DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

Student,[1]	Date Issued: December 23, 2012
Petitioner,	IHO: Michael Lazan
v.	Hearing Date: December 19, 2012
District of Columbia Public Schools,	
Respondent.	Room: 2008

OSSE STUDENT HEARING OFFICE
2012 DEC 26 AM 9:37

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on October 9, 2012. This IHO was appointed to hear this matter shortly thereafter, on October 10, 2012. Respondent filed a Response to the Complaint on October 9, 2012, denying the allegations in the Complaint.

On October 22, 2012, a resolution meeting was held. The parties did not resolve the matter and did not agree to shorten the resolution period. The resolution period expired on November 8, 2012. The HOD was due on December 23, 2012.

A Prehearing Conference was held on November 14, 2012. A Prehearing Conference Summary and Order was issued on November 19, 2012.

[1] Personal identification information is provided in Appendix A.

A hearing date was set for December 19, 2012. This was a closed hearing. Petitioner was represented by Chike Ijeabuonwu, Esq. Respondent was represented by Tonya Chor, Esq. Petitioner entered into evidence exhibits 1-17; Respondent entered into evidence exhibits 1-22, 23-34, 36. Petitioner presented as witnesses: Petitioner; Student; [redacted] Psychologist; [redacted] Program Director, School C; [redacted] Advocate. Respondent presented no witnesses. At the end of the hearing day on December 19, 2012, the parties presented oral closing arguments.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is male, [redacted] and eligible for services as a student with multiple disabilities. The Complaint indicates that DCPS denied the Student a FAPE by 1) failing to provide an appropriate placement for him; 2) failing to convene a placement meeting for the Student, with all relevant and necessary team members to discuss and recommend an appropriate placement; 3) failing to convene an MDT/IEP/Placement meeting despite a recommendation by the August 14, 2012 IEP team; 4) failing to provide a therapeutic school environment for the Student; 5) failing to convene an MDT/IEP meeting with all necessary members to review an evaluation report and revise the IEP accordingly; 6) failing to develop an appropriate IEP for him; 7) failing to perform an FBA and develop a BIP for him; 8) failing to provide the Student

with behavioral support services; 9) failing to invite the Student and parent to the IEP meeting. As relief, Petitioner seeks placement at School C for 2012-2013.

ISSUES

The issues to be determined are as follows:

1. Did the IEP review team of August 14, 2012 largely contain team members who did not know pertinent information about the Student? Did DCPS therefore improperly constitute the IEP review team on August 14, 2012? If so, did the constitution of the review team deny the Student a FAPE?

2. Did DCPS improperly exclude the parent and the Student from the August 14, 2012 review? If so, did this exclusion prevent the parents from meaningfully participating in the IEP process on August 14, 2012? If so, did this exclusion deny the Student a FAPE?

3. Did DCPS improperly classify the Student as eligible as a student with an emotional disturbance in its meeting of August 14, 2012? Should DCPS have classified the Student as eligible as a student with multiple disabilities at the August 14, 2012 IEP meeting? If the classification should have been as a student with multiple disabilities, did DCPS deny the Student a FAPE?

4. Did DCPS offer Petitioner an IEP dated August 14, 2012 that failed to provide the Student with a sufficiently "therapeutic" environment at school? If so, did that offer deny the Student a FAPE?

5. Did the IEP team require an FBA and BIP to create an appropriate program for the Student? Did DCPS fail to perform an FBA and BIP for the Student in connection to the August 14, 2012 IEP meeting and corresponding IEP? If so, did this failure deny the Student a FAPE?

6. Did DCPS fail to implement the IEP by providing sufficient behavioral support services at School B? If so, did that failure rise to the level of FAPE denial?

7. Did DCPS fail to conduct a "placement meeting" after the formulation of the August 14, 2012 IEP? If so, did this failure deny the Student a FAPE?

As relief, Petitioner is seeking a revised IEP, that the Student be classified as eligible because of multiple disabilities, and that the Student be placed at School C for the 2012-2013 school year.

FINDINGS OF FACT

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

1. The Student is an [redacted] who is currently eligible for services. (P-14-1; Testimony of Petitioner; Testimony of Student)

2. The Student was adopted by his mother at the age of nine months. His biological mother had a history of mental health problems and incarceration. The Student was exposed to drugs in utero. (P-9-2)

3. The Student has been engaged in disciplinary issues since kindergarten. His behaviors were so extreme at a young age that he would have to be restrained by day care workers. (P-3-1, P-9-3)

4. The Student has been receiving individual therapy for behavioral concerns for the past 5 years. He has been prescribed to take Risperdal, but has stopped taking the medication. (P-9-3)

5. The Student continues to have significant behavioral issues. He has difficulty "letting go" of his anger and needs behavioral support services to assist him in further developing

and then appropriately implementing positive coping skills when frustrated in the classroom and during transitions. He needs assistance in learning how to develop and maintain positive peer relationships as well as understanding how to follow adult directions. (P-5-5)

6. During fourth grade (2010-2011 school year), the Student's behavior problems escalated to knocking over desks, throwing chairs, walking out of class, bullying, fighting, cursing, disrespecting adults, and throwing pencils and books. (P-9-4)

7. As per testing by DCPS examiner [redacted], on the Woodcock-Johnson Test of Achievement-III in July, 2011, the Student scored in the low average to average range in all math, reading and writing domains with the exception of understanding directions, where he scored in the low range. The Student's broad reading was 4.3 grade level equivalent, standard score of 96. The Student's broad math was a 5.5 grade level equivalent, standard score of 103. The Student's broad writing was 3.8 grade level equivalent, standard score of 91. (P-16-5)

8. Conners-3 testing by [redacted] indicated that the Student had elevated scores in inattention, hyperactivity/impulsivity, learning problems, executive functioning, aggression, peer relations, global index, ADHD-Inattentive issues, ADHD-Hyperactive-Impulsive issues, Conduct Disorder, Oppositional Defiant Disorder. (P-16-7)

9. The Brown ADD Scales as conducted by [redacted] indicated markedly atypical performance in regulating alertness, managing frustrations, using working memory, monitoring and self-regulating action. (P-16-8)

10. [redacted] recommended a Behavior Intervention Plan for the Student, with tangible rewards and consequences for behaviors on a consistent basis. (P-16-12)

11. For fifth grade, per an IEP developed on September 28, 2011, the Student received two hours a week of behavioral support. (P-9-4)

12. Notwithstanding the counseling both in school and out of school, the Student's behavioral problems did not improve during fifth grade. The Student was suspended numerous times, and was engaged in hitting, threatening, lewd incidents, fighting, disrespectful behaviors. (P-9-4, P-11 1-2, P-12-1-26, P-13-1-3; P-14-4)

13. The Student's fifth grade first term report card from School A indicates that the Student received mostly B grades, except in math, where he received mostly Ds. (P-15-1-2)

14. For the second term in fifth grade, the Student received mostly Ds, with some Bs. The Student needed frequent prompting in regard to working well with others, following directions, following rules, respecting others, practicing self-control. (P-15-1-2)

15. Petitioner was provided an I.E.E. by letter dated April 10, 2012. This I.E.E. was for a Comprehensive Psychological Evaluation, which includes Cognitive, Clinical and Educational Components, as well as a social history. (R-17-1-2)

16. As a result of a settlement agreement dated April 10, 2012, Petitioner and Respondent agreed to convene a meeting to review a completed Independent Comprehensive Psychological evaluation which includes Cognitive, Clinical, and Educational components as well as a social history. This meeting was to be convened within 20 school days of receipt of the completed evaluation. (R-16-2)

17. An FBA from from DCPS dated April 13, 2012 and a draft BIP from May 16, 2012 recommends a behavior chart, preferential seating, and a points system whereby the Student will have the opportunity to spend the last 15 minutes of the school day with a "preferred staff member" if sufficient points are earned. The Student is also offered the opportunity to perform classroom jobs and/or assist the teacher with organizing student work if he maintains his behavior. (R-4-1-2, R-12-1)

18. At the IEP meeting of May 16, 2012, attending were the parent, Special Education teacher [redacted], Evaluator [redacted] LEA representative [redacted] General Education Teacher [redacted], and Educational Advocate [redacted] (P-14-1)

19. The IEP recommends 240 hours per month of behavioral support services. The IEP recommends group therapy sessions. The Student's social and emotional goals relate to using a behavior chart and developing positive coping skills. (P-14-4, 8)

20. The IEP also recommends 5 hours per week of specialized instruction in reading. (P-14-5)

21. At the end of the 2011-2012 school year, staff at School A including a [redacted] urged that the Student be placed in a more restrictive setting. The Student had bullied and physically attacked a female classmate throughout the school year and received over 35 days of suspension. The school recommended that the Student be moved into a more restrictive environment. (R-11-1, 5)

22. During an observation dated June 7, 2012 by [redacted] of DCPS, the Student provided little effort, was very impatient, and was attentive only part of the time. A behavior management system that charts and monitors daily progress was recommended. A rewards system based on the Student's individual preferences was recommended. (R-11-3, 5)

23. The Comprehensive Psychological Evaluation by Christina Roye, a clinical extern at the Mecca Group, LLC, and [redacted], a psychologist, is dated June 30, 2012. It consists of a clinical interview, a parent interview, a teacher interview, BASC-2 testing, Beery VMI testing, the Children's Sentence Completion Test, [redacted] testing, TOWRE testing, WISC IV testing, Woodcock-Johnson III testing. (P-9-2)

24. WISC-IV testing by [redacted] and [redacted] indicated a Full Scale IQ score of 108, with significant variability. VMI testing indicated scores in the very low range in visual perceptual skills. Woodcock-Johnson-III testing and TOWRE testing showed variable reading skills, overall in the average to low average range. Math skills as measured on the Woodcock-Johnson-III varied from the 5th grade level to the 7th grade level. Written language as measured on the Woodcock-Johnson-III varied from the average range to the low average range. (P-9-6-10)

25. Social emotional testing by [redacted] and [redacted] indicated that the Student has an "aggressive coping style" that reflects distress concerning the lack of consistency and neglect that he has felt from his biological mother and the deaths of family members. (P-9-10-12)

26. BASC-2 and Conners-3 testing by [redacted] and [redacted], as reported by the teacher [redacted] and the parent, revealed problems with hyperactivity, aggression, defiance, inattention, anger control, and conduct problems, with impulsive, uncontrolled and disruptive behaviors. Testing revealed that the Student has clinically significant symptoms for depression and is at-risk for anxiety. Testing revealed that the Student is at-risk for attentional issues and has difficulties adapting to change. (P-9-12-13)

27. [redacted] and [redacted] indicated that the Student's diagnostic impressions were that of a Student with ADHD- Combined Type, Oppositional Defiant Disorder, Depressive Disorder NOS. (P-9-16)

28. [redacted] and [redacted] recommended a small supportive classroom where teachers are experienced in working with students with emotional disabilities and the student can have access to behavior and therapeutic staff to assist him. (P-9-17)

29. [redacted] and [redacted] recommended school-based therapy for the Student for two hours a week. (P-9-17)

30. [redacted] and [redacted] also recommended one hour of community-based therapy is recommended for the Student, weekly. (P-9-17)

31. [redacted] and [redacted] also recommended a psychiatric assessment of the Student to determine the appropriateness of the Student's current medication. (P-9-17)

32. [redacted] and [redacted] also recommended a social skills group for the Student. (P-9-18)

33. Academic interventions that were recommended included sitting in the front of the classroom, being afforded breaks after completion of class assignments, an FBA, a BIP, assignments broken down into small manageable chunks. (P-9-18)

34. The Student was not allowed back at School A for the 2012-2013 school year. (Testimony of Petitioner; Testimony of [redacted])

35. As a result, the parent went to School B and registered him at the school. (Testimony of Petitioner)

36. The Student has had a difficult time transitioning to middle school. (P-5-16)

37. After the assessment by [redacted] and [redacted] was completed, DCPS was sent the assessment. After DCPS was sent the assessment, DCPS sent the parent's advocate a correspondence with a choice of dates for an MDT meeting to review the independent evaluation and review the IEP. This correspondence indicated that the parent had a choice of three dates, August 13, 2012 at 10:30am, August 14, 2012 at 10:30am, and August 16, 2012 at 10:30am. This correspondence indicated that the meeting was to be held at Central Office, Washington, DC 20011. (R-24-2)

38. The advocate selected the August 14, 2012 date and requested a confirmation of the meeting and the location of the meeting. (R-24-1)

39. No email was sent from DCPS confirming the meeting or indicating the location within the Central Office. (Testimony of [redacted])

40. The parent and the advocate did not show up at the meeting. (Testimony of [redacted])

41. At the meeting, District representative [redacted] sent an electronic message to the advocate asking whether he wanted to appear by phone. (P-8-2)

42. After the meeting concluded, the advocate responded and indicated that he wanted another meeting and sought additional dates. (P-8-1)

43. At the meeting, a [redacted] reviewed the I.E.E. and indicated that the May 16, 2012 IEP did not need to change and that the existing BIP did not need to change. (P-7-1)

44. At the meeting, the team decided that they did not have enough data support a change in placement and decided to reconvene in September, 2012. (P-7-1)

45. No IEP was written for the August 14, 2012 IEP meeting. (Testimony of [redacted])

46. An IEP team reconvened on October 9, 2012. This recommendation called for 5 hours per week of specialized instruction in reading, 1 hour per week of specialized instruction in math, 1 hour per week of specialized instruction in writing, and 240 minutes a month of behavioral support services. (P-5-6)

47. For the 2012-2013 school year, the Student has been attending School B. (Testimony of Petitioner)

48. School B is not working out well for the Student for the 2012-2013 school year. (Testimony of Petitioner)

49. The Student was not receptive to counseling at School B during the 2012-2013 school year. However, he eventually began requesting to meet with his social worker and began to attend counseling. The counseling was not especially effective for the Student. He continued to threaten his peers and be aggressive to his peers. (P-5-16, R-29-1)

50. The Student has engaged in numerous disciplinary incidents for 2012-2013, including teasing, refusing to sit, bullying, cursing, fighting, hitting a classmate in the face, harassment, being disrespectful to teachers, insulting others, wandering in class, excessive talking, insubordination, throwing food, plagiarism. The Student gets into fights every few weeks. At one point, when asked for a hall pass, the Student indicated to a teacher: "I don't need no pass. You shut up talking to me and get out of my face with that shit." This kind of conduct has resulted in numerous suspensions for the 2012-2013 school year. (P-1-1-49; Testimony of Student)

51. For the Student's first quarter at School B, the Student received three Fs, with a C in math and a C- in geography. (P-2-1)

52. School C houses solely special education students. All students in the school are considered emotionally disturbed. (Testimony of [redacted])

53. School C uses a daily points system. The premise of the system is for students to gain points every day so they can go on field trips and get other rewards. (Testimony of [redacted])

54. Classrooms at the school have 8-10 students in them. (Testimony of [redacted])

55. Each classroom has a primary teacher who is certified. Each classroom also has a teaching assistant, who has a bachelor's degree. (Testimony of [redacted])

56. Students can get a diploma as a result of their work at School C. (Testimony of [redacted])

57. The school includes a full time social worker who provides the students with psychological counseling. (Testimony of [redacted])

58. A student contract can be created by the school if the points system does not work for a particular student. (Testimony of [redacted])

59. Classes at the school run on a tutorial system, with classes that can include 20 minutes with a tutorial, 20 minutes with a teacher, and 20 minutes of independent work. Instruction is frequently provided to the students in very small groups. (Testimony of [redacted])

60. Classes at the school include math, reading, science, social studies, health. (Testimony of [redacted])

61. The academic levels of the students in the proposed class are in line with the Student. (Testimony of [redacted])

62. By Prior Written Notice dated October 9, 2012, the Student was classified as eligible for services as a student with multiple disabilities. (R-34)

63. This IHO found all the witnesses credible except the Student, who was partly credible. In this connection, the Student indicated that he did not receive any behavioral support services at School B, when documentation in the record clearly indicates that he did receive such services.

64. The Student requires a small class size, the presence of a special education teacher in the classroom, and a rewards system linked to the Student's preferences that will keep the

Student from fighting so frequently and misbehaving so frequently and keep him more focused on his academics. (P-9; P-16; R-11; Testimony of [redacted])

CONCLUSIONS OF LAW

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

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 child'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. Sect. 300.513(a).

1. Jurisdiction.

Initially, the District argues that this IHO has no jurisdiction over this matter because the claims herein have been subject to a settlement agreement between the parties. However, the District agreed that this IHO had jurisdiction over these claims at the prehearing conference, and the prehearing conference order memorializes this position with this language: "Neither party objects to this Hearing Officer presiding over this case. The parties and this Hearing Officer agree that this Hearing Officer has jurisdiction over the issues raised in the Due Process Complaint." The order also indicates, in bold: Both parties will be held to the matters agreed upon and/or set forth in this Order. If either party believes this Hearing Officer has made any misstatements or omissions, the party shall advise this Hearing Officer in writing within three business days of the date of this Order (and contemporaneously provide a copy to opposing counsel and the Student Hearing Office). This Hearing Officer will promptly address all duly raised concerns."

Notwithstanding this language, the District did not raise any concerns about jurisdiction after issuance of the prehearing conference order.

Additionally, a review of the stipulation of settlement indicates that there are no issues raised herein that were resolved in the settlement agreement. The settlement agreement dated April 10, 2012 provides that Petitioner and Respondent agree to convene a meeting to review a

completed Independent Comprehensive Psychological evaluation which includes Cognitive, Clinical, and Educational components as well as a social history. This meeting was to be convened within 20 school days of receipt of the completed evaluation. There is no claim in this case that relates to the timeliness of the meeting, i.e., whether the District failed to convene such a meeting within 20 days of the completed evaluation. Instead, claims here relate to the substance of the meeting. In particular, the claims relate to whether the composition of the subject IEP team was appropriate, whether the recommendations of the IEP team were appropriate, and whether the placement implementing the IEP was appropriate. None of these issues are addressed in the settlement agreement.

In this connection, the District cites to Makins v. District of Columbia, 277 F.3d 544 (D.C. Cir. 2002). However, Makins relates to situations where, under D.C. law, an attorney can bind a client to a settlement agreement. Makins does not relate to the impact of settled Due Process Complaints on future litigation. This IHO has jurisdiction over claims of FAPE denial resulting from the August 14, 2012 IEP meeting. Respondent's contentions in this regard are without merit.

2. The August 14, 2012 IEP meeting.

Petitioner raises a variety of different claims relating to the August 14, 2012 IEP meeting, which are addressed here except for Petitioner's claim relating to the Student's eligibility classification. This claim, which seeks that the Student be classified as as student with multiple disabilities, is moot because the District has so classified the Student. (R-34)

A. Composition of the IEP team.

Petitioner contends that the members of the IEP team contained members that did not know pertinent information about the Student. Petitioner did not argue this point during the

opening statement or the closing statement and did not present any testimony or evidence to support this claim during the hearing. Especially since Petitioner bears the burden of persuasion, this claim must be deemed without merit.

Petitioner also contends that the parent and the Student were improperly excluded from the review.

The IDEA, its implementing regulations, and case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency. The statute is particularly protective of parents' right to participate in the formulation of their child's IEP because "[p]arents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 (9th Cir. 2012)(citations omitted)

Accordingly, the federal regulations indicate that the IEP team must include the parent. 34 C.F.R. Sect. 300.321(a)(1). Moreover, the regulations indicate that the District must "ensure" that the parent participates in the IEP meeting. 34 C.F.R. Sect. 300.321(a)(2). An IEP meeting may only take place without the presence of the parent if the public agency cannot convince the parent to attend. 34 C.F.R. Sect. 300.321(d). If the agency cannot convince the parent to attend, the agency must keep a record of its attempts to arrange a mutually agreeable time and place, including detailed records of telephone calls, copies of correspondence sent to the parents, and even visits to the parent's home. 34 C.F.R. Sect. 300.321(d)(1-3).

Here, the testimony and evidence establishes that the District failed to clarify the exact location of the meeting as per Petitioner's advocate's request. The District also failed to confirm the meeting as per the Petitioner's advocate's request. When the Petitioner did not appear at the

meeting, the District did not cancel the meeting but instead went ahead with the meeting notwithstanding the absence of the parent. Since the meeting went forward without her presence, the parent was not able to express her viewpoints on the assessment in question and on the Student's educational program generally. I agree with the Petitioner that the District's actions were violative of the IDEA, significantly impeded the parent's right to meaningfully participation in the IEP process, and denied the Student a FAPE .

B. Therapeutic Program.

Petitioner contends that the Student requires a smaller, more structured classroom environment with teachers who are experienced in working with Students with emotional disabilities.

The IEP team met to review the assessment of [redacted] and [redacted], which strongly recommended a full-time special education classroom for the Student. The well-written assessment, and the record here, indicates that the Student has long-standing behavioral problems relating at least in part from a difficult personal history. These problems impede the Student's ability to access the curriculum in class. Only eleven years old, the Student is regularly fighting in class, disrupting class, and is frequently suspended from school. [redacted] and [redacted] assessment indicates that the Student requires a special education teacher in the classroom with experience in working with students with emotional disabilities. The assessment also indicates that the Student needs a smaller class size where there is greater opportunity for teacher-student interaction.

[redacted] and [redacted] report also indicates that the Student has elevated scores in hyperactivity. This finding is consistent with the earlier report by [redacted] of DCPS, which indicates that the Student has elevated scores in inattention, hyperactivity/impulsivity, learning

problems, executive functioning, aggression, peer relations, global index, ADHD-Inattentive issues, ADHD-Hyperactive-Impulsive issues. [redacted] also indicated that the Student had significant issues in regard to alertness and self-regulation and requires a rewards system in the classroom that uses tangible reinforcers. This conclusion is consistent with the June 7, 2012 report of [redacted] of DCPS, which indicates that a rewards system based on the Student's individual preferences was recommended.

When viewed together, the reports of [redacted] and [redacted] and [redacted] suggest to this IHO a more favorable teacher to student ratio, the presence of a special education teacher in the classroom, and a rewards system linked to the Student's preferences will keep the Student from fighting and misbehaving so frequently and keep him more focused on his academics.

The IEP team, without the parent, dismissed [redacted] and [redacted] report, recommending a continuation of the same program developed in the May 16, 2012 IEP without writing up a new IEP. However, the record indicates that the supports in the May 16, 2012 IEP are largely the same interventions that the Student received during his unsuccessful 2011-2012 school year. That is, the Student was to receive counseling every week to manage his behavioral issues. This counseling was to be provided in addition to counseling that the Student receives out of school. However, I find that counseling alone is not an effective educational intervention for this Student. Notwithstanding the counseling, the Student had alarming behavioral issues throughout the 2011-2012 school year to the point where the staff at School A sought to have the Student placed in a more restrictive setting and then expelled him. It should be noted that Respondent did not call any witnesses to explain the basis for the IEP team's decision. The IEP team's recommendation to dismiss the report of [redacted] and [redacted] without

modifying the IEP at all was not reasonably calculated to provide the Student with educational benefit. I find that the Respondent denied the Student a FAPE through its IEP meeting of August 14, 2012.

C. FBA/BIP.

Petitioner also alleges that the August 14, 2012 IEP team failed to review an FBA and BIP.

FBA

Courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA for a child with behavioral problems. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . The FBA should focus on the antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at *19 (S.D.N.Y. 2011). The information gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children. Harris, 561 F.Supp. 2d at 68.

In this matter, the Student has an FBA, dated April 13, 2012. The FBA briefly suggests strategies for managing the Student's behavior.[2] Petitioner did not call any witnesses or present any evidence to establish that the IEP team failed to consider an FBA on August 14, 2012. Given that Petitioner bears the burden of persuasion, I find that Petitioner has not met her burden in regard to the FBA.

BIP

In addition to an FBA, if the behavior of a student impedes the student's learning or the learning of other students, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). According to DCMR Sect. 5-3007.3, if a student's behavior impedes the child's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

The meeting notes for the August 14, 2012 meeting indicate that the team reviewed a BIP that related to the Student's behaviors. Petitioner did not call any witnesses or present any evidence on this issue. Petitioner has not met her burden with respect to this issue.

D. Summary of FAPE Claims.

In sum, I find that the IEP team denied the Student a FAPE by failing to provide the Student with an appropriate amount of special education support in the classroom and by failing

[2] There is no testimony linking the strategies recommended in this FBA to this particular Student. It should be noted that an observation from DCPS indicates that a behavior plan needs to be developed for the Student which would provide him with rewards that are linked to his special interests. (R-11-7)

to ensure parental participation at the meeting. Petitioner's other contentions relating to the August 14, 2012 IEP are denied.

3. Failure to Implement Claims.

In regard to the failure to implement claim, such claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).

Here, the Student testified that he did not receive behavioral support services at School B for the 2012-2013 school year. However, there are documents in the record that make it clear that the Student did receive behavioral support services. I credit these documents, which indicate that the Student sometimes refused to attend counseling. These records are detailed and credible, even indicating that the counseling was not especially effective for the Student. Petitioner has not shown that DCPS failed to implement the IEP at School B for the 2012-2013 school year.

4. Placement meeting.

Petitioner alleges that DCPS failed to convene an MDT/IEP/Placement meeting despite the recommendation of the August 14, 2012 IEP team to this effect.

Petitioner presented no testimony and evidence on this issue and did not present any legal support for this argument. This claim is without merit.

5. Remedy.

Petitioner asserts that appropriate relief in this matter is to order placement of the Student at School C, a non-public school in the District of Columbia.

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider "all relevant factors" 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. Id. at 12.

Here, the Petitioner testified that she did not believe that the public schools could meet the Student's educational needs. Petitioner presents testimony from School C, the school at issue in Branham. School C contains all special education students, and all students are considered "emotionally disturbed." The School uses a daily points system, whereby students may gain points every day so they can go on field trips and get other rewards. Classrooms at the school have 8-10 students in them. Each classroom has a primary teacher who is certified and experienced in working with students with emotional disturbances. Each classroom also has a teaching assistant who has a bachelor's degree. The school includes a full time social worker, who provides counseling for the students. Moreover, School C will implement a student behavioral "contract" if the points system does not work for a particular student.

Classes at the school run on a tutorial system, with classes that can include 20 minutes with a tutorial, 20 minutes with a teacher, and 20 minutes of independent work. Students at the school work in small groups. Classes at the school include math, reading, science, social studies, health. Students receive often instruction in the school in very small groups.

Applying the Branham factors, I find that the Student has severe, long-standing behavioral problems that have not been solved by the interventions of DCPS, including counseling, an FBA, a BIP. The program at School C provides specific special education behavioral supports that have not been tried before for this Student. To address the Student's behavioral problems, a points-based system with tangible, desirable rewards is established at School C. A rewards system with tangible rewards was specifically recommended for this Student by a prior DCPS examiner, [redacted], and by another DCPS employee, Wanda Stewart. Student behavioral contracts are available at School C if the rewards system does not work for the Student. The school has small class sizes of 8-10 students, which will allow the Student to benefit from greater attention and oversight. The Student will also benefit from the training of the special education teacher who will run the classroom together with a teaching assistant who is a college graduate.

An important question here is whether School C is the least restrictive environment for the Student. A parental placement need not be the least restrictive environment for a Student. N.T. v. District of Columbia, 839 F. Supp.2d 29, n.3 (D.D.C. 2012). Still, it is appropriate for this IHO to assess whether this placement is the Student's LRE. Id., at 34-36 (affirming an HOD denying a tuition award on, inter alia, LRE grounds, notwithstanding a finding of FAPE denial)

Maintaining a less restrictive placement at the expense of educational benefit or safety is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d

996 (4th Cir. 1997) There is considerable support in the caselaw for more restrictive placements when disabilities manifest themselves in aggressive and extremely disruptive behaviors -- especially when that behavior presents a risk of danger to students and school personnel. See, e.g., Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

Here, the District has tried numerous interventions with the Student, including a significant amount of counseling, an FBA, a BIP. None of these interventions have have made any meaningful impact on the Student's behavioral issues. The record indicates that the Student's behaviors impede his learning and are dangerous to himself, to his peers, and to his teachers as well. Accordingly, members of the staff at School A have urged DCPS to put the Student in more restrictive setting.

Finally, DCPS did not call any witnesses to explain how it could provide a FAPE for the Student at one of its schools for the remainder of 2012-2013 school year. Under the circumstances, this IHO finds that School C is an appropriately restrictive setting for this Student. This IHO will therefore award tuition payment for the Student at School C for the remainder of the 2012-2013 school year. [3]

[3] Petitioner did not argue for the additional remedy of a revision of the IEP in her opening statements and closing statements. Moreover, there is nothing in the record to suggest that such relief is necessary for the Student. In view of the relief ordered herein, I decline to order a revision of the IEP.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by its IEP meeting of August 14, 2012;

2. Respondent is directed to pay tuition for the Student at School C for the remainder of the 2012-2013 school year. Respondent may request proof of attendance prior to payment of such tuition.

Dated: December 23, 2012

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

Date: December 23, 2012

Michael Lazan
Impartial Hearing Officer