

DCPS filed its Response on August 18, 2011, which denied the allegations. DCPS asserts that the 03/25/2011 IEP is appropriate and that the Student has continued to receive special education and related services in accordance with his current IEP at the School. DCPS also asserts that the "Student has not performed well academically this school year due to his failure to attend school." *Response, p. 2.*

A resolution meeting was held August 31, 2011, which did not resolve the Complaint. The parties agreed to end the 30-day resolution period early, and thus the 45-day IDEA timeline for decision began to run, on that date. A Prehearing Conference ("PHC") was then held on September 7, 2011, at which the parties discussed and clarified the issues and requested relief.

Timely five-day disclosures were filed by both parties on September 28, 2011, and the Due Process Hearing was held in Room 2004 on October 5, 2011. Petitioner elected for the hearing to be closed.

During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-12.

Respondent's Exhibits: R-1 through R-9.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witness: (1) Parent-Petitioner; (2) Foster Parent; (3) Psychologist; and (4) Director, Private School.

Respondent: Special Education Coordinator ("SEC").

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is October 15, 2011.

III. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

(1) **Inappropriate IEP.** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP (*i.e.*, one that was reasonably calculated to provide educational benefit), as of 03/25/2011?

Petitioner alleges that the IEP was inappropriate in that it did not provide (a) full-time specialized instruction in an out of general education setting, and (b) a certified dedicated aide. Petitioner alleges that, as a result, the Student continues to experience significant academic and behavioral difficulties. *Complaint, pp. 3-4.*

(2) **Failure to Implement IEP.** — Did DCPS deny the Student a FAPE by failing to implement the Student's IEP, in that DCPS allegedly provided a dedicated aide that failed to perform his required duties?²

(3) **Inappropriate Placement/Location.** — Has DCPS denied the Student a FAPE by failing to provide an appropriate educational placement/location of services for the Student?

Petitioner alleges that when placed in a combination (special education/regular education) setting, the Student has struggled academically, behaviorally, and social/emotionally. *Complaint, p. 5.*

As relief, Petitioner requests that the Hearing Office order DCPS: (a) to revise the Student's IEP back to a full-time, separate classroom, and provide a dedicated aide who is a certified behavioral technician; (b) to fund an appropriate educational placement in a private special education program, if cannot implement his IEP; and (c) to fund the parent's

² Issue 2 as specified in the Prehearing Order stated that "DCPS allegedly provided a dedicated aide that both is uncertified and failed to perform his required duties." *Prehearing Order*, ¶ 5 (2). However, at the outset of the due process hearing, Petitioner's counsel withdrew the claim that DCPS failed to implement the IEP by providing an uncertified dedicated aide.

compensatory education plan as warranted under *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), for the period beginning March 25, 2011.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education in accordance with *Reid* standards.

IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with a disability, classified as an Emotional Disturbance (“ED”). *See P-8; R-4.*
2. In November 2009, an HOD was issued which (*inter alia*) ordered DCPS to provide a paraprofessional to work with and monitor the Student on a one-on-one basis throughout his school day in order to address his needs for behavior intervention and structure. According to the HOD, the “paraprofessional will ensure the Student attends classes, will assist the Student with academic work, and will process with the Student when he begins to experience behavioral issues in order to help him stay focused on academic work whether in the classroom or in a location outside of the classroom away from other students.” *R-2, p. 14.* This service was ordered to begin by 11/16/2009 and to “continue at least until the IEP team meets and determines it is no longer necessary for the Student to receive a FAPE.” *Id.*
3. On or about December 15, 2009, DCPS convened a meeting of the Student’s MDT/IEP team to review the Student’s IEP. *See P-4.* At that meeting, the team developed a full-time IEP that provided 26.5 hours per week of specialized instruction and 30 minutes per week of Behavioral Support Services in an Outside General Education setting. *P-3, p. 5.* The 12/15/2009 IEP stated that the Student does *not* require the support of a Dedicated Aide, *id.*, although the testimony indicates that he did receive such support during the remainder of the 2009-10 school year.
4. During the remainder of the 2009-10 school year, the Student made significant behavioral and academic progress under his full-time IEP. *See P-1, p. 3; Pet. Test.* He was placed in the School’s self-contained ED cluster with a dedicated aide. *Id.* He had some attendance problems, but they were not severe. *SEC Test.*

5. At the end of the 2009-10 school year, in light of the Student's progress, the IEP team agreed to place the Student into a less restrictive educational setting. *See Foster Parent Test.* (confirming agreement at least on a "trial" basis); *SEC Test.* The team developed a revised IEP dated 06/15/2010 that reduced the Student's specialized instruction services to 20 hours per week in an Outside General Education setting, while continuing the 30 minutes per week of Behavioral Support Services. *See P-7, p. 5.*³ Again, the 06/15/2010 IEP states that the Student does *not* require the support of a Dedicated Aide, *id.*, although the evidence indicates that an aide was in fact provided. *See SEC Test.; Foster Parent Test.*
6. During the first half of the 2010-11 school year, the Student was unable to maintain the same level of academic and behavioral progress that he had experienced during the 2009-10 school year. *See P-1, p. 3; Pet. Test.; Foster Parent Test.* Significant regression was observed in some areas of performance. *See Psychologist Test.*
7. On or about March 25, 2011, DCPS convened another meeting of the Student's MDT/IEP team to review the Student's IEP. *See P-9.* The Foster Parent attended the meeting and expressed concern that the Student was not attending school and that when he does he misses classes. *P-9.* She also expressed the view that the Student's dedicated aide was not a good fit for him and requested a change in staffing. *Id.; see Foster Parent Test.; SEC Test.*
8. At the 03/25/2011 meeting, the MDT/IEP team developed a revised IEP that reduced the Student's specialized instruction services to 17.5 hours per week and increased his Behavioral Support Services to one hour per week, both to be delivered in an Outside General Education setting. *See P-8, p. 8.* This time, the IEP stated that the Student does require the support of a Dedicated Aide. *Id.* The foster parent and advocate disagreed with the placement and the hours of the IEP. They requested that his IEP be revised to provide full-time hours in a separate classroom setting, essentially a return to the program provided in the 12/15/2009 IEP. *See P-9 (03/25/2011 meeting notes); P-1, pp. 3-4; Foster Parent Test.*
9. The Student has continued to experience severe school attendance problems. During the 2010-11 school year (through May), he missed over 600 classes (including 520 unexcused

³ In connection with developing the revised 06/15/2010 IEP, DCPS reviewed an independent neuropsychological evaluation from November 2009, which concluded that the Student did not demonstrate significant neurological deficits that impair his academic and social/emotional functioning. However, the Student was found to continue to experience significant motivational difficulties and impulse control challenges that adversely affected his educational performance. *See R-5, p. 2; P-5.*

absences), which together constitute over 80 total days missed. This represents nearly half of the school year. *See R-6* (DCPS Attendance Summary 08/16/2010-05/26/2011).

10. The Student did not perform well academically and failed most of his courses during the 2010-11 school year due in large part to his failure to attend classes. *See P-9* (03/25/2011 meeting notes); *R-1* (DCPS Response), p. 2; *SEC Test.*; *Psychologist Test.*
11. The Student is currently enrolled at the School for the 2011-12 school year, where he is repeating the grade, but he is not attending school on a regular basis. *See* Petitioner's Opening Statement; *R-8* (DCPS Attendance Summary 08/15/2011-09/27/2011). He is placed in a small, self-contained setting for all core academic subjects and in a general education setting for electives; and he has been assigned a dedicated aide. *See SEC Test.*

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Issues/Alleged Denials of FAPE

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see also* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

As noted above, in this case Petitioner claims that DCPS denied the Student a FAPE by: (1) failing to develop an appropriate individualized education program ("IEP") at a 03/25/2011 meeting, in that the IEP did not provide full-time specialized instruction in an outside general education setting and a certified dedicated aide ; (2) failing to implement the Student's IEP with respect to the dedicated-aide support; and (3) failing to provide an appropriate educational placement/location of services for the Student.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof in part on Issue 1, to the extent that the 03/25/2011 IEP inappropriately reduced the Student's specialized instruction from 20 to 17.5 hours per

week. Petitioner has otherwise failed to prove by a preponderance of the evidence that DCPS denied the Student a FAPE under Issues 1, 2 and 3.

1. Inappropriate IEP

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See also 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).

Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a 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.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207). An LEA also must periodically update and revise an IEP “in response to new information regarding the child’s performance, behavior, and disabilities.” *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), slip op. at p. 6; see 34 C.F.R. 300.324.

“One of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary.” *N.S. v. District of Columbia*, 709 F. Supp. 57, 73 (D.D.C. 2010); *Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 6 (D.D.C. 2006). In the event of such challenge, the issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

In this case, Petitioner has proved by a preponderance of the evidence that the 03/25/2011 reduction of specialized instruction hours from 20 to 17.5 was not reasonably calculated to confer educational benefits on the Student. The MDT meeting notes do not provide any explanation for the reduction, merely stating that the Student continues to be eligible for special education services and “will receive 17.5 hours of specialized instruction per week....”

P-9. When the SEC was asked at hearing the reasons for the reduction, she stated that she did not recall why the hours were reduced. *SEC Test.* (cross examination). Other testimony indicated that the team decided to reduce the hours because of the Student's attendance problems, e.g., *Psychologist Test*, although this would seem counterintuitive.

Moreover, after reviewing the Student's present levels of performance, needs, and goals at the 03/25/2011 meeting (P-9), the team appears to have carried over exactly the same language (including typos) that was contained in the 06/15/2010 IEP under each area of academic concern (math, reading, written expression). *Compare P-7, pp. 2-4 with P-8, pp. 3-5.* DCPS offered no explanation as to why the same present levels, needs, and goals can reasonably be addressed by fewer hours of specialized instruction. This is especially troubling where a substantial number of classes are being missed due to continuing attendance problems.

Finally, even the SEC's testimony regarding the specialized instruction currently being offered to the Student appears to be at odds with what is prescribed in the 03/25/2011 IEP. The SEC testified that for the 2011-12 school year, the Student receives self-contained specialized instruction in all of his core courses, while his electives are in a general education setting. *SEC Test.* (re-direct). She then quantified the time spent in electives as 80 minutes times five days per week. *Id.* However, $80 \times 5 = 400$ minutes, or approximately 6.67 hours, per week. That total roughly approximates to the 06/15/2010 IEP's 6.5 hour reduction in specialized instruction outside general education, rather than the 9 hour difference reflected in the revised 03/25/2011 IEP. In other words, if the Student currently receives specialized instruction for his entire academic day, *minus only the time the SEC testified that he spends in electives*, then it would appear that his program should still provide approximately 20 hours – not 17.5 hours – of specialized instruction per week. Because parents are entitled to rely on the written IEP document as defining the services to be provided, the 03/25/2011 IEP is inadequate and should be corrected. *Cf. N.S. v. District of Columbia, supra*, 709 F. Supp. at 73.

2. Failure to Implement IEP (Dedicated Aide)

As the statute and regulations indicate, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. 34 C.F.R. § 300.17(d). In order to constitute a denial of FAPE, however, courts have held that the aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation

from the IEP's stated requirements must be "material." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). See also *Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. March 18, 2011) ("Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*"); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

As was recently confirmed by the District Court in *Wilson*, "a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." 111 LRP 19583, slip op. at 5 (quoting *Bobby R.*). A "material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Id.*, quoting *Howard Road Academy*, 585 F. Supp. 2d at 68. In *Wilson*, for example, DCPS failed to transport a student to three of the four weeks of an ESY program, and thus "almost entirely failed to provide a service that [student's] IEP team determined was necessary for his educational development." Hence, the deviation was found to be material, and not a "minor discrepancy." *Id.*, slip op. at 6-7.⁴

In this case, Petitioner claims that DCPS failed to implement the Student's IEP, in that DCPS allegedly provided a dedicated aide that failed to perform his required duties. However, the Hearing Officer concludes that Petitioner did not prove this claim by a preponderance of the evidence. While the Foster Parent testified that she visited the School on several occasions when the aide was either missing or "not doing anything," she noted that her observations of this were "sporadic" and she did not have clear recollection whether the visits occurred before or after the

⁴ As recognized in *Wilson*, the failure to implement an IEP is not a mere procedural violation. When an LEA *materially* deviates from IEP requirements, educational harm to the student may be presumed, since the LEA has failed to provide a service that the IEP team determined was necessary to meet the student's unique educational needs.

aide was changed at the March 2011 meeting.⁵ See *Foster Parent Test*. (cross examination). Petitioner's evidence was insufficient to establish a material failure to implement the dedicated-aide requirement in the 03/25/2011 IEP. Moreover, the evidence shows that the Student's attendance issues and tardiness likely contributed to problems he experienced with his dedicated aides throughout the 2010-11 school year. *Id.*; see also *Psychologist Test.*; *SEC Test*. At the same time, the Student refused to attend many of his scheduled counseling sessions. See *R-7*; *Foster Parent Test*. (cross examination). Under all of the circumstances, the Hearing Officer cannot find that any discrepancies in dedicated aide services deprived the Student of a meaningful educational benefit.

3. Inappropriate Placement/Location

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP." *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). In determining educational placement, DCPS must place a student with a disability in "an *appropriate special education school or program*" in accordance with the IDEA. D.C. Code 38-2561.02 (emphasis added). See also *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), citing *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services *offered at a particular school*") (emphasis added); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) ("If no *suitable public school* is available, the District must pay the costs of sending the child to an appropriate private school."). Among other things, DCPS must ensure (*inter alia*) that the placement decision is "based on the child's IEP," and that it is in conformity with Least Restrictive Environment ("LRE") provisions. 34 C.F.R. § 300.116.

In this case, Petitioner failed to prove that the School could not implement the services and setting provided in the 03/25/2011 IEP, or that it could not provide an appropriate educational environment reasonably calculated to provide educational benefit to the Student. The School can offer placement primarily within a self-contained ED cluster, with small-group instruction and learning labs, along with a dedicated aide who is trained as a behavior technician.

⁵ As Petitioner's counsel made clear at the PHC and in his opening statement at hearing, this claim and the accompanying proposed remedy of compensatory education relate to the period following the 03/25/2011 IEP.

See SEC Test. The School will also monitor the Student's progress through daily progress reports. *Id.* However, the Student needs to attend school in order to receive educational benefit under his IEP.⁶

B. Appropriate Relief

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). In this case, the Hearing Officer will order DCPS to convene an MDT/IEP team meeting to review and revise the 03/25/2011 IEP, consistent with this HOD. Specifically, DCPS shall (1) review and revise, as appropriate, the present levels of performance ("PLOPs") and annual goals in the IEP, and (2) restore the 20 hours per week of specialized instruction (in an Outside General Education setting) previously specified in the 06/15/2010 IEP, unless the team is able to specifically justify any reduction based on revised PLOPs, Annual Goals and/or other new information regarding the specific educational needs and performance of the Student.

The Hearing Officer declines to order the prospective private placement relief requested in this case because (a) DCPS has not failed to provide the Student with an appropriate educational placement, and (b) such relief is not necessary or appropriate to remedy the more narrow denial of FAPE involving the deficiency in the 03/25/2011 IEP.

The Hearing Officer also denies Petitioner's request for compensatory education relief for the period since 03/25/2011 because Petitioner has not demonstrated any educational harm to the Student caused by the 2.5 hour reduction of specialized instruction, given the Student's extremely poor attendance record during the remainder of the 2010-11 school year (*see R-6, pp. 7-9*) and failure to attend school at the beginning of the 2011-12 school year.⁷ The

⁶ While Petitioner's witnesses believe that his attendance would improve if he were placed in a full-time special education school with greater structure, there is no real evidence to support that belief. In fact, the Foster Parent testified that she thought the Student was "doing very well" at the School when he received 20 hours of specialized instruction together with a dedicated aide. *See Foster Parent Test.* Although she thought the Student would benefit from a "fresh start," she also conceded that the School could work as an educational placement as long as the School wasn't "tired" of the Student. *Id. See also Psychologist Test.* (cross examination and redirect).

⁷ *Cf. Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008) (affirming decision not to award denial of FAPE remedy in light of student's severe truancy); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 104 (D.D.C. 2008) (conclusion that student "was not 'availing himself of educational benefit' due to extended absences was a reasonable determination.").

uncontroverted evidence also suggests that, when he does attend school, the Student may actually be receiving specialized instruction in a self-contained, Outside General Education setting in amounts roughly corresponding to the pre-reduction hours previously specified in the 06/15/2010 IEP. The 03/25/2011 IEP may simply need to be conformed to actual practice.

VI. ORDER

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

1. Within **30 calendar days** of this Order (*i.e.*, by **November 14, 2011**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members, including Petitioner and Foster Parent, to review and revise the Student's IEP dated March 25, 2011, consistent with this HOD.
2. Specifically, at the meeting convened pursuant to paragraph 1 of this Order, DCPS shall: (a) review and revise, as appropriate, the Present Levels of Performance and Annual Goals provided in each of the academic areas; and (b) revise the Special Education Services to provide for at least 20 hours per week of specialized instruction in an Outside General Education setting, unless the IEP team is able to justify any reduced amount of hours based on revised PLOPs, Annual Goals, and/or other new information regarding the specific educational needs and performance of the Student. DCPS shall also continue to provide for a one-on-one dedicated aide for the Student who is a certified behavior technician.
3. Petitioner's other requests for relief in her Due Process Complaint filed August 8, 2011, are hereby **DENIED**.
4. This case shall be, and hereby is, **CLOSED**.

Dated: October 15, 2011



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).