

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

OSSE
Office of Dispute Resolution
July 15, 2016

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2016-0144
v.)	
)	Date Issued: July 15, 2016
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

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

PROCEDURAL BACKGROUND

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

The DPC was filed on June 1, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On June 10, 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 June 7, 2016. The DPC alleges a discipline-related issue; therefore, the case was required to proceed on an expedited timeline. The DPH had to occur by July 7, 2016 (twenty school days after the DPC was filed), and the hearing officer determination (“HOD”) must be issued by July 15, 2016 (ten school days after the conclusion of the DPH on June 30, 2016).

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on June 21, 2016, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be

¹ Personal identification information is provided in Appendix A.

filed by June 22, 2016 and that the DPH would be held on June 29, 2016 and June 30, 2016. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on June 22, 2016.

The DPH was held on June 29, 2016 and June 30, 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-37 were admitted without objection. Respondent’s exhibits R-1 through R-19 were admitted without objection.

Petitioner called the following witnesses at the DPH:

- (a) Director (Nonpublic School)
- (b) Compensatory Education Provider²
- (c) Parent
- (d) Senior Educational Advocate³

Respondent called the following witness at the DPH:

- (a) LEA Representative⁴

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:⁵

- (a) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on November 13, 2014 in that it: (1) failed to provide sufficient hours of specialized instruction outside the general education setting, (2) failed to include information about the appropriate placement and LRE for Student.
- (b) Whether DCPS denied Student a FAPE by failing to offer Student an appropriate educational placement from May 31, 2014 through the present time, in that Student was not provided a self-contained setting, and/or a setting with sufficient structure, that was sufficiently restrictive, that was designed for students with Emotional Disturbance, and that could provide the small class and school setting and therapeutic interventions Student requires to access the curriculum.

² Qualified, without objection, as an expert in the development and implementation of compensatory education plans for students with special needs.

³ Qualified, without objection, as an expert in special education programming for students with disabilities.

⁴ Qualified, without objection, as an expert in special education programming and placement.

⁵ Prior to and at the start of the DPH, Petitioner withdrew what had been included in the PHO as issues (a) and (j), and modified the dates in issue (b).

Hearing Officer Determination

- (c) Whether DCPS denied Student a FAPE when it met to make a manifestation determination in December 2014 in that it: (1) incorrectly determined that Student's behaviors were not a manifestation of his disability, (2) failed to review all relevant data when making the MDR determination, and (3) failed to implement Student's IEP or provide an interim alternative placement following the proposed suspension.
- (d) Whether DCPS denied Student a FAPE when it failed to change Student's placement in February 2015, but rather changed Student's location of services from Area School to City School.
- (e) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on February 26, 2015, in that it: (1) failed to provide sufficient hours of specialized instruction outside the general education setting, (2) failed to include information about the appropriate placement and LRE for Student, and (3) removed almost all the accommodations for Student without justification, despite Students' needs.
- (f) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on March 18, 2015, in that it failed to provide sufficient hours of specialized instruction outside of the general education setting, it failed to include information about the appropriate placement and LRE for Student, and failed to provide sufficient accommodations for Student based on his needs.
- (g) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on January 14, 2016, in that it failed to provide sufficient hours of specialized instruction outside of the general education setting, and failed to include information about the appropriate placement and LRE for Student.
- (h) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on January 15, 2016, in that it fails to provide sufficient hours of specialized instruction outside of the general education setting, and fails to include information about the appropriate placement and LRE for Student.
- (i) Whether DCPS denied Student a FAPE on March 1, 2016 when it changed Student's placement illegally from City School to Town School, which was incapable of implementing Student's IEP.
- (j) Whether DCPS denied Student a FAPE by failing to implement Student's IEP during the month of March 2016, following the illegal involuntary transfer from City School to Town School.
- (k) Whether DCPS denied Student a FAPE by failing to change his placement on March 25, 2016, and instead changing his location of services from City School to District School.

RELIEF REQUESTED

Petitioner requests the following relief:

- (a) a finding that Student has been denied a FAPE as to all issues alleged;
- (b) an Order that DCPS place and fund Student at Nonpublic School, with transportation;
- (c) an Order that Student's IEP be revised within 15 school days of a decision in this matter, to include at a minimum: 31.5 hours of specialized instruction per week outside the general education setting and 1 hour per week of behavioral support

- services outside the general education setting, or in the alternate, an Order that within 15 school days of a decision in this matter that Student's IEP be revised consistent with the Hearing Officer's findings of fact and conclusions of law;
- (d) an Order that DCPS revise Student's manifestation determination review paperwork from December 2014 to reflect that the subject incident was a manifestation of Student's disability.
 - (e) an Order awarding compensatory education in the form of 6 hours of credit recovery, 50 hours of tutoring per credit recovery hour (300 tutoring hours total), and 200 hours of mentoring through Compensatory Education Provider, as well as transportation to and from Compensatory Education Provider for the implementation of the compensatory education.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. His parents⁶ bring this action on his behalf.⁷
2. Student is eligible for special education services under the disability classification "Emotional Disturbance" ("ED").
3. During the 2014-2015 school year, Student started at Area School and was moved to City School. During the 2015-2016 school year, Student started at Town School and was moved to District School.
4. In approximately 2008, Student experienced an extremely traumatic event that adversely impacted his emotional state, resulted in a great of emotional dysregulation, and sometimes results in Student engaging in emotional outbursts that would be more characteristic of a much younger child. Since 2008, he has experienced four psychiatric hospitalizations.⁸
5. On March 26, 2013, Student received a court-ordered psychological and psychoeducational evaluation which, among other things, diagnosed him with Attention Deficit Hyperactivity Disorder ("ADHD"), Mathematics Disorder, and Post Traumatic Stress Disorder.⁹ A previous psychiatric evaluation had also diagnosed Student with Mood Disorder, Not Otherwise Specified.¹⁰
6. Student has a diagnosed mathematics disability, but is close to proficient in reading and writing.¹¹ His Emotional Disability is what adversely impacts him the most in the

⁶ Two relatives are jointly rearing Student, and both are Petitioners in this action. For purposes of this decision, Student's parent who attended and testified at the DPH will be referred to as "Parent." Student's other parent will be referred to as "Mother."

⁷ Testimony of Parent.

⁸ *Id.*

⁹ P-31-12.

¹⁰ P-31-5.

¹¹ P-31.

school setting;¹² however, his struggles with focus and attention also impede his ability to access the general education curriculum.¹³

7. Shortly after the 2013 court-ordered evaluation was completed, DCPS formally reviewed it, and among other things, the DCPS evaluator recommended that “as soon as possible . . . [Student] should be referred to an age appropriate, self-contained educational setting, with a small student-teacher ratio that is designed specifically to meet the needs of students classified with an emotional disturbance.”¹⁴

8. Since 2013, Student’s behavior has grown increasingly problematic, with a history of passive and overtly aggressive behaviors and physical altercations, walking out of class, disrespect toward teachers, class disruption, bouts of irritability, and a persistent state of hyper-alertness.¹⁵ Student’s adverse behaviors, including physical aggression, arise during the lunch period, as well as throughout the rest of the school day.¹⁶

9. Student has missed significant instructional time since at least 2013. There are times when Student is present in the school building, but not attending all classes. Student has also had multiple in-school and out-of-school suspensions. Additionally, as a result of Student’s behaviors, there are times when his schools have placed him on the “do not admit list,” meaning that he is not allowed into the school building though he has not been formally suspended. Exclusion from school, such as through the “do not admit list,” frustrates and upsets Student, and can result in Student engaging in fits of uncontrollable and age-inappropriate emotional outbursts, including crying outside the school building when he is not allowed inside.¹⁷

10. Student has consistently made no academic or behavioral progress from at least 2013 through the present time.¹⁸ During the upcoming 2016-2017 school year, Student will be repeating the same grade for the third time.¹⁹

11. On October 27, 2014, DCPS conducted a functional behavior assessment (“FBA”) for Student which, among other things, indicated that Student is an “emotionally fragile, insecure, volatile [youth] who frequently acts out his personal and academic deficits with physical and verbal aggression, truancy, and academic disengagement.”²⁰

12. Student’s first IEP was finalized as of May 13, 2014. It classifies Student’s disability as ED, and provides 7 hours of specialized instruction outside the general education

¹² Testimony of Senior Educational Advocate.

¹³ *Id.*

¹⁴ The DCPS review of evaluation is not dated; however, based on the context of the document and testimony, the Hearing Officer presumes the review of evaluation was in 2013; P-32-8.

¹⁵ Testimony of Parent; P-19-3.

¹⁶ Testimony of LEA Representative.

¹⁷ Testimony of Parent.

¹⁸ Testimony of Parent; *see e.g.* P-4-4 through P-4-11 and P-6 through P-8.

¹⁹ Testimony of Senior Educational Advocate.

²⁰ P-20-3.

setting. It indicates that Student's "impulsive behavior greatly impacts the learning of other children," but it provides no behavioral support services. It provides a number of classroom and statewide testing accommodations for Student, but does not describe the type of classroom setting Student needs.²¹ Based on the data available to the team as of May 2014 (including the 2013 court-ordered evaluation and 2013 DCPS review of the court-ordered evaluation), Student should have been in a behavioral support program by that time, and should have been receiving 28.75 hours of specialized instruction outside the general education setting.²²

13. On September 19, 2014, Student received a 6-day out of school suspension for smoking marijuana in the stairway of the school building, during the school day.²³

14. Student received a behavior intervention plan ("BIP") for the first time on November 13, 2014. It describes his targeted behaviors as follows: "[Student's] emotional/behavioral problems, inclusive of his [ADHD] manifests in impulsivity (walking out of class, and inability to attend to focus, and anger directed outwards. His anger manifests in bullying peers that has led to a suspension and therefore a lack of instruction."²⁴

15. On November 13, 2014, Student's IEP was amended to include emotional and social goals for the first time, and to provide 240 minutes per month of behavioral support services outside the general education setting. However, it changed student's 7 hours of specialized instruction per week to inside the general education setting, rather than outside the general education setting as it had been in his first IEP. Otherwise, the November 13, 2014 IEP was substantially similar to the May 13, 2014 IEP.²⁵

16. On approximately December 11, 2014, a female student at Student's school (Area School) was assaulted in a stairway on school premises. Student was present in the stairway during the assault, but denies assaulting the other student.

17. Student's multidisciplinary team ("MDT") convened a manifestation determination review meeting ("MDR"), and determined that Student committed the assault, and that the act was not a manifestation of Student's disability. During the MDT meeting, Student indicated that he understood the consequences of assaulting another student at school, but continued to indicate that he was not one of the students who assaulted the student in question.²⁶

18. When making the December 2014 MDR determination, the MDT reviewed statements from Student and the assaulted student, Student's weekly behavior trackers, and reports from Parent regarding Student's medication changes and Student's desire to continue attending Area School, rather than moving to City School.²⁷

²¹ P-10.

²² R-16-2.

²³ P-19-4 and P-19-5.

²⁴ P-21-1.

²⁵ P-11.

²⁶ Testimony of Parent; P-19-7.

²⁷ P-19-7.

19. Student received a 45-day suspension (through February 27, 2015), however, the school subsequently cut the suspension short, and he returned to school right after Winter Break. During the suspension, he did not receive educational services.²⁸

20. In January 2015, shortly after Student returned to Area School after Winter Break, DCPS moved Student to City School through an involuntary safety transfer.²⁹ The same type of problematic behaviors Student exhibited at Area School persisted at City School, and Student continued to be regularly excluded from school due to his behavior, often without formal suspension paperwork.

21. Student's February 26, 2015 IEP removed most of the classroom and statewide testing accommodations that had been included on his previous two IEPs. It maintained the November 13, 2014 level of services – 7 hours per week of specialized instruction inside the general education setting, and 240 minutes per month of behavioral support services outside the general education setting – and was otherwise substantially similar to the November 13, 2014 IEP.³⁰

22. Student had an IEP dated March 18, 2015. As was the case with Student's November 13, 2014 IEP, Student's March 18, 2015 IEP provided 7 hours per week of specialized instruction inside the general education setting and 240 minutes per month of behavioral support services outside the general education setting. As was true of all previous IEPs, the March 18, 2015 IEP did not describe the type of classroom setting Student needed, and it continued with the significantly reduced level of classroom and statewide testing accommodations from the February 26, 2015 IEP.³¹

23. DCPS prepared a revised BIP for Student on May 21, 2015.³²

24. In December 2015, shortly before Winter Break, Student was engaged in a dispute with a female student at City School. Student threw an item the other student had been holding, and the other student said she would get her brother involved to address Student. Student responded that he would smash/kill the student's brother, and he was suspended for 5 days.³³

25. On January 6, 2016, shortly after Winter Break, Parent asked the principal of City School to allow Student to return. Parent expressed concern that any time Student "sneezed the wrong way," (in other words, made the slightest inappropriate action) he was excluded from school, despite his disability. The principal responded that "unfortunately, [Student's] sneezing

²⁸ Testimony of Parent; P-19-6 through P-19-7.

²⁹ Testimony of Parent.

³⁰ P-12.

³¹ P-13.

³² R-11.

³³ P-26-1.

usually involves a high level of disrespect, threats and/or profanity directed towards adults or his peers. So, yes, when this happens he will be subject to consequences.”³⁴

26. Student’s January 14, 2016 IEP maintained Student’s level of services at 7 hours of specialized instruction inside the general education setting and 240 minutes per month behavioral support services outside the general education setting. It did not describe the type of classroom setting Student needed; however, it returned some but not all of the classroom and statewide testing accommodations from his earliest two IEPs.³⁵

27. On January 15, 2016, Student’s IEP was amended to change his hours of specialized instruction from 7 hours per week inside the general education setting to 15 hours per week outside the general education setting. Student’s behavioral support remained at 240 minutes per month outside the general education setting, and the IEP indicated that Student required small group instruction and behavior support in order to access the general education curriculum. In every other respect, the IEP remained substantially the same as the January 14, 2016 IEP.³⁶

28. As of the end of February 2016, Student was slated to be moved to Town School through another involuntary transfer, and Parent retained her current counsel. The transfer was formalized on March 1, 2016. It was soon clear that Town School could not implement Student’s IEP, as it only offered specialized instruction in full inclusion or fully self-contained settings, neither of which was consistent with Student’s IEP. Parent was told that Student could return to City School; however, when he attempted to do so, he was not allowed inside the building.³⁷ As a result of this mix-up, Student was without a school to attend for approximately one month.³⁸

29. As of March 24, 2016, Student received an involuntary transfer to District School.³⁹ Parent and her counsel did not want Student to be moved to District School, in part because they believed he needed a more restrictive program than District School could offer, but he was moved to District School nonetheless.⁴⁰

30. Once he was moved to District School, Student continued to desire to attend school, and showed up regularly at District School, though he continued to exhibit the same types of troubling behaviors as he had exhibited at Area School and City School.⁴¹

31. On June 10, 2016, DCPS proposed in writing to increase Student’s hours of specialized instruction to 28.75 hours outside the general education setting. The school-based

³⁴ P-2-2.

³⁵ P-14.

³⁶ P-15.

³⁷ Testimony of Parent; testimony of Senior Educational Advocate; P-1-1.

³⁸ Testimony of Senior Educational Advocate; P-29-1.

³⁹ P-1-77.

⁴⁰ Testimony of Parent; testimony of Senior Educational Advocate.

⁴¹ Testimony of Parent.

members of Student's IEP team made this recommendation to align with Student's 2013 court-ordered psychological evaluation.⁴² Parent did not agree to amend Student's IEP in this way, because she believed that by now Student needed a more restrictive school, with all hours including lunch outside the general education setting.⁴³

District School

32. The Behavioral Education Support ("BES") program offers separate classrooms within District School, providing full-time outside the general education setting specialized instruction. The BES program at District School can implement an IEP requiring 28.75 hours of specialized instruction outside the general education setting, which covers all instruction during the school week, but not lunch.⁴⁴

33. The classrooms in the BES program are small, with a maximum of 12 students, and generally 6-8 students in a given class, with a special education teacher, a teacher's aide, and a floating behavior technician who works among various classrooms as necessary and/or assigned. Additionally, a dean and 1.5 licensed clinical social workers are assigned solely to the BES cluster of classrooms.⁴⁵

34. Within the BES dean's office is a de-escalation room, which is not padded. In-school suspension ("ISS") and out-of-school suspension are among the disciplinary tools it uses, including for students who walk out of class without permission. ISS is in the general education setting, including for BES students.⁴⁶

35. District School is a large general education school building. The BES classrooms are located toward the middle of the second floor of the building. The BES students transition between classes, and when going to specials and lunch, travel together through the building as a cohort, accompanied by an instructional aide, utilizing stairways and hallways.⁴⁷

36. Specials (such as art, music and physical education) are delivered in a self-contained setting, with only special education students present. BES students participate in lunch in the general education setting, with their dean present with them. The lunchroom is monitored by 2-3 educational aides.⁴⁸

37. Students sometimes are "out of area" (not in their assigned class or location). When a student walks out of a BES classroom without permission, a security monitor who is positioned on the floor sends an electronic alert to the dean and social worker, who try to find student and return them to the correct location. If the student exhibited particularly adverse behaviors upon leaving the classroom (such as turning over a desk) the student may be required

⁴² Testimony of LEA Representative; R-16-2.

⁴³ Testimony of Senior Educational Advocate.

⁴⁴ Testimony of LEA Representative.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

to write a short reflection paragraph/paper describing how their behavior can improve and how teachers/staff can support them in the appropriate behaviors, before being allowed to return to the classroom.⁴⁹

Nonpublic School

38. Nonpublic School is a full time, standalone special education day school, serving students with Emotional Disturbance, Intellectual Disabilities, multiple disabilities, Autism, Other Health Impairment, and speech-language disabilities. With approximately 34 total students, it is a small school with low student-teacher ratios of approximately 6 students, 1 teacher and 1 teacher's aide. Some students also have dedicated aides with them in their classrooms.⁵⁰

39. All of its teachers are certified in special education, and some are also certified in content areas. In addition to academics, the school has an emphasis on hands-on vocational training, with barbering, cosmetology and automotive classes and workshops on site.⁵¹

40. Nonpublic School has a certificate of approval from the Office of State Superintendent of Education ("OSSE"). It cost approximately \$75,000 per year, and OSSE accepts this rate.⁵²

41. Due to the building's small size, open and simple layout, and the regular presence of staff members monitoring the hallways, it is difficult for students to hide in the school building or avoid classes during the day.⁵³

42. There are a number of behavioral and therapeutic staff members at Nonpublic school, including a psychologist, two clinical social workers, a behavior coordinator, a behavior assistant, and a dean who provides behavior support. There is a schoolwide point system, through which students can earn incentives for appropriate behavior.⁵⁴

43. There is a padded transition room where students can be taken when they need to be de-escalated. The school physically restrains students when necessary prevent them from being a danger to themselves or others. The school occasionally uses in-school and out-of-school suspensions, though generally not for walking out of class without permission. ISS at Nonpublic School is outside the general education setting.⁵⁵

⁴⁹ *Id.*

⁵⁰ Testimony of Director (Nonpublic School).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

44. Student has been accepted into Nonpublic School. He and Parent visited the school, and responded positively to it. Student was particularly excited about the school's automotive training.⁵⁶

Compensatory Education Provider

45. Compensatory Education Provider provides services such as mentoring, tutoring and credit recovery to special education students.⁵⁷

46. When providing credit recovery services for DCPS students, Compensatory Education Provider uses a DCPS-approved online credit recovery program. Compensatory Education Provider arranges in advance with DCPS which classes DCPS would accept for credit recovery for a student, then it purchases those courses. Compensatory Education Provider provides a special education teacher to work in conjunction with the online credit recovery course teacher to help a student complete the course.⁵⁸

47. Compensatory Education Provider provides mentoring services to students to encourage school engagement and minimize student truancy. Compensatory Education Provider uses an assessment tool with students to determine which interventions would be most effective for them.⁵⁹

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).

⁵⁶ *Id.*

⁵⁷ Testimony of Compensatory Education Provider.

⁵⁸ *Id.*

⁵⁹ *Id.*

(a) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on November 13, 2014 in that it: (1) failed to provide sufficient hours of specialized instruction outside the general education setting, (2) failed to include information about the appropriate placement and LRE for Student.

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). In this instance, Student received a court-ordered comprehensive psychological evaluation on March 26, 2013 that diagnosed him with multiple disabilities, including ADHD, PTSD, and Mathematics Disorder. As of that time, his struggles with focus, attention and adverse behaviors were so significantly interfering with his ability to access the general education setting that the DCPS psychologist who reviewed the court-ordered evaluation shortly after its completion recommended that “as soon as possible” Student needed to be placed in a self-contained educational setting, with small student-teacher ratio . . . designed specifically to meet the needs of students” with ED. Yet, Student was not given his first IEP until over a year later, on May 13, 2014. Even then, his May 2014 IEP fell far short in the amount of services Student was provided, as compared to what the DCPS psychologist recommended in the review of the court-ordered evaluation. Respondent argues that Parent and her representatives, none of whom were present at the initial IEP meeting, can speak to why the team at that time opted to provide such a low level of services. Yet, no rationale is included in the body of the IEP, and in light of Student’s extreme and escalating behavioral and academic struggles since at least 2013, the Hearing Officer does not find such a sharp divergence from the evaluative data to have been reasonable in May 2014.⁶⁰

The May 2014 IEP is not at issue in this action; however, as of the November 13, 2014 IEP, Student’s behavioral and academic difficulties had further intensified. Notwithstanding this fact, the November 2014 IEP made Student’s program less restrictive – providing him 7 hours of specialized instruction inside the general education setting, as opposed to the 7 hours of specialized instruction outside the general education setting provided in the May 2014 IEP – though the November 2014 IEP did provide behavioral support services for the first time. Additionally, Student’s IEP did not describe the type of classroom setting he needed, which in this instance was quite particularized, consistent with the DCPS psychologist’s description in the 2013 review of the court-ordered psychological evaluation. Student’s November 2014 IEP was significantly less restrictive than Student needed, and his education was suffering as a result, as he missed instructional time due to exclusions, suspensions and truant behaviors. The failure to provide Student an appropriate IEP in November 2014 impeded Student’s right to a FAPE and caused a deprivation of educational benefit. Parent met the burden of proving that DCPS denied Student a FAPE by creating an inappropriate IEP for Student on November 13, 2014, in that it

⁶⁰ No denial of FAPE is found with respect to the May 2014 IEP, as it is not challenged in this action.

failed to provide sufficient hours of specialized instruction outside the general education setting, and failed to include information about the appropriate placement and LRE for Student

- (b) Whether DCPS denied Student a FAPE by failing to offer Student an appropriate educational placement from May 31, 2014 through the present time, in that Student was not provided a self-contained setting, and/or a setting with sufficient structure, that was sufficiently restrictive, that was designed for students with Emotional Disturbance, and that could provide the small class and school setting and therapeutic interventions Student requires to access the curriculum.**

Where a student's IEP is adequate, a location of services capable of implementing the IEP is also appropriate. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008). As indicated above, Student should have had an IEP providing him a self-contained educational setting, with small student-teacher ratio, designed specifically to meet the needs of students with ED at least as of May 2014. Instead, Student was located in the general education setting for most of the day prior to and as of May 31, 2014. The failure to provide Student an appropriate placement (with respect to his IEP and his school setting) as of May 31, 2014 impeded Student's right to a FAPE and caused a deprivation of educational benefit. Parent met the burden of proving that DCPS denied Student a FAPE by failing to offer Student an appropriate educational placement from May 31, 2014 through the present.

- (c) Whether DCPS denied Student a FAPE when it met to make a manifestation determination in December 2014 in that it: (1) incorrectly determined that Student's behaviors were not a manifestation of his disability, (2) failed to review all relevant data when making the MDR determination, and (3) failed to implement Student's IEP or provide an interim alternative placement following the proposed suspension.**

Within ten school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the student's IEP team, including the parent, must review all relevant information in the student's file, to determine if the student's conduct was a manifestation of the student's disability. *See* 34 CFR § 300.530(e). A disciplinary change of placement occurs under IDEA if a student is subjected to a series of removals that total more than ten school days in a school year. *See* 34 CFR § 300.536. Once an eligible student has been suspended for more than ten days in a school year, the local education agency ("LEA") must conduct a manifestation determination review ("MDR") to determine whether the conduct in question was caused by, or had a direct relationship to, the student's disability. 34 CFR § 300.530(e).

On December 11, 2014, Student received a 45-day suspension, which was his second multiday suspension of the school year (the first having been in September for 6 days). The team appropriately convened a MDR meeting; however, it did not review all relevant data when making its decision, such as the 2013 court-ordered psychological evaluation, the 2013 DCPS review of the psychological, or the recently completed FBA or BIP. In not reviewing these key pieces of data, the team came to the conclusion that Student's behavior in assaulting a female

student in a stairway was not related to his disability. Student and the school disagree about whether Student in fact committed the assault; however, even if Student committed the assault, physical aggression, which would be purely willful for many student, is a well-documented aspect of his particular disability. Student received no behavioral support until about a month prior to the incident, though he had needed such support since at least 2013. Therefore, the determination that the December 2014 incident was not a manifestation of Student's disability, particularly in light of the fact that there is no indication that the team considered certain key pieces of data documenting the physical aggression aspect of Student's disability, was not reasonable, and the Hearing Officer finds the behavior to have been a manifestation of Student's disability.

When a student with a disability is removed from his current educational placement for disciplinary reasons, he must continue to receive educational services that will enable him to participate in the general education curriculum and make progress toward meeting his IEP goals, even if this occurs in a different setting. *See* 34 CFR § 300.530(d). The student's IEP team decides what services the student needs while in the interim alternative educational setting. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46683 (August 14, 2006). Here, there is no evidence that Student's IEP team considered what services he would have needed in an interim alternative educational setting, and he was in fact not provided an interim alternative setting. The Winter Holiday break fell during Student's suspension, and Student did not ultimately serve all 45 days of the suspension, yet 4 days into the suspension, Student would have been suspended for 10 days of the school year so far (counting his September suspension). The Hearing Officer concludes that for approximately 2 school weeks, Student needed and was entitled to an alternative education placement and was not provided one. The incorrect manifestation determination and failure to provide Student an interim alternative placement impeded Student's right to a FAPE and caused a deprivation of educational benefit. The failure of the team to consider the services Student would have needed in an interim alternative placement significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Though Petitioner carries the burden of proof on the other issues raised in the DPC, Respondent carries the burden of persuasion with respect to proving that its manifestation determination decision did not deny Student a FAPE. *See* DCMR tit. 5-B, § 2510.16. Respondent did not meet its burden of proving that DCPS did not deny Student a FAPE through its December 2014 manifestation determination.

(d) Whether DCPS denied Student a FAPE when it failed to change Student's placement in February 2015, but rather changed Student's location of services from Area School to City School.

"[T]here is no a change in 'educational placement' under the IDEA where a student is placed in a new program where all the basic elements are fundamentally the same as the prior placement." *D.K. v. District of Columbia*, 2013 WL 5460281, 5 (D.D.C. Oct. 2, 2013). As indicated above with respect to issue "(b)," Student's placement was not restrictive enough and not appropriate since at least May 2014, in part because there were not enough hours on his IEP, and he was not placed in a small, self-contained setting. Though DCPS moved him to a different school in February 2015, it did not improve his educational program (in fact, it drastically

reduced his class and statewide testing accommodations without any readily apparent rationale). Maintaining Student's services at 7 hours per week of specialized instruction inside the general education setting and 240 minutes per month of behavioral support services outside the general education setting at City School was inappropriate for the same reasons as was true at Area School. The lack of an appropriate placement impeded Student's right to a FAPE and caused a deprivation of educational benefit. Parent met the burden of proving that DCPS denied Student a FAPE by failing to change Student's placement with his February 2015 IEP, but rather only changing his location of services at that time.

- (e) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on February 26, 2015, in that it: (1) failed to provide sufficient hours of specialized instruction outside the general education setting, (2) failed to include information about the appropriate placement and LRE for Student, and (3) removed almost all the accommodations for Student without justification, despite Students' needs.**

For the same reasons as discussed with respect to issues "(a)" and "(d)" above, Student's IEP remained inappropriate in February 2015. It did not include sufficient hours of specialized instruction, describe the type of small classroom setting Student needed, and it omitted almost all Student's classroom and testing accommodations, without any readily apparent rationale. The inappropriateness of the February 2015 IEP impeded Student's right to a FAPE and caused a deprivation of educational benefit. Parent met the burden of proving that DCPS continued to deny Student a FAPE by way of the February 2015 IEP.

- (f) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on March 18, 2015, in that it failed to provide sufficient hours of specialized instruction outside of the general education setting, it failed to include information about the appropriate placement and LRE for Student, and failed to provide sufficient accommodations for Student based on his needs.**

For the same reasons as discussed with respect to issues "(a)," "(d)" and "(e)" above, Student's IEP remained inappropriate in March 2015.⁶¹ It did not include sufficient hours of specialized instruction, describe the type of small classroom setting Student needed, and continued to omit nearly all of Student's classroom and testing accommodations, without any readily apparent rationale. The inappropriateness of the March 2015 IEP impeded Student's right to a FAPE and caused a deprivation of educational benefit. Parent met the burden of proving that DCPS continued to deny Student a FAPE by way of the March 2015 IEP.

⁶¹ The March 2015 IEP augments Student's post-secondary transition plan, which is not at issue in this action.

- (g) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on January 14, 2016, in that it failed to provide sufficient hours of specialized instruction outside of the general education setting, and failed to include information about the appropriate placement and LRE for Student.**

For the same reasons as discussed with respect to issues “(a),” “(d),” “(e)” and “(f)” above, Student’s IEP remained inappropriate in January 2016. It did not include sufficient hours of specialized instruction (still providing 7 hours of specialized instruction inside the general education setting and 240 minutes per month of behavioral support services) or describe the type of small classroom setting Student needed. By this time, Student’s behavior had continued along a troubling trajectory, and he had just received another multiday suspension. The inappropriateness of the January 14, 2016 IEP impeded Student’s right to a FAPE and caused a deprivation of educational benefit. Parent met the burden of proving that DCPS continued to deny Student a FAPE by way of the January 14, 2016 IEP.

- (h) Whether DCPS denied Student a FAPE by creating an inappropriate IEP for Student on January 15, 2016, in that it fails to provide sufficient hours of specialized instruction outside of the general education setting, and fails to include information about the appropriate placement and LRE for Student.**

The current IEP, dated January 15, 2016, increased Student’s hours of specialized instruction from 7 hours per week inside the general education setting to 15 hours per week outside the general education setting, continuing with 240 minutes per month of behavioral support services. This increase still falls short of the levels Student needed as of at least May 2014, and was insufficient for Student’s heightened needs as of January 15, 2016. The January 15, 2016 IEP does indicate that Student needs a small group instruction and behavior support; however, the testimony at the DPH is that small group instruction can occur in a resource room (for academic reinforcement/remediation) or a special education classroom. For Student, the two options are not comparable. While he struggles with mathematics, he is near proficient in other areas and less likely to need draw upon the resource room. He needed and needs an age appropriate, self-contained educational setting, with a small student-teacher ratio that is designed specifically to meet the needs of students classified with an emotional disturbance, so that his behaviors can be managed sufficiently to allow him to be present and emotionally available for learning.

- (i) Whether DCPS denied Student a FAPE on March 1, 2016 when it changed Student’s placement illegally from City School to Town School, which was incapable of implementing Student’s IEP.**

In order for a location of services to be appropriate, it must be capable of at least substantially, if not fully, implementing a student’s IEP and meeting his specialized educational and behavioral needs. *James v. District of Columbia*, 2013 WL 2650091, 4 (D.D.C. Jun. 9, 2013). Town School was not fully or substantially capable of implementing Student’s IEP. It offers only full inclusion (specialized instruction inside the general education setting only) or fully self-contained (specialized instruction outside the general education setting only). Student’s January 15, 2016 IEP, in place at the time, called for Student to receive 15 hours of

specialized instruction per week outside the general education setting, which Town School could not implement. Assigning Student to Town School, where he was ultimately unable to attend due to its inability to implement his IEP, resulted in Student being without any school setting for a period of time, as is further discussed with respect to issue “(j)” below. This assignment impeded Student’s right to a FAPE; significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to Student (in that Parent was not given input on the assignment which, unlike a typical location of services change, would have required a change in Student’s educational program/placement in order to be workable), and caused Student a deprivation of educational benefit. Parent met the burden of proof on this issue.

(j) Whether DCPS denied Student a FAPE by failing to implement Student’s IEP during the month of March 2016, following the illegal involuntary transfer from City School to Town School.

In order to prevail on a failure to implement claim, a Petitioner must show that substantial or significant portions of the IEP were not implemented. *Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (quoting *Bobby R.*, 200 F.3d at 349). In this instance, Student’s IEP was not implemented at all for approximately one month, when Student could not attend Town School due to its inability to implement his IEP, was not permitted entrance into City School, and Student did not yet have any other school assignment. The failure to implement his IEP impeded Student’s right to a FAPE and caused Student a deprivation of educational benefit. Parent met the burden of proving that DCPS denied Student a FAPE by failing to implement Student’s IEP in March 2016.

(k) Whether DCPS denied Student a FAPE by failing to change his placement on March 25, 2016, and instead changing his location of services from City School to District School.

As discussed with respect to issue “(d)” above, merely changing Student’s school without also providing him the level of services he needs to access the curriculum is a denial of FAPE. As discussed with respect to issue “(h)” above, the level of services Student had from January 15, 2016 through the present time – 15 hours per week of specialized instruction outside the general education setting, with 240 minutes per month of behavioral support – was and remains⁶² inappropriate for his needs, impeded Student’s right to a FAPE, and caused Student a deprivation of educational benefit. 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

⁶² On June 10, 2016, DCPS proposed in writing to increase Student’s hours to 28.75 hours per week of specialized instruction outside the general education setting, as he has needed since at least May 2014. In light of the behavioral deterioration that has occurred in the intervening year, this level of services is no longer sufficient to meet Student’s needs, as further discussed in the *Branham* analysis below.

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’s emotional disability is severe. In approximately 2008, Student experienced an extremely traumatic event that adversely impacted his emotional state and resulted in a great of ongoing emotional dysregulation. Since 2008, he has experienced four psychiatric hospitalizations. Student has multiple disabilities, including ADHD, PTSD, Mathematics Disorder and Emotional Disability. Student’s Emotional Disability impacts him the most in the school setting; however, his struggles with focus and attention also impede his ability to access the general education curriculum.

b. Student’s Specialized Educational Needs

Student needs an age appropriate, self-contained educational setting, with a small student-teacher ratio that is designed specifically to meet the needs of students classified with Emotional Disturbance. He needs therapeutic behavioral supports, and an environment where he can be precluded throughout the day from unauthorized hall-walking and hiding, such as in stairwells, where he has had some of his greatest behavioral difficulty.

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

Nonpublic School is a full time, standalone special education day school, serving students with Emotional Disturbance, among other disabilities. With approximately [REDACTED] total student, it is a small school with low student-teacher ratios. There are a number of behavioral and therapeutic staff members at Nonpublic school, including a psychologist, two clinical social workers, a behavior coordinator, behavior assistant and a dean who provides behavior support. Due to the building’s small size, open and simple layout, and the regular presence of staff members monitoring the hallways, it is difficult for students to hide in the school building to avoid classes during the day. Though the school uses suspensions, it is rarely for behaviors such as walking out of class, and its in-school suspension is for special education students only. Nonpublic School could address the educational needs Student has at this time.

By comparison, the BES program at District School is a small special education program within a large general education school. Student would transition throughout the building at points during the day, including through stairways and hallways. When students walk out of class without authorization, there are more phases involved in locating and returning them to class, including sending a message from the security monitor to other staff, an attempt for the other staff to locate the student in the large building, and on occasion having the student write a reflection paragraph/paper (something the student may feel unmotivated to do) before the student

is permitted returned to the class he/she wanted to avoid. District School utilizes suspensions, including for walking out of class, and its in-school suspension is in the general education setting. Student has never been in a BES program, and it likely would have been appropriate for him in 2013 at the time of the court-ordered evaluation and DCPS review of the evaluation, or 2014 when he received his first IEP. However, having had years of behavioral deterioration in the intervening years, it unlikely at this point that the BES program at District School would be sufficiently restrictive or therapeutic for Student.

d. Cost of Placement at Private School

Nonpublic School's tuition is \$75,000 per year. Its costs are accepted by OSSE. Given the level of staffing at the school, including for its vocational programs, the Hearing Officer will deem these costs to be reasonable.

e. Extent to Which Private School Represents Least Restrictive Environment ("LRE")

Student needs a small, self-contained special education setting, with therapeutic behavioral supports, without interaction with general education peers throughout the school day, and limited to no opportunities and/or spaces for him to be out of his assigned area or hiding during the school day. As of this time, Nonpublic School represents Student's LRE.

Based on the *Branham* factors discussed above, Nonpublic School would be appropriate for Student's needs.

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 by inappropriate IEPs and placements from May 2014 through the present time, as well as by an inappropriate MDR determination in December 2014. Student has consistently made no academic or behavioral progress over the past two years. During the upcoming 2016-2017 school year, Student will be repeating the same grade for the third time. Student has lost at least two years progress, and has started to disengage from classes, though he enjoys going to the school building. He should make a year's progress next year at Nonpublic School; however, that will not address the two-year deficit he has at this point. The Hearing Officer credits the testimony of Senior Educational Advocate that the proposed compensatory education plan will close one of the two years of deficit. While it will not close the entire deficit, Senior Education Advocate considered in developing the proposal the amount of services

Student can reasonably tolerate and make use of, while continuing his regular schooling. Toward that end, the Hearing Officer will award as compensatory education the requested 6 hours of credit recovery, 50 hours of tutoring per credit hour (which roughly equates to 25 hours of tutoring per ½ credit hour increment), 200 hours of mentoring to assist Student with reengaging in the educational process and address the truancy behaviors he has developed over the year, and transportation to and from Compensatory Education Provider for purposes of receiving the delineated services.

ORDER

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

- A. Within 20 business days of this decision, DCPS shall place and fund Student at Nonpublic School, with transportation;
- B. Within 30 school days of this decision DCPS shall convene Student's IEP team to revise Student's IEP to include 31.5 hours of specialized instruction per week outside the general education setting and 1 hour per week of behavioral support services outside the general education setting;
- C. Within 30 school days of this decision DCPS shall convene Student's IEP team to revise Student's manifestation determination review paperwork from December 2014 to reflect that the subject incident was a manifestation of Student's disability;
- D. Within 20 business days of this decision, DCPS shall fund the following as compensatory education:⁶³
 1. 6 hours of credit recovery
 2. 50 hours of tutoring per credit recovery hour (a maximum of 300 total tutoring hours total),
 3. 200 hours of mentoring services,
 4. round trip transportation for Student to receive the services listed in paragraph D of this Order.

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

IT IS SO ORDERED.

Date: July 15, 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

⁶³ The tutoring and mentoring services described in paragraph D of the Order shall be funded at DCPS' standard rate.

2016-0144
Hearing Officer Determination

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).