

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
July 3, 2016

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STUDENT, <sup>1</sup>	)	
through the PARENT,	)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>	)	
	)	Case No: 2016-0093
v.	)	
	)	<b>Date Issued: July 2, 2016</b>
District of Columbia Public Schools,	)	
<i>Respondent.</i>	)	

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**Hearing Officer Determination**

**SUBJECT MATTER JURISDICTION**

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

**PROCEDURAL BACKGROUND**

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

The DPC was filed on April 18, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On April 28, 2016, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on May 10, 2016. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on May 19, 2016 and concludes on July 2, 2016.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on May 17, 2016, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day

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

disclosures would be filed by May 27, 2016 and that the DPH would be held on June 2, 2016 and June 8, 2016. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the "PHO") issued on May 18, 2016 and amended on May 20, 2016 and May 24, 2016.

The DPH was held on June 2, 2016 and June 8, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER'S COUNSEL], Esq. and DCPS was represented by [RESPONDENT'S COUNSEL], Esq.

Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-38 were admitted without objection. Petitioner's exhibits P-39 and P-41 were admitted over Respondent's objection. Petitioner's exhibit P-40 was not offered into evidence. Respondent's exhibits R-2, R-3, R-4, R-10, R-11 and R-14 were admitted without objection. Respondent's exhibits R-1; R-5; R-6; R-7; R-8, R-12 over Petitioner's objection. Respondent's exhibits R-9 and R-13 were not offered into evidence.

Petitioner called the following witnesses at the DPH:

- (a) Director (Nonpublic School)
- (b) Educational Advocate<sup>2</sup>

Respondent called the following witness at the DPH:

- (a) Social Worker<sup>3</sup>
- (b) Special Education Teacher
- (c) Special Education Coordinator (City Alternative School)

Petitioner and Respondent gave oral closing arguments.

### ISSUES

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

- (a) Whether DCPS denied Student a FAPE by failing to consider the use of positive behavioral interventions, supports and other strategies to meaningfully address Student's truant behaviors that have impeded his learning (as required by 34 C.F.R. §300.324(a)(2)(i)) since at least the beginning of the 2014-2015 school year until March 2016.
- (b) Whether DCPS denied Student a FAPE by failing to review/revise his IEP, as required by 34 C.F.R. §300.324, during the 2014-2015 school year (when Student was not making progress on any of his IEP goals) through the present.
- (c) Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP/placement from the 2014-2015 school year through the present time (including through referring Student for an LRE observation) where: (1) Student

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<sup>2</sup> Qualified as an expert in IEP programing and placement, over Respondent's objection.

<sup>3</sup> Qualified as an expert in evaluating the social emotional needs of students and providing social emotional supports in an educational setting.

became increasingly disengaged with his current educational environment, (2) his progress continued to decline in the general education setting, and (3) his transition services are not geared toward him reaching his transition goals.

- (d) Whether DCPS denied Student a FAPE by failing to re-evaluate Student as required by 34 C.F.R. §300.303, where the most recent comprehensive evaluation is from 2011, and where updated data is needed to address Student's continued decline in the general education setting.

### **RELIEF REQUESTED**

Petitioner requested the following relief:

- (a) a finding in Petitioner's favor, that the student has been denied a FAPE as to each issue alleged;
- (b) an Order that DCPS fund an independent comprehensive psychological evaluation and functional behavior assessment to determine the student's present levels of performance and provide recommendations regarding appropriate programming in light of the student's continued lack of progress and school avoidance;
- (c) an Order that the student be placed in a school geared toward his transition goals of attaining vocational training, that can accommodate the student's unique needs, both because it is the most appropriate setting for the student, and as a part of the compensatory education award for the two years the student has earned almost no credit at his current school;
- (d) an Order that DCPS fund a third party compensatory education evaluation/recommendation following the completion of the evaluations requested in request for relief "(a)," to aid in determining the appropriate level of compensatory education for the denials of FAPE herein;
- (e) an Order reserving Petitioner's right to pursue compensatory education and the right to assert inappropriate placement following the review of the evaluations, if DCPS attempts to change the LRE once an alternative school is ordered;
- (f) any other relief the Hearing Officer deems appropriate.

### **FINDINGS OF FACT**

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. His mother ("Parent"/ "Petitioner") brings this action on his behalf.

2. There is no record of Student having ever received a comprehensive psychological evaluation. Student received an educational evaluation on October 27, 2011.<sup>4</sup> An educational evaluation is usually done by a teacher, but could also be done by a school psychologist, and assesses a student's performance. A comprehensive psychological evaluation is done by psychologist and assesses how a student thinks and feels, in addition to their cognitive and academic levels. It also includes information drawn from interviews with teachers, parents and the student.<sup>5</sup>

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<sup>4</sup> P-35.

<sup>5</sup> Testimony of Educational Advocate.

3. During the 2013-2014, 2014-201 and 2015-2016 school years, Student attended District School. Student has not advanced from one grade to another, but has been in the same grade each of his three years at District School. During the three years, he has earned only 9 total credits toward graduation, and he earned 8 of those 9 credits during his first year at District School, during the 2013-2014 school year.

4. In 2013-2014, his first year at District School, Student attended class fairly regularly and made IEP progress. He passed every class except one that first quarter, earning an “A” in physical education, a “B” in self-advocacy, three “Cs,” and an “F” in English.<sup>6</sup>

5. Since his first time in [GRADE] grade, he stopped attending school on a regular basis and failed nearly all his classes.<sup>7</sup> During the 2014-2015 and 2015-2016 school years, Student made little to no progress on his IEP goals.<sup>8</sup> During the 2014-2015 and 2015-2016 school years, Student grades were mostly “Fs.”<sup>9</sup>

6. Student had approximately 53 total absences (excused and unexcused) during the 2014-2015 school year,<sup>10</sup> and had approximately at least 55 total absences (excused and unexcused) as of May 23, 2016<sup>11</sup> during the 2015-2016 school year.

7. At District School, if a student misses one class period, the student is counted as absent for the whole day. Though teachers also keep class-by-class attendance records, they do not always do so consistently; therefore, the class-by-class attendance records are not always accurate.<sup>12</sup> There were times Student was in the school building and not did not attend all classes.<sup>13</sup> Based on Student’s class-by-class attendance reports, during the 2014-2015 and 2015-2016 school years, there are days when Student is at school and attending some classes but not others.<sup>14</sup>

8. On October 24, 2014 “Consent for Initial Evaluation/Reevaluation” form, Parent checked the box that said “I DO NOT give my consent to have [Student] evaluated to determine if he/she is eligible for special education and to determine educational needs. I understand this consent is voluntary and may be revoked at any time.” In addition to checking this box, Parent signed and dated the form. The form is in English, and Parent’s first language is Spanish. Special Education Teacher is proficient in Spanish, and generally would have translated for Parent in meetings and at other times as needed.<sup>15</sup>

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<sup>6</sup> P-29.

<sup>7</sup> Testimony of Special Education Teacher.

<sup>8</sup> P-17 and P-4.

<sup>9</sup> P-9; P-19; P-20.

<sup>10</sup> R-11.

<sup>11</sup> R-10.

<sup>12</sup> Testimony of Special Education Teacher.

<sup>13</sup> R-10-3; R-11-2.

<sup>14</sup> Testimony of Special Education Teacher; P-24; R-10.

<sup>15</sup> R-8.

9. District School communicated with Parent regarding Student's attendance on several occasions, during the 2015-2016 school year. As of September 28, 2015, Parent indicated that she had been getting Student up for school every morning and thinking was in school.<sup>16</sup>

10. On September 28 2015, District School convened Student's multidisciplinary team ("MDT") to discuss Student's nonattendance.<sup>17</sup>

11. When asked why he does not attend school, Student, who is fairly quiet and withdrawn, generally does not say much, but shrugs and indicates that he does not care and does not like school.<sup>18</sup> On or around September 28, 2015, Student indicated to Parent that he did not want to come to school because there are too many children, but that he would come to the school building after school was dismissed for the day (at 3:30 p.m.).<sup>19</sup>

12. On October 7, 2015, District School convened Student's IEP team to conduct the annual review of his IEP. Student and Parent attended this meeting. The school inquired as to whether there was anything going on at home with Student, or anything the school do to help.<sup>20</sup>

13. At the October 7, 2015 meeting, the team agreed to keep in contact with Parent regarding Student's attendance, and offered an attendance tracking sheet to Student, telling him it could be his defense in case a teacher make an error in keeping the class-by-class attendance.<sup>21</sup>

14. Within a few weeks after the October 7, 2015 meeting, Student began attending school occasionally, and special education teacher tried to verbally encourage him and help him get caught up.<sup>22</sup> However, subsequently, Student continued to miss a great deal of school.

15. Special Education Teacher went to Student's home in an effort to do a home visit in fall 2015; however, no one was at home, and Special Education Teacher left a doorknocker for the family to let them know she had been there.<sup>23</sup>

16. On March 4, 2016, District School made a truancy referral for Student to the court.<sup>24</sup>

17. On March 10, 2016, Student's team developed an attendance plan for him, indicating that poor academic performance was a barrier to him attending school, and listing as the interventions: (1) that Parent would walk him to school, (2) that Parent and Special Education

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<sup>16</sup> Testimony of Special Education Teacher; R-12.

<sup>17</sup> R-7.

<sup>18</sup> Testimony of Special Education Teacher; R-6.

<sup>19</sup> R-12.

<sup>20</sup> R-6.

<sup>21</sup> Testimony of Special Education Teacher.

<sup>22</sup> Testimony of Special Education Teacher.

<sup>23</sup> Testimony of Special Education Teacher.

<sup>24</sup> Testimony of Educational Advocate; R-4.

2016-0093  
Hearing Officer Determination

Teacher would check in with each other via text message regarding whether he was in school, and (3) that Student would use an attendance tracking sheet.<sup>25</sup>

18. As of March 2016, Student was showing up at school once or twice a week.<sup>26</sup> As of this point, Student was failing everything except his intro to business class, where he had a “D.”<sup>27</sup> At the March 10, 2016 meeting, Parent brought up some concerns, such as her fear that he would be held back in the same grade again for the 2016-2017 school year.<sup>28</sup>

19. Following the March 10, 2016, District School began preparing an attendance tracking sheet as an intervention for Student. The goal was for Student to pick up the form, have each teacher sign it throughout the day, for Student to return the form end of the day. A student has to actually attend school for this intervention to be workable.<sup>29</sup>

20. At the March 10, 2016 IEP team meeting, Parent through her advocate requested a functional behavior assessment (“FBA”) and a behavior intervention plan (“BIP”), and also requested that Student be referred to the DCPS Least Restrictive Environment (“LRE”) team to evaluate his placement, in hope that they would select a different placement for him.<sup>30</sup> The team did not make an LRE referral for Student, because the District School-based team members did not feel they had adequate data, due to Student’s poor attendance.<sup>31</sup>

21. The team did not utilize interventions such as counseling or mentoring, because they did not think such interventions would change the fact that he was not coming to school or that Student would be likely to participate, particularly given his quiet nature.<sup>32</sup>

22. The team likewise did not utilize interventions such as an FBA, general behavior services on his IEP, or a BIP, because it did not think those interventions would increase Student’s attendance.<sup>33</sup>

23. Typically, an FBA is used to gather data to address problematic in-school behaviors. It is not possible to conduct a comprehensive FBA with fidelity if a student is not present in school at all, because observing the student in the school environment is a crucial component of the data gathering process;<sup>34</sup> however, it is possible to complete a comprehensive FBA if the student attends, for example, 2-3 times per week. If a student is not coming to school

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<sup>25</sup> Testimony School Social Worker; R-4;

<sup>26</sup> Testimony School Social Worker.

<sup>27</sup> Testimony of Educational Advocate.

<sup>28</sup> Testimony of Educational Advocate.

<sup>29</sup> Testimony of Educational Advocate; testimony School Social Worker.

<sup>30</sup> Testimony of Educational Advocate.

<sup>31</sup> Testimony of Special Education Teacher; testimony of Educational Advocate.

<sup>32</sup> Testimony of Special Education Teacher.

<sup>33</sup> Testimony School Social Worker.

<sup>34</sup> Testimony School Social Worker; testimony of Educational Advocate.

at all, a school could conduct a due diligence FBA, which documents the efforts the school made to conduct an FBA, but without reaching any conclusions.<sup>35</sup>

24. A BIP draws on the data from an FBA and makes suggestions on how to address behaviors identified in the FBA. Typically, teachers implement BIPs in the classroom. If at student is not in school at all, it is not possible to implement a BIP.<sup>36</sup>

25. The team convened a follow-up meeting in April 2016, and discussed the fact that the attendance tracking sheet was not working because Student was not picking up the attendance sheets and/or returning them on a regular basis.<sup>37</sup> The team asked Parent whether she had been walking Student to school as the team had discussed on March 10, 2016, and she said no because he did not want her to do so.<sup>38</sup>

26. On April 6, 2016, Student's team added transportation services to Student's IEP,<sup>39</sup> but did not otherwise change the IEP. Parent indicated that Student's ability to physically make it to the building was not an issue; however, the team provided the transportation intervention anyway, in case it would help.<sup>40</sup>

27. Student's attendance did not improve once the transportation services were added.<sup>41</sup> Student does not use the transportation services because he says he does not need them.<sup>42</sup>

28. During the April 6, 2016 meeting, Educational Advocate requested that District School further evaluate Student. District School did not agree to conduct further evaluations.<sup>43</sup>

29. As of March 10, 2016, Student's advocates began requesting a full time IEP, due to concerns that Student's needs were not being met by his current IEP. However, District School did not believe that more services would have improved his attendance, and Special Education Teacher was concerned that additional services may even further deter him from coming to school, as Student does not like to be singled out as disabled.<sup>44</sup>

30. Though he is on the high school diploma IEP track, Student desires to earn a GED rather than a high school diploma, and to receive automotive vocational training.<sup>45</sup> Student

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<sup>35</sup> Testimony School Social Worker.

<sup>36</sup> Testimony School Social Worker.

<sup>37</sup> Testimony of Educational Advocate.

<sup>38</sup> Testimony of Special Education Teacher.

<sup>39</sup> Testimony of Educational Advocate.

<sup>40</sup> Testimony of Special Education Teacher; testimony of Educational Advocate.

<sup>41</sup> Testimony of Educational Advocate; R-2.

<sup>42</sup> Testimony of Special Education Teacher.

<sup>43</sup> Testimony of Educational Advocate.

<sup>44</sup> Testimony of Educational Advocate.

<sup>45</sup> Testimony of Educational Advocate.

enjoys mathematics, which is a relative strength for him;<sup>46</sup> however, Student will refuse to do work if it is beyond a basic level, or attempt to answer questions that seem difficult.<sup>47</sup>

31. Despite the fact that 2015-2016 was Student's third year in the same grade at District School, his IEPs have remained largely unchanged since at least 2014.<sup>48</sup> He has had 10 hours of specialized instruction inside the general education setting and 5 hours per week outside the general education setting. He has had goals in mathematics, reading and written expression, but no social emotional goals.<sup>49</sup>

32. Student's IEP transition plan clearly reflects his interest in becoming a mechanic.<sup>50</sup>

33. Student's needs a setting different than District School. The traditional model at District School is not working for him. He needs something will motivate him, such as job training program that he will be interested in.<sup>51</sup>

34. Student requires some special education services and modifications in order to access the general education setting. He would likely function well with non-disabled peers. An entirely self-contained setting may discourage him, because he does not like to be perceived as disabled. A vocational program would be appropriate for Student.<sup>52</sup>

### **Nonpublic School**

35. Nonpublic School has core academic classes, in addition to vocational courses such as automotive, wood working, flooring, and drywall. It prepares students for certification in their chosen areas. The vocational programs correlate with academic classes, and sometime the vocational teachers draw on the assistance of core content teachers to help a student master a skill.<sup>53</sup>

36. Nonpublic School is a full-time, standalone special education school with small class sizes. It cannot implement an IEP that requires interaction with non-disabled peers; therefore, it cannot implement Student's IEP as written.<sup>54</sup>

37. Tuition for Nonpublic School is approximately \$60,000 per year, and the program runs for 11 months of the year. It has a certificate of approval from the Office of State Superintendent of Education ("OSSE"), and OSSE has approved its tuition rates.<sup>55</sup>

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<sup>46</sup> Testimony of Special Education Teacher.

<sup>47</sup> P-1-3.

<sup>48</sup> P-1; P-2; P-12.

<sup>49</sup> P-1-8; P-2-9; P-12-7.

<sup>50</sup> P-1-12 through P-1-16.

<sup>51</sup> Testimony of Special Education Teacher.

<sup>52</sup> Testimony of Special Education Teacher.

<sup>53</sup> Testimony of Director (Nonpublic School).

<sup>54</sup> Testimony of Director (Nonpublic School).

**City Alternative School**

38. City Alternative School is a DCPS school devoted to educating [REDACTED] school student pursuing either a high school diploma or a vocational track. It operates on nontraditional hours, with daytime classes starting and ending later than a traditional [REDACTED] school. It has smaller class sizes.<sup>56</sup>

39. City Alternative School has teachers that are certified in content, and also special education teachers. The special education teachers teach in a co-teaching model, and City Alternative School is full inclusion, with no instruction occurring outside the general education setting.

40. City Alternative School has vocational training in barbering, cosmetology, computer programming, but not automotive or construction.<sup>57</sup>

41. City Alternative School uses incentives to encourage attendance, such as award assemblies, gift cards, breakfasts, and trips. All students receive home visits for all students.<sup>58</sup> The school has seen success with these incentives. There is also an attendance counselor who makes court referrals, as required by DCPS policy.

**CONCLUSIONS OF LAW**

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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

- (a) Whether DCPS denied Student a FAPE by failing to consider the use of positive behavioral interventions, supports and other strategies to meaningfully address Student’s truant behaviors that have impeded his learning since at least the beginning of the 2014-2015 school year until March 2016.**

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<sup>55</sup> Testimony of Director (Nonpublic School).

<sup>56</sup> Testimony of Special Education Coordinator (City Alternative School).

<sup>57</sup> Testimony of Special Education Coordinator (City Alternative School).

<sup>58</sup> Testimony of Special Education Coordinator (City Alternative School).

When a student's behavior "impedes the child's learning or that of others," the student's IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. 34 C.F.R. § 300.324(2)(i). Student's IEPs from 2014 through the present have not included social emotional goals or behavior support/counseling. By all accounts, Student is a pleasant person and does not appear to demonstrate outward disruptive behaviors. However, his inconsistent attendance is a behavior that is most certainly impeding his learning. Student's attendance has been problematic for two school years - 2014-2015 school year and 2015-2016 school year. During the 2015-2016 school year, District School contacted Parent regarding Student's attendance, attempted a home visit in the fall 2015, made truancy referral to the court in March 2016; asked Parent to walk Student to school in March 2016; provided transportation services to Student in April 2016; and offered/provided Student an attendance tracking sheet in October 2015 and March 2016. Interventions should have begun during the 2014-2015 school year, when Student's attendance was also quite problematic. When the interventions began in the 2015-2016 school year, however, they were not informed by data, such as from an FBA or a recent comprehensive psychological evaluation. While there is no guarantee that any given intervention would be successful, data helping to pinpoint the source of the need may make success more likely. For example, if Parent and Student live close enough to District School to walk there together, it is understandable that transportation assistance for Student would not be likely to be successful in improving his attendance. Additionally, a comprehensive psychological could have informed the team about whether Student is exhibiting any work avoidance behaviors, considering that he resists putting forth effort when he perceives that academic work exceed a basic level. The lack of attendance interventions during the 2014-2015 school year, combined with the interventions during the 2015-2016 that were not informed by data regarding the source of Student's needs and the best ways to address them significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, impeded Student's right to a FAPE and caused a deprivation of educational benefit, and rises to the level of a substantive denial of FAPE. Parent met the burden of proof on this issue.

**(b) Whether DCPS denied Student a FAPE by failing to review/revise his IEP, during the 2014-2015 school year (when Student was not making progress on any of his IEP goals) through the present.**

An "IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). While an LEA is not required to maximize a student's educational potential, it also cannot "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). Relatively speaking, Student performed reasonably well in the first quarter of the 2013-2014 school year. However, his attendance and academic performance have steeply declined since then. His IEPs have largely remained unchanged, and District School's position is understandable on one hand that Student cannot move to more advanced goals when he has missed so much school, on the other hand it is

not possible to know that Student's IEP meets his needs when there is such outdated and inadequate evaluation data for him. It is possible that Student's lack of attendance is simply willful and based on apathy and disinterest, unrelated to his disability. However, without some current testing data, such a conclusion is speculative at best. While Respondent argues that Parent refused to sign consent for Student to be evaluated, there is not sufficient evidence for the Hearing Officer to share in this perspective, as the consent form was not provided to her in the language she speaks fluently. Even with Special Education Teacher translating for Parent, the Hearing Officer does not conclude that Parent knowingly withheld consent for her son to be evaluated, when her actions otherwise seem to indicate that she wanted him to have the educational services he needs. The lack of a revised IEP based on current evaluation data over the past two years significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, impeded Student's right to a FAPE and caused a deprivation of educational benefit, and rises to the level of a substantive denial of FAPE. Parent met the burden of proof on this issue.

- (c) Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP/placement from the 2014-2015 school year through the present time (including through referring Student for an LRE observation) where: (1) Student became increasingly disengaged with his current educational environment, (2) his progress continued to decline in the general education setting, and (3) his transition services are not geared toward him reaching his transition goals.**

As Special Education Teacher credibly testified, Student needs a different type of setting at this point. Though he enjoys mathematics, overall, he has become disengaged with traditional school. Evaluation data from a comprehensive psychological will help to clarify whether any school avoidance or other issues are contributing to his disinterest in school. But at any rate, some thought should have been given to whether and to what extent the setting itself was a barrier for Student, once Student had an appropriate IEP in place, based on current testing data. The failure to closely examine Student's placement needs, including through referral to the LRE team, once an appropriate IEP was in place, based on current testing data significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, impeded Student's right to a FAPE and caused a deprivation of educational benefit, and rises to the level of a substantive denial of FAPE. Parent met the burden of proof on this issue.

- (d) Whether DCPS denied Student a FAPE by failing to re-evaluate Student, where the most recent comprehensive evaluation is from 2011, and where updated data is needed to address Student's continued decline in the general education setting.**

Pursuant to 34 CFR § 300.303, a reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. By 2014, Student's most recent evaluation data was out of date. Though parent signed a consent form in October 2014 indicated that she did not consent to Student being evaluated, the form was not provided in her native language, as required by 34 CFR § 300.300.9(a). It would be a huge leap to assume Parent

understood herself to be preventing her son from being evaluated when the form was not in her native language, even though she had translation assistance from Special Education Teacher. The failure to evaluate Student since 2011 significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, impeded Student's right to a FAPE and caused a deprivation of educational benefit, and rises to the level of a substantive denial of FAPE. Parent met the burden of proof on this issue.

### **Request for Nonpublic School**

An order for DCPS to fund a placement at Nonpublic School is part of the relief Petitioner seeks for the denials of FAPE. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. "An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child's specific needs. *Id.* To inform this individualized assessment, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

#### *a. Nature and Severity of Student's Disability*

Student has SLD; however, due to the limited and outdated nature of his evaluation data, the current severity of his disability is unknown.

#### *b. Student's Specialized Educational Needs*

Based on what is currently known, Student's needs a setting different than District School. The traditional model at District School is not working for him. He needs something will motivate him, such as job training program that he will be interested in. Student requires some special education services and modifications in order to access the general education setting. He would likely function well with non-disabled peers. An entirely self-contained setting may discourage him, because he does not like to be perceived as disabled. A vocational program would be appropriate for Student. Evaluation data may reveal additional or different needs.

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

Nonpublic School is a separate special education day school with a strong vocational focus. While the vocational training would likely engage Student, it is possible that a completely separate program would be too restrictive for his needs. New evaluation data will help shed light on this question. Nonpublic School cannot implement Student's hours inside the general education setting.

#### *d. Cost of Placement at Private School*

The yearly tuition (including educational and behavioral services) at Nonpublic School is approximately \$60,000 per year. OSSE has approved these rates; therefore, the Hearing Officer deems them to be reasonable.

*e. Extent to Which Private School Represents Least Restrictive Environment (“LRE”)*

Nonpublic School is a separate special education day school with a strong vocational focus. While the vocational training would likely engage Student, it is possible that a completely separate program would be too restrictive for his needs. New evaluation data will help shed light on this question. City Alternative School seems in many ways to be a good fit for Student’s needs, however, it could not implement Student’s hours outside the general education setting.

Based on the *Branham* factors discussed above, the program at Nonpublic School appears to be well-suited to Student’s disabilities and educational needs; however, Student needs a comprehensive psychological evaluation before his LRE can be clearly determined. For this reason, the Hearing Officer does not award Nonpublic Program under the *Branham* analysis.

### **Compensatory Education**

IDEA gives hearing officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. 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).

Here, Student was harmed over a two year period by the failure to evaluate him, the failure to provide timely behavioral supports and behavioral supports based on data to address his attendance issues, the failure to provide him appropriate IEPs, and the failure to review his placement/school setting for appropriateness based on an appropriate IEP developed with current data. At this point, Student has repeated the same grade three times, and did not make progress this most recent school year. Without educational assessments, the Hearing Officer could not determine whether Nonpublic Program constitutes Student’s LRE, but based on the remainder of the *Branham* analysis, Student would derive some educational benefit from Nonpublic Program and its vocational focus. Therefore, placement for one semester Nonpublic Program for the 2016-2017 school year will be appropriate compensatory education for Student. The equities further support this award in light of the fact that the LEA’s failure to evaluate Student recently prevents the Hearing Officer from being able to reach a firm conclusion about Student’s LRE under the *Branham* analysis.

**ORDER**

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

- (a) Within 15 business days of this decision, DCPS fund an independent comprehensive psychological evaluation and functional behavior assessment to determine Student's present levels of performance and provide recommendations regarding appropriate programming;
- (b) Within 15 school days, DCPS shall fund Student at Nonpublic School for the 2016-2017 school year.

All other relief Petitioner requested in the complaint is **DENIED**.

**IT IS SO ORDERED.**

Date: July 2, 2016

**/s/ NaKeisha Sylver Blount**  
Impartial Hearing Officer

Copies to:  
Petitioner (by U.S. mail)  
Petitioner's Attorney (electronically)  
DCPS' Attorney (electronically)  
Chief Hearing Officer Virginia Dietrich, Esq. (electronically)  
OSSE-SPED (electronically)  
ODR (electronically)

**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).