DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,[1]
on behalf of STUDENT,

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: December 30, 2012

Hearing Officer: Peter B. Vaden

OSSE
STUDENT HEARING OFFICE
2012 DEC 31 AM 8:45

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "Mother"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by failing to provide for full-time specialized instruction services, outside the general

[1] Personal identification information is provided in Appendix A.

education setting, in Student's October 9, 2012 Individualized Education Program ("IEP") and by failing to specify individual counseling services in the IEP.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 16, 2012, named DCPS as respondent. The case was assigned to the undersigned Hearing Officer on October 17, 2012. The parties met for a resolution session on November 8, 2012 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on November 16, 2012. On November 21, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on December 18, 2012 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner was represented by PETITIONER'S COUNSEL.[2] Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE and NON-PUBLIC SCHOOL PROGRAM DIRECTOR. DCPS called as witnesses ASSISTANT PRINCIPAL, SOCIAL WORKER, and SPECIAL EDUCATION TEACHER. Petitioner's Exhibits P-1 through P-18 and P-21 through P-26 were admitted into evidence without objection. DCPS' objections to Exhibits P-19 and P-20 were sustained. DCPS' Exhibits R-1 through R-12

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[2] Neither the Petitioner nor Student attended the hearing. On the morning of the hearing, Petitioner's Counsel informed the Hearing Officer that Petitioner had just advised him that she was unable to attend because she lacked transportation to the Student Hearing Office from southeast Washington, D.C. Finding that Petitioner lacked a compelling justification for not attending in person, I denied her request to "attend" by telephone and denied Petitioner's oral request for a continuance. I also denied Petitioner's motion for leave to withdraw the due process complaint without prejudice, which motion was opposed by DCPS. Over the objection of DCPS, I granted Petitioner's request for leave to testify by telephone.

were admitted without objection. Counsel for both parties made opening and closing statements. There was no request for post-hearing briefing.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE FOR FULL-TIME SPECIALIZED INSTRUCTION SERVICES, OUTSIDE THE GENERAL EDUCATION SETTING, IN STUDENT'S OCTOBER 9, 2012 IEP; AND

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE 1:1 COUNSELING AS A RELATED SERVICE IN HIS OCTOBER 9, 2012 IEP.

For relief, Petitioner seeks an order for DCPS to fund Student's prospective enrollment at a Non-Public School for the remainder of the 2012-2013 school year. Petitioner also seeks an award of compensatory education for alleged educational harm, resulting from DCPS' failure to provide FAPE to Student, since adoption of the October 9, 2012 IEP.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where he resides with his Mother and siblings. Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification, Intellectual Disability ("ID"). Exhibit P-2.

3. Student, who formerly resided in Maryland, was first found eligible for special education and related services when he attended a Maryland public elementary school. He has

attended DCPS public schools since 2008. Exhibit P-15. Student is currently enrolled in GRADE at CITY MIDDLE SCHOOL. Exhibit P-2.

4. In May 2010, Student was referred for an initial DCPS comprehensive psychological evaluation. SCHOOL PSYCHOLOGIST conducted a battery of tests on Student and obtained input from Mother and from Student's general education teacher. In her May 25, 2010 report, School Psychologist concluded that results of cognitive testing indicated that Student was functioning within the extremely low range. He attained a Composite Intelligence score of 65 and a Full Scale IQ score of 64. On the Vineland - II Adaptive Behavior Scale, Student's scores within the communication domain were low for receptive, expressive and written communication. In daily living skills, his adaptive levels were low for personal, domestic and community. In the socialization domain, his adaptive levels were low for interpersonal relationships, coping skills, and play and leisure time. According to School Psychologist, these results suggested a disability classification of ID. Exhibit P-15.

5. In June 2010, DCPS administered to Student the Woodcock-Johnson III Normative Update Tests of Achievement (WJ-III ACH). Student's overall level of achievement tested within the very low range. On the Broad Reading cluster, Student received a standard score of 36, placing him in the very low range at a grade level equivalent of 1.3. On the Broad Math cluster, Student received a standard score of 35 placing him within the very low range, at a grade equivalent of 1.1. Within the Written Language Cluster, Student received a 39 (Grade Equivalent 1.0) on the spelling subtest, and a 1 (Grade Equivalent K.5) on the Writing Samples subtest. Because Student's scores were mostly in the mid-30's, the tests showed that Student scored lower end of the very low range. Exhibit P-14.

6. In his October 19, 2011 DCPS IEP, Student was provided 5 hours per week of

Specialized Instruction in the General Education Setting, 5 hours per week of Specialized Instruction in the General Education Setting [*sic*] and 90 minutes per month of Behavioral Support Services Outside General Education. Exhibit P-3.[3]

7. On January 24, 2012, Petitioner filed a prior due process complaint on behalf of Student. In the resulting February 22, 2012 Settlement Agreement, DCPS agreed to conduct a Functional Behavioral Assessment ("FBA") of Student and to develop a Behavior Intervention Plan ("BIP") if necessary. Subsequently, DCPS agreed to pay for an independent FBA obtained by Petitioner. Exhibits P-9, P-10.

8. INDEPENDENT SCHOOL PSYCHOLOGIST conducted the independent FBA of Student on March 9-10, 2012. She concluded that Student's behaviors that contributed to his underachievement in school served to reinforce and validate his negative perceptions of himself, his peers, his teachers and the school context. She found that when Student gets frustrated at not knowing how to complete his school work, he generates an "excuse," such as a conflict with another student or a teacher to give him an escape or "out." Independent School Psychologist concluded that Student would function best in an alternative school environment that provides psych-social-emotional programming and that would allow him to engage in small group activities presented with visual cues. Exhibit P-11. Because Independent School Psychologist did not testify at the due process hearing, I make no finding as to her credibility.

9. Student's final grades for the 2011-2012 school year were four D's (Language Arts, Mathematics, Science, and Computer Applications), one A (Health and Physical Education), and one F (World Geography). Exhibit P-17.

10. At the end of the 2011-2012 school year, Student was reported to be

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[3] The evidence at the hearing did not clarify why the October 19, 2011 IEP duplicated the provision of 5 hours per week of Specialized Instruction in the General Education Setting.

"Progressing" on all of his October 19, 2011 IEP Annual Goals. Exhibit R-6.

11. In August 2012, DCPS developed a BIP for Student. Exhibit R-3.

12. On September 7, 2012, DCPS again administered the WJ-III (ACH) to Student. On the Broad Reading cluster, Student received a standard score of 40 (Grade Equivalent 1.8). On the Broad Math cluster, Student received a standard sore of 42 (Grade Equivalent 2.0). Within the Written Language Cluster, Student received an 18 (K.6 Grade Equivalent) on the Spelling subtest, and a 55 (1.9 Grade Equivalent) on the Writing Samples subtest. Exhibit P-16.

13. On Student's October 9, 2012 IEP, in the area of Academic-Mathematics, most Annual Goals from the prior year's IEP were retained. Student was reported to need "one-on-one support throughout each class period in order to help him initially tackle a problem. In the area of Academic-Reading, the Annual Goals and Baselines from the prior year's IEP were retained verbatim. He was reported to need direct phonics instruction and strategies. In the area of Academic-Written Expression, the Annual Goals and Baselines from the prior year's IEP were retained verbatim. Exhibits P-3, R-1.

14. The special education teacher member of Student's October 9, 2012 IEP team stated that Student's academic goals should not be changed from the prior year's IEP, because he had not made progress on the goals. Testimony of Educational Advocate; Exhibit P-4.

15. In Student's October 9, 2012 IEP, he was provided 5 hours per week of Specialized Instruction Outside the General Education Setting, 10 hours per week of Specialized Instruction Outside General Education [*sic*] and 120 minutes per month of Behavioral Support Services Outside General Education. Exhibit R-1.[4]

16. City Middle School has a full-time self-contained "ID" classroom. This

[4] The evidence at the hearing did not clarify why the October 9, 2012 IEP made separate provision of 5 hours per week of Specialized Instruction Outside the General Education Setting plus 10 hours per week of Specialized Instruction Outside the General Education Setting.

classroom has 7-8 students taught by 1 teacher and 2 aides. Testimony of Assistant Principal. The October 9, 2012 IEP team considered placing Student in the ID classroom. Assistant Principal, who attended the meeting as the DCPS representative, stated that Student would not "fit" in the ID class setting because he was too high functioning. Testimony of Educational Advocate; Exhibit P-4.

17. During the October 9, 2012 IEP meeting, Assistant Principal invited Mother and Educational Advocate to visit the ID classroom. Subsequent to the IEP meeting, Educational Advocate made repeated requests to Assistant Principal for permission to visit and observe the ID classroom. Assistant Principal did not respond to these requests. Testimony of Educational Advocate.

18. For the 2012-2013 school year at City Middle School, Student is placed in self-contained classes for Math, English and Science. The classrooms are located in close proximity to minimize "travel time" between class periods. Student is with non-disabled peers, in general education classrooms, for his elective classes and at lunch. Testimony of Assistant Principal.

19. Special Education Teacher teaches Student's self-contained science class at City Middle School. I found Special Education Teacher, who was called as a DCPS witness, to be very credible. Her testimony conflicted at times with the testimony of Assistant Principal. For example, Assistant Principal testified that there were 10-12 student's in Student's self-contained classes. Special Education Teacher testified that there were 15 students in her class. Assistant Principal testified that Student's effort has deteriorated dramatically since the October 9, 2012 IEP meeting. Special Education Teacher testified that she does not recall a specific change in Student's behavior. Assistant Principal testified that Mother had not responded to calls from the school about Student. Special Education Teacher testified that Mother was cooperative and had

generally been responsive. To the extent that there were inconsistencies between the testimonies of Special Education Teacher and that of Assistant Principal, I found the testimony of Special Education Teacher to be more credible.

20. There are 15 students in Student's self-contained science class at City Middle School. A teacher's aide assists Special Education Teacher. Testimony of Special Education Teacher.

21. Special Education Teacher is not aware of any ID disabled students, other than Student, in her class. Student needs reading help, so a teacher will read more difficult material to him. He also has accommodations for spelling and writing. Instruction is provided at a slower pace for him. Testimony of Special Education Teacher.

22. Student almost always exhibits behavior challenges in Special Education Teacher's classroom. He arrives extremely late for class. He makes a lot of disruptive noises in the classroom, including beating on the desk, shouting out, making fun of classmates, not staying in his seat and chewing gum. Student is not receptive to his BIP. Testimony of Special Education Teacher.

23. Student is failing his science class because he is not completing his homework and because he does not receive "preparation points" credit due to his regularly coming to class late. Testimony of Special Education Teacher.

24. Special Education Teacher has met with Mother to discuss her concerns about Student. Mother was cooperative. Special Education Teacher usually contacts Mother about behavior concerns. Mother has generally been responsive this school year. Testimony of Special Education Teacher.

25. Student has difficulty following directions. He has poor social skills *vis-a-vis* his peers. Student has attention-seeking behaviors, which are possibly due to academic frustration. His behaviors interfere with his progress in the classroom. Testimony of Social Worker.

26. Student receives individual counseling one time per week, and participates in group counseling one time per week, with Social Worker. Student is doing "pretty well" with the boys counseling group. His individual counseling is going well too. Student knows that under his BIP, he is allowed to ask to consult with Social Worker. He has taken advantage of that opportunity on several occasions. Testimony of Social Worker.

27. Non-Public School, located in suburban Maryland, is certified by the D.C. Office of the State Superintendent of Education ("OSSE") to serve students from the District of Columbia in grades 4 through 12, with Emotional Disturbance ("ED"), ID and autism spectrum disabilities. Enrollment capacity is 135 students. The school's current enrollment is 87 students. The school offers only self-contained classrooms and low student-teacher ratios with a maximum of 10 students per classroom. Each class is staffed by a teacher certified in special education and a teaching assistant. The school has a reading specialist who works with students with reading deficits. Non-Public School provides individual and/or group counseling services for eligible students. Non-Public School offers its students after-school clubs, JV basketball and intramural flag football. At the school, students have no interaction with nondisabled peers. Non-Public School's tuition rates are approved by OSSE. Testimony of Program Director.

28. Non-Public School admissions staff have reviewed Student's referral packet, provided by Petitioner's attorney, and interviewed Student and Mother. Student and Mother have toured the school, visited classrooms in session, and spoken with the school's education

director. Student has been accepted for admission to Non-Public School. Testimony of Program Director.

CONCLUSIONS OF LAW

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

Legal Standard for Prospective Non-Public Placement

In this case, Petitioner asserts that under the IDEA, Student is entitled to placement at Non-Public School, at public expense, because DCPS denied Student a FAPE by not providing full-time specialized instruction services, outside of the general education setting, in his October 9, 2012 IEP. The 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 future education." 20 U.S.C. § 1400(d)(1)(A). *Johnson v. District of Columbia*, 873 F.Supp.2d 382, 384 (D.D.C.2012). To achieve this purpose, the IDEA extends federal funding to the states to provide disabled schoolchildren with a FAPE. 20 U.S.C. § 1412(a)(1)(A). To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010). Furthermore, if no public school is available to provide sufficient support services to ensure a FAPE for the child, then DCPS "must pay the costs of sending the child to an appropriate private

school." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518-19 (D.C.Cir.2005) (quoting *Jenkins, supra*, 935 F.2d at 305); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8–9 (D.C. Cir.2005); *L.R.L. ex rel. Lomax v. District of Columbia*, 2012 WL 4789532 (D.D.C.2012).

The IDEA establishes detailed procedures for the development and review of the IEP, a plan designed by a team consisting of school district educators and administrators, education experts, and, of vital importance, the child's parents. The 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 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).

"[T]he appropriate focus of the [hearing officer's] review should be on whether DCPS is providing [Student] with an IEP that is reasonably calculated to produce meaningful educational

benefit." *A.I. ex rel. Iapalucci, supra*, 402 F.Supp.2d at 167. A hearing officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

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* D.C. Regs. 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

1. WAS STUDENT DENIED A FAPE BY DCPS' OCTOBER 9, 2012, WHICH DOES NOT PROVIDE FOR FULL-TIME SPECIALIZED INSTRUCTION SERVICES, OUTSIDE THE GENERAL EDUCATION SETTING?

Student's October 9, 2012 IEP provides him 15 hours per week of Specialized Instruction in an Outside General Education setting. (The IEP specifies 5 hours per week of Specialized Instruction plus 10 hours per week of Specialized Instruction. IEP Pages 7-8, Exhibit R-1.) Petitioner contends that these IEP services are inadequate for Student because he requires full-time outside of general education programming. The question of whether the October 9, 2012 IEP 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 [Student.]" *See J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). Because Petitioner has not alleged that DCPS failed to comply with the IDEA's procedural requirements, I proceed directly to the second prong of the inquiry.

The measure and adequacy of an IEP is determined as of the time it is offered to the student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008). "Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on the child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits." *S.H. v. Fairfax Cnty. Bd. of Educ.*, 2012 WL 2366146, 13 (E.D. Va.2012). Therefore, the relevant inquiry is whether, at the time the October 9, 2012 IEP was created, it was reasonably calculated to enable [Student] to receive meaningful educational benefits. *See A.I. ex rel. Iapalucci, supra*, 402 F.Supp.2d at 167.

In October 2012, when Student's IEP team convened for its annual review of Student's IEP, the team had conflicting information on Student's educational needs. Despite Student's prior year progress reports, which had indicated that he was progressing on his 2011-2012 IEP annual goals, the October 9, 2012 IEP team left Student's academic goals unchanged because the team concluded he had not made academic progress. Further, Student's September 2012 WJ-III ACH results showed that little improvement over his June 2010 scores. The only bright spot in the September 2012 scores was that Student had attained almost one school year's improvement in broad math. In other areas, Student showed only marginal progress or no progress at all. In terms of grade equivalence, Student was achieving at beginning 2nd Grade level, or lower, for all WJ-III ACH categories. Neither had Student progressed on his Emotional, Social and Behavioral Development goals. The October 9, 2012 IEP reported that Student's poor concentration, inability to get along with others, tendency to cause trouble for no reason and overall poor self-management prevents him from attending to academic tasks and remaining in the general education classroom. After considering this information, the IEP team increased

Student's Specialized Instruction from 10 hours per week in the general education setting to 15 hours per week outside of general education, and increased his behavioral support services from 90 minutes to 120 minutes per month. In the general education setting, where Student receives instruction in all elective classes, the IEP provides for no special education services.

I find that this increase in services was not sufficient to be considered reasonably calculated to produce meaningful educational benefit to Student. At the due process hearing, Special Education Teacher testified that she was not seeing Student make progress. Since the beginning of the school year, his behaviors – skipping class, arriving late, leaving class early, not doing homework, creating disruptions in class, etc. – have impeded his learning. Student is non-receptive to his Behavior Intervention Plan. Special Education Teacher was doubtful that Student's placement in her self-contained class, in which he is the only ID student, was appropriate. She opined that a setting with other ID students would be better for Student.

Assistant Principal opined to the contrary that based upon the work Student had produced in the classroom prior to the October 9, 2012 IEP meeting, he had been placed in a appropriate academic setting. However, the testimony of Special Education Teacher and review of the IEP document leave no doubt that Student's academically debilitating behavior issues and lack of educational progress existed and were recognized before the IEP meeting. For the reasons explained in the above Findings of Fact, in this instance, I find the opinion of Special Education Teacher to be more persuasive than that of Assistant Principal.

Considering the totality of information available to the IEP team on October 9, 2012 – including Student's lack of academic progress under the prior year's IEP, only marginal improvement in Student's WJ-III achievement scores, the IEP team's knowledge that Student's conduct and behavior prevented him from attending to academic tasks and remaining in the

general education classroom, and Special Education Teacher's inability to overcome Student's problem behaviors so that he could make academic progress in the part-time resource room setting – the IEP team's decision to offer Student only 15 hours per week of Specialized Instruction outside general education was not reasonably calculated to produce meaningful educational benefit. Petitioner prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY FAILING TO SPECIFY INDIVIDUAL COUNSELING AS A RELATED SERVICE IN HIS OCTOBER 9, 2012 IEP?

Petitioner also contends that the October 9, 2012 IEP was inadequate because it did not specify that Student would be provided 1:1 counseling as a related service. The October 9, 2012 IEP increased Student's Behavioral Support Services to 120 minutes per month. Social Worker meets twice a week with Student to provide counseling services, including weekly 1:1 counseling sessions. Social Worker's testimony established that Student is doing well with both his individual and group counseling sessions. I find that Petitioner has not met her burden of proof to show that the IEP is deficient because it does not specify that Student's behavioral support services are to be provided on a 1:1 basis. DCPS prevails on this issue.

REMEDY

i. Private School Placement

I have found in this decision that Student has been denied a FAPE because the October 9, 2012 IEP was not reasonably calculated to produce meaningful educational benefit. The failure of DCPS to offer Student an appropriate IEP does not, *ipso facto*, entitle Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement. Although the District must pay for private school placement '[i]f no suitable public school is available[,] ... if there is an appropriate

public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.'" *N.T. v. District of Columbia,* 839 F.Supp.2d 29, 34 (D.D.C.2012) (quoting *Jenkins, supra,* 935 F.2d at 305). The only alternative public school program offered by DCPS in this case is the ID classroom at City Middle School. However, at the October 9, 2012 IEP meeting, placement in this program was considered for Student, and Assistant Principal, who should be most knowledgeable about the program, suggested that Student was too high functioning to be in the ID class setting. I find, therefore, that the ID classroom at City Middle School is not an appropriate program for Student.

Petitioner seeks an order for DCPS to fund Student's private placement at Non-Public School. "[W]here a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia,* 859 F.Supp. 1, 5 (D.D.C. 1994) (quoting *Rowley, supra,* 458 U.S. at 176., 102 S.Ct. at 3034.) *See, also, e.g., Branham, supra,* 427 F.3d at 9. 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. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student has an ID disability. Student is

functioning at the 2nd Grade or lower level in all academic areas, although he is enrolled in Middle School. Student is reported to have academic ability, but because of his behaviors, attributed, *inter alia*, to attention seeking and academic frustration, he is not making progress.

b. Student's Specialized Educational Needs

Student's poor concentration, inability to get along with others, tendency to cause trouble for no reason and overall poor self-management prevent him from attending to academic tasks and remaining in the general education classroom. He usually needs one-on-one support in math. He needs difficult material to be read aloud to him. As a result of a learning disability with reading, he has not yet gained the fundamental word structure knowledge to effectively write on grade-level.

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

Non-Public School provides a full-time special education day program for ID and ED and autism spectrum disorder students. The school offers small classroom size with a 5:1 student-teacher ratio. The school has a reading specialist on staff and provides individual and group counseling services. The Non-Public School Education Director has reviewed Student's records and concluded that he would be an appropriate "fit" for their program.

d. Cost of Placement at Private School

Tuition expenses at Non-Public School conform to OSSE guidelines. DCPS offered no evidence that tuition expenses at Non-Public School are higher than costs at other local private schools serving students with disabilities.

e. Extent to Which Private School Represents Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43

(D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5), 34 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)). According to Student's IEP, his social, behavioral and emotional deficits prevent him from attending to academic tasks and remaining in the general education setting. He is making no academic or behavioral progress in the mix of self-contained and general education classes at City Middle School where he is now placed. As a full-time special education school, Non-Public School is a very restrictive environment. However, DCPS has not proposed a possible less restrictive environment where Student could receive meaningful educational benefit.

Considering all of the above factors, I conclude that Non-Public School is an appropriate placement for Student.

ii. Compensatory Education

As the D.C. Circuit Court observed in *Branham, supra*, private school placement does not "compensate for yesterday's IDEA violations." *Id.*, 427 F.3d at 11. Here, Petitioner also seeks an award of compensatory education to compensate for DCPS' denial of FAPE to Student, after the October 9, 2012 IEP was adopted. "[C]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *Reid ex rel. Reid v. District of Columbia,* 401 F.3d 516, 523-524 (D.C.Cir.2005) (Internal quotations and citations omitted.)

In this decision, I have found that DCPS' October 9, 2012 IEP was not reasonably calculated to provide meaningful educational benefit to Student and that he has not made educational progress this school year. My order will require DCPS to fund Student's private

placement at Non-Public School beginning immediately after the end of winter break – only a few weeks later than if DCPS had granted Mother's request at the October 9, 2012 IEP meeting for a full-time special education placement for Student. *Cf., e.g, Reid, supra* at 524 (Equity may sometimes require consideration of the parties' conduct, such as when the school system reasonably requires some time to respond to a complex problem.)

I have reviewed Educational Advocate's Compensatory Education Proposal (Exhibit P-33). While the proposal narrates Student's disability related educational challenges over many months, I find the proposal unhelpful in identifying what, if any, educational deficits, result from DCPS' failure to place Student in a full-time special education setting following the October 9, 2012 IEP meeting, or what educational benefits likely would have accrued had Student been placed in such a program several weeks sooner than will be mandated in this decision. *Cf. Gill v. District of Columbia*, 770 F.Supp.2d 112, 117 (D.D.C.2011) (Plaintiffs did not address what specific educational deficits resulted from the four-month loss of a FAPE.) Accordingly I decline to award separate compensatory education services.

ORDER

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

1. DCPS shall place Student, at public expense, at Non-Public School for the remainder of the 2012-2013 school year and shall promptly convene Student's IEP team to effect Student's placement at Non-Public School, in time for the first school day after the private school's winter break. DCPS shall ensure that a Non-Public School representative attends the IEP meeting pursuant to 34 CFR § 300.325(a)(2);

2. DCPS shall provide school transportation, as needed for Student to attend Non-Public School, in accordance with DCPS' school transportation policy; and

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

Date: December 30, 2012

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).