2015 school year.

May MDT Meeting

22. On May 21, 2014, a resolution session meeting ("RSM")/multidisciplinary team meeting ("MDT") was convened and DCPS offered to amend the Student's IEP to reflect 27.5 hours per week of specialized instruction.⁴³ DCPS and the Parent agreed to the number of hours per week of specialized instruction, but they disagreed on the type of placement that would be appropriate for the Student.⁴⁴ DCPS proposed that the IEP be amended to reflect 27.5 hours in a full-time self contained classroom inside a general education school. The Parent felt the IEP should be amended to reflect 27.5 hours in a full-time, separate special education day school.⁴⁵ The IHO concurs with the consensus reached by the team that the Student's IEP should be amended to reflect 27.5 hours of specialized instruction per week.

LRE Committee

23. During the April 28, 2014 IEP meeting, all parties agreed to DCPS sending a referral packet for the Student to DCPS' LRE Committee for a recommendation of an appropriate placement for the Student.⁴⁶

24. Neither Parent nor Parent's Educational Advocate was ever invited to attend an LRE Committee meeting to discuss the Student's placement and location of services.⁴⁷

³⁹ P-7-9.

⁴⁰ P-18-4.

⁴¹ P-7-1.

⁴² Testimony of Parent's Educational Advocate.

⁴³ Testimony of Parent's Educational Advocate.

⁴⁴ Testimony of Parent's Educational Advocate; R-9-3.

⁴⁵ Testimony of Parent's Educational Advocate R-9-3.

⁴⁶ Testimony of Parent's Educational Advocate.

⁴⁷ Testimony of Parent's Educational Advocate; testimony of DCPS Resolution Specialist.

Hearing Officer Determination

District Middle School

25. DCPS selected District Middle School as the Student's location of services for the 2014-2015 school, indicating that District Middle School could implement the Student's IEP.⁴⁸

26. District Middle School did not have special education program during the 2013-2014 school year, but will have one during 2014-2015 school year.⁴⁹

27. There will be two self-contained, non-categorical special education classrooms at District Middle School in 2014-2015.⁵⁰ "Non-categorical" means that students of any/various disability classifications will be placed in the same classroom.⁵¹ Each class will have up to 12 students, including students with the disability classification of Specific Learning Disabled. A special education teacher will be assigned to each of the two classrooms.⁵² The testimony at the DPH did not specify what, if any, services the prospective special education classes at District Middle School would offer to a student like Student, whose disability classification is OHI, due to ADHD.

Non-Public School

28. The Student has been accepted to Non-Public School.⁵³

29. Non-Public School holds an Office of the State Superintendent of Education in the District of Columbia ("OSSE") certificate of approval, and its costs have been approved by OSSE. All of Non-Public School's teachers are special education certified (some of the teachers who teach "specials" are provisionally special education certified).⁵⁴

30. Non-Public School is geared toward students with severe educational deficits and attention issues. The students in Non-Public School do not generally act out with aggressive behaviors. The classes are small, with approximately 6-8 students per class.⁵⁵

31. Non-Public School works with ADHD students with a disability classification of OHI, and they develop specific recommendations for each student to help address each student's needs and deficits.⁵⁶

32. Non-Public School teaches its students the core academic subjects in a manner and in an environment tailored to the students' areas of disability. Non-Public School also offers physical education, "specials," and group therapy in a manner and in an environment tailored to the students' areas of disability.⁵⁷

⁴⁸ R-11-2.

⁴⁹ Testimony of DCPS Resolution Specialist.

⁵⁰ Testimony of DCPS Resolution Specialist.

⁵¹ Testimony of DCPS School Psychologist.

⁵² Testimony DCPS Resolution Specialist.

⁵³ Testimony of Non-Public Admissions Director; P-19-1.

⁵⁴ Testimony of Non-Public Admissions Director.

⁵⁵ Testimony of Non-Public Admissions Director.

⁵⁶ Testimony of Non-Public Admissions Director.

⁵⁷ Testimony of Non-Public Admissions Director.

33. The Student would need transportation services in order to attend Non-Public School.⁵⁸

CONCLUSIONS OF LAW

“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*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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).

I. Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to provide the Student with an IEP reasonably calculated to provide the Student with an educational benefit

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). When a Petitioner challenges an IEP as inappropriate, the hearing officer must consider the allegation in light of a two-part inquiry. First, the hearing officer must consider whether DCPS complied with IDEA’s procedural requirements in crafting the IEP. No procedural violations are alleged with respect to the IEP in question, dated April 28, 2014 IEP (procedural violations are alleged with respect to the determination of the Student’s placement, as discussed in Section IV below). The second part of the inquiry is whether the IEP is “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Chambers v. Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009)). The IEP need not guarantee benefit; rather, the IEP need only be reasonably calculated to allow the student to derive educational benefit. *Smith v. District of Columbia*, 63 IDELR 77 (D.D.C. 2014). Academic progress is a significant factor in determining whether an IEP is reasonably calculated to provide a student with educational benefit. *See Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C.2006); *see also Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 81 (D.D.C.2004).

The Student’s April 28, 2014 IEP, prescribing 25 hours of specialized instruction per week inside the general education setting, with 90 minutes per month of behavioral support and

⁵⁸ Testimony of Non-Public Admissions Director.

Hearing Officer Determination

one hour per day of reading support outside the general education setting is not reasonably calculated to enable the Student to receive meaningful educational benefit, in light of the Student's severe academic deficits and propensity toward distractibility due to his ADHD. The March 2014 IEE reveals that the Student requires intense special education services in all academic areas to overcome the gaps in his knowledge. The August 2013 Confidential Psychological Educational Evaluation indicated that the Student needs a small classroom setting that allows for individualized attention and instruction and that is structured to minimize stimulus overload. Indeed, even with his support from his special education teacher in the general education classroom, and even with the creative interventions his general education teacher employed in an effort to help the Student access the curriculum (such as enlisting the City Year Worker to offer the Student extra supports) the Student has not been sufficiently accessing the curriculum to make meaningful progress in the general education setting.

The Student, a rising sixth grader who would have been a rising seventh grader had he not been retained in second grade, performed at the first and second grade level academically in 2013-2014, just as he had the previous school year. An IEP reflecting 25 hours of specialized instruction (or even 27.5 hours as the May 21, 2014 MDT members agreed the IEP should be revised to reflect) is not reasonably calculated to enable this Student to receive meaningful educational benefit if those hours are not provided in a small classroom setting equipped to work with students with attention deficits and severe academic deficits, even with the additional one hour per day of reading support and 90 minutes per month of behavioral support. The April 28, 2014 IEP calls for the Student to receive 25 hours of specialized instruction inside the general education setting. Increasing the number of hours of specialized instruction the Student was receiving per week from 15 to 25 did not bring the April 28, 2014 IEP to the level of an appropriate IEP, because the hours were not proposed to be offered in the type of environment and with the level of intense, specialized remediation the Student, who does not have a severe intellectual disability rendering him unable to learn, will need in order to begin to make academic progress.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the Student an IEP reasonably calculated to provide the Student an educational benefit.

II. Whether DCPS denied the student a FAPE by failing to provide the Student with an appropriate educational placement

“Courts have explained that a child’s educational placement ‘falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP.’” *Johnson v. District of Columbia*, 839 F.Supp.2d 173, 58 IDELR 189 (D.D.C. 2012), citing *Bd. Of Educ. Of Cmty High Sch. Dist. No.*, 218, *Cook Cnty., III v. III State Bd of Educ.*, 103 F.3d 545, 548 (7th Cir. 1996). The “basic floor of opportunity” under IDEA, according to the Supreme Court, 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. IDEA does not necessitate that the services provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) However, Congress, “did not intend that a school system

Hearing Officer Determination

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).

The Student’s April 28, 2014 IEP does not meet the *Rowley* “basic floor of opportunity” standard. The Student had been making no (or at most “trivial”) academic advancement under the previous IEP; yet, the April 28, 2014 IEP offered an increased number of hours of the same type of services. From the April 28, 2014 through the end of the 2013-2014 school year, the Student’s location of services remained District Elementary School, where the Student remained in the general education setting. This location of services failed to reflect the recommendation from the August 2, 2013, a Confidential Psychological and Educational Evaluation which recommended that the Student “be placed in a small class size to allow for individualized attention and instruction,” and that “a small classroom environment that is physically structured to minimize stimulus overload could be particularly helpful.”

The location of services selected for the Student for 2014-2014 is also not reasonably calculated to help him gain any meaningful academic benefit because, while the proposed classroom at District Middle School would be smaller, there would be a mixture of students from varying disability classifications in the classroom, including specific learning disabled students. Some of the students in the proposed classroom at District Middle School could have behavioral problems that would add to the distractibility of the classroom environment, which could impede the Student’s ability to access his education and may cause the Student’s own behavior to regress. While a special education teacher would be assigned to the student’s non-categorical classroom at District Middle School, it is not clear that the Student would receive intensive remediation in all academic areas as recommended in the IEE.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the Student an appropriate educational placement.

III. Whether DCPS denied the student a FAPE by failing to implement the Student’s April 28, 2014 IEP

The Student’s April 28, 2014 IEP calls for him to receive 25 hours per week of specialized instruction in the general education setting. The testimony at the DPH was that the special education teacher worked with the Student in the general education classroom from approximately 9:00-noon each school day, which is approximately 15 hours per week and falls short of the 25 hours per week the IEP calls for by approximately 10 hours per week. Additionally, the April 28, 2014 IEP calls for the Student to receive 1 hour per day of reading support from the reading specialist. The testimony at the DPH was that the Student was pulled out of the general education classroom to work with the reading specialist for approximately 30 minutes each day, which falls short of the 5 hours per week the IEP calls for by 2.5 hours per week.

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

Hearing Officer Determination

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. *See Department of Education, State of Hawaii v. R.F. by Pauline F.*, 57 IDELR 197 (2011).

Particularly in light of the Student's extremely low levels of performance and lack of academic progress, an approximately 40% discrepancy between the number of hours per week of specialized instruction the Student should have received and did receive inside the general education setting, and the approximately 50% discrepancy between the number of hours per week of reading support the Student should have received and did receive outside the general education setting, represents a material failure to implement the Student's IEP.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to implement the Student's April 28, 2014 IEP.

IV. Whether DCPS denied the student a FAPE by failing to follow proper procedures in determining the Student's educational placement, LRE and location of services

IDEA mandates that when "determining the educational placement of a child with a disability. . . each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. §300.116-116(a)(1); *see also Eley v. District of Columbia*, 114 24965 (D.D.C. 2014), *citing Cook County, Illinois v. Illinois State Board of Education*, 103 F.3d 545, 549 (7th Cir. 1996) (noting in a case in which IDEA's "stay put" provision was at issue that "'educational placement' in the IDEA does mean 'something more than the actual school attended by the child and something less than the child's ultimate educational goals,' and can include both the physical location of educational services and the services required by the Student's IEP.") In this instance, not only did DCPS select a new location of services for the Student for the 2014-2015 school year, but it selected a different type of classroom setting for him than he had in 2013-2014. This "placement decision" necessitated Parent's involvement, per 34 C.F.R. §300.116-116(a)(1). While the Parent agreed to have the LRE Committee make a placement recommendation, no evidence was presented to demonstrate that the Parent abdicated her role in the placement decision process.

A hearing officer's determination of whether a child received a FAPE, however, 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 ("Prong 1"); (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 ("Prong 2"); or (iii) caused a deprivation of educational benefit ("Prong 3"). *See* 34 C.F.R. 300.513(a). In this case, the Parent and DCPS were not in agreement about the type of placement that would be appropriate for the child. These differing perspectives were crystallized at the April 28, 2014 IEP meeting and the May 21, 2014 MDT meeting. The location of services/placement decision DCPS ultimately made for the Student reflected DCPS' view that the Student could access his education through specialized education in the general education setting, or in a self-contained, non-categorical classroom in a general education school.

Hearing Officer Determination

Having been unsuccessful in persuading DCPS at either the April or May 2014 meetings of her position that a separate special education day school would be the appropriate placement for the Student, there is no basis for concluding that the Parent would have been successful in persuading the LRE Committee of this perspective, had she been invited to participate with it. Therefore, while the IHO concludes that the placement selected for the Student was not appropriate, it was not the lack of opportunity for the Parent to meet with the LRE Committee that resulted in a denial of FAPE to the Student, but rather it was DCPS' view that — despite the Student's lack of academic progress and the recommendations of the August 2013 Confidential Psychological and the March 2014 IEE — the Student did not require a separate, special education day school to access his education. With respect to the test set out above for finding a denial of FAPE on procedural grounds, the Petitioner meets Prong 2, but not Prongs 1 or 3. The Parent had made her differing perspective on placement clear at the April 28, 2014 IEP and May 21, 2014 MDT meetings; therefore, while she should have continued to be included in the placement decision-making process pursuant to 34 C.F.R. §300.116-116(a)(1), there was no nexus between her continued lack of opportunity to be involved in the process and the denial of FAPE to the Student, or the deprivation of educational benefit to the Student.

Petitioner has not met her burden of proving that DCPS denied the Student a FAPE by failing to follow proper procedures in determining the Student's educational placement, LRE and location of services.

Request for Placement at Non-Public School

As discussed above, the Student's April 28, 2014 IEP was not reasonably calculated to provide Student educational benefit. An order for DCPS to fund a placement at Non-Public School is part of the relief Petitioner seeks. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child's specific needs. *Id.* 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. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

a. Nature and Severity of Student's Disability

The Student's disability is severe. He has ADHD and also some cognitive impairments.⁵⁹ He struggles to learn even in a perfect learning environment.⁶⁰ He learns at a much slower pace than his peers and needs intensive educational supports.⁶¹ High noise levels and distractions can

⁵⁹ Testimony of DCPS School Psychologist.

⁶⁰ Testimony of DCPS School Psychologist.

⁶¹ Testimony of DCPS School Psychologist.

Hearing Officer Determination

be disruptive to him.⁶² The Student should have counseling to help manage his attention and mood.⁶³ The Student performed on a first and second grade level in fourth grade, and continued to perform on a first and second grade level in fifth grade during the 2013-2014 school year,⁶⁴ despite the Student having been retained in the second grade. (Absent the retention, the Student would be a rising seventh grader rather than a rising sixth grader).⁶⁵

b. Student's Specialized Educational Needs

The Student needs to be in a small class that allows for individualized attention and instruction.⁶⁶ Specifically, the Student needs a small classroom environment that is physically structured to minimize stimulus overload.⁶⁷ The Student needs to receive intensive special education services in all academic areas. The Student also needs to participate in an extracurricular activity (for example sports) that is fun and where he can excel, in order to facilitate his positive self-esteem.⁶⁸ The Student needs a great deal of prompting, regular assistance with sounding out words, and support with remaining on task, due to his ADHD.⁶⁹

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

Non-Public School teaches its students the core academic subjects in a manner and in an environment tailored to the students' areas of disability. Non-Public School also offers physical education, "specials," and group therapy in a manner and in an environment tailored to the students' areas of disability.⁷⁰ Non-Public School works with ADHD students with a disability classification of OHI, and they develop specific recommendations for each student to help address each student's needs and deficits. The classes are small, with approximately 6-8 students per class.⁷¹

d. Cost of Placement at Private School

Non-Public School holds an Office of the State Superintendent of Education in the District of Columbia ("OSSE") certificate of approval, and its costs have been approved by OSSE.

e. Extent to Which Private School Represents Least Restrictive Environment

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 CFR § 300.550, D.C. Regs. tit. 5, § 3011 (2006). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Id.*, *citing* 34 C.F.R. § 300.552(d). The Student has not exhibited recent conflict or behavior problems interacting with his non-disabled peers. However,

⁶² Testimony of DCPS School Psychologist.

⁶³ Testimony of DCPS School Psychologist.

⁶⁴ Testimony of General Education Teacher.

⁶⁵ Testimony of Parent's Educational Advocate; P-10-4.

⁶⁶ P-10-19.

⁶⁷ P-10-19.

⁶⁸ P-9-7.

⁶⁹ Testimony of IEE Evaluator.

⁷⁰ Testimony of Non-Public Admissions Director.

⁷¹ Testimony of Non-Public Admissions Director.

Hearing Officer Determination

the Student is easily distracted due to his ADHD and needs to be in a small class where he will be regularly prompted to stay on track. Due to his severe educational deficits, the Student needs intensive academic remediation. To the extent that “specials” (elective courses such as art and music) involve reading, the Student also struggles with those classes in general education setting. The Student, therefore, requires a more restrictive environment than a general education setting.

Based on the *Branham* factors discussed above, the program at Non-Public School is reasonably calculated to address Student’s attention deficit disorder and severe academic deficits. Accordingly, Non-Public School is an appropriate placement for Student, and DCPS will be ordered to fund Student’s placement at Non-Public School.

Compensatory Education

Petitioner’s DPC requested compensatory education in the form of one-on-one tutoring as one form of relief. The standards for an award of compensatory education, set out in *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005), are also discussed in *Gill v. District of Columbia*, 770 F.Supp.2d 112, (D.D.C.2011), *aff’d.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C. Cir. Aug. 16, 2011). In the June 2, 2014 PHO, Petitioner was instructed to email a proposed compensatory education plan to the IHO and opposing counsel by July 7, 2014 or the request would be waived. Petitioner did not submit a proposed compensatory education plan by the due date, and it is not clear from the record what progress Student might have made after April 28, 2014 under an appropriate IEP or with a an appropriate placement.

However, the record does support an award of compensatory education for DCPS’ failure to fully implement the Student’s IEP by providing all the hours of specialized instruction the IEP called for. “The education of a special needs child . . . cannot be forfeited by lawyering when the facts and needs of the child are clearly revealed in the record and findings of the Hearing Officer.” *Gill v. District of Columbia*, 2011 55 IDELR 191 (D.C. Cir. Aug. 16, 2011).

Therefore, the IHO will award compensatory education in the form of one-on-one tutoring to occur outside the school day. There were approximately 8 weeks between the finalization of the April 28, 2014 IEP and the last day of school. The Student was deprived of approximately 100 hours⁷² of specialized instruction and reading support during that time, and the IHO will award 100 hours of one-on-one tutoring to occur outside the school day.

Summary

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the Student an IEP reasonably calculated to provide the Student an educational benefit, as the Student’s April 28, 2014 IEP – prescribing 25 hours of specialized instruction per week

⁷² 100 hours of compensatory education is based on the Student having been deprived of 10 hours per week of specialized instruction inside the general education setting and 2.5 hours of reading support outside the general setting, for a total of 12.5 hours per week over 8 weeks. While the team ultimately reached the consensus (and the hearing officer agrees) that the Student’s IEP should be amended to reflect 27.5 hours per week of specialized instruction, this award of compensatory education is based on the IEP as finalized on April 28, 2014.

Hearing Officer Determination

inside the general education setting, with 90 minutes per month of behavioral support and one hour per day of reading support outside the general education setting – is not reasonably calculated to enable the Student to receive meaningful educational benefit, in light of the Student’s severe academic deficits and propensity toward distractibility due to his ADHD.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the Student an appropriate educational placement. Neither the Student’s April 28, 2014 IEP, the Student’s location of services during the 2013-2014 school year, nor the location of services DCPS selected for the Student for the 2014-2015 school year meet the *Rowley* “basic floor of opportunity” standard or is reasonably calculated to allow the Student to derive meaningful educational benefit.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to implement the Student’s April 28, 2014 IEP. There was an approximately 40% discrepancy between the number of hours per week of specialized instruction the Student received and should have received inside the general education setting, and an approximately 50% discrepancy between the number of hours per week of reading support the Student received and should have received outside the general education setting,

Petitioner did not meet her burden of proving that DCPS has denied the Student a FAPE by failing to follow proper procedures in determining the Student’s educational placement, LRE and location of services. While the Parent should have been included in the full placement decision process, the Parent made clear her position on the appropriate placement during the parts of the placement decision making process in which she did participate (the April 2014 IEP meeting and May 2014 MDT meeting). DCPS’ decision to select a location of services for the Student other than what the Parent felt was appropriate was due to DCPS’ differing perspective on the type of placement that would be appropriate for the Student, rather than the Parent’s lack of opportunity to participate at every stage of the decision making process.

Order

Based on the Findings of Fact and Conclusion of Law above, it is hereby ORDERED that:

- A. Within 30 calendar days from the issuance of this decision, DCPS shall reconvene the Student’s MDT/IEP team to review and revise the student’s IEP to reflect his receipt of no less than 27.5 hours of specialized instruction outside the general education setting, in a full time special education, separate day school;
- B. DCPS shall place and fund the Student at Non-Public School or another appropriate special education day program for the 2014-2015 school year;
- C. DCPS shall provide the Student with transportation services to and from the special education day program at which the Student is placed for the 2014-2015 school year;

Hearing Officer Determination

- D. As compensatory education for the denial of FAPE, DCPS shall fund up to 100 hours of one-on-one tutoring in reading and other academic subjects agreed to by the Parent and other members of the MDT/IEP team. The tutoring shall occur outside the school day at a reasonable location to be agreed upon by the Parent. Any tutoring hours not used by August 28, 2015 shall be forfeited;
- E. All written communications from DCPS to Petitioner concerning the matters referenced above, including but not limited to the invitation to the MDT/IEP team meeting described in Paragraph A of this Order, shall include copies to Petitioner's counsel of record in this action, via facsimile or electronic mail.

Petitioner's other requests for relief are **DENIED**.

IT IS SO ORDERED

Date: July 21, 2014

/s/ NaKeisha Sylver Blount
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).