

**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  
June 2, 2014

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: June 2, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Student Hearing Office,  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came for an expedited hearing upon the Administrative Due Process Complaint Notice filed by the Petitioner (Petitioner or FATHER), 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 and Title 5-B, Chapter 5-B25 of the District of Columbia Municipal Regulations (DCMR). In his expedited Due Process Complaint, Petitioner appeals three Manifestation Determination Review (MDR) determinations that Student's code of conduct violations were not manifestations of his IDEA disability.

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

Petitioner also contends that in a February 20, 2014 Individualized Education Program (IEP), DCPS failed to provide Student an appropriate placement.

The student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on April 11, 2014, named DCPS as respondent. On May 8, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

Pursuant to the IDEA, the expedited due process hearing was convened before this Impartial Hearing Officer on May 20, 2014 at the Student Hearing Office in Washington, D.C. This Hearing Officer Determination must be issued within 10 school days after the hearing. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

Father testified, and called as witnesses NONPUBLIC SCHOOL ADMINISTRATOR and MARYLAND SCHOOL PSYCHOLOGIST. DCPS called DCPS SCHOOL PSYCHOLOGIST as its only witness. Petitioner's Exhibits P-1 through P-29 and DCPS' Exhibits R-1 through R-9 were admitted into evidence without objection. Counsel for the respective parties made opening statements and closing argument. Neither party requested leave to file a post hearing memorandum.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

### **ISSUES AND RELIEF SOUGHT**

The issues to be determined in this case, as identified in the Prehearing Order, are:

- Whether DCPS inappropriately determined that Student’s code of conduct violations were not manifestations of his disability at MDR meetings on or about December 3, 2013, February 20, 2014 and March 19, 2014; and
- Whether at an MDR meeting on or about February 20, 2014, DCPS failed to develop an appropriate IEP or identify an appropriate placement for the student in that Student needed a full-time therapeutic setting for students with an Emotional Disability and ADHD.

For relief, Petitioner seeks an order for DCPS to convene Student’s IEP team to revise his IEP, and for DCPS to fund Student’s placement, with transportation, at Nonpublic School. In addition, Petitioner seeks an award of compensatory education to compensate Student for alleged denials of a free appropriate public education (FAPE) since February 20, 2014.<sup>2</sup>

### **FINDINGS OF FACT**

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

#### A.

#### January 23, 2014 Hearing Officer Determination

On January 23, 2014 former Hearing Officer Kimm Massey issued a Hearing Officer Determination in Case No. 2013-0661 (the January 23, 2014 HOD), following a January 8, 2014 due process hearing concerning Student. Exhibit R-2. At the due process hearing in the present case, counsel for parties stipulated that I may adopt findings of fact, which I deem relevant, from the prior HOD. Accordingly, I adopt the following findings from the January 23, 2014 HOD:

A. During the summer of 2013, DCPS began Student’s initial evaluation for special education and related services.

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<sup>2</sup> In closing argument, Petitioner’s Counsel clarified that Petitioner seeks compensatory education for alleged denial of FAPE to Student following the February 20, 2014 MDR meeting.

B. Student's comprehensive psychological evaluation was conducted in September 2013. Cognitive testing revealed that Student's general intellectual ability, thinking ability, and cognitive efficiency are in the Average range, while his verbal ability is in the Low Average range. Academic achievement testing revealed that Student's reading and written language skills are in the Low range at a third grade level, while his math skills are in the Low Average at the fourth grade level. Student received multiple At-Risk scores on the social emotional functioning scales utilized, and ultimately, he was diagnosed with Disruptive Behavior Disorder Not Otherwise Specified and Attention-Deficit Hyperactivity Disorder, Combined Type. The September 2013 psychological evaluation recommended a Functional Behavioral Assessment (FBA) and a Behavior Intervention Plan (BIP) for Student to uncover the antecedents of Student's off-task behaviors in class and begin to address them.

C. For school year 2013-2014, Father enrolled Student at City Middle School 3. Student began having behavior problems during the second week of school, which is when the principal called Father for the first time. Father began having meetings with the principal and Student about Student's behavior, and at the first meeting Parent told the principal about Student's background and Father's request for testing of Student.

D. Student was suspended at least three times at the start of 2013-2014 school year, as he had three reentry meetings between October and December of 2013.

E. On November 7, 2013, DCPS conducted an initial special education eligibility meeting for Student. The team noted that observations of Student in all classes revealed that he was off-task even in highly structured environments, and that Student had failing grades despite interventions such as counseling; however, the team also noted that Student is behind academically and determined that Student's academics

are impacting his behavior. Although Student's advocate pointed out Student's many suspensions and problematic behaviors, the team determined there was not enough information to support an Emotional Disturbance (ED) disability classification. Ultimately, the team determined that Student qualified for special education and related services with a disability of OHI for ADHD.

F. On November 18, 2013, Student was suspended from school for being disruptive and using obscene, seriously offensive, or abusive language. On November 8, 2013, DCPS convened a Manifestation Determination Review (MDR) meeting for Student in connection with his suspension. The team determined that Student's behavior was not a manifestation of his disability. In making this determination, the team noted that Student has a long pattern of misbehavior that escalates when Student is redirected. However, Parent stated that Student is not disrespectful at home and his behaviors are not as severe. The team considered Petitioner's disability of OHI and concluded that the behavior at issue was not a manifestation of his disability because his problem behaviors were not consistent across settings and they were a result of Student's choice. Petitioner's advocate disagreed with the determination, asserting that Student should be considered emotionally disturbed instead of OHI for ADHD only. However, the DCPS team members were of the opinion that Student understands right from wrong, had time to make a decision as to whether to engage in the behavior, and had control over his behavior.

G. On November 26, 2013, Student's IEP team met to develop Student's initial IEP. The IEP lists OHI (ADD or ADHD) as Student's primary disability. The IEP requires Student to receive 3 hours per week of specialized instruction in general education, 2 hours per week of specialized instruction outside general education, and

120 minutes per month of behavioral support services. DCPS also indicated that Student would receive an additional 30 minutes per week of behavioral support that would not be listed on the IEP. Petitioner's advocate disagreed with the services to be provided, asserting that Student needed a full-time therapeutic placement, but DCPS did not want to pull Student totally out of general education and put too many services in place right at the outset, thereby stigmatizing him. DCPS team members also indicated the IEP could be revisited later if necessary once it had been given a chance to work.

H. Student was suspended from December 2 through 16, 2013 for misbehavior that he engaged in on November 27, 2013.

I. On or about December 5, 2013, DCPS prepared an FBA for Student to target the following behaviors of concern, which the FBA indicates occur in all settings continuously: defiance, immature talking, moodiness, noncompliance, verbal aggression, depression, off task, talking out, disorganization, hyperactivity, making excuses, and poor motivation.

J. On or about December 20, 2013, DCPS developed a BIP designed to help Student, *inter alia*, perform on task consistently, exhibit compliant behavior in the school setting, complete all classroom assignments, and refrain from engaging in hostile, confrontational verbal or physical behaviors.

In her conclusions of law, Hearing Officer Massey found, *inter alia*, that Student was entitled to an award of compensatory education because DCPS had defaulted on its child-find obligations until well into the 2013-2014 school year, that Petitioner had not established that Student's November 18, 2013 code of conduct violations were a

manifestation of his disability and that Petitioner had not met his burden of proof to prove that DCPS' initial November 26, 2013 IEP was inappropriate. Exhibit R-2.

B.

Additional Findings of Fact from the May 20, 2014 Due Process Hearing

Based upon the evidence adduced at the May 20, 2014 due process hearing in the instant case, I make the following additional Findings of Fact:

1. Student, an AGE youth, resides with Father in the District of Columbia.

Testimony of Father.

2. Student has attended City Middle School 3 since the beginning of the current, 2013-2014, school year. Last school year, he attended City Middle School 1 and City Middle School 2. Student exhibited behavior problems at both City Middle School 1 and City Middle School 2 and he was also "kicked out" of the local recreation center because of behavior problems. Testimony of Father.

3. Student is currently in the GRADE. On his April 8, 2014, end of third term, report card, Student received F's in five courses and "No Marks" in three courses. He was reported to be reading at a 1<sup>st</sup> Grade reading level, based upon a February 18, 2014 Scholastic Reading Inventory (SRI) test. Exhibit P-25.

4. An MDR team meeting was convened for Student on December 3, 2013, subsequent to a November 27, 2013 incident during which Student allegedly broke an umbrella, hit another student with it, and kicked and spit on the other student. Exhibits P-20, R-6, P-10. The MDR team determined that Student's code of conduct violation was not a manifestation of his OHI-ADHD disability, because in the course of the incident, Student had walked away and then returned and engaged in the conduct. The MDR team concluded that Student had time to make a decision and that the conduct did

not reflect impulsivity associated with an ADHD disability. The MDT team did not consider whether Student's conduct was a manifestation of his disruptive behavior disorder, because that is not Student's IEP disability classification. Testimony of DCPS School Psychologist. Student was suspended, off-site, for a medium term. Exhibit P-20.

5. An MDR team meeting was convened for Student on February 10, 2014 for an incident of "play-fighting" with other students. The MDR team determined that this code of conduct violation was not a manifestation of Student's disability. Exhibit R-7. This MDR determination is not appealed in the instant case.

6. An MDR team meeting was convened for Student on February 20, 2014, subsequent to several alleged code of conduct violation incidents, including Student's refusing to work in class, kicking chairs, and hitting a teacher with a snowball with rocks in it. The MDR team determined that Student's behavior was not a manifestation of his disability because Student knows right from wrong and was making deliberate choices. Student was suspended for three days. Exhibit P-11.

7. An MDR team meeting was convened for Student on March 19, 2014, subsequent to alleged code of conduct violations on March 18, 2014. On that day, he was alleged to have refused to go to a teacher, to have thrown a pen at a teacher, and to have pushed up against a teacher. The following day, Student was alleged to have put a bag over the head of another student. Exhibit P-11. At the MDR meeting, it was determined that Student's behaviors were not a manifestation of his IDEA disability. Student was recommended for a long term suspension. Exhibit P-22. On March 26, 2014, the City Middle School 3 principal wrote Father that the proposed long-term suspension had been denied and Student would be allowed to return to school on March

27, 2014. Exhibit P-21. The evidence at the due process evidence did not clarify why the proposed long-term suspension was denied.

8. On March 26, 2014, Student was sent home for the rest of the school year due to the school's being unable to contain him in the In-School Suspension room. Petitioner filed an appeal pursuant to DCMR, tit. 5-B, § 2506 (Student Discipline Hearings). The discipline hearing officer ordered that Student return to school on April 10, 2014. Exhibit P-28.

9. At the February 10, 2014 MDR meeting, there was discussion that Student's initial IEP had been in place for a couple of months and needed to be revised. Student's teacher stated that Student performed better in a small group setting. An IEP team meeting was convened on February 20, 2014. At the meeting, the IEP team increased Student's Specialized Instruction services to 15 hours per week Outside General Education. Father agreed with this revision. Testimony of DCPS School Psychologist, Exhibits P-9, P-11.

10. Prior to the February 10, 2014 MDR meeting, LEA/SEC at City Middle School 3 completed a Least Restrictive Environment (LRE) referral for Student to DCPS' LRE Review Team. Exhibits R-7, P-24. LEA/SEC reported in the referral that "[Student's] disability and behavior are severely impacting his ability to access the general education curriculum. He has been given specialized instruction in a resource setting. During his time in a structured resource setting, [Student] does not exhibit the same problem behaviors and does not face the same distractions as he does in the general education setting. Even when the special education teacher pushes into his general education classroom, [Student's] distractions, disruptions, and defiant behaviors prevent him from making progress in the general education classes. The IEP

team, including the parent, advocate, and attorney, feel a more restrictive environment is needed for [Student].” Exhibit P-24.

11. A DCPS observer (the LRE Review Observer) conducted an LRE observation of Student at City Middle School 3 on February 11, 2014. In her subsequent, undated, written report, the LRE Review Observer reported, *inter alia*, that Student was observed as a student with limited behavioral self-control, and who seldom, immediately cooperated with teacher requests. He appeared to need continuous support to complete assignments, and he was not observed appropriately requesting help when needed. He was seen as easily distracted, and if redirected, he would then reply loudly that he needed help with his work. His intermittent, loud, and sometimes aggressive sounding statements to his peers were observed, occurring primarily after a peer said something to him that he didn’t like, or not getting handouts from the teacher. LRE Review Observer recommended, *inter alia*, that Student remain in his current LRE setting with additional hours outside of the general education setting. Exhibit P-24.

12. On February 11, 2014, LEA/SEC informed Educational Advocate by email that she was just informed that the school was unable to move Student to a self-contained classroom before it increased the resource hours on Student’s IEP. LEA/SEC advised Educational Advocate that because the DCPS LRE Review Team was “pushing back”, the IEP team needed to increase Student’s hours of “pull-out” specialized instruction to 2-3 hours per day. At a March 19, 2013 MDR meeting, the City Middle School 3 Assistant Principal acknowledged that the school team all agreed that Student needed a full-time setting, but that the school was receiving push-back on the self-contained environment issue from DCPS. Finally, in April 2014, after the recommendations of the DCPS LRE Review Observer had been implemented and

Student had not made progress, the IEP team agreed to remove Student entirely from the General Education setting. Exhibit P-29.

13. On March 19, 2014, LEA/SEC emailed LEA Review Observer to inform her again that the IEP team and the parent were all in agreement that Student needed a more restrictive setting. By an email of March 20, 2014, LEA/SEC requested, through Petitioner's EDUCATIONAL ADVOCATE, that the parent agree to amend Student's IEP to provide for full-time Specialized Instruction outside of the General Education setting. By email of March 27, 2014, Educational Advocate advised that the parent agreed to amending Student's IEP without a meeting. On April 4, 2014, Education Advocate faxed to LEA/SEC the IEP amendment letter signed by the parent. Exhibit P-29. On April 7, 2014, Student's IEP was amended, without a meeting, to increase Student's Specialized Instruction services to full-time (26 hours per week) outside General Education. The revised IEP also provides that Student will receive 120 minutes per month of Behavioral Support services. Exhibit R-4.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

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

## Analysis

a. Did DCPS determine incorrectly that Student's code of conduct violations were not manifestations of his disability at MDR meetings on or about December 3, 2013, February 20, 2014 and March 19, 2014?

The IDEA protects disabled children from being removed from the classroom because of their disability. 34 C.F.R. § 300.530(e); 34 C.F.R. § 300.536(a). If a child suffers (1) a change of placement for (2) a disciplinary reason, then the school must conduct a manifestation determination to determine if the behavior resulted from the child's disability. *Id.* In *School Board of the City of Norfolk v. Brown*, 769 F.Supp.2d 928 (E.D.Va. 2010), the court described the IDEA's provisions regarding manifestation determination reviews:

Pursuant to the IDEA, school personnel may remove a disabled student who has violated a code of conduct from his current educational setting under limited circumstances. Where school personnel intend to place the disabled child in an alternative educational setting for a period of more than ten school days, the school must first determine that the student's behavior was not a manifestation of his disability. *See* 20 U.S.C. § 1415(k)(1)(C). In conducting this inquiry, within ten days of any decision to change the student's placement, the local educational agency, the parent, and relevant members of the student['s] IEP team (collectively, the "MDR team") shall "review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP." § 1415(k)(1)(E)(i). Where the MDR team answers either of the above inquiries in the affirmative, the student's conduct shall be determined to be a manifestation of his or her disability and the student shall be returned to the educational placement from which he or she was removed. §§ 1415(k)(1)(E)(i), 1415(k)(1)(F)(iii).

*Id.* at 945–46 (emphasis supplied). The criteria that the LEA, parent, and relevant members of the IEP Team must consider to determine whether a child's conduct is a manifestation of his disability is "broad and flexible," and would include such factors as

“the inter-related and individual challenges associated with many disabilities.” In amending the MDR provisions of the IDEA in 2004, Congress intended to ensure that the manifestation determination is done carefully and thoroughly, with consideration of any rare or extraordinary circumstances presented, and that the manifestation determination will analyze the child’s behavior as demonstrated “across settings and across time.” See Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46720 (August 14, 2006).

Here the parent appeals the City Middle School 3 MDR team’s determinations on December 3, 2013, February 20, 2014 and March 19, 2014 that Student’s code of conduct violations were neither caused by, nor had a direct and substantial relationship to, his disability. The MDR teams’ decisions, as explained by DCPS School Psychologist, were evidently based upon a rather narrow understanding of Student’s disability. DCPS School Psychologist, who participated in all three meetings, testified that the violations would only be considered a manifestation of Student’s disability if the Student was truly “not in control of his behavior.” In her opinion, Student was in control of his behaviors. School Psychologist also testified that the MDR teams only considered whether Student’s conduct was a manifestation of his ADHD disability. The MDR teams did not consider whether Student’s conduct had a relationship to his Disruptive Behavior Disorder, because that was not how Student was classified on his IEP.

I find that, by focusing so narrowly on Student’s OHI-ADHD primary disability classification, the MDR teams failed to give the “broad and flexible” consideration to Student’s disability and the code of conduct violations, which the IDEA requires. Student’s disability is clearly not limited to his ADHD impairment. In the October 2, 2013 IEE Comprehensive Psychological Evaluation report, Student was reported to

exhibit oppositional, aggressive and conduct disordered behaviors, which impact his academics and interpersonal functioning. LEA/SEC reported in her LRE referral that Student's distractions, disruptions, and defiant behaviors prevent him from making progress in the general education classes. The DCPS LRE Review Observer observed that Student had limited behavioral self-control, was easily distracted, and made loud, and sometimes aggressive sounding statements to his peers. By limiting it's manifestation determination consideration to Student's OHI-ADHD disability, the MDR teams failed to consider the impact of Student's other documented behavioral impairments on his conduct.

Petitioner's expert witness, Maryland School Psychologist, opined that Student's conduct violations reviewed at the MDR meetings – verbal and physical aggression, lying, cursing, defiance and insubordination – were consistent with his diagnosed disruptive behavior disorder. Even DCPS School Psychologist testified that she believed that Student's conduct in the disciplinary incidents were related to his social-emotional concerns. I find that, by focusing exclusively on Student's primary disability classification, OHI-ADHD, when Student also has a well-documented behavior disorder, the MDR teams failed to give the required broad and flexible consideration to whether Student's code of conduct violations were caused by or had a direct and substantial relationship to his interrelated ADHD and behavior disorders.

- b. At the February 20, 2014 IEP meeting, did DCPS fail to develop an appropriate IEP or identify an appropriate placement for Student which met his need for a full-time therapeutic setting for students with an Emotional Disability and ADHD?

Student's initial DCPS IEP was developed on November 26, 2013. The IEP provided Student five hours per week of Specialized Instruction, including two hours

outside General Education and 120 minutes per month of Behavioral Support services. On February 20, 2014, Student's IEP was amended to increase his Specialized Instruction services to 15 hours per week, all outside General Education. The Petitioner contends that the revised February 20, 2014 IEP was inappropriate because Student should have been provided full-time special education services in a therapeutic setting. DCPS maintains that at the time Student's IEP was revised on February 20, 2014, the IEP was appropriate. I disagree.

“The question of whether a public school placement is appropriate rests on ‘(1) whether DCPS has complied with IDEA’s administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]’” *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C.2010), quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004). In this case, Petitioner has not raised a procedural issue with the development of the March 20, 2013 IEP. Therefore, I move directly to the second prong of the inquiry. The IDEA’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The minimum standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. The IDEA imposes no additional requirement that the services

so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Importantly for this case, the IDEA requires that placement decisions must be made by the student's IEP team, including the parents, which must be knowledgeable about the student's needs as well as about the school system's resources. *See* 34 C.F.R. § 300.321; *Melodee H. ex rel. Kelii H. v. Department of Educ., State of Hawaii*, 2008 WL 2051757, 10 (D.Haw.2008). In that regard, the Act requires that the Local Education Agency (LEA) ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services and that the continuum includes, *inter alia*, instruction in regular classes and instruction in special classes. *See* 34 CFR § 300.115. In this case, the evidence establishes that by the time of the February 20, 2014 IEP team meeting, the IEP team had concluded that Student could not make progress in the General Education setting and required an outside of General Education placement. Notwithstanding, the IEP team did not place Student in a full-time outside of General Education setting until the April 7, 2014 IEP revision.

Prior to February 11, 2014, the City Middle School 3 special education coordinator, LEA/SEC, notified DCPS' LRE Review Team that Student's IEP team had concluded that Student's disability and behavior were severely impacting his ability to access the general education curriculum and that even when provided "push-in" services, Student's distractions, disruptions and defiant behaviors were preventing him

from making progress in the general education classroom. The entire IEP team, including the parent and his representatives felt a more restrictive environment was needed. On February 11, 2014, in response to LEA/SEC's referral, an observer from the DCPS LRE Review Team, LRE Team Observer, conducted a classroom observation of Student. Based upon her two-hour observation, LRE Team Observer recommended that Student remain in his General Education setting, with additional hours of Specialized Instruction outside of General Education. The same day, LEA/SEC informed Educational Advocate by email that she was just informed that the school was unable to move Student to a self-contained classroom before it increased the resource hours on Student's IEP. LEA/SEC advised Educational Advocate that because the DCPS LRE Review Team was "pushing back", the IEP team needed to increase Student's hours of "pull-out" specialized instruction to 2-3 hours per day. When the IEP team convened on February 20, 2014, the team increased Student's Specialized Instruction hours to 15 hours per week outside of the General Education setting. At a March 19, 2013 MDR meeting, the City Middle School 3 Assistant Principal acknowledged that the school team all agreed that Student needed a full-time setting, but that the school was receiving push-back on the self-contained environment issue from DCPS. Finally, in April 2014, after the recommendations of the DCPS LRE Observer had been implemented and Student had not made progress, the IEP team agreed to remove Student entirely from the General Education setting.

As LRE Team Observer wrote in her classroom observation report, it was the responsibility of the IEP team (not the DCPS LRE Review Team) to make the final determination of the appropriate educational setting for Student. Here, several weeks before the February 20, 2014 meeting, the IEP team members determined that Student

required a full-time outside General Education placement. However, after receiving “push-back” from the DCPS LRE Review Team, the IEP team did not consider changing Student’s placement from General Education to a full-time special education setting. As such, the IEP team did not consider the full continuum of alternative placement options for Student as required by the IDEA, but limited its consideration to the General Education setting, with increased Specialized Instruction pull-out services.

In effect, prior to the February 20, 2014 IEP meeting, after receiving LRE Review Observer’s recommendation, the IEP team predetermined that Student’s educational placement would remain in the General Education setting, even though all members of the team felt that a more restrictive environment was needed. Predetermination of educational placement constitutes a procedural violation of the IDEA. *See, e.g., Schoenbach v. District of Columbia*, 2006 WL 1663426, 5 (D.D.C., 2006). Procedural violations of the IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). However, procedural violations that seriously infringe upon the parent’s opportunity to participate in the IEP formulation process do result in denial of FAPE. *See, e.g., A.I. ex rel. Iapalucci v. District of Columbia* 402 F.Supp.2d 152, 164 (D.D.C.2005); 20 USC Id. § 1415(f)(3)(E). Here, the IEP team’s failure, at the February 20, 2014 IEP meeting, to consider a full-time self-contained special education classroom for Student deprived Father of a meaningful opportunity to participate in the development of his son’s IEP. *Cf., e.g., Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir.2004) (Child was deprived of a FAPE where the school district did not come to the IEP meeting with an “open mind” and had predetermined the IEP as to the important component of ABA therapy). I find that, as a consequence, Student was denied a FAPE until his IEP

was revised again, on April 7, 2014, to meet Student's need for a full-time outside of General Education placement.

### Remedy

a.

#### Private School Placement

For relief in this case, Petitioner seeks DCPS funding for Student to attend Nonpublic School. If no suitable public school is available to fulfill the child's IEP needs, DCPS must pay the costs of sending the child to an appropriate private school; however, if there is an "appropriate" public school program available, *i.e.*, one "reasonably calculated to enable the child to receive educational benefits," DCPS need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). A private school placement is proper under the IDEA if the education provided the said school is reasonably calculated to enable the child to receive educational benefits. *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994).

Student has not visited, and has not been offered a final acceptance at, Nonpublic School, the private placement requested by Father. Whether Nonpublic School would be appropriate for Student is therefore a matter of speculation. Moreover, DCPS has offered, albeit belatedly, to provide Student the public school program which the IEP team, including the parent, considered appropriate, namely placement in a full-time outside of General Education setting in a regular public school. Petitioner has offered no evidence that this public school program is not reasonably calculated for

Student to receive educational benefits. Therefore, I conclude that Petitioner has not met his burden of proof to show that Student's placement at Nonpublic School would be proper in this case.

b.  
Compensatory Education

The IDEA gives Hearing Officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir.2005). The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10 -11 (D.D.C. July 2, 2013).

In this decision, I have found that Student was denied a FAPE by DCPS' delay in providing him a full-time outside of General Education placement until the April 7, 2014 IEP meeting, when the IEP team increased Student's Specialized Instruction services from 15 hours to 26 hours per week. For about six weeks after the February 20, 2014 IEP meeting, Student was not provided some 11 hours per week of additional Specialized Instruction services – which he should have received if his IEP had been appropriately

revised at the February 20, 2014 IEP meeting.

In the January 23, 2014 HOD, Student was awarded 100 hours of one-on-one independent tutoring as compensatory education. In her compensatory education plan in this case, Educational Advocate, who did not testify, recommends that City Middle School 3 provide the current independent tutor “an abbreviated curriculum/ tests/series of worksheets” that will allow Student to make up for missing work over the current school year with the goal of enabling Student to advance to the next grade for the 2014-2015 school year. Educational Advocate’s recommendation does not propose additional hours of tutoring for Student. However, after considering the denial of FAPE in this case, as well as Educational Advocate’s recommendations, I find that Student should continue to receive compensatory education tutoring over the DCPS summer vacation and that DCPS should ensure that Student’s tutor is supplied the worksheets and other materials that Student needs to be able to make up for services he did not receive since the February 20, 2014 IEP meeting. Therefore, I will order DCPS to provide Student, as compensatory education, up to ten hours per week of one-on-one tutoring over the DCPS 8-week summer vacation period. In order not to duplicate the tutoring services ordered in the January 23, 2014 HOD, the award in this case shall be reduced by any still available, unused tutoring services ordered in the prior HOD.

Educational Advocate also recommends that Student receive compensatory education for the days of school he missed due to disciplinary suspensions, which might not have occurred if the MDR teams had considered whether Student’s conduct violations were related to his behavior disorders. The hearing evidence does not establish whether Student would have still been suspended from school if the MDR teams had considered his behavior disorders, or the extent of any educational harm

which resulted from Student's out-of-school suspensions. Moreover, my remedial authority on disciplinary appeals is limited to returning a student to the placement from which he was removed. *See* 34 CFR § 532(b)(2)(i). In this case, Student has already returned to City Middle School 3. Therefore, I do not order additional relief for the failure of the DCPS MDR teams to consider Student's behavior disorders in determining whether Student's conduct violations were manifestations of his disability.

**ORDER**

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

1. DCPS is ordered to make available to Student, as compensatory education, 80 hours of independent one-on-one academic tutoring over the DCPS 2014 summer break, in such academic subjects and on a schedule as may be reasonably agreed by the Petitioner. The hours of tutoring services provided in this award shall be reduced by any still available hours of academic tutoring, ordered in the January 23, 2014 HOD, which are not used before the end of the 2013-2014 regular school year. DCPS shall ensure that Student's tutor is supplied the worksheets and other materials that Student needs to make up for Specialized Instruction services not provided in the February 20, 2014 IEP and to progress in the general education curriculum;
2. All other relief requested by Petitioner in this case is denied.

Date: June 2, 2014

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).