

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

OSSE  
Office of Dispute Resolution  
September 24, 2016

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STUDENT, <sup>1</sup>	)	
through the PARENT,	)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>	)	
	)	Case No: 2016-0162
v.	)	
	)	<b>Date Issued:</b> September 24, 2016
District of Columbia Public Schools,	)	
<i>Respondent.</i>	)	

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**Hearing Officer Determination**

**SUBJECT MATTER JURISDICTION**

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

**PROCEDURAL BACKGROUND**

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

The DPC was filed on July 1, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On July 12, 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 July 15, 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 agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on July 31, 2016, and the 45-day period was scheduled to conclude on September 14, 2016. On September 1, 2016, Respondent filed a consent motion for continuance, which was granted on September 2, 2016. As a result the HOD is due on September 24, 2016.

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

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on August 2, 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 filed by August 19, 2016 and that the DPH would be held on August 26, 2016 and September 1, 2016 and June 30, 2016. Subsequently, the parties agreed to change the second day of the DPH to September 7, 2016. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on August 3, 2016.

The DPH was held on August 26, 2016 and September 7, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2006. 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-4, P-6, P-7, P-13 through P-27, P-31, P-32, P-37, P-38, P-41 were admitted without objection. Petitioner’s exhibits P-5, P-8, P-9, P-11, P-28, P-29, P-30, P-33 through P-36, P-39, P-40, P-42, P-43 were admitted over Respondent’s objection. Petitioner’s exhibit P-10 was withdrawn, and Petitioner’s exhibit P-12 was not admitted. Respondent’s exhibits R-1 through R-6 and R-8 through R-15 were admitted into evidence without objection. Respondent’s exhibit R-7 was admitted over Petitioner’s objection.

Petitioner called the following witnesses at the DPH:

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

Respondent called the following witness at the DPH:

- (a) Compliance Specialist<sup>3</sup>
- (b) Social Worker<sup>4</sup>
- (c) DCPS School Psychologist<sup>5</sup>

At the conclusion of Petitioner’s case-in-chief, Respondent moved for a directed verdict, and the Hearing Officer took the motion under advisement. Based on the findings of fact and analysis below, the motion is **DENIED**. 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:

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<sup>2</sup> Qualified, without objection, as an expert in special education programming and IEP development for students with Emotional Disturbance.

<sup>3</sup> Qualified as an expert in IDEA compliance, with experience in IEP development, over Petitioner’s objection.

<sup>4</sup> Qualified, without objection, as an expert in social work and behavioral support services.

<sup>5</sup> Qualified, without objection, as an expert in school psychology.

- (a) Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP or placement at the April 26, 2016 IEP meeting, in that the IEP fails to include transportation as a related service, fails to include a description of Student's LRE, and/or by failing to identify a 2016-2017 location of services for Student that can implement Student's IEP and/or provide the type of setting Student needs, in light of his disability.
- (b) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP or placement on or about September 29, 2014, in that the IEP did not include many of the goals, accommodations, supplemental supports, or the LRE Student needed, and that were specified in Student's October 3, 2013 IEP from the state of State A.
- (c) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP or placement on or about May 27, 2015, in that it did not include many of the goals, accommodations, supplemental supports, or the LRE Student needed, and that were specified in Student's October 3, 2013 IEP from State A.
- (d) Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP during the 2014-2015 school year (in that the entire IEP was not implemented from start of school year until the end of August 2014, and in that Student did not receive related counseling services in whole or in part throughout the entire school year) and/or by failing to provide Student with an appropriate placement for either the 2014-2015 or 2015-2016 school years, in that it did not provide Student a program comparable to the program he had in State A, which provided him 30 hours of specialized instruction outside the general education setting and in a separate day school for students with Emotional Disturbance.
- (e) Whether DCPS denied Student a FAPE by failing to timely provide and/or implement a behavior intervention plan ("BIP") and/or an appropriate BIP during the 2014-2015 and/or 2015-2016 school years. The Student came to DCPS with an out of state BIP, and Petitioner has never been provided any BIP from DCPS.
- (f) Whether DCPS denied Student a FAPE by failing to provide Parent with full access to educational records on or about February 24, 2016, included but not limited to prior evaluations referenced in the DCPS psychological report, behavior/discipline records, standardized test scores, service trackers, behavior plans, IEP progress reports, report cards and attendance records.

### **RELIEF REQUESTED**

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE as to all issues alleged;
- (b) an Order that DCPS shall revise Student's IEP to include transportation and a description of the setting that is required for Student to access his education – a full time, self-contained setting with low student teacher ratio, a small group setting, and therapeutic interventions to address Student's behaviors in order that he can access his education;
- (c) an Order that DCPS revise Student's IEP to include the supplement aides, services and accommodations previously eliminated in his September 20, 2014 IEP;
- (d) an Order that DCPS revise Student's IEP to include goals in the area of reading comprehension and written mechanics;

- (e) an Order that DCPS shall update Student's functional behavioral assessment and develop a BIP for Student as soon as possible following the commencement of the 2016-2017 school year;
- (f) an Order that DCPS fund Student's nonpublic placement, with transportation;
- (g) an Order that DCPS provide Parent's counsel copies of all educational records previously requested, including but not limited to: all prior IEPs developed by DCPS, prior evaluations referenced in the DCPS psychological report, behavior and/or discipline records, standardized test scores, service trackers, and behavior plans;
- (h) an Order awarding Student compensatory education for DCPS' failures to fully implement Student's IEP.

### **FINDINGS OF FACT**

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parent. Student was born to his biological mother addicted to illicit substances, came into Parent's care shortly after his birth, and has been in Parent's care ever since.<sup>6</sup>

#### **Educational Background**

2. Prior to the 2014-2015 school year, Student and Parent lived in different jurisdiction ("State A"), and Student attended school in State A.<sup>7</sup> State A determined Student to be eligible for special education services under the disability classification "Emotional Disturbance" ("ED") in approximately the 2008-2009 school year, and from that point Student maintained the ED disability classification throughout his time in State A.<sup>8</sup>

3. Student's ED affects him academically in the areas of math calculation, written language expression, written language mechanics, and social emotional skills. He has relative strengths in reading when provided with accommodations and supports. State A thoroughly documented information about the academic impact of Student's ED throughout his years in special education in State A.

4. When his behaviors are appropriately managed, Student is motivated to learn and can be a leader in class.<sup>9</sup> However, Student's difficulties with maintaining appropriate social interactions, remaining in the classroom, as well as his weaknesses in the areas of receptive language and non-literal reading comprehension, adversely impact his ability to access grade level curriculum and hinder his academic progress in all academic areas.<sup>10</sup> Student is easily distracted and can be a distraction to others.<sup>11</sup>

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<sup>6</sup> Parent is not Student's biological parent; however, Parent is Student's relative and legal guardian, and has reared him since he was an infant. Testimony of Parent.

<sup>7</sup> Testimony of Parent.

<sup>8</sup> Testimony of Parent; P-6-2.

<sup>9</sup> P-4-9.

<sup>10</sup> P-4-4 and P-4-5.

<sup>11</sup> P-4-13.

5. Due to his disability, Student has difficulty beginning and/or completing his class assignments. He needs promptings to begin his assignments and follow up reminders to complete his assignments. He is easily drawn into peer instigations, and frequently leaves the classroom throughout the day, which interferes with his ability to access the general education curriculum.

6. As of the 2010-2011 school year, Student had demonstrated consistent, extreme difficulty adapting to the large number of students in general education classes in State A. He was demonstrating uncontrollable behaviors in his general education school in State A.<sup>12</sup>

7. In the 2010-2011 school year, State A determined that Student's least restrictive environment ("LRE") was a full-time, separate, therapeutic day school. State A selected Nonpublic School<sup>13</sup> as Student's location of services, and funded him there from the 2010-2011 school year until Student and Parent relocated to the District of Columbia in the 2014-2015 school year.<sup>14</sup>

8. State A last evaluated Student on November 3, 2011. Had he remained in the jurisdiction, State A had anticipated re-evaluating Student by around November 2, 2014.<sup>15</sup>

9. Student's most recent functional behavior assessment from State A is from November 3, 2011. Student's most recent behavioral intervention plan from State A was from October 3, 2013, and addressed the inappropriate behaviors he was exhibiting, such as sexually inappropriate comments, verbal disrespect, inappropriate peer interactions, verbal/physical threats, and leaving his assigned area without permission.<sup>16</sup>

10. While he was at Nonpublic School, Student's behavior did not become perfect, but it improved significantly in the school setting.<sup>17</sup> For example, during the 2013-2014 school year, Student showed "noticeable improvement in refraining from attempting to leave the class/building without permission."<sup>18</sup> Even at that point, Student continued to exhibit significantly adverse behaviors at home, Parent was unable to allow him to participate in extracurricular activities due to his inability to transport and comport himself safely. Parent was pursuing an outside therapist for him and planning to explore a medication trial for him as of that time.<sup>19</sup>

11. Student's most recent an IEP from State A was dated October 3, 2013 and included 30 hours per week of specialized instruction outside the general education setting, one

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<sup>12</sup> Testimony of Parent.

<sup>13</sup> Nonpublic School is located in State A, and is within commuting distance from the District of Columbia.

<sup>14</sup> P-6-2; P-4-29.

<sup>15</sup> P-4-1.

<sup>16</sup> P-4-11.

<sup>17</sup> Testimony of Parent.

<sup>18</sup> P-6-2.

<sup>19</sup> P-4-9.

hour per week (approximately 240 minutes per month) of individual or group counseling outside the general education setting, and transportation to and from school, given that he was assigned to a nonpublic school outside the general education setting.<sup>20</sup> The IEP included accommodations and supplemental supports including simplified instructions, checking for understanding, allowing for the use of manipulatives, immediate feedback, small group instruction and special seating as needed (such as seating near a staff person, near the board, away from a particular peer, and/or away from distractions).<sup>21</sup>

12. As of the October 3, 2013 IEP, Student was below grade level academically, but was making academic and behavioral progress at Nonpublic School.<sup>22</sup> Student was reading at the advanced level; however, due to his difficulties with social interactions, remaining in the classroom, weaknesses in receptive language, and difficulty with nonliteral reading comprehension, he continued to have reading goals on his IEP.<sup>23</sup>

13. In August 2014, Parent and Student relocated to the District of Columbia. Parent provided DCPS the educational documents she had in her possession from State A, and expressed to DCPS that Student needed to remain at Nonpublic School (which, though located in State A, was commuting distance from Parent's new home in the District of Columbia) or attend some other school that could provide him the learning environment and services he needed.<sup>24</sup>

14. By September 2014, DCPS had obtained records from Nonpublic School and from [REDACTED], including Student's October 3, 2011 Educational Assessment, an October 17, 2011 Psychological Evaluation, a November 3, 2011 Functional Behavior Assessment, and the most recent IEP from Nonpublic School.<sup>25</sup>

15. As was true in State A, Student is eligible for special education services in the District of Columbia under the disability classification ED.<sup>26</sup>

16. Student began attending the Behavior & Education Support ("BES") program at City School at the start of the 2014-2015 school year.<sup>27</sup>

17. Approximately five weeks into Student's time at City School, DCPS conducted a triennial reevaluation of Student dated September 26, 2014. The reevaluation consisted of consulting with his teachers regarding his progress at that time, and reviewing the previous evaluations, FBA, progress reports and other data collected by State A when Student resided there.

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<sup>20</sup> P-4-28.

<sup>21</sup> P-14-14 and P-14-15.

<sup>22</sup> Testimony of Nonpublic School Director; P-4-9; P-4-22 through P-4-25; P-11.

<sup>23</sup> P-4-3; P-4-5.

<sup>24</sup> Testimony of Parent.

<sup>25</sup> P-6-1; P-6-2; P-6-3; P-6-4.

<sup>26</sup> R-6-1.

<sup>27</sup> Testimony of Parent; P-6-1.

18. As a part of the September 2014 triennial reevaluation process, DCPS School Psychologist observed Student on two different days. The first observation was in his self-contained classroom setting. Overall, he was engaged during the lesson and participated appropriately during most of it. The second observation was when Student was in the cafeteria. Student gravitated toward the general education students in the cafeteria, sought negative attention from them through mocking and teasing, and engaged in instigative behaviors.<sup>28</sup>

19. On September 29, 2014, Student's IEP team met and prepared an IEP for Student that provided 26.5 hours per week of specialized instruction outside the general education setting, and 240 minutes per month of behavioral support services outside the general education setting. It initially only included goals in mathematics; however, shortly thereafter on October 10, 2014, the IEP was amended to also include goals in written expression and emotional, social and behavioral development.<sup>29</sup> Though Parent expressly disagreed with the services provided in the IEP, she consented to the October 2014 amendment being made without convening an additional IEP meeting.<sup>30</sup> The October 2014 amended IEP indicates that, as his LRE, Student needs a smaller group setting to minimize distractions. The only accommodations/supplemental supports it included were extended time and use of a calculator.<sup>31</sup>

20. The September 29, 2014, October 2, 2014 and May 27, 2015 IEPs indicated that "Student is being provided a BIP (Behavior Intervention Plan) as well as a FBA (Functional Behavioral Assessment) to maximize support;" however, Student does not have a DCPS FBA or BIP.<sup>32</sup>

21. During the 2014-2015 school year, Student exhibited adverse behaviors such as fighting, routine and excessive verbally and physically aggressive behaviors with staff and peers, calling 911 from the school phone inappropriately. Student, who has had a demonstrated tendency to run out of the classroom or school building when he becomes frustrated and/or angry since at least 2011, often walked out of class and was out of his assigned area during the 2014-2015 school year.<sup>33</sup>

22. Student was suspended on at least one occasion during 2014-2015 school year. Parent was also called multiple times to pick Student up when he was disrespecting teachers and staff, and she did so.<sup>34</sup>

23. Student's adverse behaviors interfered with his ability to complete his school work. For example, in March 2015 while taking a standardized test, Student had a temper tantrum and attempted to leave the testing room when told not to access unauthorized websites

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<sup>28</sup> Testimony of DCPS School Psychologist; P-6.

<sup>29</sup> P-3; R-3; R-5; R-6.

<sup>30</sup> Testimony of Parent.

<sup>31</sup> R-6-8 and R-6-9.

<sup>32</sup> R-3-6; R-5-7; R-8-8;

<sup>33</sup> P-6-4.

<sup>34</sup> Testimony of Parent; P-2-5; P-6-8.

from the testing computer. Ultimately, he was escorted out of the testing room and back to his classroom when he persisted in the impermissible behavior.<sup>35</sup>

24. During the 2014-2015 school year, Student at times was so distracted by his fellow classmates that he did “not respond to redirection.” He would shut down when he became angry, and would “say disrespectful things to adults and to other students.” He experienced a “decline in exhibiting role model behavior during the school year.”<sup>36</sup>

25. During the 2014-2015 school year, Student experienced “a decline in his academic performance,” though his report card grades generally fell within the “C” and “B” range, with substantial accommodations, scaffolding supports, and modifications to assignments.<sup>37</sup>

26. On May 27, 2015, Student’s IEP team met and prepared an IEP for Student that provided 26.5 hours per week of specialized instruction outside the general education setting, and 240 minutes per month of behavioral support services outside the general education setting. It contained four math goals, one written expression goal, and two social emotional goals. It indicates that, as his LRE, Student needs a smaller group setting to minimize distractions. The IEP included accommodations and supplemental supports including use of a calculator, extended time, location with minimal distraction, noise buffer or headphones, small group testing, breaks between test units, extended time on test units, breaks during a test unit.<sup>38</sup>

27. During the 2015-2016 school year, Student “received inconsistent group and individual behavioral support services,” and did not receive all of the behavioral services listed on his IEP. The services he missed were material, not only in quantity, but also given his need for consistent behavioral support services in light of his disability, particularly when he was in a general education setting for the first time in a number of years.<sup>39</sup>

28. On January 21, 2016, City School administered the GAIN-Short Screener to Student, which indicated that Student was in the high severity range on internalizing disorders and externalizing disorders, and the moderate severity range on the crime/violence sub-screener. Student’s low frustration tolerance, impaired ability to problem solve when faced with frustrations during instruction and once he has internalized his feelings, and poor self-control negatively impacted him in the school setting.<sup>40</sup>

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<sup>35</sup> P-13-2.

<sup>36</sup> P-1-2.

<sup>37</sup> P-1-1; P-16; P-2-3; P-2-4; P-3-3; R-5-3; R-5-4; R-8-3; R-8-4.

<sup>38</sup> R-8.

<sup>39</sup> Testimony of Educational Advocate; testimony of Social Worker; P-1-11; P-13. Based on the fact that certain dates of service are not included in the service trackers makes, along with Social Worker’s testimony that Student missed some of his behavioral support services, though he received some as well, the Hearing Officer concludes that is more likely than not that Student did not receive all the services listed on his IEP.

<sup>40</sup> P-5-1; P-1-8.

29. During the 2015-2016 school year, Student was suspended for several days and had two formal disciplinary incidents/referrals for engaging in reckless and sexually inappropriate behavior. He exhibited these types of problematic behaviors throughout the school year.<sup>41</sup> Student continued to not complete homework. Student's special education teacher was in touch with Parent nearly every day about Student's behavior during the 2015-2016 school year.<sup>42</sup>

30. Student's most recent IEP is from April 26, 2016. It repeats the four math goals from the May 27, 2015 IEP and adds one additional math goal. It repeats the one written expression goal from the May 27, 2015 IEP and adds two additional goals. It repeats the two social emotional goals from the May 27, 2015 IEP and adds one additional goal. It continues to provide 26.5 hours of specialized instruction per week and 240 minutes of behavioral services per month outside the general education setting. It indicates that, as his LRE, Student needs a small student to teacher ratio, intense supports in mathematics, a setting that will minimize distractions, and weekly (as needed) intensive social emotional supports from the social worker to address managing frustrations, reducing anxiety and reducing inappropriate comments and behavior.<sup>43</sup>

31. During the 2015-2016 school year, Student generally made some minimal<sup>44</sup> progress on his IEP goals, to the extent that the goals had been introduced. The goals added on Student's April 26, 2016 IEP had not yet been introduced, or had just been introduced, by the end of the school year. Student mastered one goal, in written expression.<sup>45</sup>

32. Student, who was an advanced reader in State A, started the 2015-2016 school year slightly below grade level in reading. He was reading on grade level by the end of the school year.

33. Student was significantly below grade level in math throughout the 2015-2016 school year, and only improved slightly in math throughout the school year.<sup>46</sup>

34. Student's report card grades during the 2015-2016 school year started with mostly "As" and a "B" in science during the first advisory; were mostly in the "A"/"B" range with a "C" in science during the 2<sup>nd</sup> and 3<sup>rd</sup> advisories; and had declined to all "Cs" and "C+s" in the 4<sup>th</sup> advisory.<sup>47</sup>

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<sup>41</sup> P-8-2; P-23-1; P-24; P-25-1; P-26; R-14.

<sup>42</sup> Testimony of Parent; P-24.

<sup>43</sup> P-1; R-9.

<sup>44</sup> In reaching the conclusion that the progress Student made on his IEP goals was minimal, the Hearing Officer considers his IEP progress reports in conjunction with the fact that the goals from his May 27, 2015 IEP had to be repeated on his most recent IEP, from April 26, 2016, and also the fact that Student missed significant instructional time due to his behaviors.

<sup>45</sup> R-15.

<sup>46</sup> R-15.

<sup>47</sup> P-15.

35. Overall, Student's behaviors were out of control during the two years he was in the BES program at City School, including repeated instances of aggression and sexually inappropriate behavior.<sup>48</sup>

36. Overall, Student missed a significant amount of instruction during the two years he was in the BES program at City School. He failed to complete a significant amount of classwork, and was frequently out of his assigned classroom/area during the school day, even on the days when he had reported to school. He at times attended some classes and not others, and has significantly higher number of absences from his academic classes than from his specials such as art and physical education.<sup>49</sup>

37. Student has now completed the highest grade offered at City School, and for the 2016-2017 school year, Respondent assigned him to the BES program at District School.<sup>50</sup>

### **The BES Program at District School**

38. District School is a general education school with approximately 1,000 students. The BES program is comprised of self-contained classrooms within District School which serve students with ED. There are approximately 75 ED students at District School.<sup>51</sup>

39. The students in the District School BES Program take their academic classes in the self-contained BES classroom setting, and transition throughout the building and take their specials (such as art and physical education) and have lunch with general education students.<sup>52</sup>

40. There are two social workers onsite and one school psychologist assigned to District School. The school also works with the District of Columbia Department of Behavioral Health for additional social work support.<sup>53</sup>

41. The District School BES program could provide 26.5 hours of specialized instruction outside the general education setting and 240 minutes of behavioral services as listed on Student's current IEP.<sup>54</sup>

### **Nonpublic School**

42. Nonpublic School has small classes, with a ratio of 12 student per 2 adults (not including any dedicated aides that may be assigned to particular students in a given classroom). There are approximately 80 students in the school, all of whom are special education students.<sup>55</sup>

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<sup>48</sup> Testimony of Educational Advocate.

<sup>49</sup> P-14; P-16.

<sup>50</sup> R-10.

<sup>51</sup> Testimony of Assistant Principal; testimony of Educational Advocate; P-9-2.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Testimony of Nonpublic Director.

43. Nonpublic School serves mostly students with the ED disability classification. It has 18 therapists on-site, all of whom hold a therapeutic license.<sup>56</sup>

44. Nonpublic School can implement all the services on Student's current IEP, except that it cannot provide the interaction with non-disabled peers that his current IEP calls for.<sup>57</sup>

45. Nonpublic School has a certificate of approval from the District of Columbia's Office of the State Superintendent of Education ("OSSE"), and its costs are approximately \$46,500 per year.<sup>58</sup>

46. Nonpublic School is the school Student attended when he lived in State A, and it has accepted him to return there.<sup>59</sup>

### **Records**

47. Beginning on February 24, 2016, Parent and her counsel and advocate made several requests to Respondent in writing, verbally, and in person at City School for a complete set of Student's records, including standardized test results, OHIO scales, disciplinary actions including suspension, referral and incident reports, behavioral logs, IEP progress reports (not all were provided), the BIP, and a complete set of attendance records.

48. Parent did not hear from Respondent regarding her requests for at least 45 days.<sup>60</sup> On May 12, 2016 and June 22, 2016, Respondent sent Petitioner some, but not all, of the requested documents.<sup>61</sup>

### **Transportation**

49. At least as of the April 26, 2016 meeting, Parent was requesting that DCPS provide Student transportation assistance to and from school<sup>62</sup> because he sometimes he loses his way and forgets how to get where he is going, and he does not tend to look carefully when crossing the street. He cannot safely transport himself by public transportation.<sup>63</sup>

50. City School is located several blocks and turns away from Parent's home. District School is located in Student's neighborhood, but a little farther from Parent's home.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Testimony of Nonpublic Director.

<sup>59</sup> Testimony of Nonpublic Director.

<sup>60</sup> P-30-1.

<sup>61</sup> Testimony of Educational Advocate; P-28-1; P-29-1; P-31-1; P-33-1; P-36. For example, Petitioner had not received disclosure documents For example, Parent had not received R-5 or R-6 prior to receiving them in the disclosures themselves, five business days prior to the start of the DPH. Testimony of Educational Advocate.

<sup>62</sup> P-31-1.

<sup>63</sup> Parent expressed similar concerns about Student's limited independent living skills to State A in 2013. At that time, Parent expressed that while she would have liked for Student to participate in more social activities outside of school, due to his need for constant monitoring and extreme behavior, she was unable to allow him to participate, because such programs would not be able to adequately supervise him. P-4-9.

51. DCPS has not provided transportation for Student. Parent pays someone walk Student to and from school.<sup>64</sup>

### 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 except that, except that, once Petitioner has established a prima facie case, Respondent shall carry the burden of persuasion on issues regarding the appropriateness of an IEP or placement. *Schaffer v. Weast*, 546 U.S. 49 (2005); D.C. Code § 38-2571.03(6)(A)(i) D.C. Code § 38-2571.03(6)(A)(i). Through documentary evidence and witness testimony, the party with the burden of persuasion must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; D.C. Code § 38-2571.03(6)(A)(i); *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 provide Student with an appropriate IEP or placement on or about September 29, 2014, in that the IEP did not include many of the goals, accommodations, supplemental supports, or the LRE Student needed, and that were specified in Student’s October 3, 2013 IEP from State A.**

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).

The parties have disputed whether, when Student relocated from State A to the District of Columbia in 2014, DCPS had an obligation to provide Student with comparable services to those Student received in State A. Respondent correctly asserts that 34 C.F.R. §300.324(f), which requires an LEA to automatically provide to a student who transfers from one jurisdiction to

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<sup>64</sup> Testimony of Parent.

another mid-school year services comparable to those a student was receiving in his/her previous jurisdiction, is inapplicable to this case, because Student transferred to DCPS during the summer, between the 2013-2014 and 2014-2015 school year. He did not transfer during a school year. While this is correct, an LEA nonetheless has an obligation to provide a student with a disability the personalized services he or she needs to benefit from their education. The services in an IEP must be reasonably calculated to meet a student's needs. In this instance, a student with severe emotional disabilities transferred into DCPS from a school system that had years of experience educating him in general education and nonpublic settings. What they had to say about Student's needs should have been given great weight by Student's DCPS IEP team as it worked to craft IEPs that were reasonably calculated to meet Student's needs to receive educational benefit.<sup>65</sup>

Here, DCPS' decision to lower the number of hours of specialized instruction Student was receiving outside the general education setting, omit reading goals from his IEP,<sup>66</sup> place him in a general education school where he would suddenly have access to and contact with nondisabled students, and significantly reduce his accommodations was not based on any special knowledge about Student (who they were just meeting), new assessments, or special ability to provide a fully outside the general education setting in one of its own public schools (as Student's LOS was a general education school). Those decisions, which cut against the substantial and detailed data provided by State A, were not connected to Student's actual needs, and were, therefore, not reasonably calculated to provide him educational benefit.

Further, Student's LRE needed to be described in his IEP as, due to the way his disability manifests, it would be important for him to have a highly restrictive physical setting, and one that does not bring him into contact with nondisabled peers during the school day. *Brown v. District of Columbia*, 67 IDELR 169 (D.D.C. 2016). 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). However, 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. The failure to provide Student an appropriate placement (with respect to his IEP and his school setting) as of September 29, 2014 (as amended in October 2014) impeded Student's right to a FAPE and caused a deprivation of educational benefit. DCPS did not meet its burden of proving that it did not deny Student a FAPE and that it provided Student an appropriate educational placement as of the September 29, 2014 IEP, as amended in October 2014.

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<sup>65</sup> As discussed in the Compensatory Education section below, the Hearing Officer concludes that to the extent Student received any educational benefit the past two school years, it was not more than trivial benefit, despite his high report card grades.

<sup>66</sup> Student is a strong reader, but due to his disability, he needs specific types of support to make progress in reading.

- (b) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP or placement on or about May 27, 2015, in that it did not include many of the goals, accommodations, supplemental supports, or the LRE Student needed, and that were specified in Student's October 3, 2013 IEP from State A.**

For the same reasons as discussed with respect to issue "(a)" above, Student's IEP remained inappropriate in May 27, 2015. Without any readily apparent rationale connected to Student's actual needs, it did not include sufficient hours of specialized instruction; describe the type of self-contained, therapeutic, separate classroom setting Student needed; it omitted many of the accommodations Student needed; and it failed to include reading goals. The inappropriateness of the May 27, 2015 IEP impeded Student's right to a FAPE and caused a deprivation of educational benefit. DCPS did not meet its burden of proving that it provided Student a FAPE through an appropriate IEP and placement by way of the May 27, 2015 IEP.

- (c) Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP or placement at the April 26, 2016 IEP meeting, in that the IEP fails to include transportation as a related service, fails to include a description of Student's LRE, and/or by failing to identify a 2016-2017 location of services for Student that can implement Student's IEP and/or provide the type of setting Student needs, in light of his disability.**

For the same of the same reasons as discussed with respect to issues "(a)" and "(b)" above, Student's IEP remained inappropriate in April 26, 2016. It did not include sufficient hours of specialized instruction or describe the type of completely separate, self-contained, therapeutic setting Student needs. The IEP did not identify a location of services that could meet Student's need for a separate, self-contained, therapeutic setting; nor did DCPS identify such a location for Student after the April 26, 2016 IEP was finalized.

Many students Student's age would be able to walk or use public transportation to reach their neighborhood school. However, Student's disability impedes his ability to do so safely. The Hearing Officer credits Parent's testimony that Student cannot safely transport himself to District School, and could not have done so when he was at City School, particularly given that Parent expressed similar safety concerns regarding Student's participation in extracurricular activities when Student was in State A and transportation was not a point of disagreement between Parent and the school system (which was already voluntarily transporting Student to Nonpublic School). Respondent argues that State A's only reason for providing transportation to Student was because he was attending a nonpublic school, and that DCPS should not have to transport Student to a public neighborhood school in the District of Columbia. However, the Hearing Officer's determination that DCPS' failure to provide transportation to Student was inappropriate is not based on what State A did. Rather, it is based on the fact that transportation was an actual need for Student in order for him to access his education. *See District of Columbia v Ramirez*, 377 F.Supp.2d 63 (D.D.C. 2005).

The inappropriateness of the April 26, 2016 IEP impeded Student's right to a FAPE and caused a deprivation of educational benefit. DCPS did not meet its burden of proving that it

provided Student a FAPE through an appropriate IEP and placement by way of the April 26, 2016 IEP.

- (d) Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP during the 2014-2015 school year (in that the entire IEP was not implemented from start of school year until the end of August 2014, and in that Student did not receive related counseling services in whole or in part throughout the entire school year) and/or by failing to provide Student with an appropriate placement for either the 2014-2015 or 2015-2016 school years, in that it did not provide Student a program comparable to the program he had in State A, which provided him 30 hours of specialized instruction outside the general education setting and in a separate day school for students with Emotional Disturbance.**

In reviewing failure-to-implement claims, a hearing officer must ascertain whether the aspects of the IEP that were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.” *See Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff’d sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007). Where an LEA’s failure to implement is material (not merely *de minimus*), courts have held that the standard for determining whether there has been a denial of FAPE does not center around whether the student has suffered educational harm. *See Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA’s material failure to implement part of the student’s IEP). Rather, “the proportion of services mandated to those provided . . . is the crucial measure for determining whether there has been a material failure to implement.” *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013). Here, the services Student missed were material – not only in quantity, but also given his need for consistent behavioral support services in light of his disability, particularly when he was in a general education setting for the first time in a number of years.<sup>67</sup> Parent meets the burden of proving that DCPS denied Student a FAPE by failing to fully implement his behavioral services.<sup>68</sup>

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<sup>67</sup> Testimony of Educational Advocate; testimony of Social Worker; P-1-11; P-13. Based on the fact that certain dates of service are not included in the service trackers makes, along with Social Worker’s testimony that Student missed some of his behavioral support services, though he received some as well, the Hearing Officer concludes that is more likely than not that Student did not receive all the services listed on his IEP.

<sup>68</sup> Student did not have a DCPS IEP until the end of September 2014. While DCPS did not necessarily have to implement the [REDACTED] IEP directly given that Student transferred during the summer, it did have an obligation to have an appropriate IEP in place for Student from the beginning of the school year.

- (e) **Whether DCPS denied Student a FAPE by failing to timely provide and/or implement a behavior intervention plan (“BIP”) and/or an appropriate BIP during the 2014-2015 and/or 2015-2016 school years. The Student came to DCPS with an out of state BIP, and Petitioner has never been provided any BIP from DCPS.**

At the time Student’s IEP team met to develop his September/October 2014, May 2015 and April 2016 IEPs, his behavioral challenges and their impact on his ability to make academic progress were well known and documented. The IDEA requires a student’s IEP team to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior that is impeding the student’s learning or that of others. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). A student’s IEP must take into account and be designed to meet the unique needs of the student, and it must be “regularly revised in response to new information regarding the child’s performance, behavior, and disabilities.” *Suggs v. District of Columbia*, 679 F. Supp. 2d 43 (D.D.C. 2010), citing 20 U.S.C. §§ 1414(b)-(c). Student’s September/October 2014 and May 2015 IEPs indicate that an FBA would be conducted for Student and a BIP would be provided, but given Parent’s repeated requests for such documents and lack of any evidence that they exist, the Hearing Officer finds it more likely than not that they were not created. An FBA should have been conducted and a BIP should have been in place at least by December 2014. The failure to timely conduct an FBA and create a BIP for Student 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 Student (because Parent could have participated in preparing the BIP), and caused a deprivation of educational benefit. Parent meets the burden of proof on this issue.

- (f) **Whether DCPS denied Student a FAPE by failing to provide Parent with full access to educational records on or about February 24, 2016, included but not limited to prior evaluations referenced in the DCPS psychological report, behavior/discipline records, standardized test scores, service trackers, behavior plans, IEP progress reports, report cards and attendance records.**

Pursuant to 34 C.F.R. §300.501(a), “[t]he parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to . . . (2) The provision of FAPE to the child.” 34 C.F.R. § 613(a) provides that “[t]he agency must comply with a [parent’s] request to inspect and review any education records relating to their children . . . without unnecessary delay and before any . . . hearing pursuant to §300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510.” As indicated in the Findings of Fact above, the Hearing Officer has concluded that Respondent did not provide Parent access to all of Student’s records, particularly from State A. Respondent argues that the appropriate remedy for such a claim would have been for Petitioner to delay the DPH and make an additional records request. While Petitioner would have had this option, Petitioner also had the right to proceed with her DPH with the records she had. Given Student’s significant and time-sensitive needs, this was a reasonable option. Nonetheless, for purposes of the DPH and participating in meetings, the lack of a full set of Student’s records has significantly impeded

Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Petitioner meets the burden of proof on this issue.

### **Request for Nonpublic School**

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

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

Student's emotional disability is severe. His ED affects him academically in the areas of math calculation, written language expression, written language mechanics, reading and social emotional skills. Student is easily distracted and can be a distraction to others. He is easily drawn into peer instigations. He is frequently out of the classroom and/or his assigned area throughout the day, which interferes with his ability to access the general education curriculum.

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

Student needs a 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 absence from the classroom.

#### *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 ED. With approximately 80 total students, it is a small school with low student-teacher ratios. There are a number of behavioral and therapeutic staff members at Nonpublic School. Student previously attended Nonpublic School, and though his behavior did not become perfect, he made academic and behavioral progress. Nonpublic School could meet Student's educational needs.

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 among general education students, and take specials and have lunch with nondisabled students. This type of environment proved unsuccessful for Student in State A and at City School.

*d. Cost of Placement at Private School*

Nonpublic School's tuition is approximately \$46,500 per year. Its costs are accepted by OSSE. Given the level of staffing at the school, the small student body, and the services it provides, the Hearing Officer deems 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, physically restrictive setting with therapeutic behavioral supports, without interaction with general education peers throughout 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 the 2014-2015 school year through the present time, a lack of an FBA and BIP, and a failure to fully implement his behavioral services in the 2014-2015 school year. To the extent Student made any academic progress over the past two school years, it was trivial. For example, though he ultimately ended the 2015-2016 school year on grade level in reading, he started the school year (after his first full school year in the general education City School) below grade level. With appropriate supports, Student would have been above grade level in this subject area where he has natural strengths. Additionally, his IEP goals had to be repeated from the 2014-2015 to the 2015-2016 school year, and an additional behavioral goal had to be added in 2015-2016, which given the totality of the record, the Hearing Officer interprets as an indication that his behavior had regressed.

Petitioner has requested individual tutoring and counseling hours, and given that he will be receiving one-on-one instruction and counseling, the Hearing Officer finds Petitioner's request for 36 hours of specialized tutoring hours and 36 hours of counseling services to be well-tailored to restore Student to the levels where he would have been, had he not experienced the denials of FAPE.

**ORDER**

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

- A. Within 8 school days of this order, DCPS shall fund Student at Nonpublic School, with transportation;
- B. Within 20 school days of this order, DCPS shall revised Student's IEP to include transportation and a description of the setting that is required for Student to access his education – a full time, self-contained setting with low student teacher ratio, a small group setting, and therapeutic interventions to address Student's behaviors in order that he can access his education;
- C. Within 20 calendar days of this order DCPS shall conduct an FBA for Student.
- D. Within 30 calendar days of this order DCPS shall develop a BIP for Student.
- E. Within 30 calendar days of this order DCPS shall revise Student's IEP to include transportation; appropriate reading goals; appropriate supplement aides, services and accommodations; a description of the setting that is required for Student to access his education (a full time, self-contained setting with low student teacher ratio, a small group setting, and therapeutic interventions to address Student's behaviors in order that he can access his education);
- F. Within 10 school days of this order DCPS shall provide to Parent through her counsel copies of all Student's educational records previously requested (including but not limited to: all prior IEPs developed by DCPS, prior evaluations referenced in the DCPS psychological report, behavior and/or discipline records, standardized test scores, service trackers, and behavior plans), or shall provide Parent through her counsel a formal letter indicating that such documents do not exist and/or that DCPS has no ability to obtain them.
- G. Within 8 school days of this order DCPS shall provide to Parent written authorization for Student to receive 36 hours of independent tutoring services and 36 hours of independent counseling services, funded at the DCPS rate.

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

**SO ORDERED.**

Date: September 24, 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)

2016-0162  
Hearing Officer Determination

**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).