

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
September 04, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: September 4, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: [REDACTED]

v.

Hearing Dates: August 20-21, 2013

PUBLIC CHARTER SCHOOL,

Student Hearing Office, Rooms 2004, 2006
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “Petitioner” or “MOTHER”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“DCMR”). In her Due Process Complaint, Petitioner alleges that Respondent Public Charter School (“PCS”) has denied Student a free appropriate public education (“FAPE”) by failing to develop and implement an appropriate Individualized Education Program (“IEP”) and failing to fund an Independent Educational Evaluation (“IEE”) requested by Mother in February 2013.

¹ Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 24, 2013, named PCS as respondent. The parties met for a resolution session on July 18, 2013 and were unable to reach an agreement. On July 17, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

On July 24, 2013, Petitioner filed a motion for summary judgment, contending that PCS' response to the due process complaint did not comply with the IDEA. By order of July 30, 2013, I denied the motion.

The due process hearing was convened before the undersigned Impartial Hearing Officer on August 20-21, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL and CO-COUNSEL. PCS was represented by PCS' COUNSEL.

Petitioner testified and called as witnesses, Student, EDUCATIONAL CONSULTANT, NONPUBLIC SCHOOL ADMINISTRATOR, and CLINICAL CASEWORKER. PCS called as witnesses SCHOOL COUNSELOR, SPEECH-LANGUAGE PATHOLOGIST, and PSYCHOLOGIST. Petitioner's Exhibits P-1 through P-28 and PCS' Exhibits R-1 through R-5, and R-7 through R-9 were admitted into evidence without objection. Exhibit R-6 was withdrawn. Petitioner's objection was sustained to Exhibits R-10 through R-50, which were not disclosed by PCS prior to the hearing. Respondent's motion for a directed finding at the close of Petitioner's case-in-chief was denied. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case, identified in the Prehearing Order, are:

- Whether PCS’ July 24, 2012 IEP was inappropriate for Student because its annual goals were substantially the same as the goals in the prior, February 2011, IEP, under which Student did not make meaningful progress, and not based upon updated data; because the July 24, 2012 IEP lacks a behavior intervention plan and because it lacks evidence-based methodologies to address the needs of LD students;
- Whether PCS failed to implement the July 24, 2012 IEP because it failed to provide speech and counseling services, and unilaterally changed Student’s placement in February 20, 2013 to PCS RESTRICTIVE CAMPUS, which does not provide Student the specialized instruction and related services specified in the July 24, 2012 IEP;
- Whether Student’s placement at PCS was inappropriate because ■ was unable to keep up with ■ class work in an inclusion setting and needed full-time specialized instruction;
- Whether Student’s current placement at PCS Restrictive Campus is inappropriate because Restrictive Campus is unable to provide the services specified in Student’s IEP; and
- Whether PCS violated the IDEA by failing to provide authorization for an LEA-funded IEE when Parent, in February 2013, informed the school that she disagreed with the LEA’s psychological evaluation and requested an IEE.²

For relief, Petitioner seeks an order that PCS fund Student’s 2013-2014 school year

² Two additional issues identified in the Prehearing Order were withdrawn by Petitioner’s Counsel. At the conclusion of Petitioner’s case-in-chief, Petitioner withdrew the issue of whether PCS violated the IDEA by failing to provide Parent copies of all of Student’s educational records. During closing argument, Petitioner’s counsel withdrew the issue of whether PCS violated the IDEA and denied Student a FAPE by changing Student’s placement to PCS Restrictive Campus without convening an IEP meeting or obtaining Parent’s input. In her closing argument, Petitioner’s counsel also abandoned the Prehearing Order issue of whether PCS denied Student a FAPE by failing to convene a meeting to review Student’s IEP when allegedly requested by Parent in February 2013.

enrollment at Nonpublic Placement. In addition, Petitioner requests a compensatory education award to compensate Student for PCS' alleged failure to develop and implement an appropriate IEP for ■■■ during the 2012-2013 school year.

FINDINGS OF FACT

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

1. Student, an AGE adolescent, resides with Mother in the District of Columbia.

Testimony of Mother.

2. PCS is a public charter school located in the District of Columbia. It serves as its own local education agency ("LEA") within the meaning of the IDEA. Hearing Officer Notice. At the PCS regular campus, 87% of the children are disabled students. Exhibit P-15.

3. Student was identified as Developmentally Delayed at approximately four years of age. In February 2007, Student was reevaluated by the Prince Georges County, Maryland school division. That evaluation revealed Low Average cognitive abilities and Student's disability classification of Developmentally Delayed was continued. Subsequently, Student transferred to CITY ELEMENTARY SCHOOL 1, a District of Columbia Public Schools ("DCPS") school. After Student was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), ■■■ disability classification was changed in 2008 to Other Health Impaired - ADHD by the City Elementary School 1 IEP team. Exhibit R-2.

4. Student's February 22, 2011 IEP, developed by the IEP team at CITY ELEMENTARY SCHOOL 2, identified Student's Primary Disability as Other Health Impaired ("OHI"). That IEP noted that test results indicated Student had significant deficits in math and was extremely low functioning in reading. The IEP team reported that Student required a small,

structured setting to accommodate ■ academic needs. The February 22, 2011 IEP provided Student 26.0 hours per week of Specialized Instruction and 1 hour per week of Behavioral Support services, all outside the General Education setting. Exhibit P-1.

5. Mother enrolled Student in PCS at the beginning of the 2011-2012 school year.

Testimony of Mother.

6. As of September 12, 2011, Student was able to read, independently, on a kindergarten-first grade level. Exhibit P-7.

7. PCS' Speech-Language Pathologist conducted a Speech and Language Evaluation of Student in December 2011 and January 2012. Speech-Language Pathologist administered the Clinical Evaluation of Language Fundamentals - 4th Edition and the Goldman Fristoe Test of Articulation - 2. The results of this evaluation indicated that Student presented with an educationally significant language delay. Exhibit P-14.

8. In January and February 2012, a PCS school psychologist conducted a psycho-educational evaluation of Student to assess ■ cognitive, academic and behavioral functioning. On the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”), a measurement of Student’s general cognitive and intellectual abilities, Student’s General Ability Index was calculated, yielding a score of 81, falling in the Low Average range of intellectual ability. Subtests results included Verbal Comprehension (Borderline), Perceptual Reasoning (Low Average), Working Memory (Extremely Low) and Processing Speed (Average). On the Wechsler Individual Achievement Test – Third Edition (WIAT-III), an assessment of academic skills, Student attained a Low score on Basic Reading, Low score on Mathematics, Very Low score on Written Expression, a Low score on Oral Language, a Low score on Total Reading, a Low score on Reading Comprehension and Fluency and a Below Average score on Math

Fluency. Exhibit R-2.

9. The PCS school psychologist obtained Behavior Assessment Scales for Children (BASC-2) ratings from Student, Mother and two teachers. From these responses, the psychologist concluded that significant symptoms of Student's ADHD disorder persisted within the school and home environments, that Student's reported difficulty controlling ■■■ impulses and maintaining necessary levels of attention in the classroom significantly impacted ■■■ academic functioning, that Student reportedly displayed a number of aggressive behaviors and demonstrated a low frustration tolerance, which was likely related to ■■■ lack of emotional control, which is a characteristic of ADHD. The teacher and parent BASC-2 ratings showed that Student's adaptive functioning was below age-level expectations and that ■■■ demonstrated deficits in study, social, and functional communication skills as well as deficits in adaptability and activities of daily living. Exhibit R-2.

10. The school psychologist diagnosed Student with ADHD, Combined Type (prior history), Learning Disorder – Not Otherwise Specified, Mixed Receptive-Expressive Language Disorder (Rule-out) and Phonological Disorder (Rule-out). Exhibit R-2.

11. The PCS IEP team conducted an annual review of Student's IEP on July 24, 2012. ■■■ disability classification was changed to Multiple Disabilities, reflecting ■■■ new diagnosis of Learning Disability. The July 24, 2012 IEP continued, verbatim, most of the academic annual goals from the DCPS February 22, 2011 IEP. For math and reading, Student was reported to still require a small, structured setting to accommodate ■■■ academic needs. For the Emotional, Social and Behavioral Development area of concern, the July 24, 2012 carried over, completely verbatim, the Present Levels of Performance, Needs, Annual Goals and Baselines from the February 22, 2011 IEP. The July 24, 2012 PCS IEP provided that Student

would continue to receive 26.0 hours per week of Specialized Instruction and 1 hour per week of behavioral support services, all outside the General Education setting, plus 240 minutes per month of Speech-Language Pathology in General Education [*sic*]. This IEP does not include a Behavior Intervention Plan (“BIP”). Exhibit P-2.

12. On October 24, 2012, Student’s IEP was amended to provide that Student’s state testing procedure would be changed from DC-CAS to DC-CAS-Alternate Assessment. Exhibit P-3.

13. For the 2012-2013 school year at the PCS regular campus, Student was placed in a classroom of “20-some” students, most of whom were special education students. The class was regularly staffed with both a regular education and a special education teacher, and PCS behavioral support staff were available to assist. Testimony of Psychologist.

14. During the 2012-2013 school year at PCS, Student was repeatedly placed in detention or out of school suspensions for getting into fights. Testimony of Mother, Exhibit P-12. In a February 11, 2013 incident, Student refused to comply with ■■■ teacher’s direction to work on a class assignment. When the teacher insisted, Student allegedly physically attacked ■■■ This incident led to a disciplinary Manifestation Determination Review (“MDR”) meeting on February 20, 2013. The MDR team determined that Student’s February 11, 2013 misconduct was not a manifestation of ■■■ disability. Mother disagreed with that determination. Exhibit P-22.

15. The February 20, 2013 MDR meeting was attended by the Petitioner as well as by Petitioner’s Counsel and PCS Counsel. The PCS representatives at the meeting recommended that Student be moved from the PCS regular campus to the PCS Restrictive Campus. Exhibit P-22. The setting at PCS Restrictive Campus, a full-time therapeutic program, is more restrictive

than the educational setting at PCS. Its focus is on children with conduct problems. There are no more than 10 children in each classroom, which is staffed by a general education and a special education teacher. There is not a lot of contact with non-disabled general education students. Testimony of Psychologist. Mother agreed to try placing Student at PCS Restrictive Campus. Exhibit P-22, Testimony of School Counselor. Student's IEP was not amended or revised before July 22, 2013. Exhibit R-6.

16. During the academic day at PCS Restrictive Campus, students are instructed in one core academic subject a day, for no more than two hours. For the rest of the school day, the focus is on behavioral interventions. Testimony of Clinical Case Worker, Exhibit P-8.

17. Student's 2012-2013 mid-year grades at PCS were mostly C's and D's. ■ 2nd Advisory Period GPA was 1.8. Student's grades improved after ■ transferred to PCS Restrictive Campus. At the end of the 2012-2013 school year, ■ final grades were C's for English Language and Math and B's for Science and Social Studies. Exhibit P-6.

18. PCS uses parts of the Wide Range Achievement Test, Fourth Edition ("WRAT4) to assess student progress. Testimony of Psychologist. On the WRAT4 Sentence Comprehension test administered in October 2012, Student tested at the K-3 (Kindergarten - 3d month) grade equivalent. On the WRAT4 administered in June 2013, Student tested at the 1.0 (beginning 1st grade) grade equivalent on Sentence Comprehension and at the 4.0 (beginning 4th grade) grade equivalent on Math Computation. Exhibits R-3, R-5.

19. By letter of February 27, 2013, Petitioner's Counsel wrote PCS' Counsel for the purpose, *inter alia*, to request an independent comprehensive psychological/educational evaluation of Student stating that the parent disagreed with the most recent (March 6, 2012) PCS Psycho-Educational Evaluation. Exhibit P-22. On April 1, 2013, in a second letter to PCS'

counsel Petitioner's Counsel repeated the request for an LEA-funded IEE. Exhibit P-23. In its response to the due process complaint in this case, PCS affirmed that it would defend its evaluations and asserted that new evaluations were unnecessary. PCS' Supplemental Answer to Due Process Complaint.

20. Nonpublic School is a full-time special education day school in the District of Columbia for children with learning challenges, from Kindergarten through 12th Grade. Most of the children at Nonpublic School have a Specific Learning Disability, Other Health Impairment and/or Multiple Disabilities. No nondisabled Students attend Nonpublic School. Testimony of Administrator.

21. Nonpublic School offers a highly structured program and uses a token economy system for behavioral support. In the middle school program at Nonpublic School, there are some 55 students, 7 students to each classroom. The middle school teachers are all certified in Special Education. The program offers differentiated instruction tailored to each Student's profile. Testimony of Administrator.

22. Student has been accepted for admission at Nonpublic School. Student made a 2-day visit to Nonpublic School's Extended School Year program in July 2013. ■■■ attended classes where ■■■ was observed by admissions staff. Nonpublic School also did some testing of Student. ■■■ academic levels tested at high 1st grade for writing and around 2nd grade for reading. Nonpublic School is able to provide the Behavioral Support and Speech-Language Pathology Related Services specified in Student's IEP. Nonpublic School would be able to implement the requirements of Student's July 24, 2012 IEP. Testimony of Administrator.

23. Nonpublic School has a current Certificate of Approval issued by the DC Office of the State Superintendent of Education (“OSSE”). The tuition fee at Nonpublic School is approximately \$39,500 per year. Testimony of Administrator.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. See DCMR tit. 5-E, § 3030.3. *See, also, Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 95 (D.D.C.2008) (Plaintiff, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate, citing *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).)

Analysis

Petitioner’s remaining claims in this case involve three categories: alleged inappropriateness of the July 24, 2012 IEP, implementation of July 24, 2012 IEP and her request for an Independent Educational Evaluation of Student. I address each category in turn.

I. **Alleged Inappropriateness of July 24, 2012 IEP**

- WAS PCS’ JULY 24, 2012 IEP INAPPROPRIATE FOR STUDENT BECAUSE ITS ANNUAL GOALS WERE SUBSTANTIALLY THE SAME AS THE GOALS IN THE PRIOR, FEBRUARY 2011 IEP, UNDER WHICH STUDENT DID NOT MAKE MEANINGFUL PROGRESS, AND NOT BASED UPON UPDATED DATA; BECAUSE THE IEP LACKS A BEHAVIOR INTERVENTION PLAN AND BECAUSE IT LACKS EVIDENCE-BASED METHODOLOGIES TO ADDRESS THE NEEDS OF A LEARNING DISABLED STUDENT?
- WAS STUDENT’S (PRE-FEBRUARY 2013) PLACEMENT AT PCS INAPPROPRIATE BECAUSE STUDENT WAS UNABLE TO KEEP UP WITH

■■■■ CLASS WORK IN AN INCLUSION SETTING AND NEEDED
FULL-TIME SPECIALIZED INSTRUCTION?

According to Petitioner's expert, Educational Consultant, PCS's July 24, 2012 IEP was inappropriate for Student because annual goals for academics and for Emotional, Social and Behavioral Development were not adequate and because the accommodations identified in the IEP's Present Levels of Performance, notably Student's requirement "for a small structured setting to accommodate ■■■■ academic needs" are not provided in the Classroom Accommodations section of the IEP.

The question of whether an IEP is appropriate rests on "(1) whether [the LEA] has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010), quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004). In this case, Petitioner has not raised a procedural issue with the development of Student's July 24, 2012 IEP. Therefore, I move directly to the second prong of the inquiry.

The appropriateness of an IEP is judged prospectively, at the time the IEP was implemented, not by the effectiveness of the program in hindsight. Thus, the Hearing Officer must ask whether the IEP was appropriately designed and implemented so as to convey a meaningful benefit to the child. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008). The IDEA's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The minimum 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.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley, supra*, 458 U.S. at 201. The IDEA 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 (internal quotations and citations omitted.) Congress, however, “did not intend that a school system could 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 testimony of Petitioner’s Expert, Educational Consultant, concerning the alleged inappropriateness of Student’s July 24, 2012 IEP focused on two aspects of the IEP. ■ opined that the academic and behavioral support goals were inadequate and that the IEP failed to provide the classroom accommodations identified by the IEP team as required for Student. Addressing the goals issue first, the IDEA requires that each child’s IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child’s other educational needs that result from the child’s disability.

See 34 CFR § 300.320(a)(2)(i). *See, also, Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598 (1988) (IEP sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.)

With a few exceptions, the statement of annual goals for academics in Student's July 24, 2012 IEP is carried over, often verbatim, from the annual goals in February 22, 2011 City Elementary School 2 IEP. (E.g., Annual Goal for Reading: "[Student] shall determine the meaning of compound words using knowledge of the meaning of individual words (e.g., lunchtime, daydream, everyday) with 80% accuracy.") The Emotional, Social and Behavioral Development section of the July 24, 2012 IEP was copied, entirely verbatim, from the February 22, 2011 IEP.

The IDEA regulations require that a child's IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address—

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child's anticipated needs; or
- (E) Other matters.

See 34 CFR § 300.324(b); Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46685 (August 14, 2006). "The federal courts have said little on the failure to revise programs, but the school district *is* required to revise the programs as appropriate." *Kings Local School Dist., Bd. of Educ. v. Zelazny*, 325 F.3d 724, 731 (6th Cir. 2003). Educational Consultant opined that the similarity in the goals in the July 24, 2012 IEP to the goals in Student's February 22, 2011 IEP indicates that Student made little or no progress over the 2011-2012 school year at PCS. I agree. Where so many of the goals and needs in

Student's February 22, 2011 IEP were repeated in the July 24, 2012 IEP, it was incumbent on the IEP team to revise ■■■ IEP to address this evident lack of expected progress. However, except to add 240 minutes per month of speech-language pathology as a related service, the July 24, 2012 IEP team continued the identical, evidently unsuccessful, services and placement from Student's DCPS IEP developed 18 months earlier. I find that, by failing to assure that Student's IEP team revised Student's IEP to address ■■■ lack of expected progress and anticipated needs, PCS denied Student a FAPE.

Educational Consultant further opined that PCS' July 24, 2012 IEP annual goals were inadequate because the goals do not reference evidenced-based methodologies. The IDEA does not refer to "evidenced-based" methodologies "which are generally terms of art that may or may not be based on peer reviewed research." *See Assistance to States for the Education of Children with Disabilities, supra*, 71 Fed. Reg. 46665. In developing its IDEA 2004 regulations, the U.S. Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") declined to require IEP teams to focus discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, "as we believe such requirements are unnecessary and would be overly burdensome." *Id.* at 85. Therefore, I find that inclusion of evidenced-based methodologies was not required as part of Student's IEP goals.

Petitioner also contends that the July 24, 2012 IEP should have included a Behavior Intervention Plan ("BIP") The IDEA does not require that a BIP be incorporated into a child's IEP. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). The Act does require that, in the case of a child whose behavior impedes ■■■ learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other

strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). However, Petitioner adduced little, if any, evidence at the due process hearing concerning Student's behaviors at PCS in the 2011-2012 school year or whether those behaviors impeded ■ learning or that of other students. I find that Petitioner has not established that the July 24, 2012 IEP was inadequate because it did not include a BIP.

Educational Consultant further opined that the July 24, 2012 IEP was inappropriate because, although the IEP identifies as an "Impact on the student" Student's requirement for a "small structured setting to accommodate ■ academic needs," the IEP omits to provide that setting as a classroom accommodation. Until Student was moved to PCS Restrictive Campus, ■ was taught in a combined classroom of 20 plus disabled and non-disabled children. I agree that by not providing for the small structured setting which Student required, the IEP team failed to ensure that the IEP was tailored to Student's "unique needs." *See, Honig, supra*. I attach little weight to the contrary opinion of PCS' expert, Psychologist, that the IEP was appropriate to meet Student's educational needs, because, in ■ testimony Psychologist did not address the IEP team's determination that Student required a small, structured setting to accommodate ■ academic needs. Neither did Psychologist offer any explanation for the July 24, 2012 IEP team's repetition, often verbatim, of so many annual goals and needs from Student's February 22, 2011 IEP.

In summary, I find that Petitioner has established that PCS' July 24, 2012 IEP was not reasonably calculated to provide Student educational benefits because the IEP was not revised as required by the IDEA to address Student's lack of expected progress toward the annual goals set out in ■ prior, February 22, 2011 IEP and because the IEP does not provide the small, structured classroom accommodation, which the IEP team determined that Student required.

II. Implementation of July 24, 2012 IEP

- WAS STUDENT’S PLACEMENT AT PCS INAPPROPRIATE BECAUSE STUDENT WAS NOT PROVIDED FULL-TIME SPECIALIZED INSTRUCTION OUTSIDE OF THE GENERAL EDUCATION SETTING?
- DID PCS FAIL TO PROVIDE THE SPEECH-LANGUAGE AND COUNSELING SERVICES REQUIRED BY █████ JULY 24, 2012 IEP?
- WAS STUDENT’S FEBRUARY 2013 TRANSFER TO THE PCS RESTRICTIVE CAMPUS A FAILURE TO IMPLEMENT █████ IEP?

Petitioner contends that PCS failed to implement the July 24, 2012 IEP because (i) at PCS’ regular campus, Student was placed in a classroom with non-disabled students; (ii) at PCS Restrictive Campus, Student was not provided the hours of Specialized Instruction required by █████ IEP; and (iii) over the 2012-2013 school year, PCS failed to provide the hours of speech-language and counseling services required by Student’s IEP. The IDEA is violated when a school district deviates materially from a student’s IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A petitioner “must show more than a *de minimis* failure to implement all elements of [the student’s] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP in order to prevail on a failure-to-implement claim. Courts applying this standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (citations and internal quotations omitted.)

(i)

In the preceding section of the decision, I concluded that PCS’ July 24, 2012 IEP was not reasonably calculated to provide educational benefits to Student because, *inter alia*, the IEP did

not provide accommodation for a small, structured classroom setting, which the IEP team determined that Student required. The IEP did provide for full-time Specialized Instruction outside of the General Education setting. Petitioner contends that before Student was moved to PCS Restrictive Campus, ■ was placed in a General Education setting at PCS, based upon there being both disabled and nondisabled students in the classroom. I believe that Petitioner misinterprets the term “outside of General Education” as used in the IEP. For purposes of the IDEA the concept of a general education setting or “regular educational environment” encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate. *See Assistance to States for the Education of Children with Disabilities, supra*, 71 Fed. Reg. 46685. At PCS, some 87% of the students have disabilities. Every class is co-taught by a regular education teacher and a special education teacher. I conclude that there is no “regular educational environment” at PCS and that Student’s placement at PCS was always in an outside of General Education setting.

(ii)

Petitioner has not met her burden of proof to show that PCS did not provide the speech-language or behavioral support services required by Student’s IEP. The July 24, 2012 IEP provided that Student would receive 240 minutes per month of speech-language pathology and 1 hour per week of Behavioral Support Services. Student testified that ■ did not receive counseling at either the PCS regular campus or at PCS Restrictive Campus and that ■ only received speech-language services 3 times at the Restrictive Campus. Speech-Language Pathologist testified that Student received ■ speech-language services, both at the regular campus and at PCS Restrictive Campus if ■ was at school. Counselor testified that ■ provided the IEP Behavioral Support services to Student when ■ was at the main campus. Psychologist testified that PCS Restrictive Campus is a full-time therapeutic program focused on children

with conduct problems. ■ testified that children at the Restrictive Campus receive 2 hours of behavior support every day. This testimony was supported by the testimony of Clinical Caseworker, who observed on visits to the Restrictive Campus that, except for 2 hours a day of academic instruction, Student's class day at the campus was predominantly behavioral intervention time. On this issue, I found the testimony of Student to be less credible than that of Speech-Language Pathologist, Counselor and Psychologist. I conclude that Petitioner has not established that PCS failed to implement the speech-language and behavioral support services required by Student's July 24, 2012 IEP.

(iii)

Parent also contends that PCS failed to implement the July 24, 2012 IEP when Student was moved to PCS Restrictive Campus in February 2013. At Parent's request, on February 20, 2013, PCS convened a Manifestation Determination Review meeting following a serious disciplinary incident on February 11, 2013 when Student allegedly assaulted a teacher.³ At the MDR meeting, the PCS team members recommended that Student be moved to PCS Restrictive Campus because it was felt that Student needed a more restrictive education environment. After Mother agreed to try placing Student at PCS Restrictive Campus, Student was moved to the new, more restrictive, setting. The IDEA provides that changes to the IEP may be made either by the entire IEP Team, which includes the parent, at an IEP Team meeting, or amended without an IEP Team meeting when the parent and public agency agree. *See Assistance to States for the Education of Children with Disabilities, supra*, 71 Fed. Reg. 46686 (citing IDEA §§ 614(d)(3)(F), 614(d)(3)(D).) Although Mother complains that after Student moved to PCS

³ At the February 20, 2013 meeting, the PCS members of the MDR team concluded that Student's behavior was not a manifestation of ■ disability. In ■ due process complaint, Petitioner initially appealed that decision. During the course of these proceedings, Petitioner decided not to pursue that appeal. *See Prehearing Order, July 19, 2013.*

Restrictive Campus, ■ no longer received the Specialized Instruction Services specified in ■ July 24, 2012 IEP, I find that Mother and PCS agreed to this change to Student's IEP.

Because there was a *de facto* change to Student's July 24, 2012 IEP, the IDEA required that PCS convene an IEP team meeting or obtain Mother's agreement to a written amendment to the IEP. *See, e.g.,* 34 CFR 300.324(a)(4) (In making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.) Petitioner alleged in her due process complaint that PCS violated the IDEA and denied Student a FAPE by changing Student's placement to PCS Restrictive Campus, without convening an IEP meeting or obtaining Parent's input. *See, e.g., Eley v. District of Columbia*, 2012 WL 3656471, 7 (D.D.C. Aug. 24, 2012) (Failure to timely re-evaluate the IEP is a procedural violation of IDEA.) At the due process hearing, Petitioner's Counsel withdrew that issue.

I conclude that at the time of the February 20, 2013 MDR meeting, Petitioner agreed to change Student's placement from the PCS regular campus to the PCS Restrictive Campus. The decision to move Student from the PCS regular campus to PCS Restrictive Campus effected an agreed change to Student's July 24, 2012 IEP. Therefore, I find that PCS did not deny Student a FAPE by failing to implement the Specialized Instruction services specified in the July 24, 2012 IEP after Student moved to PCS Restrictive Campus in February 2013.

III. DID PCS VIOLATE THE IDEA BY FAILING TO PROVIDE AUTHORIZATION FOR AN LEA-FUNDED IEE WHEN PARENT, IN FEBRUARY 2013, INFORMED THE SCHOOL THAT SHE DISAGREED WITH THE LEA'S PSYCHOLOGICAL EVALUATION AND REQUESTED AN IEE?

In a February 27, 2013 letter, Petitioner's Counsel wrote PCS' Counsel to request an independent comprehensive psychological/educational evaluation of Student stating that the

parent disagreed with the most recent (March 6, 2012) PCS psycho-educational evaluation. She reiterated the IEE request in an April 1, 2013 letter. PCS failed to provide funding or authorization for an IEE, stating that new evaluations were unnecessary. Parent contends that PCS' failure to fund her requested IEE violated the IDEA. I agree.

Under 34 CFR § 300.502(b), subject to certain limitations, a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense. *Id.* "Public expense" means that the LEA either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. 34 CFR § 300.502(a)(3)(ii). Upon receipt of the Petitioner's IEE request, the IDEA afforded PCS only two alternative courses of action to avoid a procedural violation of the Act. The first route was to provide notice of the intent not to change its evaluation, refuse payment of an IEE and initiate a due process hearing; the other route was to pay for the IEE. *See L.S. ex rel. K.S. v. Abington School Dist.*, 2007 WL 2851268, 6 (E.D.Pa.2007). In this case PCS did neither.

A failure to timely provide an IEE, when properly requested by a parent, is a procedural violation of IDEA. *See Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109 (D.D.C. 2011). Procedural violations of IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), citing *C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876,

881 (3d Cir.2005) (*per curiam*). In this case, Petitioner has not shown that PCS' failure to fund her requested IEE either resulted in a loss of educational opportunity to Student or seriously deprived her of parental participation rights. Accordingly, I do not find Student was denied a FAPE by PCS' not providing funding for the requested IEE. However, Petitioner is entitled to have Student receive an IEE psycho-educational evaluation and I will order PCS to fund the assessment.

Remedies for Denial of FAPE

In this decision, I have found that PCS denied Student a FAPE because PCS' July 24, 2012 IEP was not reasonably calculated to provide Student educational benefits. Specifically, I have found that the IEP was not appropriate for Student because the IEP was not revised to address ■■■ lack of expected progress toward the annual goals set out in ■■■ prior, February 22, 2011 IEP and because the IEP omits the small, structured classroom accommodation, which the IEP team determined that Student required. As a remedy for these violations of the IDEA, Petitioner seeks an order for PCS to fund Student's private placement at Nonpublic Placement and an award of compensatory education.

i. Private School Placement

“Where an [LEA] has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). The failure of PCS to offer Student an appropriate IEP does not, *ipso facto*, entitle Student to private school placement at the LEA's expense. “An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement. Although the [LEA] must pay for private

school placement “[i]f no suitable public school is available[,] ... if there is an appropriate public school program available ... the [LEA] need not consider private placement, even though a private school might be more appropriate or better able to serve the child.” *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012), quoting *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991). In this case, there has been no evidence offered that PCS is able or willing to make available to Student an appropriate program which can provide ■■■ IEP-specified hours of Specialized Instruction services in the small, structured setting which ■■■ requires.

An award of private-school placement is “prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA.” *Branham, supra*, at 11 (citations omitted). Placement awards, must be tailored to meet the child’s specific needs. *Branham, supra*. 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. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student’s Disability

The evidence in this case establishes that Student has significant SLD, OHI and Speech-Language disabilities. ■■■ has Low Average cognitive skills, but ■■■ is functioning below grade level and age expectations in all academic areas, notably in reading and writing where ■■■ tests 5-6 years below ■■■ nominal grade in school. During the 2012-2013 school year, Student exhibited severe emotional and behavioral issues which resulted in repeated in-school and out-of-school suspensions before Student was moved to PCS Restrictive Campus in February 2013.

b. Student's Specialized Educational Needs

According to Educational Consultant, cognitive testing shows that Student has Low Average cognitive abilities, but because of ■■■ LD and ADHD impairments, ■■■ needs individualized, targeted small group instruction at a school that is experienced with educating children with ■■■ disabilities. Student's IEP teams at City Elementary School 2 and at PCS have also consistently endorsed Student's need for a small, structured classroom setting. PCS' expert, Psychologist, opined that Student can be served at PCS because other children with much more severe disabilities have made progress in the PCS program. I discount Psychologist's opinion because regardless of how other children may have performed, the evidence establishes that this Student has made, at best, minimal progress at PCS. For example, when Student entered PCS in the fall of 2011, ■■■ was reading at a kindergarten – first grade level. From October 2012 to June 2013, Student's Sentence Comprehension scores rose only from K-3 to 1.0 grade equivalent, measured by the WRAT4 – still years below ■■■ actual grade level.

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

Nonpublic School serves children with disabilities, most of whom, like Student, have SLD, OHI and/or Multiple Disabilities. Nonpublic School offers a highly structured, individualized program with no more than 7 students in a classroom. Nonpublic School is a therapeutic program and uses a token economy system for behavioral support. Nonpublic School is also able to provide the counseling and speech-language services Student requires. At the due process hearing, PCS' Counsel stipulated that Nonpublic School would be an appropriate placement for Student, were the Hearing Officer to find Student had been denied a FAPE at PCS.

d. Cost of Placement at Private School

The cost of tuition at Private School is approximately \$39,500 per year. PCS offered no evidence that tuition expenses at Private School are higher than costs at other District private

schools serving students with disabilities.

e. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006)). “In determining the least restrictive environment, consideration is given to the types of services that the child requires.” *Id.* (citing 34 C.F.R. § 300.552(d)). Student’s IEP team at PCS has determined that the least restrictive environment for Student is a full-time special education setting, which is the setting at Nonpublic School.

Based upon the foregoing, I conclude that Petitioner has shown the education that would be provided to Student by Nonpublic School is reasonably calculated to enable ■■■ to receive educational benefits and that this private school placement would be proper under the IDEA.

ii. Compensatory Education

Once a student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake “a fact-specific exercise of discretion” designed to identify those compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a child might have shown if ■■■ had received the required special education services and the type and amount of services that would place the child in the same position ■■■ would have occupied but for the LEA’s violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. District of Columbia*,

supra, 401 F.3d at 518.)

I have found that Student was denied a FAPE by PCS' July 24, 2012 IEP, which was not reasonably calculated to provide educational benefits. Petitioner's expert, Educational Consultant, opined that with an appropriate IEP, which included provision for a small, structured classroom setting, Student would have experienced at least one year of academic progress in the 2012-2013 school year. This expert recommends that Student receive 1:1 academic tutoring in reading, writing and math, for two years, to make up for the loss. However, in ■■■ written compensatory education recommendation (Exhibit P-16), Educational Consultant recommended the identical two years of tutoring to compensate Student for alleged denial of FAPE dating from when ■■■ was reevaluated in October 2011. Although I found Educational Consultant to be a credible witness, I am not persuaded that Student requires the same compensatory education services whether the denial of FAPE began in October 2011 or at the beginning of the 2012-2013 school year. Furthermore, Educational Consultant premised ■■■ recommendation, in part, on ■■■ view that Student's February 2013 placement at PCS Restrictive Campus was inappropriate under the July 24, 2012 IEP. I have found that Petitioner agreed to change Student's IEP and that Student's placement at the Restrictive Campus was not a denial of FAPE. Notwithstanding, courts and hearing officers have broad discretion to award compensatory education as an equitable remedy and a "perfect case" is not required. *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012). Considering my findings in this case and taking into account Educational Consultant's written recommendation and testimony, I find that an appropriate compensatory education remedy would to order PCS to fund 5 hours per week of 1:1 academic tutoring for Student, for the remainder of the 2013-2014 school year.

SUMMARY

In this decision, I have found that PCS denied Student a FAPE by failing to develop and

implement an IEP for [REDACTED] that was reasonably calculated to provide educational benefits during the 2012-2013 school year and that a private school placement at Nonpublic School for the 2013-2014 school year would be proper relief under the IDEA. I find that Student is also entitled to an award of academic tutoring, as a compensatory education remedy, to compensate Student for PCS' denial of FAPE under the July 24, 2012 IEP. Lastly, I have found that PCS violated the IDEA by failing to provide an IEE psycho-educational evaluation of Student when requested by Mother in February 2013.

ORDER

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

1. PCS shall fund Student's enrollment at Nonpublic School for the 2013-2014 school year, to include costs for speech-language and behavioral support related services and transportation;
2. As compensatory education, PCS shall fund 1:1 academic tutoring for Student, five hours per week, during the remainder of the 2013-2014 school year. PCS shall coordinate these tutoring services with Nonpublic School administration to assure that the services are delivered at a time and place that does not interfere with Student's instruction at Nonpublic School; and
3. PCS shall fund an IEE psycho-educational evaluation of Student to be obtained by Petitioner in accordance with DCMR, Tit. 5-E § 3027.

All relief other requested by the Petitioner in this matter is denied.

Date: September 4, 2013

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

NOTICE OF RIGHT TO APPEAL

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