

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
May 25, 2016

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2016-0057
v.)	
)	Date Issued: May 25, 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 March 11, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On March 21, 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 March 25, 2016. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on April 11, 2016 and concludes on May 25, 2016.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Prehearing Conference (“PHC”) on April 11, 2016, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day

¹ Personal identification information is provided in Appendix A.

disclosures would be filed by April 21, 2016 and that the DPH would be held on April 28, 2016. The PHC was summarized in the Prehearing Conference Summary and Order (the “PHO”) issued on April 11, 2016.

The DPH was held on April 28, 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-31 were admitted without objection. Respondent’s exhibits R-1 through R-8 were admitted over Petitioner’s objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Student
- (c) Psychologist (Parent)²
- (d) Director (Nonpublic School)
- (e) Educational Advocate

Respondent called the following witness at the DPH:

- (a) Social Worker³
- (b) Special Education Coordinator⁴

Petitioner and Respondent gave oral closing arguments.

ISSUES

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

- (a) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on or about January 19, 2016 and February 26, 2016, in that the IEP: (1) failed to provide specialized instruction in a full time outside the general education setting; (2) failed to provide an appropriate amount of behavior support services; (3) failed to include baselines in many of the goals, and (4) failed to appropriately categorize Student as Emotionally Disturbed or Multiple Disabilities, despite Student’s lack of educational progress and ongoing behavior problems.

² Qualified as an expert in school psychology, without objection.

³ Qualified as an expert in social work, without objection.

⁴ Qualified as an expert in special education programming (meaning goals, accommodations and all portions of the IEP other than the “least restrictive environment” (“LRE”) and service hours portion) and in placement (meaning the service hours and LRE portions of the IEP), over objection as to the portion of the designation rated to the LRE.

- (b) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on January 19, 2016 and/or February 26, 2016 when it failed to appropriately categorize Student as Emotionally Disturbed or Multiple Disabilities and failed to provide specialized instruction in a separate special education therapeutic day school in light of Student's lack of educational progress and ongoing behavior problems.
- (c) Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability and complete a timely FBA and conduct a reading assessment such as [SPECIAL READING PROGRAM] to address Student's significant reading deficits, and convene a follow-up meeting with Parent to review these evaluations and revise the IEP and develop a BIP.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding in Petitioner's favor, that Student has been denied a FAPE as to each issue alleged;
- (b) an Order awarding compensatory education in the form of tutoring, counseling and speech and language services, and funding for a [SPECIAL READING PROGRAM] and services;⁵
- (c) an Order increasing Student's level of IEP services to full time outside of general education setting, and increasing Student's behavior support services;
- (d) an Order funding an independent FBA and a [SPECIAL READING PROGRAM] assessment and services;
- (e) an Order funding placement and transportation for Student to attend Nonpublic School;
- (f) other relief as the Hearing Officer deems just and reasonable.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parent.⁶
2. Student is eligible for special education services under the disability classification "Specific Learning Disability." This is Student's first year at District School.⁷ Student had a history of severe behavioral issues at Student's former school.
3. Student has some foot pain that at times makes it somewhat uncomfortable for him to walk. He was provided transportation services to and from school as a result; however,

⁵ During the DPH, the parties reached an agreement that DCPS would provide as compensatory education 75 tutoring and 50 hours counseling at the OSSE rates, as DCPS had offered during the RSM. Respondent made no admission of a denial of FAPE in agreeing to provide these services.

⁶ Testimony of Parent; P-6; R-2.

⁷ Testimony of Special Education Coordinator.

he does not generally use the school transportation due to fears that his peers will tease him about riding the “short bus.” Instead, Student generally takes Metro to and from school.⁸

4. Once he enters the school building and reaches his assigned section of the building, Student does not generally have difficulty moving from one class to another at District School, because his classes for the most part are within a door or two of each other. Student’s gym class is the only class that is not physically located near his other classes. Student sometimes has trouble traversing the school building, due to his foot pain.⁹

5. Student has failed the vast majority of his classes during the first three terms of 2015-2016 school year, and most of his non-failing grades have been “Ds” or incompletes.¹⁰ Student was showing progress at the beginning of the year, such as by taking notes and asking questions. However, his attendance and progress soon began to slip.¹¹ For example, in biology class Student has received interventions during the 2015-2016 school year such as blended learning techniques, use of a graphic organizer to help him organize his notes, and the ability to take breaks during class. There is a special education teacher, an aid, and a floating behavior technician assigned to the classroom. Student received an “F” in biology for the first three terms.¹²

6. Student needs significant one-on-one instruction to help him build social skills, communicate effectively, and make academic progress.¹³

Behavior/Attendance

7. District School’s policy is that when a student arrives unexcused after 11:00 a.m., s/he is marked absent for the day.¹⁴ From the beginning of the 2015-2016 school year until approximately February 26, 2016, Student was often turned away from school after arriving late and missing two class periods. However, after Parent and her advocates addressed this issue with Student’s team at the February 26, 2016 IEP meeting, Student stopped being turned away at the door for being late.¹⁵

8. Student has a long history, including from his previous school, of behaviors including cursing at adults and peers, “Jonng” (a form of taunting), playing, defiance, noncompliance, walking out the classroom, disrespect of female peers, and work avoidance issues when he does not understand.¹⁶ There are times when Student gets in trouble at school and is sent home and it is not documented as a suspension.¹⁷

⁸ Testimony of Parent.

⁹ Testimony of Social Worker.

¹⁰ Testimony of Special Education Coordinator; P-22; R-1-1 through R-1-7.

¹¹ Testimony of Special Education Coordinator.

¹² Testimony of Special Education Coordinator; P-22-3.

¹³ Testimony of Psychologist (Parent).

¹⁴ Testimony of Special Education Coordinator.

¹⁵ Testimony of Parent; testimony of Educational Advocate; P-12-1.

¹⁶ Testimony of Student; testimony of Educational Advocate.

¹⁷ Testimony of Student; testimony of Parent.

9. Student's attendance this school year has been poor.¹⁸ Student has been absent more days than present this school year.¹⁹ This impacts his ability to progress because he is not present consistently enough to engage and access the curriculum.²⁰ Student has missed some school time due to his foot pain, but his absences are not generally due to his foot pain.²¹ Student attended some classes more often than others; however, even in classes where Student's attendance was better than in other classes, his grades were still low.²²

Most Recent Evaluation (from December 2013) and Pending Updated Evaluation

10. Student had a DCPS-conducted confidential psychological evaluation on December 12, 2013. At the time, Student was performing significantly below grade level in reading, mathematics, science, social studies and extended literacy. Student was also behaving in class in a way that was disruptive, disrespectful to teachers and peers, inattentive and impulsive, and he was using profane language.²³

11. According to the December 2013 psychological evaluation, Student's cognitive abilities are in the significantly below average range (composite, verbal and composite memory index) and below average range (nonverbal).²⁴ His verbal abilities are even weaker than his nonverbal abilities, but both are weak; therefore, he will struggle with language-based instruction.²⁵ Student scored low in composite memory which, combined with his low verbal intelligence abilities indicates that he will struggle to retain information in school.²⁶ His cognitive processing fell in the very low range.²⁷

12. According to the December 2013 psychological evaluation, Student's academic functioning fell in mostly the very low, and also the low range, in the broad reading, broad mathematics, math fluency, and written language clusters.²⁸

13. As of the DPH, DCPS was in the process of completing an updated comprehensive psychological evaluation for Student, at the request of Parent and her advocates.²⁹ As of the DPH, Student's team intended to reconvene on May 15, 2016 (when the evaluations were anticipated to have been completed) to have a new eligibility meeting, address any concerns, determine any necessary changes to Student's IEP, and review progress under the BIP created the day prior to the DPH.³⁰

¹⁸ Testimony of Social Worker.

¹⁹ P-24; R-1-8 through R-1-21.

²⁰ Testimony of Special Education Coordinator.

²¹ Testimony of Parent; P-20-9.

²² Testimony of Social Worker; R-1-2.

²³ P-5-1 through P-5-3.

²⁴ P-5-5 through P-5-7.

²⁵ Testimony of Psychologist (Parent).

²⁶ *Id.*

²⁷ P-5-10.

²⁸ P-5-7 through P-5-10.

²⁹ Testimony of Educational Advocate.

³⁰ Testimony of Special Education Coordinator.

IEPs and Services

14. Student had an IEP dated March 10, 2014 that indicated Student was eligible for special education services under the disability classification “Specific Learning Disability.” It included academic goals in mathematics, reading, written expression, cognitive, emotional, social and behavioral development. It provided 15 hours of specialized instruction outside the general education setting, 120 minutes of behavioral support services outside the general education setting.³¹

15. Student’s February 12, 2015 IEP was in place at the start of the 2015-2016 school year. It indicated Student was eligible under the disability classification “Specific Learning Disability.” It included academic goals in mathematics, reading, written expression, cognitive, communication/speech and language, emotional, social and behavioral development. It provided 20 hours of specialized instruction outside the general education setting, 180 minutes of behavioral support services outside the general education setting, and 90 minutes of speech-language pathology outside the general education setting.³²

16. The February 12, 2015 IEP delineates some of Student’s behavioral challenges. For instance, it indicates that in mathematics, Student required a one-one-one setting with minimal distractions. It stated that when he was in a whole group or a small group setting, he lacked focus, distracted himself and the entire class, he bullied and harassed other students, shouted obscenities and used obscene gestures, frequently put his hands on other students, made uncomfortable and inappropriate sexual advances and commentary to female students, and that Student also harassed adults.³³

17. At the January 19, 2016 IEP team meeting, the team reduced Student’s behavior support from 180 to 120 minutes per month due to Student’s large number of absences, to reduce the amount of time Student was out of class. Parent was not present at this meeting, and while Social Worker discussed the reduction of services with her at some point, Social Worker had not discussed the reduction with Parent as of the meeting.³⁴

18. Student had an IEP dated January 19, 2016 that indicated Student was eligible under the disability classification “Specific Learning Disability.” It included academic goals in mathematics, reading, written expression, cognitive, communication/speech and language, emotional, social and behavioral development. The reading and written expression goals did not include baselines. It provided 20 hours of specialized instruction outside the general education setting, 120 minutes of behavioral support services outside the general education setting, and 60 minutes of speech-language pathology outside the general education setting.³⁵

³¹ P-16.

³² P-14.

³³ P-14-3.

³⁴ Testimony of Social Worker.

³⁵ P-13.

19. Student missed a number of behavior support service sessions and had an inconsistent response to others, including during the month of February 2016.³⁶ Student had not make progress on any of his social emotional goals during the 2015-2016 school year as of February 2016³⁷

20. Student's IEP team met on February 26, 2016 and reviewed Student's IEP. The team discussed a number of problematic behaviors from Student, including Student's excessive tardies, foul language issues, refusal to follow directions, sexually inappropriate comments, including to faculty. Pointing out that Student had a history of these types of behaviors, Parent requested a more restrictive setting. The team maintained Student's disability classification as "Specific Learning Disability" and the 20 hours per week of specialized instruction outside the general education setting, and 120 minutes of specialized instruction per month outside the general education setting.³⁸

21. At the RSM on March 25, 2016, the team agreed to restore Student's behavioral support back to 180 minutes per month from 120 minutes per month.³⁹ The team made this change at Parent's request, though the school based members of the team thought 120 minutes per month was appropriate at the time, and indicated that Student could access more support if he needed or wanted to do so.⁴⁰

22. At the March 25, 2016 RSM meeting, the team agreed to increase Student's hours of specialized instruction from 20 to 25 hours outside of the general education setting. The team agreed that all Student's classes, including electives, would be in a self-contained setting, and that Student would not have any classes with general education students. The team agreed that this new level of services hours was full time.⁴¹

April 2016 BIP and Attendance Plan

23. A BIP is plan that lays out clear and practical ways to address concerning behaviors in a student.⁴² The day prior to the DPH, a new BIP was created for Student.⁴³ While it included some interventions that had already been attempted, the interventions had not been implemented with the level of consistency that they will be under the new BIP.⁴⁴ Parent and her advocates agreed to the new BIP.⁴⁵ Generally, the effectiveness of a BIP is assessed after it has been in place for approximately 30 days.⁴⁶

³⁶ Testimony of Social Worker; P-17.

³⁷ Testimony of Social Worker; P-19.

³⁸ P-11 and P-12.

³⁹ Testimony of Educational Advocate.

⁴⁰ Testimony of Social Worker.

⁴¹ Testimony of Educational Advocate.

⁴² Testimony of Social Worker.

⁴³ Testimony of Parent.

⁴⁴ Testimony of Social Worker.

⁴⁵ Testimony of Educational Advocate; testimony of Special Education Coordinator.

⁴⁶ Testimony of Educational Advocate.

24. Student's new BIP describes the function of Student's behavior as to avoid things that Student does not like (such as being put in situations where he cannot complete a task) and to receive attention that he can control (as opposed to attention for something that makes him uncomfortable, such as reading out loud). It prescribes interventions for Student such as redirection, providing breaks as needed, providing Student self-monitoring tools and checklists so that he can be prepared for upcoming events, providing him a separate work space as needed, and providing him individualized attention.⁴⁷

25. An attendance plan is generally a document that describes a student's barriers to attendance and provides a specific plan to address the student's barriers to attendance. An attendance plan was created for Student the day prior to the DPH.⁴⁸ Parent and her advocates agreed to the attendance plan.⁴⁹

District School

26. District School is a large general education school.

27. At District School, Student is a part of the Behavior Education Support ("BES") program, which is a smaller cluster within the school.⁵⁰ Behavior technicians, a dedicated Dean, and a dedicated social worker are available to the students in the BES program.⁵¹ Student has a positive relationship with Social Worker, who provides Student's behavior services.⁵²

28. District School has a behavioral system that includes a self-evaluation component, such as allowing five-minute breaks to reflect on behavior in writing, revamp and return to class.⁵³ The school has de-escalation rooms where students can retreat when feeling intense emotions.⁵⁴

Nonpublic School

29. Nonpublic School has approximately 30 students total. There are approximately six students in each class, with a minimum of two adults per class (a teacher and an assistant). All teachers are certified in their content areas, and they have special education teachers as well.⁵⁵

30. For the most part, students at Nonpublic School do not transition throughout the building from class to class. The students remain in the same classroom throughout the day, and the teachers rotate from classroom to classroom.⁵⁶

⁴⁷ Testimony of Social Worker.

⁴⁸ *Id.*

⁴⁹ Testimony of Educational Advocate.

⁵⁰ *Id.*

⁵¹ Testimony of Special Education Coordinator; testimony of Social Worker.

⁵² Testimony of Social Worker.

⁵³ Testimony of Special Education Coordinator; P-22-3.

⁵⁴ Testimony of Special Education Coordinator.

⁵⁵ Testimony of Nonpublic Director.

⁵⁶ *Id.*

31. Nonpublic School has students with behaviors similar to Student's. It uses a behavioral points system, reinforcing appropriate and positive behaviors with things like motivational trips, special lunches, opportunities to participate with the basketball and flag football team, and participation at a fine arts festival. There is a social worker present at all times, and there are three quiet rooms students can enter of their own volition when they need to recollect themselves prior to retuning to class. Two staff members are in the hallways at all times, and as a result there is little if any wandering in the halls.⁵⁷

32. Nonpublic School has some DCPS students, funded by the Office of State Superintendent of Education ("OSSE").⁵⁸

33. Nonpublic School could meet Student's academic and behavioral needs.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).

- (a) **Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on or about January 19, 2016 and February 26, 2016, in that the IEP: (1) failed to provide specialized instruction in a full time outside the general education setting; (2) failed to provide an appropriate amount of behavior support services; (3) failed to include baselines in many of the goals, and (4) failed to appropriately categorize Student as Emotionally Disturbed or Multiple Disabilities, despite Student's lack of educational progress and ongoing behavior problems.**

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefit. *N.T.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

v. District of Columbia, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). At a minimum, an IEP must “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). Here, Student has made no meaningful academic or behavioral progress this school year. Though this was his first year at District School and it was a new setting for him, he continued to exhibit the same problematic behaviors consistent with his history from his previous school. Student’s inappropriate behaviors stemmed in part from his attempts to draw attention to himself that he could control, rather than attention from attempting to do academic and other tasks with which he would struggle and that made him uncomfortable. Student attended some classes more than other classes, but had such poor attendance throughout the school year as to indicate school avoidance issues. Student failed a substantial number of classes during the first three terms, and obtained “Ds” in most of the others. Student requires significant one-on-one instruction and minimal distractions in order to make academic and social progress. Based on these factors, at least as of January 19, 2016, Student’s hours of specialized instruction should have been increased to 25 hours outside the general education setting. The same is true as of February 26, 2016 when Parent and her advocates specifically requested this increase in services. The team’s failure to increase student’s hours to 25 hours until March 25, 2016 was inappropriate. It rises to the level of a substantive violation because it impeded Student’s right to a FAPE and caused a deprivation of educational benefit.

As of January 19, 2016, there was no basis for reducing Student’s behavior support from 180 to 120 minutes per month. Student’s longstanding behavior problems – carrying over from his previous school and documented in the February 2015 IEP that was in effect at the start of the 2015-2016 school year – had by no means improved, and had if anything further deteriorated. Likewise, his attendance throughout the school year, including as of January 2016, was exceedingly poor. The rationale for reducing Student’s behavior support was to afford Student more time in class, considering how much instruction he had missed to that point. While a laudable goal, the evidence does not support a conclusion that Student’s attendance was likely to improve without significant behavior support. For these reasons, the Hearing Officer does not find the reduction in January 2016, or the continuation of the reduced level in February 2016, to have been appropriate. The decision to reduce the behavior support in January 2016 was not discussed with Parent prior to the reduction being made. The reduction rises to the level of a substantive denial of FAPE in that it 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 (because Parent was not informed prior to the January 2016 reduction), and caused a deprivation of educational benefit.

The IDEA requires that a student’s IEP include “A statement of measurable annual goals.” The lack of baselines interfered with the ability to measure Student’s progress or lack thereof. The reading and written expression goals in Student’s January 19, 2016 IEP did not

include baselines. The lack of baselines was a procedural violation of the IDEA which rose to a substantive denial of FAPE in that, by failing to provide Parent the necessary information to measure Student's progress, it significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student.

The IDEA defines a student as eligible for special education and related services under the disability classification "Emotional Disturbance" when the student exhibits "one or more of [several] characteristics over a long period of time and to a marked degree that adversely affects [the] child's educational performance." 34 C.F.R. § 300.8(c)(4). The Hearing Officer finds that Student has demonstrated several of the delineated characteristics over a long period of time and to a marked degree. Namely, Student has demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers and inappropriate types of behavior or feelings under normal circumstances. The testimony was clear that Student consistently bullies, sexually harasses and otherwise speaks and acts inappropriately to his peers and even to adults in the school setting. These behaviors did not begin this year, but have persisted over years, including at his previous school. Student's adverse social interactions distract him and others, and impede his learning. For these reasons, the Hearing Officer concludes that Student should have been classified with Emotional Disturbance. Likewise, pursuant to 34 C.F.R. § 300.8(c)(7), the term "Multiple Disabilities" means "concomitant impairments . . . the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments." Neither party has asserted that Student should not have been classified as Specific Learning Disability as he has been, and the available evaluative data supports this classification. Both of Student's disability classifications need to be addressed in order for him to make progress; therefore, the Hearing Officer finds that Student should have been classified as Multiple Disabilities (Emotional Disturbance and Specific Learning Disability). "Nothing in the [IDEA] requires that children be classified by their disability so long as each child who has a disability that is listed in §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act." 34 C.F.R. §300.111(d). Accordingly, even if an LEA classifies a student incorrectly, if the student is receiving the services he needs to meet his unique needs and help him access his education, there has not been a denial of FAPE. However, in this instance, the procedural misclassification rises to the level of a substantive denial of FAPE. For example, Student's behavior support likely would not have been reduced had he been classified with an Emotional Disturbance. The lack of the Multiple Disabilities (Emotional Disturbance and Specific Learning Disability) classification impeded Student's right to a FAPE and caused a deprivation of educational benefit.

Petitioner met the burden of proof on this issue.

- (b) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on January 19, 2016 and/or February 26, 2016 when it failed to appropriately categorize Student as Emotionally Disturbed or Multiple Disabilities and failed to provide specialized instruction in a separate special education therapeutic day school in light of Student's lack of educational progress and ongoing behavior problems.**

The appropriateness of a student's IEP and placement must be assessed as of the time the IEP was developed. "Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id.*, quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008). As discussed with respect to issue "(a)" above, the Hearing Officer concludes that the January 19, 2016 and February 26, 2016 IEPs inappropriately failed to provide full-time instruction outside the general education setting for Student, and inappropriately failed to classify Student as "Multiple Disabilities (Emotional Disturbance and Specific Learning Disability). The next question is whether, as of the time those IEPs were created, Student needed to be moved to a more restrictive setting than a general education school.

Both by January 19, 2016 and February 26, 2016, Student was demonstrating extreme school avoidance problems. He was absent more than present during the 2015-2016 school year. Student was not simply avoiding school altogether, but he would often be turned away for arriving late, and would be sent home at times for his misbehaviors. He attended some classes more than other classes. He was failing nearly all classes. He was seeking negative attention he could control to avoid the discomfort (and likely embarrassment) from struggling to do academic tasks. When he was in class, he was a severe distraction to himself and other students. He bullied and harassed (including sexually) fellow students as well as adults. Once in the building and in his section of the building, he could transition fairly easy between his self-contained classes, but his foot pain made him uncomfortable traversing the large building, including for his gym class. District School had attempted a number of interventions, but Student was not making academic or behavioral progress. Student's problems as of the 2015-2016 school year were not new, but had persisted for years, carrying over from his previous school. Student needs significant help, and the evidence indicates that as of January and February 2016 he needed a full-time therapeutic day school. The failure to provide this next level of restrictiveness is a substantive denial of FAPE, in that it impeded Student's right to a FAPE and caused a deprivation of educational benefit. Petitioner met the burden of proof on this issue.

- (c) Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability and complete a timely FBA and conduct a reading assessment such as [SPECIAL READING PROGRAM] to address his significant reading deficits, and convene a follow-up meeting with Parent to review these evaluations and revise the IEP and develop a BIP.**

An LEA must ensure that students eligible for special education and related services are assessed in "all areas related to the suspected disability." 34 CFR § 300.304(c)(4). In determining the content of a student's IEP, the LEA must conduct an evaluation that uses a "variety of assessment tools and strategies to gather relevant functional developmental and

academic information about the child.” 34 C.F.R. 300.304(b)(1). Here, due to the longstanding, persistent and severe behavioral and attendance issues described in connection with issues “(a)” and “(b)” above, there was ample evidence to indicate that Student needed an FBA at least as of the beginning of the 2015-2016 school year, yet he did not receive one until shortly prior to the DPH. The FBA results were also not reviewed with Parent until shortly prior to the DPH, by which time almost an entire school year had passed. The failure to appropriately assess a student and review the evaluation results with a parent is a procedural violation of the IDEA. In this instance, it rises to the level of a substantive violation, because it impeded Parent’s ability to fully participate in the decision-making process regarding the provision of FAPE to Student, in that Parent did not have the information needed to meaningfully participate in IEP team meetings. It also impeded Student’s right to a FAPE and caused Student a deprivation of educational benefit. Petitioner met the burden of proof on this issue.⁶⁰

Request for Nonpublic School

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

a. Nature and Severity of Student’s Disability

Student’s Multiple Disabilities (Emotional Disturbance and Specific Learning Disability) are severe. Student’s cognitive abilities are in the significantly below average/below average range.⁶¹ His cognitive processing and composite memory are in the very low range.⁶² His academic functioning is very low. Student has a long history of problematic and troubling behaviors, and his extremely poor and inconsistent attendance likely indicates school avoidance issues.

b. Student’s Specialized Educational Needs

Student needs significant one-on-one instruction to help him build social skills, communicate effectively, and make academic progress.

⁶⁰ There was not sufficient evidence presented for the Hearing Officer to determine whether or not Student should have been given a reading assessment.

⁶¹ P-5-5 through P-5-7.

⁶² P-5-10.

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

Nonpublic School is extremely small, with few to no transitions for students during the school day. It has students with behaviors similar to Student's. Two staff members are in the hallways at all times, and as a result there is little if any wandering in the halls. Though District School has some of the same features of Nonpublic School, Nonpublic School's extremely small physical size, close supervision in the hallways, and minimal to no transitions in the already small physical space would address part of Student's barrier to progress – making it inside the building, through the building to his BES program, and remaining in class once he gets there. District School offers behavioral support, but the therapeutic environment of Nonpublic School is more in line with Student's significant needs at this point.

d. Cost of Placement at Private School

Petitioner did not provide precise evidence on the cost of Nonpublic School. However, the evidence is that Nonpublic School has some DCPS students, funded by the Office of State Superintendent of Education ("OSSE"). For this reason, the Hearing Officer will infer that Nonpublic School's costs are reasonable.

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

Student works best academically and behaviorally in a small, and even one-on-one, setting. He has consistently and for a long period of time demonstrated extremely maladaptive behaviors, which require intense remediation. For these reasons, Nonpublic School represents Student's LRE as of this time.

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

ORDER

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

- (a) As compensatory education for the denials of FAPE discussed above, DCPS shall (to the extent that it has not already done so, consistent with the parties' agreement during the DPH) within seven business days of this Order provide to Parent written authorization to obtain at the OSSE rate 75 hours of tutoring and 50 hours of counseling for Student at DCPS' expense;⁶³

⁶³ During the DPH, the parties reached an agreement that DCPS would provide as compensatory education 75 tutoring and 50 hours counseling at the OSSE rates, as DCPS had offered during the RSM. Respondent made no admission of a denial of FAPE in agreeing to provide these services. To the extent that Respondent has already fulfilled this agreement of the parties, this paragraph imposes no additional obligation.

Hearing Officer Determination

- (b) To the extent that it has not already done so, DCPS shall within ten business days of this Order increase Student's level of IEP services to those reflected on the draft IEP in the record at exhibit R-5-12;⁶⁴
- (c) DCPS shall fund Student at Nonpublic School at the standard tuition rate, in line with what OSSE pays for other DCPS students funded at Nonpublic School;
- (d) As soon as practicable, and no later than ten business days from this Order, DCPS shall make the necessary funding and transportation arrangements and locate Student at Nonpublic School.

All other relief Petitioner requested in the complaint is **DENIED**.⁶⁵

IT IS SO ORDERED.

Date: May 25, 2016

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner's Attorney (electronically)

DCPS' Attorney (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

NOTICE OF RIGHT TO APPEAL

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

⁶⁴ The evidence indicates that these changes have already been made to Student's IEP. To the extent that Student's current finalized IEP includes the level of services reflected at R-5-12, this paragraph imposes no additional obligation.

⁶⁵ The evidence was that DCPS conducted an FBA shortly before the DPH with which Parent did not express disagreement; therefore, an independent FBA is not ordered. There was not sufficient evidence to justify an order of [SPECIAL READING PROGRAM], though Parent could perhaps utilize the relief awarded in Order "(a)" to procure such services.