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

PETITIONER, on behalf of STUDENT,[1]	)	Date Issued: June 20, 2015
Petitioner,	)	Hearing Officer: Peter B. Vaden
v.	)	Case No: 2015-0119
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	Hearing Date: June 2, 2015
Respondent.	)	Office of Dispute Resolution, Room 2006 Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by GUARDIAN (the Petitioner or Guardian), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq*., and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs). The focus of Petitioner's due process complaint is the alleged failure of respondent District of Columbia Public Schools (DCPS), since April 2013, to offer Student appropriate Individualized Education Programs (IEP) and educational placements. The Guardian requests that the Hearing Officer order DCPS to place Student in a residential school.

Student, an AGE youth, is a resident of the District of Columbia, incarcerated as an adult in the D.C. Jail. Petitioner's Due Process Complaint, filed on April 3, 2015,

named DCPS as respondent. The undersigned Hearing Officer was appointed on April 7, 2015. By order entered April 14, 2015, I ordered the filing date changed to April 8, 2015, the day that service of the complaint was made on DCPS. On April 13, 2015, DCPS filed a Notice of Insufficiency, which I overruled by order entered April 14, 2015. On April 14, 2015, Petitioner, by counsel, filed a request for an expedited hearing, which I denied by order entered April 20, 2015. The parties agreed to attempt mediation of their dispute in lieu of convening a resolution meeting, but they did not reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on May 9, 2015. On April 20, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on June 2, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REP and by DCPS' COUNSEL.

Petitioner called as witnesses LEGAL INVESTIGATOR, CLINICAL PROGRAM DIRECTOR, EDUCATION DIRECTOR, MOTHER, PROBATION OFFICER, CLINICAL PSYCHOLOGIST and SOCIAL WORKER. DCPS called no witnesses. Petitioners' Exhibits P-1 through P-44, with the exceptions of Exhibits P-25, P-38, P-39 and P-44 were admitted into evidence. DCPS' objections to Exhibits P-1, P-2, P-14 through P-16, P-18 through P-21, P-30, P-32 through P-37, and P-40 through P-42 were overruled. DCPS' Exhibits R-1 through R-11 were admitted into evidence without objection, except for Exhibit R-11 to which Petitioner's objection was overruled. Counsel for Petitioner

made an opening statement. In lieu of closing statements, the parties were granted leave until June 8, 2015 to file post-hearing written argument. Counsel for both parties filed closing briefs.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the April 20, 2015 Prehearing Order:

> – Whether since January 2013, DCPS has denied Student a free appropriate public education (FAPE) and denied the parent her participation rights by improperly determining Student's educational placement without conferring the decision to Student's IEP team, with the parent's full participation;
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> – Whether since January 2015, DCPS has violated the IDEA by failing to provide prior written notice of the reasons for its refusal to change Student's educational placement;
>
> – Whether since April 2013, DCPS has denied Student a FAPE by failing to provide an appropriate IEP that provided for full time special education outside of general education, sufficient behavioral support services, and appropriate Physical Education and Physical Therapy services;
>
> – Whether DCPS violated the IDEA by failing to provide prior written notice following a November 2014 IEP meeting upon refusing the parent's request to provide a fitness plan for Student;
>
> – Whether since April 2013, DCPS has denied Student a FAPE by failure to implement his IEP, in that the CITY HIGH SCHOOL 2 self-contained program used the PLATO computerized instruction program instead of live teaching by qualified teachers as provided to nondisabled students.

For relief, Petitioner requests that the Hearing Officer order DCPS to place Student at and fund his enrollment at RESIDENTIAL SCHOOL; order DCPS to change Student's hours of specialized instruction to 29 hours per week; order DCPS to provide

Student with compensatory education for the failed services Student allegedly received from April 2013 to January 2014; order DCPS to ensure that appropriate Physical Education related services are added to Student's IEP; order that Student's IEP behavioral support services be provided by a trained Psychologist or Psychiatrist; order DCPS to ensure that Student receive an independent educational evaluation (IEE) physical therapy evaluation at customary rates for the D.C. area, performed by a DC licensed physical therapist; and order DCPS to provide Student compensatory education for physical therapy services not provided during the past two years.

FINDINGS OF FACT

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

1. Student, an AGE resident of the District of Columbia, is serving an 18 month sentence in the [redacted] (D.C. Jail), following conviction and incarceration as an adult. Testimony of Probation Officer.

2. Student has been identified as eligible for special education and related services under the disability classification Emotional Disturbance (ED). Exhibit P-31.

3. DCPS is the local education agency (LEA) for students with disabilities incarcerated in the D.C. Jail. DCPS provides services to incarcerated students through the Incarcerated Youth Program (IYP). Representation of DCPS' Counsel.

4. Student's home life and educational history have been unstable for several years. For the 2011-2012 school year, he attended CITY MIDDLE SCHOOL. Exhibit P-1. In August 2012, Student was arrested on several criminal charges. Exhibit P-40. Student attended CITY HIGH SCHOOL 1 at the beginning of the 2012-2013 school year. Exhibit P-2. In November 2012, Student was arrested on an assault charge. Exhibit P-

24. In January 2013, Student enrolled in the Behavior and Emotional Support (BES) program at CITY HIGH SCHOOL 2. Exhibit R-9. In late February 2013, Student was detained at the D.C. Youth Services Center (YSC) following his conviction on charges related to the August 2012 incident. Exhibits R-9, P-11. On March 19, 2013, in settlement of a prior due process complaint filed on Student's behalf, Guardian agreed that Student would remain at the BES Program at City High School 2 for the remainder of the school year. Exhibit R-11. On March 29, 2013, Student returned to City High School 2. Exhibit R-9. From June 12 to June 27, 2013, Student was admitted to PSYCHIATRIC HOSPITAL pursuant to a court order. He was discharged on June 27, 2013. Exhibits P-12, P-13. Student returned to the BES Program at City High School 2 for the 2013-2014 school year. On October 7, 2013, Student was committed to the D.C. Department of Youth Rehabilitation Services (DYRS) until May 8, 2014. Exhibit P-40. From January 23, 2014 until May 1, 2014, Student was placed by DCPS at STRUCTURED DAY SCHOOL in Maryland. Exhibit P-28. On May 7, 2014, Student was arrested on criminal charges. On July 28, 2014, Student was arrested on separate, unrelated, criminal charges which were dismissed. Exhibit P-40. From August 28 to September 16, 2014, Student was placed by DCPS at NONPUBLIC DAY SCHOOL in Washington, D.C. Student was arrested on a new criminal charge and since approximately October 13, 2014, has been enrolled in the Incarcerated Youth Program (IYP) at D.C. Jail. Exhibit R-3. On February 16, 2015, Student was sentenced to 18 months incarceration as an adult. Testimony of Social Worker.

5. In a November 2012 Psychoeducational Evaluation report, a Court-appointed examiner reported that Student's Full-Scale IQ was in the Low Average range. Exhibit P-3. On March 24, 2015 at the D.C. Jail, Clinical Psychologist conducted

cognitive and behavioral testing of Student. She reported that Student's scores indicated his IQ was in the Very Low range. Clinical Psychologist reported that, based on Student's previous IQ scores, the 2015 test score appeared to be an underestimate of Student's current cognitive abilities. Exhibit P-5.

6. Since early childhood, Student has had a history of problem behaviors. In an August 2012 psychiatric evaluation, the examiner reported that Student had grown from a sad and hurt little boy to an angry and somewhat sullen adolescent. He diagnosed Student with Depressive Disorder, Anxiety Disorder - Not Otherwise Specified, Attention Deficit Disorder by history, and Mood Disorder secondary to sleep apnea (Rule out). Exhibit P-4. Student's June 2013 discharge diagnoses from Psychiatric Hospital were Depressive Disorder NOS, and Attention Deficit-Hyperactivity Disorder (ADHD). Student was reported to have poor judgment, poor insight and poor impulse control. Exhibit P-13. In August 2013, a court-appointed psychiatrist diagnosed Student with Mood Disorder NOS, ADHD by history, Cannabis Abuse by history, Rule out Developmental Reading Disorder, Rule out Reactive Attachment Disorder and Rule out Use of Synthetic Marijuana. Exhibit P-24. In March 2015, Clinical Psychologist diagnosed Student with Persistent Depressive Disorder-Early Onset, ADHD-Combined Type and Cannabis Use Disorder-in Early Remission. Exhibit P-5.

7. Student's February 16, 2012 IEP at City Middle School reported that he exhibited poor behaviors such as being defiant, verbally aggressive, and inattentive; that he had poor motivation and that he exhibited hyperactivity while seeking the attention of others. The February 16, 2012 IEP provided that Student would receive 30 hours per week of Specialized Instruction and two hours per week of Behavioral Support Services,

all outside general education. Guardian and an attorney for Student attended the February 16, 2012 IEP meeting. Exhibit P-1.

8. Student's February 4, 2013 IEP at City High School 2 again reported that he exhibited poor behaviors such as being defiant, verbally aggressive, and inattentive; that he had poor motivation and hyperactivity while seeking the attention of others. The IEP also reported that it was difficult for Student to sit in his seat during instruction; that he would talk and be disruptive as an avoidance of work; that be became disrespectful and used inappropriate language to staff and peers when he was redirected or his behavior was addressed; and that he had a habit of seeing himself as a victim and refused to take responsibility for his actions. The IEP noted that although Student exhibited these behaviors, he was sometimes compliant if given 1:1 attention and challenged with work that was appropriate to his needs. The February 4, 2013 IEP provided Student would receive 25.5 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all outside general education. Guardian attended the February 4, 2013 IEP meeting. Exhibit P-7.

9. Petitioner, represented by Petitioner's Counsel, filed a prior due process complaint on Student's behalf on March 3, 2013. A settlement was reached on March 19, 2013. Exhibit R-11.

10. On July 31, 2013, Petitioner's Counsel sent an email to DCPS advising that it was his position that Student needed a residential placement and requesting guidance on the process to obtain a change in placement. By email of July 31, 2013, PROGRAM MANAGER wrote Petitioner's Counsel that Student's IEP team would have to determine whether a residential placement was Student's least restrictive environment. She

recommend that the attorney reach out to Student's last DCPS school location. Exhibit P-15.

11. On March 6, 2014, DCPS convened an IEP annual review meeting for Student at Structured Day School. The description of his behavior issues was unchanged from his prior IEP. The March 6, 2014 IEP provided that Student would receive 29 hours per week of Specialized Instruction and one hour per week of Behavioral Support Services, all outside general education. The IEP stated that Student's least restrictive setting was a self-contained classroom. Guardian attended the March 6, 2014 IEP meeting. Exhibit P-29.

12. On April 30, 2014, DCPS notified Guardian that Student's new location of special education services for the 2013-2014 school year was Nonpublic Day School and that the school had the programming in place to meet Student's IEP needs. Exhibit R-4. On the same day, DCPS sent the Guardian a Prior Written Notice (PWN) stating that the notice was for Student to [be assigned to] an out of general education setting that has a therapeutic component to address his social/emotional and academic needs. Exhibit R-5.

13. Student enrolled in Nonpublic Day School on August 28, 2014. His last day of school there was September 22, 2014. During the August 28 to September 22, 2014 period, Student was absent on six days and was tardy on 10 days. Exhibit P-30.

14. Student's IEP was revised on November 13, 2014 at IYP at D.C. Jail. The November 13, 2014 IEP provided that Student would receive 26.5 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all outside general education. The November 13, 2014 IEP stated that Student was

receiving his services at IYP located inside of a correctional facility. Guardian and Petitioner's Counsel attended the November 13, 2014 IEP meeting. Exhibit P-31.

15. At the November 13, 2014 IEP meeting at IYP, Petitioner's Counsel stated that Student had previously received physical therapy services and that PT services would be beneficial for Student because of prior surgeries and his excessive weight. Petitioner's Counsel stated he would email the necessary documents for review. The IEP meeting was then concluded, without adding PT services to Student's IEP. Exhibit R-3.

16. On January 13, 2015, Petitioner's Counsel wrote DCS by email to request a referral for Student's placement to be changed from Nonpublic Day School to a residential treatment center. DCPS' Counsel responded by email on February 5, 2015 that DCPS was willing to convene an IEP meeting to discuss Guardian's concerns including any request concerning Student's placement. She provided an official's name for Petitioner's Counsel to contact to schedule the IEP meeting. Exhibit P-37.

CONCLUSIONS OF LAW

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

Burden of Proof

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

Analysis

Introduction

Student is currently incarcerated at the D.C. Jail after having been sentenced as an adult, on February 16, 2015, to 18 months confinement. Unless there is a specific exception, all IEP content requirements apply to students with disabilities in correctional facilities, including, but not limited to, to be involved in and make progress in the general education curriculum—that is, the same curriculum as for nondisabled students. The IDEA's Least Restrictive Environment (LRE) mandate also applies to students in correction facilities. If a determination is made that a student with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that student then could be placed in a setting other than the regular educational setting. As with all students with disabilities, placement decisions for students in correction facilities must be made on an individual basis by the student's IEP team, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. *See* Office of Special Education and Rehabilitative Services, *Dear Colleague Letter*, 64 IDELR 249 (Dec. 5, 2014). *See, also, Buckley v. State Correctional Institution-Pine Grove*, 2015 WL 1610446, 7 (M.D.Pa. Apr. 13, 2015) (Discussing IEP requirements for students in correctional facilities.)

The primary relief sought in this case, DCPS funding for Student's placement at Residential School, is premised on the Petitioner's assertion that Student has received no educational benefit from his past three years in secondary school, including placements in a special class at a public high school, in a structured school for students with emotional and other disabilities in Maryland and in a special school in the District for students with emotional and other disabilities. The IDEA requires that a student's placement decision to be made by the IEP team, including the parents, *see* 34 CFR §

300.116(a). Since Student was in middle school, his IEP teams, including the November 13, 2014 IEP team, have determined that his educational placement should be in a self-contained classroom outside of general education. DCPS has identified site locations to implement this requirement, including most recently the IYP at D.C. Jail.

Whether the November 13, 2014 IYP IEP team's decision to place Student in a self-contained classroom, but not in a residential setting, was a denial of FAPE was not certified as an issued to be decided in the Prehearing Order. In this determination, I may not rule on issues which were not identified in the Prehearing Order. *See, e.g., District of Columbia v. Walker*, 2015 WL 3646779, 6 (D.D.C. Jun. 12, 2015) (vacating so much of hearing officer's ruling which was beyond the issue that the parties agreed to litigate.) Accordingly, in this decision, I do not reach the issue of Student's alleged requirement for a residential placement and my analysis will be limited to those issues set forth in the Prehearing Order, *to wit*:

A.

> Has DCPS, since January 2013, denied Student a FAPE and denied the Guardian her participation rights by improperly determining Student's educational placement without conferring the decision to Student's IEP team, with the parent's full participation?
>
> Has DCPS, since April 2013, denied Student a FAPE by failing to provide an appropriate IEP that provided for full time special education outside of general education, sufficient behavioral support services, and appropriate Physical Education and Physical Therapy services?

I consider, first, Petitioner's claims that since January 2013, DCPS has denied Student a FAPE by not providing appropriate IEPs and by making unilateral placement decisions. Student's first IEP after January 2013 was the February 4, 2013 IEP developed by the City High School 2 IEP team. Revised IEPs have been developed for

Student on March 6, 2014 and November 13, 2014.[2]

To determine whether an IEP is adequate to provide a FAPE, a hearing officer must determine "[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more." *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (*Rowley*).

Petitioner contends that DCPS unilaterally determined Student's educational placement, in violation of the IEP procedural requirement that placement decisions be determined by the student's IEP team, including the parent. *See* 34 CFR § 300.116(a). Student's IEP placement, since at least February 2012 when he attended City Middle School, has been full time Specialized Instruction, in special classes, outside of general education. This placement was confirmed in determinations by Student's IEP teams at meetings on February 4, 2013, March 6, 2014 and November 13, 2014. Guardian attended each of the meetings and she was accompanied Petitioner's Counsel at the November 13, 2014 meeting. Following the February 4, 2013 IEP meeting, Petitioner, by Petitioner's Counsel, filed a due process complaint which was settled on March 19, 2013.

Since July 31, 2013, Petitioner's Attorney has sought a residential placement for

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[2] In DCPS' April 15, 2015 Response to the due process complaint, there is a reference to an August 8, 2014 Amended IEP. That IEP was not offered into evidence.

Student. Although DCPS never agreed to provide a residential placement for Student, I find that Guardian's right to participate in the IEP formulation process was respected. *Cf. T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 420 (2nd Cir. 2009) ("The parents' actions suggest that they seek a "veto" over school choice, rather than "input"—a power the IDEA clearly does not grant them." *Id.*)

To the extent that Petitioner contends that DCPS violated the IDEA by deciding the site location to implement Student's IEP – Nonpublic Day School, the BES Program at City High School 2, or IYP at D.C. Jail – this claim is unavailing. While the IDEA provides for the student's parents to be a part of the team which creates the IEP and determines the student's educational placement, the "[Act] does not 'explicitly require parental participation in site selection.'" *Copeland v. District of Columbia*, 2014 WL 4520213, 6 (D.D.C. Sept. 15, 2014) (quoting *James v. District of Columbia*, 949 F.Supp.2d 134, 138 (D.D.C.2013)). *But see Eley v. District of Columbia*, 2014 WL 2507937, 11 (D.D.C. Jun. 4, 2014) (Location where educational services are to be implemented is a vital portion of a student's educational placement.) Once Student's IEP teams determined his placement requirement, *i.e.*, full time Specialized Instruction outside the general education setting, it was not a violation of the IDEA for DCPS to designate the locations of services that were capable of implementing the IEPs. *See Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C.2013) ("In order to provide a student with a FAPE, the student's education must be "provided in conformity with the IEP" developed for him, and therefore, the educational agency must place the student in a setting that is capable of fulfilling the student's IEP." *Id.*, citing 20 U.S.C. § 1401(9); 34 C.F.R. § 300.116.) I conclude that Petitioner has not shown that DCPS violated the IDEA requirement for Student's educational placement to be determined by his IEP

teams.

Turning to the second, substantive, prong of the *Rowley* inquiry: Were DCPS' February 4, 2013, March 6, 2014 and November 13, 2014 IEPs reasonably calculated to enable Student to receive educational benefits? DCPS asserts that my consideration of Student's February 4, 2013 IEP is barred by the IDEA's two year statute of limitations. I agree. The due process complaint in this case was initially filed on April 3, 2015, more than two years after the 2013 IEP was developed. *See District of Columbia v. Walker, supra*, 2015 WL 3646779, 6 (The "adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.") The IDEA requires that a parent's due process complaint must allege a violation that occurred not more than two years before the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint. *See* 34 CFR § 300.507(a)(2). Guardian attended the February 4, 2013 IEP meeting and filed a prior due process complaint on March 3, 2013. She must be deemed to have had knowledge of the content of the 2013 IEP at the time it was formulated. Petitioner is barred by the IDEA's two-year statute of limitations from pursuing her claims about the content of the February 4, 2013 IEP.

Petitioner contends that the March 6, 2014 and November 13, 2014 IEPs were inadequate because they did not provide for full time special education outside of general education and they lacked sufficient behavioral support services and appropriate physical education and physical therapy services. In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

> The IEP must be formulated in accordance with the terms of IDEA and "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204, 102

> S.Ct. 3034. IDEA also requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a "basic floor of opportunity" for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than "a potential-maximizing education." Id. at 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be " more appropriate or better able to serve the child") (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee "the best possible education, nor one that will maximize the student's educational potential"; instead, it requires only that the benefit "'cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.'") (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, "[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute." *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

K.S. 962 F.Supp.2d at 200-221.

Petitioner is incorrect in her claim that the March 6, 2014 Structured Day School IEP and the November 13, 2014 IYP IEP do not provide for full time special education outside of general education. Both IEPs state expressly that the nature and severity of Student's needs require that he be served outside the general education classroom. The March 6, 2014 and November 13, 2014 IEPs provide, respectively for 29 hours and 26.5 hours per week of Specialized Instruction outside general education. The March 6, 2014 IEP stated that Student's least restrictive setting was a self-contained classroom. The November 13, 2014 IEP stated that Student was receiving his services at IYP located inside of a correctional facility. Petitioner offered no evidence that these were not full time, outside of general education, placements.

The March 6, 2014 IEP and the November 13, 2014 IEP provided, respectively, one hour per week and 240 minutes per month of Behavioral Support Services.

Petitioner offered no evidence that Student required more than one hour per week/240 minutes per month of behavioral support related services. In fact, the opinion of Petitioner's expert, Licensed Psychologist, that Student should receive "no less than one hour per week" of counseling, was in accord with the IEP teams' decisions. I find that Petitioner has not shown that when the March 6, 2014 and November 13, 2014 IEPs were developed, the IEP provisions for Behavioral Support Services were not appropriate for Student.

Petitioner's claim that the IEPs should have provided for physical education and physical therapy services is based upon recommendations in past assessments that Student needs to address his diet and to exercise for excess weight. For example, an August 28, 2012 psychiatric evaluation report stated that Student needed to address diet and to exercise to lower his Body Mass Index (Exhibit P-4). A July 31, 2013 Psychiatric Evaluation report stated similarly that Student needs a weight loss program and a sleep study to address weight and sleep symptoms which may be interrelated (Exhibit P-24).

Physical therapy (PT) or special physical education must be included as a service on a student's IEP if required to meet the unique needs of the student with a disability and/or for the student to benefit from special education. *See* 34 CFR § 300.34(a); 300.39(b)(2)(ii). The determination as to whether PT or special physical education is necessary must be made by the student's IEP team on a case-by-case basis in light of the student's unique needs. *See Letter to Geigerman*, 43 IDELR 85 (OSERS Nov. 3, 2004). Nothing in the IDEA, or in the definition of related services, requires the provision of PE or any related service to a student unless the student's IEP team has determined that the related service is required in order for him to benefit from special education and has included that service in the student's IEP. *See* Department of Education, *Assistance to*

States for the Education of Children with Disabilities, 71 Fed. Reg. 46569 (August 14, 2006).

Petitioner offered no competent evidence at the due process hearing that Student requires PT in order to benefit from special education or that he requires special physical education to address any unique needs that result from his ED disability and to ensure his access to the general education curriculum. While PT would no doubt be beneficial for Student with his weight concerns, the IDEA does not require a school district to furnish every service necessary to maximize a child's educational potential. *Rowley*, 458 U.S. at 197 n. 21, 102 S.Ct. 3034. I find that Petitioner has failed to establish that Student was denied a FAPE by the failure to provide PT or special physical education services in his March 6, 2014 and November 13, 2014 IEPs.

B.

> Has DCPS, since April 2013, denied Student a FAPE by failure to implement his IEP, in that the BES Program at City High School 2 used the PLATO computerized instruction program instead of live teaching by qualified teachers as provided to nondisabled Students?

Student was enrolled in City High School 2 for most of the second semester of the 2012-2013 school year and for the first semester of the 2013-2014 school year. At City High School 2, Student was placed in the BES Program, a self-contained program for students with behavioral and emotional disabilities. In a March 19, 2013 settlement agreement, which resolved Petitioner's March 3, 2013 due process complaint, Guardian agreed, *inter alia*, that Student would receive specialized instruction and related services at the BES Program at City High School 2 for the remainder of the 2012-2013 school year.

In her due process complaint in the present case, Petitioner contends that DCPS

failed to implement Student's IEP because in the BES Program, Student allegedly received instruction via the internet-based PLATO learning system. The standard for failure-to-implement claims, used by the courts in this jurisdiction, was formulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that a petitioner "must show more than a *de minimis* failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP" in order to prevail on a failure-to-implement claim. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (Aug. 27, 2013) (quoting *Bobby R.*, 200 F.3d at 349). Courts applying this standard have focused on the proportion of services mandated to those actually provided, and the goal and import, as articulated in the IEP, of the specific service that was withheld. *Id.*

The IDEA permits the use of internet based instruction, if determined to be appropriate by the student's IEP team. *See* 34 CFR § 300.320(a)(4); Assistance to States for the Education of Children with Disabilities, *supra*, 71 Fed. Reg. 46547. ("Whether an internet-based instructional program is appropriate for a particular child is determined by the child's IEP Team, which would determine whether the program is needed in order for the child to receive FAPE.") Student's February 4, 2013 IEP specified that he would be placed in the BES Program at City High School 2 and Guardian agreed to the services location in the March 19, 2013 settlement agreement.

There was no evidence at the due process hearing as to whether Student's IEP team had or had not discussed the use of internet-based instruction for Student. Nor was there any evidence of whether and to what extent internet-based instruction was actually used in the BES program. The only witness to testify about internet-based

instruction was Clinical Psychologist, who opined that the PLATO program was not good for students with poor frustration tolerance. However, Clinical Psychologist admitted that she did not know how much of Student's instruction was computer-based as opposed to "live." I find that Petitioner has not met her burden of proof on this issue. She has not established whether Student's IEP team determined that internet-based instruction would be appropriate for Student or even whether Student was instructed using the PLATO program. I conclude that Petitioner has not established that by using internet-based classroom instruction at City High School 2, DCPS failed to implement Student's IEP.

C.

> Did DCPS violate the IDEA by failing to provide prior written notice, following a November 2014 IEP meeting upon refusing Guardian's request to provide a fitness plan for Student?
>
> Has DCPS violated the IDEA since January 2015 by failing to provide prior written notice of the reasons for its refusal to change Student's educational placement?

Petitioner's remaining claims concern the alleged failure of DCPS to provide prior written notices (PWN) when it refused a request for provide a fitness plan for Student at a November 2014 IEP meeting and, since January 2015, when it has refused to change Student's educational placement. DCPS denies that PWNs were required in these circumstances.

The IDEA requires that an LEA must give prior written notice before the LEA refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. *See* 34 CFR § 300.503(a). The PWN must include, *inter alia*, an explanation of why the agency refuses to take the action. *See* 34 CFR § 300.503(b)(2). Before the November 13, 2014 IEP meeting, Petitioner's

Counsel had been seeking PT services for Student for some time. *See, e.g.*, Exhibit P-21. At the November 13, 2014 IEP meeting at IYP, Petitioner's Counsel stated that Student had previously received physical therapy services and that PT services would be beneficial for Student because of prior surgeries and his excessive weight. Petitioner's Counsel stated he would email the necessary documents for review. The IEP meeting was then concluded, without adding PT services to Student's IEP. I find that Petitioner has established that the IDEA's PWN requirement was triggered by the refusal of the IEP team to add PT services to Students' IEP at the November 13, 2014 IEP meeting and that DCPS' failure to provide the required PWN explanation of why it refused to provide PT services was a procedural violation of the IDEA. *See Honig v. Doe,* 484 U.S. 305, 312, 108 S.Ct. 592, 598 (1988) (Safeguards include prior written notice whenever the responsible educational agency refuses to change the child's placement or program.)

Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See, e.g., Lesesne, ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). The purpose of the prior written notice requirement "is to ensure that parents are aware of the decision so that they may pursue procedural remedies." *M.B. ex rel. Berns v. Hamilton Southeastern Schools*, 668 F.3d 851, 861-862 (7th Cir.2011). In this case, Guardian was aware of the IEP team's decision not to provide PT services and she was able to exercise her due process rights. She has been represented at all times by counsel, who accompanied her to the November 13, 2014 IEP meeting, communicated on her behalf with DCPS and, seasonably, filed the present due process complaint. Therefore, DCPS' failure to provide a written explanation for its refusal to add PT services to Student's IEP did not impair Guardian's ability to participate in the process or result in harm to Student. I find that, on these facts, DCPS' failure to issue the PWN

following the November 13, 2014 IEP meeting is not actionable by Petitioner.

Petitioner also contends that DCPS was obliged to provide her a PWN because it has allegedly refused, since January 2015, to change Student's educational placement. On January 13, 2015, Petitioner's Counsel wrote DCS by email to request a referral for Student's placement to be changed from Nonpublic Day School to a residential treatment center. DCPS' Counsel responded by email on February 5, 2015 that DCPS was willing to convene an IEP meeting to discuss Guardian's concerns including any request concerning Student's placement. She identified an individual for Petitioner's Counsel to contact to schedule the IEP meeting. Since placement decisions must be made by a student's IEP team, DCPS' Counsel's response was appropriate. *See* 34 CFR § 300.116(a). At the due process hearing, there was no evidence that Petitioner moved forward with a request for an IEP meeting until the Resolution Session Meeting in this case. *See* Exhibit P-39. I conclude, therefore, that Petitioner has not shown that since January 2015, DCPS has refused a request to change Student's placement, for which a PWN would have been required.[3]

Summary

On the substantive issues before me in this case – alleged unilateral placement decisions by DCPS; alleged failure of IEPs to provide full-time special education outside of general education, sufficient behavioral support services, and appropriate Physical Education and Physical Therapy services; and alleged failure to implement Student's IEPs – Petitioner has not met her burden of proof. Petitioner has established that DCPS failed to provide a required PWN

[3] Here too, the failure to provide a PWN, if it were required, would have been a procedural violation of the IDEA. Since Petitioner was able to pursue a remedy in the form of her present due process complaint, the alleged failure to provide the PWN could not have resulted in loss of educational opportunity or seriously deprived Guardian of her participation rights. *See, e.g., Lesesne, supra*.

to Guardian after the November 13, 2014 IEP team did not add PT to Student's IEP, but this was a procedural violation which is not actionable. Petitioner is therefore not entitled to any relief in this case.

Whether Student was denied a FAPE by the November 13, 2014 IEP team's determination to provide Student full-time special education outside of general education, but not a residential placement, was not certified as an issue for the due process hearing. Therefore, the primary relief sought by Petitioner at the hearing, an order for DCPS to fund Student's residential placement, is not available in this case.

ORDER

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

1. All relief requested by the Petitioner herein is denied; and

2. This decision is without prejudice to the right of Petitioner to file a new due process complaint relating to IEP team determinations hereafter on whether Student requires a residential placement.

Date: June 20, 2015

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(I).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team